



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4109218/2021

Held in Edinburgh on 5-7 July 2022

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**Employment Judge M Sangster
Tribunal Member I Ashraf
Tribunal Member T Lithgow**

Mr H Drummond

**Claimant
In person**

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**Commissioners for Her Majesty's Revenue
and Customs**

**Respondent
Represented by
Ms Forrest
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claimant's complaints of discrimination arising from disability, indirect discrimination and failure to make reasonable adjustments succeed. The respondent is ordered to pay the claimant:

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- The sum of **£11,108.49** including interest, for financial loss; and
- The sum of **£9,071.34** including interest, by way of compensation for injury to feelings.

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REASONS

Introduction

1. The claimant presented complaints of disability discrimination namely discrimination arising from disability, indirect discrimination and failure to make reasonable adjustments.
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2. The respondent resisted each of the complaints.
3. At an open preliminary hearing held on 18 January 2022, Employment Judge Macleod found that the claimant was a disabled person for the purposes of section 6 of the Equality Act 2010 (**EqA**) at the relevant time, namely in
10 November 2020, as a result of syncope and pre-syncope episodes. By email of 8 June 2022, the respondent accepted that they had the requisite knowledge of the claimant's disability at that time.
4. A statement of agreed facts was lodged, as well as a joint bundle of documents, extending to 169 pages. A further document was lodged by the
15 claimant, with consent, at the outset of the hearing.
5. The claimant gave evidence on his own behalf. The respondent led evidence from Paul Curry (**PC**), Regional Assistant Director, Taskforce & Specialist Compliance, for the Respondent.
- 20 6. The other individuals referenced in this judgment are as follows:
 - a. Paul Mclver (**PM**), First Line Manager in the Complex & Agents division of the respondents' Individual & Small Business Compliance business area; and
 - 25 b. Elizabeth Gilmore (**EG**), Senior Manager for the respondent.

Issues to be determined

7. The complaints brought were discussed at the outset of the hearing. The issues to be determined by the Tribunal were as follows:

Discrimination Arising from Disability – s15 EqA

- a. Was the claimant treated unfavourably by the respondent by the respondent when his application for the role of Higher Officer Complex Tax & Evasion Investigator (Edinburgh) (the **Role**) was declined?
- 5 b. If so, was this due to something arising in consequence his disability, namely the fact that he did not have a full valid UK driving licence?
- c. If so, was the treatment a proportionate means of achieving a legitimate aim. The legitimate aims relied upon by the respondent are as follows:
- 10 i. The respondent's need to ensure that those appointed to investigator roles which involve travel throughout the Scotland, often at short notice and during unsociable hours, are properly able to carry out that travel and therefore fulfil their role; and
- 15 ii. Increasing the number of those in the workforce with driving licences, as it was identified that there was too big a part of the current workforce who do not have driving licences which was a key operational risk.

Indirect discrimination because of disability - s19 EqA

- d. Did the respondent have a provision, criterion or practice (PCP) of a requirement for a full valid UK driving licence as an essential requirement for the Role? The respondent accepted that it did.
- 20 e. Did the respondent apply (or would the respondent have applied) the PCP to persons who do not have the same disability/disabilities as the claimant?
- f. Did the PCP put, or would it put, people with the same disability as the claimant at one or more particular disadvantage when compared to others, in that their applications were automatically rejected?
- 25 g. Did the PCP put the claimant at that/those disadvantage(s) at any relevant time?

- h. If so, has the respondent shown the PCP to be a proportionate means of achieving a legitimate aim? The legitimate aims relied upon are as set out at paragraph 7.c. above.

Reasonable Adjustments – s20 & 21 EqA

- 5 i. The provision, criteria or practice (PCP) relied on by the claimant is the requirement of a full valid UK driving licence as an essential criteria for the Role.
- j. Did the respondent have such a PCP? The respondent accepts that it did.
- 10 k. Did the respondent fail to provide an auxiliary aid for the claimant, namely the provision of a support worker.
- l. Did any such PCP/failure to provide an auxiliary aid put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, namely that his application for the Role was automatically rejected?
- 15 m. If so, did the respondent know, or could it reasonably have been expected to know, the claimant was likely to be placed at any such disadvantage?
- n. If so, were there steps that could have been taken by the respondent to avoid any such disadvantage? The claimant asserts that it would have been reasonable for the respondent to:
- 20 i. Open the job up on the basis that the applicant should provide details of how they might undertake travel without a licence;
- ii. Accept an application based upon the provision of access to work support; and/or
- iii. Consider reallocation of any tasks within the wider team where
25 some tasks absolutely require a driving licence.
- o. If so, would it have been reasonable for the respondent to have taken those steps at any relevant time and did they fail to do so?

Findings in Fact

8. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
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9. The respondent has around 50-55,000 employees. It is arranged by reference to 'customer groups', one of which is Customer and Corporate Compliance. Individual & Small Business Compliance (**I&SBC**) is a business area within that, which has a number of divisions, including Taskforce & Specialist Compliance (**T&SC**) and Complex and Agents (**C&A**).
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10. The respondent is in the process of moving from numerous local offices to a small number of regional centres. That transition commenced in around 2015 and is due to be completed by March 2025.
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11. In Scotland, there are around 400-500 employees working within T&SC. Approximately $\frac{3}{4}$ of these are caseworkers, who are employed either at Officer or Higher Officer grade. The transition to regional centres in T&SC in Scotland was largely completed by 2020. Workers are now primarily based in Edinburgh, Glasgow and East Kilbride.
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12. The claimant commenced employment with the respondent on 7 October 2002. His employment is continuing. He is contracted to work full-time, which is 37 hours a week. The claimant is employed by the respondent at Officer grade.
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13. The claimant experiences syncope and pre-syncope episodes. As a result of these, in May 2018, the claimant was informed by DVLA that he must not drive. He has received annual notifications, confirming that he must not drive, from DVLA since then.
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14. In October 2018 the claimant started working in as a compliance caseworker in Hidden Economy, based in Edinburgh. Hidden Economy was being incorporated into T&SC at that time, a process which was completed shortly thereafter. The claimant lives in Dundee, so required to commute to Edinburgh
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on a daily basis. He informed the respondent, prior to taking up the role, that he was unable to drive as a result of his medical condition. This was not seen as a barrier to the claimant taking up the role, nor did it present any insurmountable obstacles to him undertaking the role. The claimant had
5 contacted Access to Work, prior to commencing in the role, to see if assistance could be provided, if necessary. They confirmed, in principle, that funding for a support worker to drive for the claimant could be provided, if this was required.

10 15. The claimant's role involved investigating businesses who may not be reporting some/all of their income to HMRC. This could involve visiting the business premises. On occasion this was unannounced, but all visits would be carefully planned and risk assessed, generally 2-3 weeks in advance. The normal practice is for at least two caseworkers attend each visit. As a result of
15 this, the claimant usually attended visits with another caseworker, who drove them to the visit. On occasion, the claimant would use public transport. It was however never necessary for the claimant to revert to Access to Work for the provision of funding for a support worker to drive for him.

20 16. There were other caseworkers, at Officer and Higher Officer grade, employed in T&SC in Scotland who did not drive. Similar, informal, arrangements were in place for them to enable them to carry out their duties.

25 17. From the outset, the claimant found the work in Hidden Economy incredibly interesting and engaging. He found that to be a revelation, after years of working for the respondent, but not having been particularly engaged in his previous roles. A month after he took up the role in Hidden Economy, he was offered an alternative position in Dundee, at a higher salary. He declined that offer, given the extent to which he was enjoying his role in Hidden Economy.
30 The claimant performed well in this role.

35 18. In 2020 the respondent commenced a process to recruit 597 further caseworkers into I&SBC across the UK (233 at Officer grade and 374 at Higher Officer grade). The recruitment exercise was discussed by the senior leadership team within I&SBC. They concluded, based on informal and

anecdotal discussions they had had with members of their teams, that due to the move to regional centres, a large number of the caseworkers who had driving licences had left the respondent's employment and only a small cohort of caseworkers now had driving licences. No assessment was undertaken to ascertain precisely how many caseworkers had driving licences, despite the fact that this information was readily available as a result of annual written declarations, provided by all employees who drive in the course of their duties to their line managers, for insurance purposes. Similarly, there was no formal assessment of whether there were caseworkers employed who had driving licences, but chose not to drive in the course of their duties (there not having been any requirement previously for caseworkers to do so).

19. Having reached the conclusion that there was only a small cohort of caseworkers who had driving licences, the senior leadership team within I&SBC agreed that, for this recruitment exercise only, it would be an essential criteria that all applicants have a valid UK driving licence. No Equality Impact Assessment was undertaken in relation to this decision, nor was there any discussion/consideration of how this may impact individuals with particular protected characteristics. The senior leadership team relied upon the fact that, whilst this had not previously been a requirement for caseworkers in I&SBC, they were aware it had been a requirement for other roles. Having agreed to proceed with the recruitment exercise, a Recruitment Approval Form was then completed and sent to senior management and HR for approval. The Recruitment Approval Form stated 'no' in response to the question 'Does the vacancy have essential criteria?'

20. In November 2020 the respondent commenced the recruitment exercise. As part of this, they advertised for 10 full time Complex Tax and Evasion Investigators, based in Edinburgh at Higher Officer grade (the **Role**). The closing date for the Role was 25 November 2020.

21. The job description noted that the post-holders:

- a. would be responsible for leading and coordinating tax investigations into high-risk businesses;

- b. would work either work independently or lead a team of officers to review tax risks and business records;
- c. would need to make justifiable decisions to raise assessments, seize goods, and/or issue substantial penalties where appropriate;
- 5 d. may be required to travel significant distances with the potential for regular overnight stays; and
- e. would require to work five days over seven, including evenings, weekends and bank holidays and commit to working outside of standard office hours, when required, sometimes at short notice.

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22. The job description stated, under the heading '*Driving Licence*' '*Applicants need to be aware that the ability to drive and have a valid full UK driving licence is a requirement for the role, due to the type of activities and geographical mobility role entails.*' Under the heading '*reasonable adjustment*' it was stated that '*if a person with disabilities is put at a substantial disadvantage compared to non-disabled person, we have a duty to make reasonable changes to our processes*'. A link to further guidance in relation to reasonable adjustments was provided. Generic email addresses were provided as contacts for applicants.

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23. The respondent's position was that reasonable adjustments would be considered only if an individual met the essential criteria for the Role.

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24. The Role was similar to the position undertaken by the claimant, albeit more senior. The skills required were approximately a 70% match to that of the claimant's existing position, with the addition of leadership skills and more technical knowledge in the particular area focused upon (for which training would be provided to anyone appointed). The Role was to be undertaken in the same way as the claimant's role. Whilst the job description for the Role stated that '*for some of our roles you could be spending up to 80% of your working time out of the office*', in fact the requirement for anyone appointed to the Role, as with all caseworkers, was to undertake visits 2-3 days out of every 5, but not always for the full day. As with all caseworkers, all visits undertaken

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by those appointed to the Role would be carefully planned and risk assessed and generally at least two caseworkers would attend every visit.

- 5 25. On 20 November 2020, one of the claimant's former line managers sent him a copy of the advertisement for the Role, stating that he felt the claimant should seriously consider applying for it. The claimant highlighted that the advert stated that a driving licence was essential. His former line manager responded stating that he felt that the claimant was more than capable of the role, so he should speak to the vacancy holder, as he doubted that the claimant would be prevented from applying, given that the reason for not having a driving licence falls within the Equality Act and there were other supports available (via Access to Work).
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- 15 26. The claimant was encouraged that his former manager, who had mentored him through his development in his current role, thought he was capable of carrying out the Role. It was the first time he had ever received encouragement of this nature. The claimant had not applied for promoted roles previously, as most other recruitment exercises were generic. Successful candidates were placed on a reserve list and offered roles at the higher grade as and when they arose. If a candidate on the list refused role when offered, they would be removed from the list. The claimant was not interested in applying for promotion on this basis, as there was no guarantee of where he would ultimately be placed and whether he would find the work there interesting. He did not want to move from his current role, which he found to be fulfilling and engaging, without an assurance of where he would be working in the future. On this occasion however it was a targeted campaign for a role very similar to that currently undertaken by the claimant. Given the similarities to his current role, the claimant was confident that he would find the role fulfilling and engaging and was keen to apply for it.
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- 30 27. On Friday 20 November 2020, the claimant sent an email to the generic email address provided in the job description stating *'I am currently a band O Compliance Caseworker in the Hidden Economy bit of ISBC...and my previous manager emailed me a link to the Edinburgh vacancy with a very flattering*

5 *message saying he thought I should apply. I looked it over and it does sound like a very interesting post, but I note the reference to a full driving licence being essential, and while I have passed my test, I am currently unable to drive for medical reasons, and had to return my licence to the DVLA in 2018. I believe that access to work could provide funding for taxis that would enable me to undertake any travel for which public transport would not be suitable where otherwise my inability to drive myself would be a barrier to my employment, and so I was hoping to be able to apply on that basis as an adjustment on grounds of disability. Might it be possible to have a chat with someone about this?'*

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28. To ensure that he had as much time as possible to complete the application, he then commenced completion of the online form. On stating that he did not have a full valid UK driving licence, the application process was brought to an end. He then received an email, at 16:03 on 20 November 2020, stating that his application had been unsuccessful as he had not met the eligibility requirements for the job.

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29. 24 November 2020 at 14:00, the claimant sent a further email to the generic email address provided in the job description, stating as follows:

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'Good morning – on Friday I sent an email from my home email address in relation to the Edinburgh vacancies, requesting that my application be considered despite the fact that my driving licence has been medically revoked, as I believe that support would be available from Access to Work that would enable me to fulfil any duties without the need to drive myself should public transport not be available or suitable for the travel required.

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30 *I did start the process to submit an application, however this was rejected at an early stage in the process, before I had been asked about any qualifications or experience that might speak to my suitability for the post. I assume that the system did this automatically as I truthfully reported but I do not currently hold a Driving Licence.*

I haven't yet received a response to my email on Friday, but note that the deadline for applications is tomorrow, and that as things currently stand my application has been rejected.

5 *Without any discussion as to the rationale for the requirement for a Driving Licence being an essential criterion, I am unable to form an opinion as to whether I believe that to be a reasonable basis for my application to be excluded, or wish to challenge the decision, given that I consider the reason for my current lack of a Driving Licence to be a disability within the definition*
10 *provided in the Equality Act 2010, and am both unconvinced that my having a valid driving licence could be absolutely essential in such a role, and upset that I am excluded from such a role without any specific consideration of my suitability for it other than my ability to drive.*

15 *I would appreciate clarity as to why a valid driving licence is considered to be an essential requirement for the post, for all applicants, and whether the use of taxis, or a support worker that can drive, through Access to Work funding were considered and ruled out as unsuitable (and if so, why that was the decision)?*

20 *Additionally, I would ask if any assessment undertaken of the equality impact of applying this criterion, particularly in the context of the Public Sector Equality Duty to advance equality of opportunity and eliminate unlawful discrimination, and if so, for a copy of that assessment, along with any advice taken from Civil*
25 *Service HR in this regard.*

In the meantime, while I pursue the matter of whether a driving licence is an objectively reasonable requirement for all applicants, I would ask that I be allowed to submit a manual application for the post if an electronic application
30 *is filtered out, such that I may be considered for one of the vacancies along with those able to successfully apply online - while I have had it suggested to me that I would be a good fit for one of the posts, I understand that others might be a better fit yet - all I ask is that I not be excluded from the selection*

process by virtue of disability, but rather, if I am not to be appointed, it follow a fair assessment of my merits as a candidate otherwise.

If helpful I can be contacted on [numbers provided] to discuss, although I would appreciate a written response thereafter.'

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30. The claimant received a response to his email at 18:43 on 24 November 2020 stating, in essence, that a driving licence was an essential criterion for the role and this had been clearly outlined in the advert and job description.

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31. The claimant responded, by email 08:49 on 25 November 2020, highlighting that the response provided did not address the issues he had raised in his previous email and reiterating those issues.

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32. A holding response was sent to the claimant on 27 November 2020 at 09:39. It stated that the respondent was still looking into providing responses to the claimant and would contact him soon with the outcome. The claimant chased for that outcome on 4 December 2020 and was advised that the respondent hoped to provide this the following week.

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33. On 7 January 2021 PC sent a response to the claimant by email. His email stated that, for this particular recruitment campaign, the business unit's senior leadership team took the decision that all applicants must hold a driving licence and that decision was endorsed by the HR team. He then referenced the obligation on the respondent to make reasonable adjustments and stated
'ISBC T&SC SLT has adopted the test of 'reasonableness' to the individual case and circumstances, and unfortunately you do not meet the criteria. On this occasion you are not considered as being substantially disadvantaged as there are many roles in HMRC (indeed ISBC) that you could do if you are unable to drive. It is perfectly reasonable in an organisation of our size for the 'reasonable adjustment' to be for another role, and for this to be identified without the need for additional funding and costs incurred to support the restrictions that being an individual without a driving licence would pose.'

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34. The claimant responded on 8 January 2021, highlighting that PC's email primarily set out a generic legal position, but not the objective justification relied upon. He stated that, without that, the fundamental basis of his complaint remained unresolved.

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35. By email dated 18 January 2021, PC confirmed that the decision about driving licences being essential for the particular role was because it requires travel at times or to places where public transport would not be appropriate, and job holders are therefore required to drive a vehicle in order to undertake the role. He provided the following additional context, stating that it was discussed at by the senior leadership team, to help clarify the business position:

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- *'As we move forward towards being based in regional centres, caseworkers are (or were before the pandemic) having to travel increasingly large distances. In essence, we are covering the whole of Scotland, including the islands, from Edinburgh and Glasgow a position replicated across the rest of the UK.*
- *The use of public transport is not always viable or inefficient and has increased potential to compromise customer confidentiality.*
- *We have two big a part of the current workforce who do not have driving licences which is a key operational risk we identified in the delivery of our business*
- *We also looked at this from a duty of care perspective and as a means of reducing risks to our staff (e.g. late night visits, having to people who can drive where long distances are involved.)*

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36. The claimant was, and remains, extremely disappointed and aggrieved that he was not able to apply for the promoted role, simply due to the fact that he could not drive. It amplified his feelings of frustration surrounding his medical condition and inability to drive. He was aware that the next stage, had his application been able to proceed, was numerical and verbal reasoning tests, then interview. He had conducted the numerical and verbal reasoning tests previously and scored in the 90th percentile, in comparison to Higher Officers undertaking the test. He was confident therefore that he would have been

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successful at that stage. In relation to interview, given that he had been undertaking a very similar role for the last two years, which he enjoyed and was performing well in, and that this former manager also felt he would be 'more than capable' of undertaking the role, he felt he had a very good chance of securing it. He was excited at the prospect of undertaking the Role. He thought it would be fulfilling work. Given that he had not experienced any difficulties undertaking his current role, he did not foresee any difficulties in undertaking the promoted role, which was conducted in a very similar fashion. In any event, he was aware that Access to Work would provide assistance, if required, at no cost to the respondent. He felt it was 'heart-breaking' that someone with no experience in a similar role could apply and their application would be considered simply because they had a driving licence.

37. He could not, and does not, understand why the respondent had stated that it was essential for anyone applying for the Role to have a driving licence. He was aware that there were individuals carrying out the same role who did not have driving licences. It was not clear to him why everyone applying required to have a driving licence on this occasion, when there were, in his view, obvious work arounds to any difficulties which could be implemented without cost to the respondent and without any risk to confidentiality (any support worker would be vetted by the respondent in the same way as the claimant).

38. He was also very upset at the suggestion that he could simply apply for any other promoted post to overcome any disadvantage. He was motivated by the content of the role, not the status of Higher Officer or the higher salary. He felt that he had been made to feel selfish by the respondent for seeking to apply for that particular role, rather than any other position at the Higher Officer grade.

39. He remains very aggrieved that he was not given the opportunity to be assessed for the role, as he felt he would have been successful and would have been appointed. He is aware that the respondent's recruitment is now centralised, so he will not have the opportunity again to apply for a particular role in a targeting recruitment campaign, which compounds his feeling of

frustration and upset that he was not appointed to the Role, or at least given a full opportunity to apply.

- 5 40. Whilst the respondent had approval to recruit 374 Higher Officer caseworkers throughout the UK, only 225 offers of employment were made. All successful candidates had driving licences. The successful candidates commenced their new roles in/around March 2021, prior to the new financial year. Only 6 Higher Officer caseworkers were appointed to be based in Edinburgh, despite the fact that there was approval for 10 positions.
- 10 41. The claimant raised a formal grievance on 2 February 2020. PM was appointed to investigate the claimant's grievance. PM held an investigation meeting with the claimant on 6 April 2021. He investigated the claimant grievance and produced an investigation report, which was provided to EG. She met with the claimant on 15 September 2021. On 12 October 2021 she provided a written outcome to the claimant, confirming that his grievance was not upheld. The reasons provided in PC's email of 18 January 2021 were restated in her outcome. She also stated, in relation to Access to Work funding that it *'would be appropriate when there is a requirement to provide disabled employees with taxis from their home address to their place of work and home again, helping them stay in employment. It would not be reasonable to utilise Access to Work for the significant amount travel involved in the role. Access to Work funding is not to provide a personal driver. As stated the amount of travel is significant and could include period of long distances, this would not therefore*
- 20 *be a reasonable use of Access to Work funding.'*
- 25 42. The claimant was informed of his right to appeal, but did not do so. He felt the entire process, from initially raising his concerns on 20 November 2020, to the grievance outcome almost a year later was extremely protracted and his concerns had still not been addressed adequately. He felt very disappointed that, after the length of time the grievance process had been ongoing, PC's view was simply adopted without, in his view, any critical evaluation. Given
- 30 that he could not, at that stage, apply for the role, he did not see any point in

appealing. Having his application considered was the only outcome which he actually sought. He was aware the opportunity for that had passed.

5 43. The respondent agreed to increase salaries of employees by 13% over 3 years (3% in March 2021 and 5% in June 2021 and June 2022). The claimant's salary was accordingly as follows:

- a. In November 2020 - £24,818
- b. From 1 March 2021 - £25,563
- 10 c. From 1 June 2021 - £26,816
- d. From 1 June 2022 - £27,650

44. The respondent contributes 5.45% of the claimant's salary to his pension.

15 45. Higher Officers' pay in the period started at £31,807 from 1 March 2021, £33,080 from 1 June 2021 and £34,404 from 1 June 2022.

20 46. The respondent now undertakes recruitment for caseworkers in Customer and Corporate Compliance centrally. Any successful candidates attend Central Training Unit, before being allocated a role in a particular business area or division within that, based on business needs only. Following the bespoke recruitment exercise which commenced in November 2020 for caseworkers, it has not been an essential criteria that caseworkers have a driving licence.

25 **Respondent's submissions**

47. Ms Forrest for the respondent submitted, in summary, that:

- a. The respondent accepts that the claimant's application for the role was automatically declined as he did not have a driving licence and that he did not have a driving licence as a result of his disability. This was accordingly unfavourable treatment as a result of something arising in consequence of disability. The respondent's position is however that respondent's treatment of the claimant was a proportionate means of achieving a legitimate aim, namely to secure an increase in the number of caseworkers with driving licences. There was no less discriminatory way of achieving that aim, given
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the closure of local offices. Allowing candidates who did not have driving licences to apply would not have achieved that aim. Public transport is not always a viable or appropriate means of travel for caseworkers, given the nature of their role. The cases of *Land Registry v Houghton and others* UKEAT/0149/14 and *Hensman v Ministry of Defence* UKEAT/0067/14 were referred to.

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- b. The respondent accepts they had the PCP asserted, namely a requirement for a full valid UK driving licence as an essential criteria for the Role. They accept that the claimant's application was rejected as a result of this. Their position however is that group and individual disadvantage has not been established. Individuals with driving licences from other countries, which were not valid in the UK, were treated in the same way as the claimant. If the Tribunal does not accept this however, the same legitimate aims are relied upon. The respondent asserts that the application of the PCP was a proportionate means of achieving this, for the same reasons as advanced in relation to the s15 claim.
- c. In relation to the reasonable adjustments claim, again the PCP is accepted. The respondent denies however that the PCP placed the claimant at a substantial disadvantage in comparison to those who do not have the same disability. Others who did not have a valid UK driving licence also had their applications rejected. The duty accordingly did not arise. The case of *Smith v Churchills Stairlifts plc* [2006] IRLR 41 was referred to. In any event, it was not reasonable for the respondent to take the three steps proposed by the claimant.
- d. In relation to remedy, the claimant has not taken appropriate steps to mitigate any loss, by applying for alternative roles at Higher Officer grade. Financial losses should accordingly be limited. In relation to injury to feelings, the Tribunal requires to consider the effect of the respondent's conduct on the claimant. While it is clear that the claimant was upset, he was not off sick, did not consult his GP and was not prescribed any medication. Any award should be in the lower Vento band. Any award

should also be reduced by 25% given the claimant's unreasonable failure to follow the Acas Code, by failing to appeal against the grievance outcome.

Claimant's submissions

48. In summary, the claimant submitted that:

- 5 a. The respondent has retrospectively attempted to objectively justify their actions, but did not consider this at the time. At no point did the respondent discuss or consider the way in which the essential criteria stated may disadvantage those with protected characteristics, or other ways of achieving the aims asserted. No Equality Impact Assessment was
10 undertaken. The senior leadership team simply decided that this should be an essential criteria for this role, but did not then highlight this on the Recruitment Approval Form. They had no data to back up the assertion that there were insufficient employees with driving licences when they made that decision, or now. No data was provided regarding the length of the journeys
15 which Higher Officers require to undertake. No assessment was made of those who had a driving licence but chose, for whatever reason, not to drive in the course of their duties. Four of the Higher Officer vacancies in Edinburgh were then left unfilled because there were insufficient candidates meeting the requirements of the role. This undermines the respondent's
20 objective justification.
- b. In relation to group disadvantage, DVLA withdraw licences of anyone who experiences fainting episodes. Therefore, anyone with the same disability as the claimant would have their licence revoked. Their application for the Role would also have been automatically declined as a result. Others,
25 without the same disability would not have their application automatically declined.
- c. Reasonable adjustments ought to have been considered and made, such as reallocation of work or support via Access to Work, who would have provided funding for a support worker to drive when required. At very least
30 the claimant's application ought to have been progressed and consideration given to this, if he was successful. The respondent did not properly consider

the potential of support via Access to Work and appear to fundamentally misunderstand the support potentially available.

Relevant Law

Discrimination arising from disability

5 49. Section 15 EqA states:

‘(1) A person (A) discriminates against a disabled person (B) if – (a) A treats B unfavourably because of something arising in consequence of B’s disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

Guidance on how this section should be applied was given by the EAT in ***Pnaiser v NHS England*** [2016] IRLR 170, EAT, paragraph 31. In that case
15 it was highlighted that ‘arising in consequence of’ could describe a range of causal links and there may be more than one link. It is a question of fact whether something can properly be said to arise in consequence of disability. The ‘something’ that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial)
20 influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

50. There is no need for the alleged discriminator to know that the ‘something’ that causes the treatment arises in consequence of disability. The requirement for knowledge is of the disability only (***City of York Council v Grosset*** [2018] ICR 1492, CA).
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51. The EAT held in ***Sheikholeslami v University of Edinburgh*** [2018] IRLR 1090 that:

‘the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two

distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.'

52. The burden is on the respondent to prove objective justification. To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so (**Homer v Chief Constable of West Yorkshire Police** [2012] IRLR 601). The Tribunal requires to balance the reasonable needs of the respondent against the discriminatory effect on the claimant (**Land Registry v Houghton and others** UKEAT/0149/14). There is, in this context, no 'margin of discretion' or 'band of reasonable responses' afforded to respondents (**Hardys & Hansons v Lax** [2005] IRLR 726, CA).

Indirect Discrimination

53. Section 19 of the Equality Act 2010 (**EqA**) states:

(1)'A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice ('PCP') 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.'

54. S23 EqA states:

5 *'On a comparison of cases for the purposes of section...19 there must be no material difference between the circumstances relating to each case.'*

55. Lady Hale in the Supreme Court gave the following guidance in ***R (On the application of E) v Governing Body of JFS*** [2010] IRLR 136:

10 *'Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins.'*

15 56. In the case of ***Essop v Home Office; Naeem v Secretary of State for Justice*** [2017] IRLR 558 SC, at [25] Lady Hale stated:

20 *'Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.'*

25 57. The Equality and Human Rights Commission Code of Practice on Employment (the **EHRC Code**) at paragraph 4.5 states as follows:

30 *'The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future*

- such as a policy or criterion that has not yet been applied - as well as a 'one-off' or discretionary decision.'

58. 'Particular disadvantage' essentially means something more than minor or trivial. That was determined in ***R. (on the application of Taylor) v Secretary of State for Justice*** [2015] EWHC 3245 (Admin) where the following comments were made:

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'The term 'substantial' is defined in section 212(1) to mean 'more than minor or trivial'. I do not perceive any significant difference between the phrase 'substantial disadvantage' and the phrase 'particular disadvantage' used in section 19 of the Act.'

59. Paragraph 4.17 and 4.18 of the EHRC Code state

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'The people used in the comparative exercise are usually referred to as the 'pool for comparison'. In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively. In most situations, there is likely to be only one appropriate pool, but there may be circumstances where there is more than one. If this is the case, the Employment Tribunal will decide which of the pools to consider.'

20 60. The position in relation to objective justification is set out above, at paragraph 52.

Failure to make reasonable adjustments

61. Section 20 EqA states:

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'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.'

62. The duty comprises three requirements (of which the first is relevant to this case). 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.'

5 63. Section 21 EqA provides that a failure to comply with the first requirement is a failure to comply with a duty to make reasonable adjustments and that A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

10 64. Further provisions in Schedule 8, Part 3, EqA provide that the duty is not triggered if the employer did not know, or could not reasonably be expected to know that the claimant had a disability and that the provision, criteria or practice is likely to place the claimant at the identified substantial disadvantage.

Burden of Proof

65. Section 136 EqA provides:

15 *'If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.'*

20 66. There is accordingly a two-stage process in applying the burden of proof provisions in discrimination cases, explained in the authorities of **Igen v Wong** [2005] IRLR 258, and **Madarassy v Nomura International Plc** [2007] IRLR 246, both from the Court of Appeal. The claimant must first establish prima facie case of discrimination by reference to the facts made out. If the claimant does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondent's explanation is inadequate, it is
25 necessary for the Tribunal to conclude that the complaint should be upheld. If the explanation is adequate, that conclusion is not reached.

30 67. In **Madarassy**, it was held that the burden of proof does not shift to the employer simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. Those facts only

indicate the possibility of discrimination. They are not of themselves sufficient material on which the Tribunal “could conclude” that on a balance of probabilities the respondent had committed an unlawful act of discrimination. The Tribunal has, at the first stage, no regard to evidence as to the respondent’s explanation for its conduct, but the Tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant’s case, as explained in *Laing v Manchester City Council* [2006] IRLR 748, an EAT authority approved by the Court of Appeal in *Madarassy*.

Discussion & Decision

Discrimination Arising from Disability

68. The Tribunal considered the guidance *Pnaiser*. The first question is whether the claimant was treated unfavourably. In determining this, no question of comparison arises. The EHRC Employment Code indicates that unfavourable treatment is treated synonymously with disadvantage. It is something about which a reasonable person would complain. Taking those into account, the Tribunal found that the claimant’s application for the Role was automatically declined and that amounted to unfavourable treatment.

69. The Tribunal accepted, as PC did in his evidence and the respondent did in submissions, that the claimant’s application for the role was declined because he did not have a valid UK driving licence, which arose in consequence of his disability.

70. The Tribunal then considered justification, and the question of whether the unfavourable treatment complained of was a proportionate means of achieving a legitimate aim, for the purposes of section 15(1)(b) EqA.

71. The legitimate aims relied upon by the respondent were:

a. The respondent’s need to ensure that those appointed to investigator roles which involve travel throughout the Scotland, often at short notice

and during unsociable hours, are properly able to carry out that travel and therefore fulfil their role (the **First Aim**); and

- 5 b. Increasing the number of those in the workforce with driving licences, as it was identified that there was too big a part of the current workforce who did not have driving licences, which was a key operational risk (the **Second Aim**).

72. The Tribunal considered whether the respondent had demonstrated the legitimate aims relied upon. The Code states (at para 4.28) that, for an aim to be legitimate, it must be *'legal, should not be discriminatory in itself, and it must represent a real, objective consideration'* and (at para 5.12) that *'It is for the employer to justify the treatment. They must produce evidence to support that it is justified and not rely on mere generalisations.*

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73. In relation to the First Aim, the Tribunal accepted that there was a requirement for caseworkers to travel throughout Scotland and that this was often during unsociable hours. There was no evidence however to support the assertion that this was often at short notice. The evidence presented to the Tribunal was that visits were carefully planned and risk assessed, generally at least 2-3 weeks in advance. Under exception of that point, the Tribunal accepted that there was a requirement to travel throughout Scotland, often during unsociable hours and that the respondent had a legitimate aim of ensuring that those who were appointed as caseworkers were able to fulfil the requirements of their role.

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74. The Tribunal then considered whether the unfavourable treatment established was a proportionate means of achieving the First Aim. The Tribunal was mindful that, in order to be proportionate, the measure has to be both an appropriate means of achieving the aim relied upon and also reasonably necessary in order to do so and that the respondent's reasonable needs should be balanced against the discriminatory effect on the claimant.

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75. The Tribunal concluded that it was not reasonably necessary for the respondent to automatically decline the claimant's application because he did not have a driving licence, in order to achieve the First Aim. The respondent's

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evidence was that, prior to this recruitment campaign, there had never been a requirement for caseworkers to have a driving licence and there is currently no such requirement. The respondent accordingly employs a number of caseworkers who do not have a driving licence. Indeed, the claimant falls within that category. No evidence was presented to indicate that those caseworkers are unable to undertake the requirements of their role. Indeed, the claimant's unchallenged evidence was that he is able to do so without a driving licence. The Tribunal concluded that the respondent could have achieved the aim relied upon by considering reasonable adjustments to the Role, if the claimant was appointed, such as allocating the claimant local business which did not involve significant travel and/or securing funding for a support worker to drive, on the occasion that a long journey was required which could not be undertaken by public transport. It was not proportionate to simply decline the claimant's application because he did not have a driving licence.

76. In relation to the Second Aim, the Tribunal did not accept that the respondent demonstrated that there was too big a part of the current workplace who did not have driving licences. No evidence was presented to the Tribunal in relation to the number of employees with driving licences, whether as a whole or in T&SC in particular. The respondent relied simply on their view that there was a 'small cohort' of the workforce with a driving licence. PC stated in his evidence that no assessment was undertaken by the respondent to determine the proportion of the workplace who had a driving licence. This was despite the fact that he was aware the respondent conducted an annual check of all those who drove in the course of their duties, so the information could have been readily obtained. Rather, he stated that the conclusion was reached on the basis of 'anecdotal' discussions with managers. Taking into account the terms of the Code, as set out in paragraph 72 above, the Tribunal concluded that the respondent did not discharge the burden on them to demonstrate the legitimate aim relied upon.

77. Notwithstanding that conclusion, the Tribunal considered whether the unfavourable treatment established was a proportionate means of achieving the Second Aim. The Tribunal concluded that it was not. It was not necessary

to decline the claimant's application in order to increase the number of those in the respondent's workforce with driving licences. That aim could have been achieved by stating that a driving licence was a desirable criteria, rather than treating it as an essential criteria. It was not proportionate to simply decline the claimant's application because he did not have a driving licence. Six additional Higher Officers with driving licences were employed to be based in Edinburgh, as a result of the recruitment exercise. There was approval for ten positions. If the claimant had been employed in the role, as well as the six who were offered the position, the respondent would have been in the same position in relation to the number of Higher Officer caseworkers who could drive. Denying the claimant the opportunity to be considered for the role was not proportionate in these circumstances.

78. In light of all of the above points, the Tribunal concluded that the respondent has not established that declining the claimant's application for the Role was a proportionate means of achieving a legitimate aim.

79. Declining the claimant's application for the Role accordingly amounted to discrimination arising from disability.

Indirect Discrimination

80. The respondent accepted that they had the PCP relied upon by the claimant, namely a requirement for a full valid UK driving licence as an essential requirement for the Role and that they applied this to everyone applying for the Role.

81. The Tribunal considered whether the claimant had established group disadvantage, the onus being upon him to do so (***Nelson v Carillion Services Limited*** [2003] IRLR 428). The Tribunal accepted that individuals with the same disability as the claimant would not have a driving licence, as DVLA automatically revoke driving licences where individuals experience syncope. The applications of individuals with the same disability as the claimant would also, therefore, be automatically declined. While the Tribunal accepted the respondent's position that there may be individuals who do not

have a licence for other reasons than disability, and their applications would also automatically be declined, the Tribunal concluded that 100% of individuals with the same disability as the claimant would have their application automatically declined. Of those who did not have that disability, the proportion of individuals whose applications were automatically rejected, because they did not have a driving licence, was/would be significantly lower. Those with the same disability as the claimant were accordingly placed at a particular (more than minor or trivial) disadvantage, namely the automatic rejection of their application, as a result of the PCP. In light of that, the Tribunal accepted that group disadvantage was established.

82. The Tribunal accepted that the PCP put the claimant at that particular disadvantage also.

83. The Tribunal then considered whether the respondent had shown that the PCP was a proportionate means of achieving a legitimate aim. The Tribunal was mindful that, whilst the respondent relied upon the same aims as those stated in relation to the claim under s15 EqA, at this juncture the Tribunal was considering objective justification of a PCP, rather than of unfavourable treatment.

84. The Tribunal reached the same conclusions in relation to the legitimate aims relied upon as set out in paragraphs 73 and 76 above.

85. The Tribunal then considered whether a full valid UK driving licence being an essential criteria for the Role was a proportionate means of achieving those aims.

86. The Tribunal concluded that it was not reasonably necessary for there to be an essential criteria that all candidates for the Role must have a full valid UK driving licence, in order to achieve the First Aim. The respondent's evidence was that, prior to this recruitment campaign, there had never been a requirement for caseworkers to have a driving licence and there is currently no such requirement. The respondent accordingly employs a number of

caseworkers who do not have a driving licence. Indeed, the claimant falls within that category. No evidence was presented to indicate that those caseworkers are unable to undertake the requirements of their role. Indeed the claimant's unchallenged evidence was that he is able to do so without a driving licence. The Tribunal concluded that the respondent could have achieved the First Aim, by stating that driving was a desirable criteria and considering reasonable adjustments to the Role, if the need arose. It was not proportionate to state that it was essential that all candidates must possess a valid UK driving licence.

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10 87. The Tribunal also concluded that it was not reasonably necessary for there to be an essential criteria that candidates for the Role must have a full valid UK driving licence, in order to achieve the Second Aim. That aim could have been achieved by stating that a driving licence was a desirable criteria, rather than treating it as an essential criteria. It was not proportionate to state that it was essential that all candidates must possess a valid UK driving licence.

15 88. In light of all of the above points, the Tribunal concluded that the respondent has not established that the PCP applied was a proportionate means of achieving a legitimate aim.

89. The claimant's complaint of indirect discrimination accordingly succeeds.

20 *Reasonable Adjustments*

90. The respondent accepted that they had the PCP relied upon by the claimant, namely a requirement for a full valid UK driving licence as an essential requirement for the Role and that they applied this to everyone applying for the Role.

25 91. No support worker was provided for the claimant. It was accordingly established that the respondent failed to provide that auxiliary aid.

30 92. The Tribunal considered whether the PCP, or the failure to provide an auxiliary aid (a support worker), put the claimant at a substantial disadvantage, in relation to a relevant matter, in comparison with persons

who were not disabled at any relevant time. The Tribunal accepted the claimant's unchallenged evidence that he was unable to drive as a result of his disability. The PCP, and the failure to provide the auxiliary aid (a support worker), accordingly put the claimant at a substantial disadvantage, in comparison to with people who were not disabled and had the ability to drive.

93. Having reached these findings, the Tribunal then considered each of the adjustments proposed by the claimant, to ascertain whether the steps proposed would have eliminated or reduced the disadvantage to the claimant and, if so, whether or it would have been reasonable for the respondent to have taken those steps or provided the auxiliary aid. In relation to the effectiveness of the adjustments proposed, the Tribunal was mindful that there does not require to be absolute certainty, or even a good prospect, of an adjustment removing a disadvantage. Rather, a conclusion that there would have been a chance of the disadvantage experienced by the claimant being alleviated or removed is sufficient. In relation to each adjustment proposed, the Tribunal reached the following conclusions:

a. **Open the job up on the basis that the applicant should provide details of how they might undertake travel without a licence.** The Tribunal concluded that this would have alleviated the disadvantage experienced by the claimant: it would have allowed the claimant to undertake the assessments and interview and, if successful, explain how he felt the role could be undertaken, notwithstanding the fact that he did not have a driving licence. The Tribunal concluded that it was practicable for the step to be taken, given that the respondent employed other individuals who were able to undertake the role without a driving licence. It did not involve any cost and would result in limited disruption to the respondent. It would therefore have been reasonable for the respondent to have taken this step.

b. **Accept an application based upon the provision of access to work support.** The Tribunal concluded that there was a chance that this would have alleviated the disadvantage experienced by the claimant: he had

made contact with Access to Work prior to taking up his role in Hidden Economy in 2018, they had confirmed, in principle, that they would provide funding for a support worker to drive or taxis, when required. Whilst the claimant had not required to seek any support from Access to Work in the two years he worked in Hidden Economy, the agreement was still there and funding for a support worker could have been explored. It was practicable for the step to be taken. It did not involve any cost, as the cost would be met by Access to Work, and would have involved limited disruption to the respondent. It would therefore have been reasonable for the respondent to have taken this step.

c. **Consider reallocation of any tasks within the wider team where some tasks absolutely require a driving licence.** The Tribunal concluded that this would have alleviated the disadvantage experienced by the claimant. The claimant could have been allocated case work in relation to local businesses, limiting longer journeys where driving would generally be shared by the two caseworkers undertaking the visit. Such an arrangement was practicable, would have cost nothing and involved very limited disruption to the respondent's activities. It would therefore have been reasonable for the respondent to have taken this step.

94. The Tribunal accordingly concluded that the respondent failed in its obligation to make reasonable adjustments.

25 **Remedy**

95. Having found that each of the complaints succeed, the Tribunal moved on to consider remedy.

30 *Acas Code*

96. The Tribunal firstly considered whether the claimant had unreasonably failed to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures (2015) (the **Acas Code**). The Tribunal noted that the claimant

had brought his concerns to the respondent's attention timeously, in November 2020, seeking to resolve these concerns informally, but did not receive a substantive response until January 2021. This did not resolve his concerns, so he raised a formal grievance on 2 February 2021. A formal
5 outcome to that grievance was provided to the claimant over 8 months later, on 12 October 2021. Given these circumstances, and those set out in paragraph 38 above, the Tribunal concluded that while the claimant did fail to follow the Acas Code by failing to appeal, that failure was not unreasonable.

10 *Financial Loss*

97. The Tribunal found that there was a 75% chance that the claimant would have been appointed to the Role, had his application not been automatically declined. That conclusion was reached as a result of the following:

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- a. The claimant was performing well in his existing role, at the time he sought to apply for the Role;
 - b. There were significant similarities in the role the claimant was undertaking at the time and the Role;
 - 20 c. The claimant's previous scores in the numerical and verbal reasoning tests; and
 - d. The fact that there were 4 unfilled positions for the Role, following the recruitment exercise.

25 98. The claimant sought financial losses from November 2020 until March 2023. The Tribunal was satisfied that 2 years' financial loss, from March 2021 (when the claimant would have taken up the Role) until the end of March 2023, was just and equitable in the circumstances. Whilst the respondent referenced the fact that the claimant had not applied for alternative positions, the Tribunal
30 noted that no evidence was led of any roles which he ought to have applied for in the period. The Tribunal also noted that the respondent's recruitment exercises are now centralised and accepted, as reasonable, the claimant's position that he would not leave a job he found engaging and fulfilling for an unknown position which he may not enjoy.

99. The difference between the claimant's salary and that of the minimum for a Higher Officer was £13,163. This sum was calculated as follows:

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- a. 1 April 2021 – 31 May 2021 = £1,040.67
 - b. 1 June 2021 – 31 May 2022 = £6,494.00
 - c. 1 June 2022 – 31 March 2023 = £5,628.33

100. The claimant has also lost employer pension contributions on that sum,
10 amounting to £717.38.

101. Reducing those sums by 25%, to reflect the Tribunal's finding that the claimant had a 75% chance of securing the Role, gives a total of £10,410.29, which is the sum which the Tribunal award for financial loss. Interest of is also
15 due on that sum from 26 September 2021 to date, amounting to £698.20.

Injury to Feelings

102. The claimant gave oral evidence in relation to injury to feelings. The Tribunal's
20 findings in relation to this are set out at paragraphs 36-39 inclusive above.

103. The Tribunal also noted, and accepted, the respondent's position the claimant was not absent from work, did not consult his GP and was not prescribed any medication.

25 104. In all the circumstances, the Tribunal was satisfied that an award in the lower Vento band was appropriate, namely £8,000, plus interest of £1,071.34 from 25 November 2020 to date.

30 **Employment Judge: Mel Sangster**
Date of Judgment: 29 July 2022
Entered in register
and copied to parties: 29 July 2022