EMPLOYMENT TRIBUNALS

Claimant: Ricardo Carmine Romero

Respondent: Driver and Vehicle Licensing Agency

HELD AT: Cardiff and on video **ON:** 23, 24, 27, 28, 29 and 30 June 2022

BEFORE: Employment Judge S Moore
C J Mangles
C Stephenson

REPRESENTATION:

Claimant: Ms Hand, Counsel
Respondent: Mr Allsop, Counsel

JUDGMENT having been sent to the parties on 19 July 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Introduction

1. There were two claims presented in this case. The first claim was presented on 29 April 2021. The claimant brought claims of direct disability discrimination, discrimination arising from disability, indirect disability discrimination, failure to make reasonable adjustments and disability related harassment. The second claim was presented on 12 August 2021. The claimant brought an unfair dismissal claim and further claims of disability discrimination.

2. There was a case management hearing in November 2021. The claimant had withdrawn a number of claims (indirect and harassment). The claimant was directed to further clarify his claims. An amended response was then filed.

3. The agreed bundle ran to 1607 pages. This was added to during the hearing following additional disclosure by the respondent. The final bundle ended at page 1629A. The Tribunal heard witness evidence from the claimant. The respondent called the following witnesses:

Ms Manser-Davies – Claimant's line manager's line manager;

Ms Wadeward – dismissing manager

Mr Rees – Head of Output Services Group ("OSG")

Mr Jones – Operations Leader and Manager, OSG

4. A witness statement was exchanged and admitted for a Ms Jenkins but as Ms Hand did not propose to ask her any questions, she was not called to give oral evidence.

5. The Tribunal made a number of adjustments for the claimant and also other witnesses attending. The claimant required a 5 minute break every hour and timed breaks at 11.30am and 3.30pm. Where the claimant was required to assimilate large pieces of information during cross examination he was given sufficient time to read through the documents and an explanation of the document as well as the passage relied upon.

6. The Tribunal had raised with the parties that the impact statement had not been included in the bundle. Although disability had been conceded, the Tribunal still needed to determine if the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability and sought the assistance of counsel as to how they proposed we would determine this issue given there was no impact statement before us. The tribunal had also observed that the claimant had funded a private assessment expert report which resulted in his diagnosis of ADHD and enquired as to whether that would assist the Tribunal. Subsequently the respondent sent the report to the Tribunal but it was agreed that it was not relevant or necessary to admit that report given the withdrawal of the reasonable adjustment claim (see below). The impact statement was added to the bundle by agreement.

7. On 27 June 2022 after the claimant's evidence had concluded, the claimant withdrew a number of claims as follows.

a. The direct disability discrimination claim in relation to the Respondent's decision to not appoint the Claimant to the role of Central Support Budget Co-ordinator ("CSBC"), or to offer a trial in this role, on 13 January 2021 and ;

b. The discrimination arising from disability claim in relation to the Respondent's decision to not appoint the Claimant to the role of CSBC and ;

c. The entire failure to make reasonable adjustments claim and;

d. The unfair dismissal claim in relation to the challenges to fairness relied on that that there were alternatives to dismissal in this case, namely appointing the claimant into the role of AO Grade CSBC.

8. In light of the withdrawal of the reasonable adjustments claim the respondent subsequently accepted they had actual or constructive knowledge of the claimant's disability of ADHD. The respondent had conceded the claimant was a disabled person in respect of ADHD prior to the hearing.

Issues

9. The issues that remained before the Tribunal were as follows:

Disability

10. The Respondent concedes that the Claimant was disabled within the meaning of section 6 of the Equality Act 2010 on account of his ADHD at all material times for the purposes of the claim and that the Respondent had knowledge of the disability.

S13 EQA 2010 - DIRECT DISABILITY DISCRIMINATION

11. Was the Respondent's decision to not appoint the Claimant to the role of AO Machine Operator OSG, or to offer a trial in this role, on 4 December 2020 less favourable treatment?
12. If so, was the less favourable treatment on the grounds of the Claimant's disability?
13. The Claimant is not aware of the identity of a named comparator for the purpose of either of the s13 claims and relies on a hypothetical comparator who is a person in materially the same circumstances as the claimant, with an employment history similar to that of the claimant, who does not have the claimant's disability.

s.15 EQA 2010- DISCRIMINATION BECAUSE OF SOMETHING ARISING FROM DISABILITY

14. Was the Respondent's decision to not appoint the Claimant to the role of AO Machine Operator OSG on 4 December 2020, or to offer him a trial, unfavourable treatment?
15. If so, was this decision unfavourable treatment because of something arising in consequence of the Claimant's disability? The 'something arising[1]' was:
16. In respect of the s15 claims, the Claimant avers that the decision not to appoint him into the role of AO Machine Operator OSG, or to offer him a trial, was for a reason arising from his disability. The Claimant avers that this reason was the perception formed by the Respondent that some the symptoms of his disability, including issues with concentration and occasional difficulty with background noise meant he was unsuitable for the Machine Operator role. For avoidance of doubt, the Claimant denies that these symptoms would have prevented him from being able to carry out the Machine Operator role.
17. Further, or in the alternative the Claimant claims that to the extent the Respondent avers that the decision not to appoint him into the role was because

[1] This was not set out in the list of issues, but cross referenced to the claimant's response to Tribunal orders at page 106 of the bundle

of his previous performance in that role, the Claimant avers that the perceived deficiencies in his performance claimed by the Respondent of failure to perform to the required standard and disruptiveness (which are denied) were for reasons arising from his disability.

18. Can the Respondent show that any unfavourable treatment was justified as a proportionate means of achieving a legitimate aim? There were:

(a) the need to ensure the efficiency and productivity of OSG and;
(b) to minimise the risk of a serious data breach whereby sensitive documents might be inadvertently disclosed to unauthorised third parties.

Dismissal

19. Was the Respondent's decision to dismiss the Claimant because of something arising in consequence of the Claimant's disability? The Claimant avers that the 'something arising' from his disability was his absence record and inability to carry out his substantive role on a continuing basis, both of which arose from his disability.
20. Can the Respondent show that any unfavourable treatment was justified as a proportionate means of achieving a legitimate aim? There were:

(a) to ensure that the Respondent is able to operate efficiently as an organisation, using public funds, in order to deliver its services to the public,
(b) ensure that its employees are deployed in roles that are appropriate to their capability, skills and / or experience, and
(c) to protect and promote the health and safety of its employees, including the Claimant.

S.98(4) ERA 1996- UNFAIR DISMISSAL

21. What was the reason for the Claimant's dismissal? The Respondent contends that it was capability, alternatively some other substantial reason.
22. Was dismissal within the range of reasonable responses?
23. The challenges to fairness relied on by the Claimant in respect of his unfair dismissal claim are that that there were alternatives to dismissal in this case, namely appointing the claimant into the role of AO Machine Operator OSG.
24. Was the Claimant's dismissal procedurally fair?

REMEDY [2]

25. What losses has the Claimant suffered?
26. Is the Claimant entitled to an award of general damages in respect of injury to feelings?
27. Would the Claimant have been dismissed at the same time or within the same time period had he not been unfairly or unlawfully dismissed?
28. Has the Claimant mitigated his losses?

[2] Remedy had to be reserved as the hearing went part heard

Findings of Fact

29. We have made the following findings of fact on the balance of probabilities.

30. In February 2021 the claimant was formerly diagnosed with ADHD, inattentive type (also known as Attention Deficit Disorder - ADD) following a private ADHD Psychiatric Assessment. The assessment was conducted by a GMC registered Consultant Psychiatrist, Dr Richard Parkin. The claimant's impact statement cited the report, which was not challenged and we accept the evidence in the claimant's impact statement. The relevant findings of fact regarding the claimant's disability are as follows.

31. Inattentive ADHD is characterised by lifelong problems with poor attention, significant distractibility, poor focus and concentration. Dr Parkin also raised the possibility of the claimant having an autistic spectrum disorder based on "…lifelong interpersonal difficulties, particularly relating to difficulties with socialising, communication and understanding people's emotional states.". Dr Parkin further explains that "…there may be an element of social anxiety, which could be a consequence of his neurodevelopmental problems or could be a co-morbid condition…" and that "given all of the above" the claimant has "fluctuating problems" with his "mood".

32. Dr Parkin concluded that the claimant has had several inattentive or hyperactive-impulsive symptoms prior to age 12 and that he has a persistent pattern of inattention and/or hyperactivity that interferes with functioning or development. Therefore, the claimant has suffered with the adverse effects of his ADD throughout his employment with the respondent from 22 March 1999 to 14 May 2021 and will continue to do so as it is a lifelong condition.

33. The claimant has always felt that he did not quite function like other people and this has affected his self-esteem for as long as he can remember. Until his formal diagnosis, he didn't understand what was wrong with him and often felt perceived as lazy and incapable and worried about what people thought of him. Over time he has developed ways of coping with this mainly through avoidance of issues so that he can try to project some kind of normality externally.

34. The claimant's inattentive ADHD has had the following impact on his day to day activities.

Work

35. From leaving college (circa 1995), he has purposely chosen jobs that were more active/manual in nature as he felt acutely aware that he struggled with focussing on tasks that he found mundane, required prolonged concentration, assimilation of that information and its retention e.g. administration based work. He felt more able in these jobs as they were relatively varied and short in length of time and did not require prolonged concentration. None of these roles involved the assimilation of lengthy written information, neither did they involve lengthy conversations.

Social activities

36. As an adult the claimant continues to avoid reading as a past time as he cannot focus long enough to enjoy what he is reading and to digest the main points.

37. He becomes easily distracted by extraneous sounds and noise if he is trying to concentrate and can become extremely agitated if there is more than one conversation taking place which can often results in an explosive verbal outburst and leaving the room.

38. The claimant will flit to topics of his choice in conversations and inappropriately interrupt. This has caused arguments in his family and he has often been called inconsiderate and selfish as a result.

39. The claimant commenced employment in 1999. Until January 2014 he worked in the OSG department operating machinery in a predominantly manual role. He was initially an Administrative Assistant ("AA") grade. Dr Parkin confirmed that the claimant's symptoms of ADD did not affect him badly in this role – this happened when he moved to a role in 2014 where focus and attention were very necessary (see below).

40. We had sight of a number of appraisals from 2005 and 2006. These noted that the claimant worked well and performed to a high standard and highlighted strengths of attention to quality issues. He had acted up as a supervisor on occasions. In 2006 there was reference to him having "a laid-back attitude" and this needed to improve if he was to become a supervisor, which subsequently happened, and we therefore find that the claimant must have made those improvements.

41. In March 2009 the claimant was promoted to an Administrative Officer ("AO") grade but he decided a few months later to downgrade back to AA because of the loss of shift allowance. In 2010 the claimant's team was given an award in recognition of outstanding contribution.

42. In 2011 the respondent conducted a job evaluation and this resulted in the AA operatives being regraded to an AO grade in the July. Some operatives were not regraded due to attendance and conduct issues. The respondent's own records show that the claimant received a regrade, and it must therefore follow (and we find) that the claimant by that point had no attendance or conduct issues. In fact there were no records or evidence in the claimant's personnel file or any other records to indicate that during the claimant's time during OSG there were any such issues. Some records had been lost by the respondent / their agent during a SAR disclosure exercise but there was no evidence before the Tribunal as to what may have been in those records.

43. In 2014 there was a restructure of the OSG department and the claimant chose to transfer to the DVRE department on 3 February 2014 due to the impact working shifts long term had had on his health and personal life.

44. On 5 March 2014 the claimant received a verbal warning for being on his mobile phone.

45. There were subsequent suggestions and evidence led by the respondent that the claimant had been moved from the OSG department due to performance issues, but we find that this was not the case and indeed did not accord with the respondent's

own records. The claimant's transfer document at the time indicated that the transfer had been permanent and was voluntary. There was a box that could have been ticked if the transfer had been compulsory, and that was not so ticked.

46. Following the claimant's transfer to the DVRE role it was common ground that he struggled in this role. It was an administration heavy role which the claimant had not undertaken before. It was expected that training at an AA level would take 6-8 weeks and by 18 weeks the claimant had not been able to pass that training. He received a final written warning in November 2014 for his performance. The claimant struggled straight away with concentration and became stressed and anxious at the pressure of targets which he could not meet. He found it hard to focus and retain information on DVLAs written Operating Instructions whilst navigating various computer applications and then, having to make a decision. He felt it profoundly difficult to retain information and then felt unsure of any decisions he had made and had to double check with colleagues. He was not able to achieve the required number of actions per hour (14-18 per hour) even though he was on lower level work. This knocked his self-esteem and led to feelings of embarrassment and incapability.

47. In February 2015 the claimant transferred to the CAEG department where he began a different role as Complaints Allocator, in which he remained until the point of his dismissal. The claimant's issues and effects of his symptoms in the Complaints department carried on until his dismissal. He also started to cherry pick easy cases to alleviate stress which management became aware of. The claimant also noticed how background office chatter was extremely distracting when trying to concentrate on lengthy complaint emails.

48. We had sight of an Occupational Health report in April 2015 which recommended that the claimant be placed in a suitable role but it did not at this stage identify any learning disabilities in respect of the claimant, nor did it specify he should be in a manual role.

49. In February 2018 the claimant received a further final written warning for improvement regarding his attendance, which he managed to improve by November 2018.

50. In September 2018 the claimant applied for a Machine Operator Vacancy through an expression of interest. The respondent's procedure for such applications was by completion of a pen portrait. The claimant's pen portrait contained a detailed description of his duties during his previous tenure in OSG including 13 years experience in operating the machinery whilst adhering to strict data protection, security, health and safety and ISO regulations. including his managing a small team in 2005 producing smart tacho driving licences. The claimant described having considerable autonomy providing advice and guidance to managers, supervisors and visitors and having created a training manual for all aspects of smart tacho production, dealing with complex calls and collating stats / inputting data on various spreadsheets.

51. The claimant's evidence was that he was offered this role off the back of his pen portrait without having to attend an interview but withdrew as the role had been inaccurately advertised as a day shift. At that time the claimant was trying to improve his attendance being under a final written warning. There was no paperwork to support

these events. The claimant believed it may have been part of the paperwork that had been lost by the respondent (and or their agents) when responding to the SAR.

52. The respondent's witness statements did not deal with this issue. Mr Jones was asked about it under cross examination. He denied that the claimant had been offered the job. His explanation was that an expression of interest (" EOI") was put out and a couple of applications were received but then the vacancies were put on hold. Mr Jones had not dealt with the recruitment but agreed the claimant's pen portrait had been sent to his counterpart and then the claimant withdrew his application asking for an apology from Mr Rees as to why a day role that did not exist had been advertised.

53. Ms Jones (the claimant's supervisor) subsequently told HR in an email, who forwarded her email to Mr Jones, that the claimant had applied and been offered the position but he declined as it was shift work (7 December 2020 email).

54. We prefer the claimant's account and find he was offered the job in OSG in or around September 2018 because it was later corroborated by Ms Jones email and not rebutted and Mr Jones' had not dealt with the application himself therefore his evidence was hearsay.

55. The claimant was line managed in his role as Complaints Allocator by Ms Jones and her line manager was Ms Manser-Davies.

56. The claimant also struggled in his role of Complaints Allocator and he started to be referred to Occupational Health again. A number of referrals were undertaken and an Access to Work assessment suggested that the claimant may have dyslexia, although this was later ruled out by occupational health. Reasonable adjustments were made, and the consistent recommendation was that the claimant should be considered for a manual role. It should be noted that the respondent is a predominantly administrative agency and there are not a large number of manual roles available within that organisation.

57. The claimant's main difficulties that were identified in the subsequent Occupational Health reports were retaining large amounts of information, in particular in respect of the lengthy email correspondence that he had to read as part of his role, concentrating on that information and assimilating that information.

58. In July 2019 the claimant had a trial on the shuttle bus routes but this was unsuccessful as the claimant had caused the bus to be delayed due to a rest break and subsequent visit to purchase food and beverages. We find it was reasonable of the respondent not to rearrange a further trial as the roles had been filled by the time the claimant returned from his sick leave.

59. On 28 August 2019 the claimant received a first written improvement warning for attendance. He had been absent on three occasions within the last twelve months.

60. In October 2019 there was a discussion as to whether the claimant would receive a further written warning, but this was suspended pending a further Occupational Health referral and it was not eventually issued. This referral recommended that the claimant needed a manual non-computerised role, and at this point the respondent began to search for alternative employment.

61. It should be noted that in an Occupational Health report of 18 March 2020 the Occupational Health advice was that the claimant would not be able to sustain and efficiently undertake more than 50% of his duties long term and suggested redeployment.

62. In March 2020 the Covid -19 pandemic began and the United Kingdom entered into lockdown for a period thereafter the claimant was on special leave.

Relevant policies

63. The Tribunal were referred to the *Cabinet Office Efficiency Compensation Guidance 2016.* This contains the guidance for exercising the discretion to pay compensation in cases where staff depart on inefficiency grounds.

64. Compensation should be considered for civil servants when they are dismissed on efficiency grounds under section 6.3 of the Civil Service Management Code. The objective of the compensation is to compensate the employee for loss of employment that is beyond their control; not to compensate for poor performance or poor attendance when there is no underlying health condition. Compensation is not guaranteed. Compensation payments are paid under the Civil Service Compensation Scheme (CSCS) rules. Employees are awarded differing levels of compensation depending on whether they have cooperated with a number of criterion. 100% will be awarded if an employee has cooperated with all measures to improve their attendance and performance, kept in touch with the department throughout their absence, demonstrated a positive attitude and showed full commitment to work (where possible, trying to return to work), sought and co-operated with all attempts to make reasonable adjustments and co-operated with departmental OH services and followed all of their advice.

RMG Policy

65. This is the respondent's policy which sets out the process to redeploy staff on medical grounds. At stage 1, the Head of Group must contact HR and provide a copy of the OH report and an explanation as to why the staff member has been unable to find a suitable alternative role within their home directorate. Subject to further approval the HR Business partner ("HRBP") will conduct a search for a suitable role across the agency. If no vacancy is found the staff member will be placed on the Restructuring, Redeployment and Redundancy Register ("RRR").

66. At stage 2, the line manager registers the staff member onto the register and they are given at "at risk" status. The policy states as follows:

"This status applies for members of staff for whom there is a clear obligation to provide an alternative role, e.g. to provide a reasonable adjustment under the Equalities Act; to accommodate a member of staff returning from maternity leave; to fulfil the terms of a settlement agreement. The LM[3] of the member of staff remains responsible for them while they are awaiting redeployment and should follow the principles of the RRR Process (link to RRR Process).

The HR Resourcing SME will maintain a list of LMs who have staff that need to be redeployed on medical grounds so that they can be contacted before any internal vacancy is advertised via the respective HRBC.

[3] Line Manager

The LM will work with HRBC to identify suitable vacancies and arrange for staff to be seen by the recruiting manager/s.

The HRBC will inform the LM of any vacancies that are due to be advertised on the internal vacancies pages as Expressions of Interest [EOI] so that they can discuss with their member of staff.

The member of staff will be required to confirm in writing, within 48 hours, if they are/are not interested in the role.

If the member of staff wishes to pursue the role, the vacancy will not be advertised, allowing them the opportunity to express an interest without having to take part in a competitive interview process. The exception to this being if other staff, at the same grade, on the RRR Register are also interested in the same role.

The Vacancy Holder [VH] will be expected to meet with the individual/s and determine what transferable skills they have as well as any development they may require to ensure proficiency in the role. The VH will need to provide justification in writing if they consider the development too great to allow the member of staff to perform the role to the expected standard within a reasonable amount of time, in most cases around 6 months. This justification will need to be signed-off by the HoG/or equivalent.

HR will reserve the right not to allow vacancies to be advertised if a RMG member of staff has been deemed unsuitable without satisfactory reasons being provided.

If the VH is content that the RMG member of staff will be able to fulfil the requirements of the role then they will be expected to offer them the position.

…….

The VH will inform the individual/s of the outcome of the meeting.

The LM will retain a record of all job offers made and written justifications from recruiting managers for non-selection on the DfT RRR Action Plan.

…….

Health concerns arise in new post:

If, following a transfer, the staff member's health continues to prevent them from performing the new duties, the LM will inform OH that the transfer has failed and request confirmation that all reasonable adjustments have been exhausted.

On receipt of the OH report, the LM must contact the CSHR Casework Service to seek advice on whether the individual's case should be passed to a Decision Manager to consider dismissal.

…….

If no suitable alternative role has been identified, the LM will need to re-refer to OH just prior to the end of Stage 2 (around the 10 weeks mark) to check if Ill Health Retirement [IHR] should be considered. The LM should also request an inefficiency dismissal estimate …

At the end of the 3 month period, the LM will need to check again across the home directorate for any suitable vacancies. If none are identified the HRBP/BC should be contacted to check if there are any suitable vacancies on the horizon across the Agency, before moving to Stage 3.

……

STAGE 3

The LM will pass the case to a Decision Manager to consider:

a. If the business can sustain the displaced member of staff.

b. Dismissal on the grounds of limited posting ability.

c. If suitable vacancies are available in the home directorate to offer demotion, as an alternative to dismissal.

67. Up to the events of the OSG vacancies at the end of 2020, we find that the claimant was in a supportive environment. We find that reasonable procedures were followed to manage his performance and his attendance. Reasonable adjustments were made and generally speaking Ms Jones offered the claimant a good level of management support. We find that the claimant was not particularly proactive himself at seeking alternative roles. Before he was placed in the stage one RMG process vacancies would have been available internally and externally for the claimant to have applied for, but it was his line manager who was drawing these vacancies to the claimant's attention. Once the claimant entered into the RMG he could not have been so proactive because vacancies would be brought to the claimant's attention by the HR team and his line manager, as this step would be necessary before they could be published on the respondent's internal recruitment website.

68. We also find that the claimant was offered help but did not take help in drafting his CV/personal statement and also in respect of opportunities to undertake further training, in particular with Excel which he did not take up.

69. We also find that the respondent acted reasonably in drawing all vacancies to the claimant's attention. There was criticism of the respondent by the claimant for drawing certain vacancies to his attention on the basis that they were not suitable, but the claimant also then criticised the respondent for not telling him about roles where they appear to have made an assessment that they would not be suitable. For the avoidance of doubt we find it was reasonable in the circumstances for the respondent to have drawn to the claimant's attention the vacancies that they did.

70. We turn now to events in relation to some vacancies that arose in OSG in November 2020.

71. Four positions arose in the OSG department at the AO grade for machine operator where the claimant had worked between 1999 – 2014. The required skills set out in the ("EOI's) were as follows:

- Ability to build and maintain effective working relationships with internal and external stakeholders.
- Ability to work in an organised and methodical manner, producing work to a high standard.
- A strong focus on continuous improvement and the ability to create and innovate.
- Able to undertake appropriate analysis to support decisions or recommendations

- Manage & organise workload and technical resources in conjunction with colleagues in order to achieve agreed performance and quality targets and standards.

Changes to OSG and breakdown of the role

72. Both Mr Rees and Mr Jones' evidence was that OSG had changed significantly since the claimant had left the department in 2014. In summary these changes were significantly less people, new machinery requiring training and an excellent attention to detail and more sensitive mail (health records).

73. The claimant disputed this account and asserted the changes had been inflated to justify the decision not to offer the role or trial.

74. Mr Jones' evidence was that the machinery was said to be much more complex, with closing batches of work on PC's and the printing or mail being processed through different systems making the role less manual. This is not what he told the claimant at interview (see below).

75. The OSG vacancy required the successful candidate to retain information and have the ability to cross reference documents within a quick timescale which involved fast paced reading along with quick decision making to ensure correct print templates were used for specific letters. The machines process 22,000 documents per hour and when they come off the machine they have to be processed manually which means cross referencing small numbers at pace. The claimant was asked about this under cross examination. He told the Tribunal this was the same process as when he had been in OSG and had never had an issue reading numbers at pace. See paragraph 96 below for our findings in this regard.

76. The OSG vacancy required working in teams of two. One individual would work at the front of the machine and one at the back. One person is feeding the envelopes into a box when the machine is running and the person at the back has to manually feed 200 – 300 letters into trays and also manually process any documents which the machine kicks out and cross check the reference numbers.

77. The claimant demonstrated an awareness of this procedure in answering questions from the Tribunal and described how he had previously dealt with crashes within the machine by taking out the documents to ensure the reference numbers were corresponding, and check the name and medical reference.

78. The Tribunal had sight of an example document in Appendix A to Mr Jones' statement which showed the font size of the numbers referred to requiring matching to the correct mail tray.

OSG roles and procedure to assess claimant

79. On 16 November 2020 Ms Manser-Davies was informed that there were roles in the claimant's former department. She brought these to the attention of the claimant, who confirmed he was interested. Under the RMG procedure the claimant was entitled to be considered for these roles before they went out to competitive interview (see paragraph 66).

80. It was agreed between the claimant and Ms Manser-Davies that Ms Manser-Davies would compile a pen portrait which would set out the claimant's previous skills and experience in OSG. There was a different email subsequently produced to the Tribunal during the proceedings which suggested that Ms Manser-Davies had informed the claimant that his reasonable adjustments would also be conveyed to the hiring manager, which was Mr Jones. We find that this email was not the one sent to the claimant at that time because of the contextual nature of the emails surrounding it, and Ms Manser-Davies' frank uncertainty about whether or not the other version of the email referencing the reasonable adjustments had ever been sent. She was also unable to explain why there would be two versions of the same email.

81. What actually then happened was the pen portrait that the claimant thought was going to Mr Jones was not sent, and under instruction from HR Ms Manser-Davies had to "strip out" the claimant's skills and experience and all references to him previously working in OSG. She was instructed instead to send what was called an "RMG Pen Portrait." We had sight of this in the bundle. The RMG pen portrait set out the working patterns and adjustments made to date in the claimant's existing role of Complaints Allocator. It then set out required ongoing adjustments; these were recorded as "headset and a five minute break every hour". It was not explained how Ms Manser-Davies could have assessed what adjustments would be needed "ongoing" in any new role in OSG. There was then a section where adjustments required in a new role would be completed after a discussion with the vacancy holder (who in this case was Mr Jones) and the claimant. There was also a section to list live warnings for performance, conduct and attendance. These recorded the claimant had had a written improvement warning, he was on a sustained improvement period and that he was on special leave during lockdown.

82. There was nowhere in the RMG procedure that provided for the provision of this adjusted pen portrait, and it remained unexplained to the Tribunal why such a document would be used to assess someone's suitability for a vacancy regardless as to whether or not they were on the redeployment list.

83. Following receipt of the stripped out pen portrait HR contacted Mr Jones, who was the hiring manager within OSG. HR had clearly identified that these vacancies were about to be published, and they sent the claimant's pen portrait to Mr Jones. This was on 17 November 2020 at 15:15. The HR advisor informed Mr Jones that before the vacancies were advertised, HR were required to check the RRR list to check against any displaced staff. She told Mr Jones that the claimant had previously worked in OSG and asked him to "*take a look and if you don't believe they are suitable then can you let me have your rationale".*

84. On 18 November 2020 Mr Jones replied to HR as follows (at 9:04am, so we observe that there must have been a discussion with Mr Rees who was Mr Jones' senior manager, two or three grades above). Mr Jones informed HR that he had discussed it with Kevin (Mr Rees) and that *"we would have to decline both of these",* meaning the two employees whose pen portraits had been sent to him. He goes on to say about the claimant that he had *"previously worked in the area and was unable to perform to the required level".* This was not in accordance with the procedure set down in the RMG policy which provided that the VH would be expected to meet with the individual then provide justification in writing etc.

85. On 20 November 2020 HR replied to Mr Jones. It should be noted that Mr Jones had copied in two other individuals to his reply to HR who were members of the Senior Leadership Team within OSG. HR pushed back explaining that they would need *"a really good reason"* not to take the claimant on especially when he had previous experience. Mr Jones did not reply to that reply, instead Mr Rees replied and stated that the claimant had been moved out of OSG during the downsizing and was not seen as suitable for the new structure and team sizes (acknowledging this was before his time). Mr Rees went on to say he was aware the claimant had moved around a number of roles in OCSD and did not feel it appropriate that OSG *"pick up others' inability to manage his performance"* adding *"This one is definitely not acceptable to me".*

86. A few minutes later a manager who had been copied in by Mr Jones, who we shall refer to as "GG" then emailed HR and stated; *"Just to add, throughout the period Ricardo was in OSG he failed to perform to the required level. He was disruptive, failed to follow instructions and guidance/ training and was easily distracted, he loses focus which isn't a risk we can take bearing in mind the requirement is to operate high volume production equipment."*

87. HR responded that it was "*definite no to Ricardo"* and referenced showing another person called "Debbie" *the kind of pushback she had got from the business.*

88. There was no other evidence to corroborate the description of the claimant that was set out in these emails. The evidence before the Tribunal showed the opposite as we have outlined above. This was the start of what we found to be the general badmouthing of the claimant which continued (as we will outline below). Some of the comments and statements made about the claimant were wholly incorrect if the respondent's own records are to be accepted, for example that the claimant was transferred out of the department due to performance (as the respondent's own records demonstrated this was not the case).

89. On 23 November 2020 the expressions of interest for all the OSG roles were published to all candidates. The claimant asserted that none of these should have been advertised at this stage in accordance with the RMG policy. However this is not strictly what the policy says. The policy provides that the vacancy should not be advertised until the claimant had been allowed an opportunity to express an interest, which the claimant had done. Given this, and that there were four roles, we find this was not contrary to the RMG process and the respondent was not required to put all four roles on hold.

90. On 1 December 2020 another HR advisor contacted Mr Jones about the OSG vacancies asking for a call. There was evidently a phone call as Mr Jones later sent an email advising he had been discussing the situation with Mr Rees. He explained he had sifted people already and would be interviewing the following week. He asked if he could not interview the claimant in line with everyone else. The HR advisor replied explaining:

"it would be more a discussion around the role to assess his suitability, it wouldn't be an interview. You would need to meet with Ricardo as soon as possible, however if it is after the interviews you have planned, that's ok, but you won't be able to appoint until you have considered Ricardo."

91. Mr Jones replied thanking the HR advisor. However the next day, on 2 December 2020 there was further push back from Mr Jones and Mr Rees to HR about interviewing the claimant. The first email was from Mr Jones to HR which stated:

"I've made contact with Ricardo's line manager and I'm due to speak to him on Friday at 11. Kevin is really not happy that this is taking place, the adjustments required in his pen portrait cannot be supported in OSG. One of the reason he left was due to his inability to concentrate and there is no possibility of him wearing a headset here, he also requests his mobile phone to enable him to receive personal calls, this is a secure area where we produce work for Government departments other than the DVLA and mobile phones are not permitted on the production floor. Kevin has previously spoken to Tracey to explain that we will not be able to take Ricardo and this is reinforced by the adjustments in his Pen Portrait."

92. HR replied:

I understand the frustrations that are going back and forth but this is why we have suitability interviews, this is an opportunity for you to speak with the individual and explore their reasonable adjustments and whether or not they can be accommodated in the role. The reasonable adjustments he currently has in place are for his current role in CAEG and may/may not be appropriate in an alternative role.

93. Mr Jones agreed to have the discussion with the claimant and "see how it goes". However at this point Mr Rees sent an email stating:

"I have previously explained to Tracey that I am not taking this person back into OSG we can have the discussion but the position will not change sorry. I cannot afford the issues that comes with the individual in what is a very small team. He was previously unsuccessful in retaining a job in the area and I see no logic or business benefit to reviewing that previous decision on RRR grounds. OCSD or the Agency needs to look at the wider options."

94. All this took place unbeknown to the claimant. As far as the claimant was concerned, Mr Jones agreed to interview him, and the interview was arranged for 4 December 2020. From those emails we find that Mr Jones and Mr Rees had no intention of considering the claimant for the roles in OSG and the decision was made prior to the interview taking place. We did not accept Mr Jones' evidence that he was able to make up his own mind and would not have been influenced by the position taken by Mr Rees. This was not a credible position to have taken for two reasons. Firstly, Mr Jones' own language in the emails showed he had made up his mind and his senior leadership team had evidently influenced him against the claimant from the outset. Secondly, Mr Rees was emphatic in his email of 2 December 2020 where he states *"I am not taking this person back"* and *"the position will not change".* Mr Rees was Head of OSG and we think it highly unlikely given those declarations that Mr Jones would have been in a position to overturn what Mr Rees had said.

95. On 4 December there was a suitability interview between the claimant and Mr Jones. The claimant had prepared a list of questions. This took place on the telephone. We find that the account given by the claimant of this interview in an email to his line manager dated 6 December 2020 is an accurate account of the interview.

Mr Jones kept no notes of the interview whereas this was a contemporaneous email sent shortly afterwards. Our findings in respect of the interview are as follows:

- The claimant openly admitted to his issues with retention and assimilation of information specifically in Complaints as Mr Jones had stated he was aware that he was currently on the RMG process.
- The claimant specifically reiterated he did not have an issue with retention and assimilation of information within OSG hence his previous tenure. He explained to Mr Jones he had frequently deputised in OSG and made it clear about his length of successful service there.
- He also stated that his issues had been specific to his current business area as it was far more admin based and he had to digest lengthy emails/mail and believed this was not the case in OSG.
- The claimant was asked specifically on the suitability interview about what reasonable adjustments he would need in the role with regard to the noise cancelling headphones. The claimant explained he did not find the machine noise an issue in OSG but that the background noise was an issue in Complaints due to the requirement to digest long, lengthy emails which he found stressful given his 'dyslexic tendencies'. He told Mr Jones he did not think he would need the headphones in OSG but that he was also aware that these could be worn from a Health & Safety perspective if needed.
- Mr Jones explained that the role in OSG was likely to be on the print section. The claimant explained that whilst the majority of his experience was in Plastic Card production (14 years) and mail (2 years), he told Mr Jones he had helped out on numerous occasions in print and understood that this involved generating correspondence for other government agencies. He noted that the print section relied on pre-programmed templates and he would not find this an issue.
- The claimant asked Mr Jones what major changes have occurred since he had left OSG that he would find the most different to which Mr Jones commented that some machines now can be run with minimal amount of staff and the claimant should be able to pick up the training fine given his background and that he (from a retail background) learnt the ropes in just 3 weeks.
- The claimant was asked twice if he was working from home which led to him having to state he was currently on sick leave as part of the RMG process.

96. We find there was no discussion about the claimant's ability to read numbers at pace. We preferred the claimant's account that this was not discussed over Mr Jones' account that it was, as it is not mentioned in the lengthy email sent by the claimant afterwards and we think it implausible he would not have mentioned this issue. We find that there was no proper discussion of the claimant's skills or experience at the interview. Whilst the claimant did his best to explain his previous skills and experience we find Mr Jones had closed his mind to give that any serious consideration. There was no proper discussion about how the OSG had changed other than the claimant was left with the impression there had not been any significant change and it would be a relatively straightforward process to learn the new machinery. The claimant told Mr Jones that he would not necessarily need to wear the noise cancelling headphones and that the other headphones available in the department would be sufficient. The claimant agreed he did not need his mobile

phone while he was in the department and there was a discussion about the use of a supervisor's phone in the event of emergencies.

97. In relation to the need for additional breaks, Mr Jones had asserted in his witness statement that if the claimant took additional breaks this would mean the machine had to stop which would result in lost production every day. However Mr Jones accepted under cross examination the need for breaks was not discussed at all with the claimant. He had based that conclusion on an assumption based on what the pen portrait had stated.

98. We pause here to say that Mr Jones was not aware of the RMG procedure when he was asked to undertake this procedure with the claimant, other than what had been said by HR in the emails above. As he had not been aware of the procedure, we find that it must follow he had not been trained, and we also find that he was not given adequate HR support. He was given some guidance as can be seen from the emails but where there should have been clear red flags to HR with the pushback and comments coming from Mr Jones and Mr Rees, this guidance was inadequate and did not flag that the RMG procedure was not being followed correctly.

99. Following the interview Mr Jones was supposed to complete the reasonable adjustments section in the pen portrait formally discussed above. He did not do so but fed back verbally to HR that the claimant was not going to be suitable. This appears to have then been fed back to Ms Jones who emailed the claimant on 4 December 2020 with the following reasons:

"Feedback I have received advised that there is a requirement to not only retain information, but match this to the print format as well as doing this within a quick timescale. The work requires a fast pace of reading along with quick decision making to ensure correct print templates are used for letters. You explained you become distracted by the noise in the office when trying to retain/read information in emails. With this in mind, the hiring manager explained that OSG was a noisy area and due to the nature of the work they are printing for the Government Digital Services (letters for DWP/NHS etc.), there is no margin for error due to this creating data breaches, if an error was to be made"

100. The claimant was informed on 4 December 2020 of the reasons he would not be considered for the OSG role. The claimant was extremely distressed to find out about this and the reasons and sent the email we have referred to above in paragraph 95. He also challenged the feedback on data breaches and stated that he did not believe there had ever been any reports of data breaches against him when he was in OSG previously. On 7 December 2020 Ms Jones forwarded this email onto HR and asked if they would find out if the claimant could be considered for a trial. HR emailed Mr Jones at 11.15am on 7 December 2020 posing three questions about the claimant's suitability for the role in OSG. Mr Jones took just nine minutes to reply. He was asked if the claimant could wear noise cancelling headphones. It is unexplained why this was asked given the claimant had explained in the email we have quoted above at paragraph 95 he did not need the noise cancelling headphones and this email had been copied to the HR advisor posing the question. Mr Jones was asked what adjustments could be put in place to mitigate the risk of a data breach. It was not put to Mr Jones that the claimant maintained he had never had a data breach previously and no further enquiries were made. Mr Jones stated there were no adjustments that could be made and cited the need to matching documents with reference numbers at speed. Mr Jones was also asked how much training would be required for the claimant

to carry out the role to which Mr Jones responded that he was trained within three weeks and he would expect the same from the claimant.

101. Mr Jones accepted under cross examination that his decision the claimant would not be able to "keep up" was not based on anything he had discussed with the claimant at interview, as this was not discussed. Instead it was based on previous line manager reports and the interview. When he was asked about the claimant never having had a data breach, Mr Jones said that this was according to the claimant and some data had been lost (referencing the SAR data). He accepted all data breaches were recorded. Mr Jones told the Tribunal that the senior leadership team recalled the claimant being involved in a data breach but this had not been previously mentioned in any of the evidence. We find that the claimant had not been involved in any data breach. If he had done so, we would have expected to have seen evidence given that data breaches are required to be properly recorded and this would not have been recorded on the claimant's personnel file where documents would be lost but a central register in accordance with data protection requirements.

102. Mr Jones and Mr Rees accepted they had not looked at the claimant's personnel file to corroborate any of the matters being alleged about the claimant.

103. Mr Jones was also asked about the training for new starters and it was put to him that they would also need training and observation as would the claimant. Mr Jones' evidence was that the difference would have been any new starter would have had a completely different training process to the proposed 4 week trial period for the claimant which he considered was not long enough. He admitted that he was unaware the RMG policy provided for a trial period of up to 6 months.

104. Following this exchange HR asked if they would consider a 4 week trial. Mr Rees sent an email in response to HR as follows:

Sorry I am getting frustrated I have been clear on this. I am not happy to take him on trial. Can you please speak to other parts of OCSD or the Agency please.

105. The request for a trial was refused.

106. The Tribunal heard evidence from Mr Jones that other people in OSG had been given reasonable adjustments. We also heard specifically about another person in the team who had required extra breaks due to a physical impairment but had been effectively forced to give up these breaks due to bad feelings amongst his team members. Rather than manage the communication around the need for those breaks, that team member had to give up that adjustment.

107. Subsequently the claimant made a number of subject access requests and received the emails that we have referenced above which led to feelings of hurt and distress on the part of the claimant. He began to focus on lodging a grievance. The claimant also confirmed that he would not consider AA roles (a demotion) in the search for redeployment.

108. The claimant obtained a private assessment diagnosis of ADHD on 9 February 2021. He did not choose to share that with the respondent and it is not relevant for the purposes of these proceedings, except to say that the respondent has been made

aware of the contents that the claimant had a diagnosis of ADHD which did accord with the general advice that had been coming from Occupational Health for some time (that there was potentially a learning disability).

109. On 12 March 2021 the claimant received a response to a further SAR request he had made in which he received the emails between HR, Mr Jones, Mr Rees and GG we have referred to above. The claimant found the contents extremely upsetting, concerning and humiliating and concluded the interview with Mr Jones had been "a farce to merely tick a box". The claimant complained to a Ms Roach in HR on 14 March 2021 about the emails calling the content "shocking, appalling, derogatory, discriminatory, upsetting, humiliating and serves to severely aggravate the serious issues I have already been subjected to at work". We do not set out all of this email but the recipient must have been in no doubt as to the impact on the claimant of the SAR content and that he expected an investigation and disciplinary proceedings to follow. This did not happen. There as no evidence that anyone spoke to Mr Jones or Mr Rees about these emails.

110. Ms Roach responded on 26 March 2021. She stated:

"*I can assure you that all steps were taken to ensure your case has been dealt with fairly and in line with our procedures. Where we received notification from a vacancy holder that the role would not be suitable we have had robust conversations to ensure that any reasonable adjustments that could be made to make the posting suitable were fully considered. Only after we were satisfied that all aspects had been considered fairly did we accept the vacancy holder response.*

We understand that you have been sighted (sic) on some correspondence that was released in your subject access request, however we can assure you that welfare of our staff is our priority, as is fair process and the core values of the Civil Service Code. We robustly challenge any decisions which we feel do not meet these standards.

I can confirm that the email and the contents of your SAR have been forwarded to the appropriate person dealing with your ACAS conciliation claim, to take forward as requested."

111. The claimant and his partner told Ms Jones about their concerns regarding the SAR emails during a discussion on 31 March 2021. Ms Jones had not seen a copy of these emails and suggested that he put his paperwork together should Ms Wadeward request to see it. She did not know whether Ms Wadeward had been sent copies of the SAR emails.

112. The claimant's case was referred to Ms Wadeward, the decision manager appointed under the RMG process. She arranged to have a meeting with the claimant to discuss their final decision. A number of adjustments were made by Ms Wadeward and the claimant confirmed that there were no issues in respect of the way Ms Wadeward dealt with the procedure in terms of her treatment of the claimant. The issue was with the procedure.

113. On 19 April 2021 a meeting took place between Ms Wadeward, the claimant and his partner. The claimant's partner informed Ms Wadeward specifically about the subject access request emails which were described in various terms as "shocking"

regarding the OSG role. His partner told Ms Wadeward there were conversations between HR and senior managers which contained incorrect information. She explained they mentioned the claimant was struggling with information and issues with background noise but reiterated he had never had issues with background noise in OSG. She explained about the mobile telephone for caring responsibilities but that the claimant had said a landline would be ok. She also explained that the noise cancelling headphones were for his existing role. She also went onto the describe the content of the emails set out above.

114. Ms Wadeward was not provided with a copy of the emails nor did she ask for a copy. From this, we find that HR had not passed on the SAR emails to Ms Wadeward. There was no evidence that Ms Wadeward had been informed about the claimant's concerns he had raised with HR regarding the OSG vacancy or HR's reply (see paras 109-110).

115. The claimant informed Ms Wadeward that he considered his position to be untenable and that he sought the compensation payment payable. However he also continued to state he would accept a manual role.

116. Ms Wadeward went away to investigate whether there were any further roles for the claimant, but no such roles were available. She did not take any steps to further investigate the OSG situation as she felt that she could and should be able rely on the decision making of her Civil Service colleagues (referencing Mr Rees and Mr Jones).

117. The claimant's dismissal was confirmed on 14 May 2021. Ms Wadeward awarded the claimant 100% (amounting to £27,399.86) under the Efficiency Compensation Scheme referred to at paragraphs 63-64 above. At the time of his dismissal his gross annual salary was £21,588.

118. The letter erroneously referred to the right to appeal (this is not provided for under the RMG procedure).

The Law

Direct Discrimination

119. Section 13(1) of the Equality Act 2010 ("EQA 2010") provides that direct discrimination takes place where a person treats the claimant less favourably because of the protected characteristic than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

120. Under s136 EQA 2010, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. Guidelines were set out by the Court of Appeal in **Igen Ltd v Wong [2005] IRLR 258** regarding the burden of proof. The Tribunal must approach the question of burden of proof in two stages.

121. The first stage requires the complainant to prove facts from which the ET could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act if the complaint is not to be upheld. To discharge the burden of proof "it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex," (per Gibson LJ).

122. We were referred to the recent decision by the Supreme Court in **Efobi v Royal Mail Group** [2021] IRLR 811.

123. In **Nagarajan v London Regional Transport and others [1999] IRLR 572 HL** held that the Tribunal must consider the reason why the less favourable treatment has occurred. Or, in every case of direct discrimination the crucial question is why the Claimant received less favourable treatment.

124. The key to identifying the appropriate comparator is establishing the relevant "circumstances". In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** this was expressed as follows by Lord Scott of Foscote:

"...the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class."

125. **Hewage v Grampian Heath Board [2012] IRLR 870 (SC)** endorsed the guidelines in **Madarassy v Nomura International [2007] IRLR 246 (CA)** concerning what evidence is required to shift the burden of proof. Facts of a difference in treatment in status and treatment are not sufficient material from which a Tribunal could conclude that on the balance of probabilities there has been unlawful discrimination; there must be other evidence.

126. <u>S15 EQA 2010– Disability Arising from Discrimination</u>

Section 15 provides:

15 Discrimination arising from disability

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

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

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

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

127. **Basildon & Thurrock NHS Foundation Trust v Weerassinghe UKEAT/0397/14** provides the Tribunal should identify two separate causative steps in Section 15 claims (per Langstaff J, then the President of the EAT):

"The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages."

128. **Pnaiser v NHS England & anor [2016] IRLR 170** sets out the approach to be followed in Section 15 claims (paragraph 31):

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. [4]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) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant.
(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links.
(e) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
(f) The statutory language of section-on 15(2) makes clear that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability.

[4] We were also referred to **Dunn v SOSJ** [2019] IRLR 298.

It does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

129. In respect of S15 (1) (b), the Tribunal must objectively balance whether the conduct in question is both an appropriate and reasonably necessary means of achieving the legitimate aim. In **Birtenshaw v Oldfield [2019] IRLR 946,** the EAT held that the Tribunal's consideration of that objective question should give a substantial degree of respect to the judgment of the decision-maker as to what is reasonably necessary to achieve the legitimate aim provided he has acted rationally and responsibly. Counsel for the respondent also referred us to **E (Elias) v Secretary of State for Defence [2006] IRLR 934 CA** in particular the following passage; "*the objective measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end."*

130. Mr Allsop also cited **Hensman v Ministry of Defence [2014] EqLr 670** and the discussion in **The Trustees of Swansea University Pension & Assurances Scheme and another v Williams [2015] IRLR 885** in relation to proportionality.

Unfair dismissal

131. The Respondent relied upon capability as the reason for dismissal which is a potentially fair reason for dismissal under Section 98 (2) of the Employment Rights Act 1996 ("ERA 1996"). Under S98 (4), in a capability case it is necessary to consider whether a fair procedure has been followed. "An employer should be very slow to dismiss upon the grounds that the employee is incapable of performing the work which he is employed to do without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him an opportunity to improve his performance." (**James v Waltham Holy Cross UDC [1973] IRLR 202).**

132. Mr Allsop referred us to **Orr v Milton Keynes Council** [2011] IRLR 317 CA. the focus of the Tribunal's analysis under S98 must be on the view taken by the decision maker. Since belief involves a state of mind, it is necessary to determine whose state of mind was for this purpose intended to count as the state of mind of the employing company or organisation. This is subject to the "Iago" situation whereby facts are attributed to the decision maker (**Jhuti v Royal Mail Group** [2020] IRLR 129).

133. Ms Hand submitted that the **Jhuti c**ase was applicable to his case. We return to this below under our conclusions.

134. We were referred to a number of other authorities. Whilst we have not cited each one we have had regard to authorities cited where relevant to the findings of fact and conclusions.

Conclusions

Direct Discrimination

135. The less favourable treatment relied upon by the claimant was not being offered the role in OSG and not being offered a trial.

136. We have no hesitation in concluding both of these amounted to less favourable treatment and put the claimant at a detriment.

137. We have had to consider whether that less favourable treatment was because of the claimant's disability. We accept that that at the time of the alleged less favourable treatment neither Mr Rees nor Mr Jones knew specifically that the claimant had ADHD. At this time there had been no formal diagnosis. However the respondent has conceded they (as in the DVLA) had knowledge and rightly so given the various occupational health reports and awareness of the claimant's difficulties. Mr Jones and Mr Rees certainly had an awareness of impairments as they certainly knew that the claimant was on the RMG procedure and they also knew of his need for reasonable adjustments in his existing role.

138. Our focus must be to consider the reason why the less favourable treatment has occurred.

139. We have given this matter very careful consideration. We consider that there were two factors in play in the minds of Mr Jones and Rees at the time that they made the decisions they made. We do not think the burden of proof comes into play because of the content of the emails that were before us. We must make findings on what was in the mind of those individuals. We have looked back at those emails and concluded there were two factors in play in reaching both the decision not to offer him the OSG role or a trial:

(1) Firstly, what we have called the "badmouthing" of the claimant (or the claimant's reputation) that was evidently circulating, it being noted that neither Mr Rees nor Mr Jones had ever worked with the claimant, so they were being given information from former colleagues; and

(2) Also in their minds, we conclude, was the fact that the claimant was on the RMG procedure and that would potentially need to have reasonable adjustments.

140. The Tribunal must decide what was the real and effective cause of the treatment; there can be one or more causes. We have had regard to the emails we have set out at paragraphs 84,85,86,91,93 and 104. Initially there appears to have been general negative feedback about the claimant's perceived bad performance when he was in OSG previously. As stated in our findings, whilst there was opinion based evidence from managers who had worked with the claimant at the time, this

was not corroborated by the other documentary evidence before us in the bundle. We treated that opinion based evidence relayed through Mr Jones and Mr Rees evidence with caution as it was hearsay, relayed to Mr Rees and Mr Jones some 5 years after the claimant had left OSG (apart from the email from GG which was in the bundle). Neither Mr Jones nor Mr Rees had even worked with the claimant. Further some of that hearsay evidence about the claimant was blatantly incorrect such as the suggestion he had been ”moved” from OSG due to performance. Mr Rees and Mr Jones accepted they had not gone away and checked any of the matters being said about the claimant on his personnel records (which at that time had not been lost as the SAR request had not been made).

141. Being wrong about someone's perceived performance some years ago would not in itself justify or warrant a conclusion that the claimant's disability was the reason for the unfavourable treatment. We have concluded that the mistaken belief about the claimant's previous performance, held by Mr Jones and Mr Rees was not the real and effective cause of the unfavourable treatment.

142. We find that the real and effective cause of the unfavourable treatment in the mind of Mr Rees and Mr Jones was the claimant's need for reasonable adjustments.

We wish to make it clear that we do not find that Mr Jones or Mr Rees consciously discriminated against the claimant, but we do find that stereotypical assumptions were made about his abilities to perform the duties in the OSG roles. We have concluded there was unconscious bias in their minds that was formed on receipt of the pen portrait. We have looked at the language in the emails. In particular, at paragraph 91 where Mr Jones stated: "*the adjustments required in his pen portrait cannot be supported in OSG. One of the reason he left was due to his inability to concentrate and there is no possibility of him wearing a headset here, he also requests his mobile phone to enable him to receive personal calls, this is a secure area where we produce work for Government departments other than the DVLA and mobile phones are not permitted on the production floor. Kevin has previously spoken to Tracey to explain that we will not be able to take Ricardo and this is reinforced by the adjustments in his Pen Portrait."*

Further at paragraph 93, Mr Rees stated; *"I have previously explained to Tracey that I am not taking this person back into OSG we can have the discussion but the position will not change sorry. I cannot afford the issues that comes with the individual in what is a very small team. He was previously unsuccessful in retaining a job in the area and I see no logic or business benefit to reviewing that previous decision on RRR grounds. OCSD or the Agency needs to look at the wider options."*

143. In our judgment these emails clearly set out that the reason for the less favourable treatment was the (incorrect) assumptions and perceptions made about the claimant's reasonable adjustments which existed and were because of his disability.

144. In relation to not offering the trial, Mr Jones' reasons for refusing a trial are set out at paragraph 100. We found there was no evidence to support his conclusions that the claimant would need to wear inappropriate headphones or could put the department at risk of a data breach, but these were in his mind at the time when he decided he would not offer the trial. Further, both of their minds were already made up

for the reasons we have concluded above. The claimant's need for reasonable adjustments and the perceptions of his abilities were all because of his disability.

145. For these reasons we find that the section 13 direct discrimination claim succeeds.

S15 – Discrimination arising from disability

Decision to not appoint the claimant to the role of AO Machine operator on 4 December 2020 or offer him a trial

146. In respect of the section 15 claim, the respondent did not advance submissions in respect of S15 (1) (a) instead focussing on S15 (1) (b). Mr Allsop did not make a formal concession in respect of those matters to be addressed under S15 (1) (a) but as no submissions were advanced we consider it would be disproportionate to deal with this in detail in our decision. The treatment was in our judgment unfavourable treatment as it was an evident detriment in not being offered the role or the trial. We also accept that the decisions arose in consequence of the claimant's disability namely the perception formed by the respondent that some symptoms of his disability including issues with concentration and occasional difficulty with background noise meant he was assumed to be unsuitable for the role and that a trial would be pointless.

147. The focus of Mr Allsop's submissions was in respect of the legitimate aims.

148. The legitimate aims relied upon in respect of this unfavourable treatment was a need to ensure efficiency and productivity of OSG and to minimise the risk of a serious data breach whereby sensitive documents might be inadvertently disclosed to unauthorised third parties.

149. We accepted that both aims relied upon by the respondent were legitimate aims.

150. However we have concluded that that unfavourable treatment was not a proportionate means of achieving those aims for the following reasons.

151. The respondent assessed the claimant's suitability for the role by focussing only on the reasonable adjustments on the pen portrait. There was no assessment of the claimant's actual suitability for the vacancy by assessing his skills and relevant experience against the required skills for the job. This put the claimant at a significant disadvantage to other candidates who presumably would have been assessed on a normal pen portrait. This is evidenced by the fact that when the claimant was previously assessed for a role in 2018 on the "normal" pen portrait he was offered the role.

152. Further, the reasonable adjustments on the pen portrait were not correct. They had been completed by Ms Manser Davies who could not have known what adjustments would be needed in the OSG role. Under the RMG procedure, Mr Jones should have identified what adjustments were needed at the suitability interview but he did not do so, instead focussing on Ms Manser Davies opinion that the claimant would need a headset and 5 minute breaks per hour. This is despite HR repeatedly advising Mr Jones that these the adjustments listed on the pen portrait were the ones

in place in his existing admin role. Mr Jones was still under the erroneous impression at this Tribunal that those would be the adjustments that he would have to be making, which was evidenced from all of his communications (still focussing on headphones, breaks, mobile phone use) none of which the claimant said he needed in the OSG role (see paragraphs 95). The claimant explained at the interview that noise and concentration had never been an issue in OSG and the headset and mobile phone were not required. Further, Mr Jones accepted that breaks were never even discussed.

153. There was no credible evidence that rejecting the claimant for the role in OSG achieved the aim of ensuring efficiency and productivity and minimised the risk of a security breach.

154. The respondent submitted that the effects of the claimant's disability namely issues with concentration being affected by general office noise, struggles to focus on tasks he found mundane that required prolonged concentration, assimilation of information applied equally to the OSG environment and this was the picture presented at interview with Mr Jones. We reject this contention for the reasons we have outlined above in our findings of fact at paragraphs 95-97 and his previous performance in OSG set out in paragraphs 39-42 and 50-54.

155. The respondent asserted that the suitability interview was the chance for the claimant to put forward his skills and experience. We might have been able to accept that if it had been conducted in an open and fair way, but we find it was not. There was no structure, there was no proper evaluation of the claimant's ability to do the job, there were no notes taken or comparison against competencies for the roles, and this was evidenced in our judgment by the wrong assumptions that have prevailed in respect of the claimant's need for his existing reasonable adjustments to continue into the OSG role. There was no mention in any of the reports before the Tribunal that the claimant had an issue with an ability to read numbers. The reports consistently stated the claimant had an issue with focussing on long emails and assimilating the information therein, but there was no proper assessment of why or how the claimant could not perform in a role that he had previously performed, notwithstanding the changes to that department. In particular, we did not accept the respondent's contention that putting the claimant in the role or giving him a trial period would have resulted in inefficiencies. There was no evidence the claimant would have needed any more training than a new candidate coming in who would require training from scratch. The respondent's own policy provided for a period of up to six months for training if an individual was placed in a role under the RMG procedure and it is difficult to see therefore how it could be sensibly argued that a 4 week trial would not have been a proportionate means of achieving the legitimate aims relied upon.

156. In relation to the legitimate aim regarding data breach, again there was no evidence that the claimant had ever been responsible for any data breach during his 14 years tenure in the OSG department, and we find again that such an assumption was based on stereotypical assumptions about the claimant's ability. See our findings of fact at paragraph 101.

157. We are mindful that the Tribunal should give a substantial degree of respect to the judgment of the decision maker as to what is reasonably necessary to achieve the

legitimate aim provided he has acted rationally and responsibility **(Birtenshaw v Oldfield).** In our judgment Mr Jones did not act in a rational and responsible manner as he based his judgment on unsubstantiated bad mouthing of the claimant and did not properly assess his suitability using a fair and transparent procedure.

158. For those reasons we find that the section 15 claim in respect of the OSG offer of the role and the trial succeeds.

Dismissal

159. It is common ground the dismissal was unfavourable treatment. The "something arising" (what arose in consequence of the claimant's ability) was the claimant's poor attendance record and his inability to do a substantive role. The three legitimate aims relied upon were:

(1) to ensure the respondent was able to operate efficiently as an organisation using public funds in order to deliver services,

(2) to ensure employees were deployed in roles that were appropriate to their capability, skills and experience; and

(3) to protect health and safety of employees, including the claimant.

160. In respect of the first aim, there was no evidence led by the respondent as to how dismissal achieved this aim. There was evidence that in the claimant's existing role in the complaints department he was only performing to 50% of the role. On this basis, had the OSG role not come into play we can see how dismissal could have achieved that aim as it would be proportionate to dismiss someone performing at that level on a permanent basis. However we consider it would have been a more proportionate means to offer the claimant the OSG role under the RMG procedure. This is an unsurprising conclusion given the respondent's own procedures envisages this to be the position. The procedure provides for a trial period of up to six months. The dismissal resulted in a compensation pay out to the claimant of £27,399.86. The claimant's annual salary at the time of dismissal was £21,588. There was no evidence that the respondent undertook any type of cost benefit analysis comparing the cost to the public purse of even the full six month trial against paying out that level of compensation.

161. Turning to the second legitimate aim, we accept that this is a valid aim: to ensure employees are deployed in roles that are appropriate to their capability and skills etc., but we do not consider that this was achieved by dismissing the claimant. In fact we see it as rather the opposite: that if the claimant had been offered the role in OSG that would have been a more proportionate way of achieving that aim rather than dismissing him. Again the RMG policy envisages up to a six month trial to achieve the aim of retaining employees who are placed on the register.

162. Turning to the aim of health and safety. There seemed to be two suggestions in this regard. The first was that dismissal was proportionate as prolonging the RMG procedure could have had a detrimental impact on the claimant's well being. Ms Wadeward was asked under cross examination whether the claimant would have accepted a manual role even though he had said the position was untenable and she

said she felt he would have done. We do not find that it was proportionate to promote the claimant's health and safety by dismissing him. A more proportionate means would have been to offer him the OSG role under the RMG policy and allow him to have a trial as envisaged under that policy. In relation to other employees this was not a position advanced with any seriousness by the respondent. The only evidence we had about this was Mr Jones' reference to two employees working at the front and back of the machine and how if the claimant needed breaks this could impact on that other person. This is simply not borne out or supported as Mr Jones accepted that the need for breaks was never even discussed with the claimant and the respondent had no informed view of what, if any additional breaks the claimant would need had he been offered the OSG role.

163. For those reasons, on balance we do not think that the dismissal was a proportionate means of achieving the respondent's legitimate aims, and for those reasons we find that the dismissal was a discriminatory dismissal. On the balance of probabilities, having regard to the claimant's previous work history in OSG, if he had been offered the OSG role, he would not have been dismissed in May 2021.

Unfair Dismissal

164. The respondent relied upon the potentially fair reason of capability as the reason for dismissal and we have no hesitation in finding that that was the reason.

165. We find that the respondent has not acted reasonably in treating capability as a sufficient reason for dismissing the claimant under section 98(4) ERA 1996.

166. Up until the OSG process we found that both the search for alternative employment and support mechanisms put in place to manage the claimant's capability were adequate, supportive and reasonable.

167. Ms Wadeward made the decision to dismissal, reliant on decisions taken by Mr Jones and Me Rees that the claimant should not be offered the OSG role which was in our judgment a suitable alternative role. Mr Allsop relied upon this as a reasonable belief that the claimant was incapable of performing his contractual role (with which we agree) and being unable to secure redeployment. It is this second part of the reasonable belief that we are unable to agree with. In our judgment it cannot be fair or equitable that Ms Wadeward could rely on an erroneous state of affairs (the decision not to offer the OSG role), however genuinely held, to enable the respondent to escape a finding of unfair dismissal given the significant shortcomings we have set out in assessing the claimant for the suitable alternative role in OSG. The point is that had a reasonable procedure been followed then the OSG role should have been an obvious suitable alternative role to have offered the claimant as an alternative to his dismissal.

168. We did not accept Ms Hand's submission that this a case where the facts fall under a **Jhuti** scenario. There was no "Iago" type situation here in respect of the dismissal. The dismissal, in our judgment, was unreasonable under section 98(4) because of the failure to consider that suitable alternative employment as provided for under the respondent's own RMG policy, and we do not think it matters that the decision was taken by Ms Wadeward in good faith based on what she had assumed about a reasonable procedure. Given what the claimant's partner told Ms Wadeward at the meeting on 19 April 2020 we consider it was incumbent on Ms Wadeward to

have undertaken further investigation into what was being said about what the SAR emails had revealed. A failure to do so meant that there was a lack of proper investigation into the procedure for assessing the OSG as a suitable alternative role. The fact that she was wrong about that, in our judgment, does not mean that should exonerate the respondent of the unreasonableness of that process. Ms Wadeward was on notice that as far as the claimant was concerned something had gone very wrong with the assessment of his suitability for the OSG vacancy.

169. We also had no explanation as to why HR did not inform Ms Wadeward of the SAR emails when they passed on the information to her under the RMG procedure. They were aware the claimant's concerns at that point. There was no "robust challenge" by HR to the decision by Mr Jones and Mr Rees despite a later claim there had been by Ms Roach. HR simply accepted a push back from Mr Jones and Mr Rees after three emails in numerous breaches of the RMG procedure which HR were tasked with upholding. This is evidenced by the continued incorrect assumptions made about the adjustments the claimant would need in the OSG role which were never even discussed with the claimant.

170. For these reasons we find the dismissal was unfair.

Polkey

171. We had to consider but for the procedural unfairness what was the percentage chance the dismissal would still have occurred. The procedural unfairness was a failure to consider or investigate the shortcomings in the selection procedure for the OSG vacancy which would have been a suitable alternative role for the claimant. We have concluded, based on the evidence before us, taking into account the claimant's previous performance, that there is no chance the dismissal would still have occurred.

172. All of the credible evidence before us in respect of the claimant's previous performance in OSG was that he was a good performer with no history of any data breach. He was deemed appointable in 2018 based on a non discriminatory pen portrait. There was no shift work involved. We also took into account that Dr Parkin had confirmed that the claimant's symptoms of ADD did not affect him badly in this role – this happened when he moved to a role in 2014 where focus and attention were very necessary.

173. If the claimant had had a proper assessment in respect of the adjustments needed, a trial under the RMG policy and proper training (as was afforded to the new starters) we cannot say, without such an assessment being wholly speculative, that he would still have been dismissed. We were not persuaded that the changes in the department would have led to the claimant failing in this role. Mr Jones had told the claimant at his interview that the role in OSG was likely to be on the print section. The claimant had explained that whilst the majority of his experience was in Plastic Card production (14 years) and mail (2 years), he had helped out on numerous occasions in print and understood that this involved generating correspondence for other government agencies. He noted that the print section relied on pre-programmed templates and that he would not find this an issue.

174. We also accepted the claimant's evidence that he had asked Mr Jones what major changes have occurred since he had left OSG that he would find the most different to which Mr Jones commented that some machines now can be run with minimal amount of staff and the claimant should be able to "pick up the training fine" given his background and that he (from a retail background) learnt the ropes in just 3 weeks.

175. A remedy hearing shall be listed.

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Employment Judge S Moore

Date: 23 August 2022

REASONS SENT TO THE PARTIES ON 24 August 2022

FOR THE TRIBUNAL OFFICE Mr N Roche

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