Neutral Citation Number: [2022] EAT 166

Case No: EA-2020-000007-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date 23 November 2022

Before :

HIS HONOUR JUDGE WAYNE BEARD

- -

Between :

MR J HILAIRE	**Appellant**
- and –	
LUTON BOROUGH COUNCIL	**Respondent**

- -
- -

Julian Hilaire the **Appellant** in person
Nathaniel Caiden (instructed by Luton Borough Council) for the **Respondent**

Hearing date: 26 October 2022

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JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION

The appeal was in respect of a failure to make a reasonable adjustment. The claimant was required to attend an interview (the PCP) in a redundancy situation. The argument was twofold, whether the ET had correctly identified that there was no disadvantage and whether further adjustments than delaying the interview should be considered.

In considering whether the duty to make an adjustment has arisen because there is a substantial disadvantage an ET applies S. 20 EA 2010 "in comparison with persons who are not disabled". The relevant matters to consider are effects of the particular disability which mean that the employee has difficulty in complying with a PCP in comparison to someone without that disability. Where the ET's finding is that the claimant suffered problems with memory and concentration and with social interaction such problems would probably hinder effective participation in an interview. The ET would then have to consider whether that disadvantage arising from the effects of the disability was more than minor or trivial.

In dealing with any question of an adjustment pursuant to EA 2010 is s.20(3) " to take such steps as it is reasonable to have to take to avoid the disadvantage" any step examined must avoid or alleviate the effect which creates the comparative disadvantage; here delay was held to be an adjustment. In order for delay to be an adjustment it would have to allow sufficient time for the effects hindering participation in an interview to diminish to the extent where they were only trivial to be considered an adjustment within the meaning of the statute. The ET's findings pointed to a significant impairment from which recovery would be protracted. A short delay could not be considered an adjustment in the circumstances as it would not alleviate the disadvantage.

Causation is an essential element of disadvantage, where the employee would not have taken part in the interview for reasons unconnected with disability, there is no causation. The ET had evidence upon which it was entitled to draw the conclusion that the claimant did not attend out of choice and that did not relate to his disability.

The claimant argued he should have been "slotted" into a role without interview. The ET decided that there was no step (other than delay) it was reasonable for the respondent to have to take. This was a collective redundancy process where selection applied to thirteen employees. The ET had accepted the respondent's evidence that there was no other reasonable step; this was a rational conclusion. Slotting in would have alleviated the disadvantage to the claimant but would have impacted on others in the redundancy process. Making an adjustment is not a vehicle for giving any advantage over and above removing the particular disadvantage. Thus a vacancy can be filled (see Archibald v Fife Council [2004] IRLR 651) as a reasonable step. However, in the circumstances of this case including impact on other employees, the ET was entitled to conclude that there was no other step for the respondent to have to take including slotting in.

HIS HONOUR JUDGE WAYNE BEARD:

PRELIMINARIES

1. I shall refer to the parties as they were before the Employment Tribunal (ET) as claimant and respondent. This is an appeal against the decision of Employment Judge Smail and members, included in a reserved Judgment sent to the parties on 20 November 2019, rejecting all of the claimant's claims. The Claims made were broad ranging and the appeal originally sought to overturn the entire judgment. Lewis J rejected all grounds of appeal at the rule 3:7 (**Employment Appeal Tribunal Rules 1993** {as amended}) sift stage. The claimant exercised his right to an oral hearing under rule 3:10 and HHJ Shanks came to the conclusion that a preliminary hearing was necessary. At that preliminary hearing before HHJ Auerbach all but one of the grounds of appeal were rejected. This appeal is in respect of one issue; whether the tribunal correctly approached the claim of a failure to make a reasonable adjustment. That ground relates to the means adopted by the respondent in a redundancy process to select which employees would be given alternative employment. I should also add the claimant sought to appeal these decisions by the EAT in the Court of Appeal; Bean LJ refused permission to appeal.

2. In his skeleton argument the claimant raised two matters which he argued should be considered today. The first is narrow and relates to costs incurred to put medical evidence before the ET. The second, much broader matter, is that HHJ Shanks at the rule 3:10 provided for all matters, unlimited, to be considered at the Preliminary Hearing. The claimant contends at the preliminary hearing argument was limited to his "most valued" points before HHJ Auerbach. Dealing with the first of those points, that is not a matter for this appeal tribunal. Any application for costs should have been made to the ET. There is no refusal of a costs order in the judgment appealed and as such I cannot consider that issue. The second point is misconceived, the entirety of the written grounds of appeal and arguments were before HHJ Auerbach. Any request made by him that oral arguments be limited would have been a method of managing time. Therefore, HHJ Auerbach was seised of all matters included in the written appeal. His decision on those matters is conclusive. This is all the

more so as his decisions were upheld by a refusal of permission at the Court of Appeal. That means, once again, that these are not matters before me and I cannot make a decision upon them.

HHJ AUERBACH'S DECISION

3. HHJ Auerbach concluded that there was an arguable ground of appeal as to the selection process and "*in particular, regarding the need for the Claimant to attend an interview*". HHJ Auerbach considered that while the ET had decided that the respondent had made an adjustment, there was a question as to whether that was a sufficient analysis. He asked whether alternatives to an interview as the means of selection should have been considered in this case, particularly when the claimant and his union had raised issues about the process. The second element relates to the ET conclusion that there was no substantial disadvantage.

EMPLOYMENT TRIBUNAL DECISION

4. The claimant's amended ET1 dealt with the issue of selection for redundancy in an amended ET1 particulars which read:

> **"The selection of the Claimant for redundancy – to remove him through an organisational change process, without giving adequate consideration to his current health situation ---is alleged to amount to a failure to make reasonable adjustments."**

In its ET3 response the respondent set out:

> **"The Claimant's post was deleted by way of a restructure. He was invited to a ring fenced interview in the new structure ------granted two extensions to the deadline for submission of an application ------ consideration was also given to the Claimant's request to postpone and the Claimant had been offered an alternative date for his interview."**

5. The facts found by the ET, relevant to the remaining ground of appeal, are as follows. The ET found that the claimant was disabled with the mental impairment of depression and with the physical disability of arthritis. However, the ET considered that it was only the former aspect of disability which had any relevance to the issues before it. The tribunal found that the claimant suffered moderately severe depression with a somatic syndrome (which means that his depression arose in part because of the claimant's concentration on physical pain) associated with his arthritic condition. The impact on day to day activities found by the tribunal (para. 100) was lethargy including excessive

sleep, social disengagement including a wish to avoid people, lack of motivation, problems with memory and concentration, along with a persistent low mood and, of specific importance to this appeal "(…) *persistent difficulty in normal social interaction (…)*"; the ET held that the respondent knew of this disability.

6. There was a redundancy situation and part of this involved a restructuring of the youth support department where the claimant worked. Part of this process required those interested in working in the new structure applying for a post. The ET recorded that the claimant had difficulty with the redundancy process even at this application stage. The claimant was given an extension for providing an application form after complaining that he had not received sufficient support because he was absent from work due to ill health during the consultation in the redundancy process and that "*he was bogged down in paper and that he had no time deal with the organisational change matter*." The application deadline which had been set at 12 August 2013 was altered to 23 August for the claimant, he also received some level of support in the preparation of the application form. He was invited to an interview to take place on 4 September 2013. The claimant wrote indicating that his sickness absence was to continue with a further GP certificate for a further month and indicating that he could not attend any meetings or interviews. The respondent contacted the claimant asking for an indication as to when he would be available to attend interview; reminders were sent to him when he did not respond. Thirteen candidates had been interviewed and were awaiting an outcome so a deadline of 23 September 2013 was put in place. At paragraph 141 of the Judgment the ET wrote this:

> **"Veronia Charles considered whether there was a way other than interview. The unions had objected to redundancy selection criteria. She felt that to deviate from the agreed procedures without an adequate rationale would potentially cause significant problems for the Respondent in that employees would be treated inconsistently. Further, even if they had decided to do selection criteria without the agreement of the unions it was likely that the Claimant would have been selected for redundancy owing to his sickness absence record. Veronia Charles maintained the need then to interview the Claimant. She explained that to him by letter dated 17 September 2013."**

The claimant informed the respondent on 20 September 2013 that he was too ill to attend an interview.

7. The ET concluded that the respondent applied a PCP of requiring the claimant to attend an interview. The claimant had attended a formal appeal meeting on 27 September 2013 (a successful

appeal against a written warning for sickness absence). The ET also found that the claimant was able to engage with the process "(…) *if he wanted to. He did not want to (…)"*. They relied on an email from the claimant dated 3 October 2022 which set out:

> **"Even if I wasn't off sick with work related stress, causing depression, I still would not have attended this interview ….. the reason for this is, I have e-mails relating to me with discriminatory content from lower, middle, senior management and HR conspiring to dismiss me through my sickness, which shows I was never going to be supported or helped by management to return to work. Some of those managers were involved in the whole ringfence interview process and would have been sitting on the interview panel …… in regards to this letter, you have now sent me requesting I contact Lynda Farmer and attend a meeting with Nick Chamberlain, I would like to bring to your attention that I have evidence from LBC's internal systems that Lynda Farmer and Simon Ashley are two of the managers conspiring to dismiss me. I also have evidence that Nick Chamberlain was also involved. He was given information by Donna Shaw prior to him carrying out my stage 2 grievance which he chose to ignore because it favoured me. He then carried out his investigation which should have been fair and without bias or prejudice, yet he falsified his responses in order not to uphold my complaints and chose to support the behaviour of previous managers."**

The ET concluded "(…) *he was not going to attend these interviews (…)*". In the light of these facts the ET concluded that the claimant was not placed at a substantial disadvantage by this PCP.

8. The ET Judgment, when dealing with the facts, does not always deal with them as a strict chronological narrative. I do not criticise that structure given the broad ranging complaints made. The ET chose to deal with issues thematically and this was a particularly useful way of structuring the ET analysis in this case. However, it does mean that it is not immediately apparent that the claimant was undergoing a number of processes simultaneously. In August and September 2013 he was seeking to raise a grievance in respect of his pay, applying to appeal a grievance outcome on bullying and harassment, and dealing with an appeal as to a warning for sickness absence.

STATUTORY PROVISIONS

9. The appeal requires application of sections 20 and 21 **Equality Act** 2010 (EqA) which provide:

> **"Section 20**
> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
> **(2) The duty comprises the following three requirements.**
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant**

> **matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **Section 21**
> **(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.**
> **(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.**
> **(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."**

THE CASE LAW

10. The claimant has provided a copy of the first instance decision of EJ Slater and members in the Manchester Employment Tribunal in Case Nos. 1804896/13 and 1805624/13 **Waddingham v NHS Business Services Authority**. This can only be of persuasive authority but has been chosen, no doubt, because it specifically deals with an interview process in a redundancy situation. Paragraph 40 shows that the ET in that case found that to require someone who was unlikely to perform well, because of disability, to undergo a competitive interview was a substantial disadvantage. It seems clear in that case that the claimant attended the interview but failed to reach the required standard to be selected. The tribunal had evidence of that failure and evidence about the effect of treatment from which they drew the conclusion that the disability led to the claimant underperforming. It seems to me that this is an application of uncontroversial law to the facts found

11. In **Piggott Bros v Jackson** [1991] IRLR 309 the Court of Appeal considered issue of the approach to perversity. Lord Donaldson proposed a strict test, namely, that a tribunal decision can only be regarded as perverse if it was not a 'permissible option'. In order to show that it was not:

> **"(…) the EAT will almost always have to be able to identify a finding of fact which was unsupported by *any* evidence or a clear self-misdirection in law by the [employment] tribunal. If it cannot do this, it should re-examine with the greatest care its preliminary conclusion that the decision under appeal was not a permissible option and has to be characterised as "perverse"."**

This is a stringent test so that it will only be in the rarest cases that a rational decision, based on evidence which is capable of belief and where the ET's direction in law is correct could the appellate tribunal hold that it was not a permissible option.

12. When considering any disadvantage to the claimant the ET must be careful that it is an effect of the disability, which creates circumstances where the claimant is disadvantaged in complying with a PCP see **Newcastle upon Tyne Hospitals NHS Trust v Bagley** UKEAT/0417/1 It is clear that there are no reversal of burdens of proof provisions and it is entirely for the claimant to establish that a PCP led to a substantial disadvantage see **Bethnal Green & Shoreditch Educational Trust v Dippenaar** UKEAT/0064/15. That case and **Project Management Institute v Latif** UKEAT/0028/07 [2007] IRLR 579 indicate that the question of whether there is a disadvantage and whether it is substantial (more than merely trivial) is a matter of fact for the ET. The issue of reasonableness was dealt with in **Smith v Churchill's Stairlifts PLC** [2006] IRLR 41 and **Linsley v Revenue and Customs Commissioners** [2019] IRLR 604. In the former case it is made clear that the ET considers reasonableness on an objective basis. In **Linsley** it was held that for any disadvantage there may be a number of adjustments made. However, employers are not required to select the best or most reasonable adjustment so long as the adjustment selected is reasonable.

13. In **DPP Law Ltd v Greenberg** [2021] IRLR 1016 Popplewell LJ reviews the authorities and sums up the the approach to be taken at appellate level when considering the judgments of tribunals. At paragraph 57, he sets out the principles:

> **"The following principles, which I take to be well established by the authorities, govern the approach of an appellate tribunal or court to the reasons given by an Employment Tribunal:**
> **(1) The decision of an Employment Tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical.**
> **------**
> **This reflects a similar approach to arbitration awards under challenge: see the cases summarised by Teare J in *Pace Shipping Co Ltd v Churchgate Nigeria Ltd (The "PACE"* [2009] EWHC 1975; [2010] 1 Lloyds' Reports 183 at paragraph 15, including the oft-cited dictum of Bingham J in *Zermalt Holdings SA v Nu-Life Upholstery repairs Ltd* [1985] 2 EGLR 14 that the courts do not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards with the object of upsetting or frustrating the process of arbitration". This approach has been referred to as the benevolent reading of awards, and applies equally to the benevolent reading of Employment Tribunal decisions.**
> **--------**
> **2) A tribunal is not required to identify all the evidence relied on in reaching its conclusions of fact. To impose such a requirement would put an intolerable burden on any fact finder. Nor is it required to express every step of its reasoning in any greater degree of detail than that necessary to be *Meek* compliant (*Meek v Birmingham City Council* [1987] IRLR 250). Expression of the findings and reasoning in terms which are as simple, clear and concise as possible is to be encouraged. ----------**
> **(3) It follows from (2) that it is not legitimate for an appellate court or tribunal to reason**

> **that a failure by an Employment Tribunal to refer to evidence means that it did not exist, or that a failure to refer to it means that it was not taken into account in reaching the conclusions expressed in the decision. What is out of sight in the language of the decision is not to be presumed to be non-existent or out of mind.**
> **-------**
> **Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload."**

SUBMISSIONS

14. Despite explaining to the claimant the limits of the appeal I was engaged in, the claimant's submissions (perhaps understandably because of the fact that he has lived this case for approaching nine years) encompassed many aspects outside the ground of appeal that had been given permission to proceed to this full hearing. I have attempted to record those aspects of his submissions that do impact on the appeal.

15. The claimant submitted that the respondent had knowledge of two aspects of disability, depression and arthritis. It was therefore in a position to understand the cumulative effects of two disabilities and how they would place him at a substantial disadvantage in respect of the PCP of requiring him to attend an interview. He argued that whilst the respondent did postpone that was not an adjustment which would remove the substantial disadvantage caused by the PCP. The disadvantages caused by the PCP were exacerbated by the increasing stress caused by the respondent's approach to dealing with the various internal process that were underway. He mentioned specifically that not combining the process were adding to stress as was the fact that he did not receive wages for a period of three months.

16. The claimant argued that the tribunal were aware of a number of impacts of depression as set out in paragraphs 100, 101, 102, 103 and 179 of the Judgment showing the adverse consequences of that disability. It was the responsibility of the respondent to find out what disadvantages would

impact upon the claimant by the application of the PCP referring to the **Equality & Human Rights Commission Code of Practice on Employment** (ECHR Code) at paragraphs1.214 and 1.225.

17. The claimant's asserts that there were a number of adjustments that could have been made by the respondent he lists them as:

a. Slotting him into a role;
b. Providing him with a line manager to support him in the redundancy process;
c. Explaining the restructure process at a sickness meeting;
d. Combining meetings on various subjects to deal with all matters compendiously not separately;
e. Providing the Claimant with interview training;
f. Resolve is outstanding workplace issues before selecting for redundancy.

18. The claimant argued that it was for the respondent to justify why they could not just slot him into a job. There was already provision for such an adjustment, as it was an outcome that had been applied to other workers in the process. He also referred to trade union comments on using a skills audit to select rather than interview. He contended that if the respondent slotted him in until his work issues had been resolved it would not have resulted in additional cost because after he had been made redundant the respondent still had to conduct two further investigations.

19. The claimant pointed out that whilst he was not required to suggest adjustments to the respondent he had done so when he wrote indicating that an interview would be unfair and he mentioned two employees who had been slotted in. Referring to paragraph 1.197 in the EHRC Code the respondent should have been considering the positive step of slotting the claimant into a role. The respondent had not considered anything beyond postponement.

20. The claimant argued that the interview process was to be competitive and scored. This would have placed the claimant at a substantial disadvantage given his condition at the time.

21. In dealing with the conclusion at paragraph 180 of the ET Judgment the claimant argued there was no real relevance to meetings that had occurred earlier in the year. Referring to the specific meeting set out in the paragraph he made the point that he was accompanied by union representative. He argued that by September the respondent ought to have known that his disability of depression had become significantly worse.

22. The claimant argued that there was a competitive interview involving thirteen people to be selected for 4.9 FTE roles. He asked, rhetorically, how he would be expected to take part without support. He was out of practice in being interviewed having been employed by the respondent for more than twenty years, he was off sick, he had asked for interview training, that would have been a reasonable adjustment.

23. He argued that it was wrong of the tribunal to conclude that the disability of arthritis was not easily seen to be relevant. He spoke of flare ups of arthritis where he would lose ability to use hands, to walk and would suffer severe pain. This was not considered when examining the disadvantage caused by requiring him to attend an interview. In addition the ET did not consider any cumulative effects arising out of the combination of two conditions. Whilst the ET finds that the claimant was able to engage in the interview, the medical report and their findings based upon it states that the depression reached a turning point in September 2013.

24. The respondent's argument begins by asserting that this is a perversity appeal and that therefore the hurdle that the claimant must surmount is a high one. Mr Caiden argued that the claimant's presentation of the appeal amounted to inviting the EAT to substitute its view for that of the ET. That focus of the appeal is suggesting that the ET made an error in concluding certain matters of fact. Mr Caiden made the point that for a perversity appeal to succeed it is not sufficient for the appellate court to disagree with a factual finding, that finding must be unsupported or unsupportable on the evidence. If there is any evidence to properly support the finding that means the appeal cannot succeed. Often evidence at ET will point both ways, it is the role of the ET having seen the witnesses and heard all the evidence to choose between them. If the ET has reached a permissible conclusion that is fatal to a perversity appeal.

25. Mr Caiden argued that the starting point is to properly appreciate the PCP. This is set out clearly at paragraph 180 of the ET judgment and there is no appeal on the PCP that the ET identified. The point being emphasised by Mr Caiden was that the PCP was simply about attendance at an interview; it was not about performance at an interview. Therefore, on appeal it is not capable of

being considered perverse because of any potential difficulties with performance at an interview. Referring to the **Waddingham** case he said that the facts were clearly about performance at an interview. The PCP in that case was related to the competitive nature and conditions of the interview, performance not attendance. In response to a question from me that the tribunal could be said to have approached the matter on a binary basis considering whether the claimant was capable of attending and not considering whether it was more difficult for the claimant to attend because of his disability. Mr Caiden contended that given the PCP identified the ET was entitled to approach the question as potentially binary because of its finding of fact that the claimant was never going to attend, it did not need to descend to further detail.

26. Mr Caiden pointed out that at paragraph 16 of the ET Judgment it was made clear that the case revolved around factual disputes and not legal interpretation. He then relied on paragraph 19 as demonstrating that the ET had set out a correct summary of the law as it relates to reasonable adjustments. In reference to the **Greenberg** guidance, he argued that as the law was correctly recorded, unless there was good reason to consider otherwise, it should be considered that the ET applied it faithfully.

27. Mr Caiden relied on these aspects of the Judgment to demonstrate that the ET was entitled to come to the conclusion that the claimant was able to attend the interview because he had attended meetings prior to and soon after the times when the interview could have taken place. The judgment sets out that a grievance meeting took place on 10 January 2013; the claimant attended supported by his union representative. On the 4 July 2013 there was a meeting to establish complaints; the claimant attends again supported by his union. He argued that other parts of the Judgment demonstrate that the claimant was not passive in these meetings. The claimant attended a consultation meeting on 12 July 2013 alone. On the 27 September 2013, whilst off sick with depression, the claimant attended a meeting where he was appealing a warning for absence. He argued that the judgment, read benevolently in the round, examined these various meetings and in the end did not believe the claimant, factually, that he wasn't able to attend because of disabilities.

28. His secondary point on this aspect was one of causation. He indicated that even if the ET were not entitled to conclude that the claimant was not substantially disadvantaged by the PCP, they were entitled to conclude that was not the reason for his non-attendance. Mr Caiden referred to the email that the ET concluded supported a conclusion that the claimant did not attend because he did not want to. That was a factual finding on causation supported by evidence and which the ET were entitled to reach.

29. Mr Caiden then moved on to discuss the requirement that a failure to make an adjustment could only be subject to criticism if a it was an adjustment that it would be reasonable for the respondent to have to make. The first aspect of this argument is based on the finding that the claimant would not have attended. As a logical conclusion if no adjustment would have resulted in the claimant's attendance then it would not be reasonable to make the adjustment. His second argument is that the tribunal could not be criticised on this basis as any other adjustment would have an impact on a carefully structured redundancy selection process. Any of the other adjustments mentioned would be likely to interfere with this structure. This was a much broader exercise than moving an individual into a vacancy, this was the opposite the respondent having to decide that a number of individuals would be made redundant. In those circumstances the ET was entitled to decide that the process needed to be concluded and to accept the reasons advanced by the respondent that no other adjustment could be made. In those circumstances it was entitled to conclude that other adjustments were not reasonable.

CONCLUSIONS

30. The first aspect of the grounds of appeal I deal with relates to the question of whether the effects of the claimant's disability placed him at a substantial disadvantage in complying with the PCP. I do not accept Mr Caiden's narrow interpretation of the PCP found by the tribunal. It is obvious that a PCP which requires attendance at an interview also requires participation in the interview process, to find otherwise defies common sense. To interpret the PCP otherwise would mean to attend

could simply mean to turn up and then leave. Mr Caiden prayed in aid **Greenberg** which requires a sensible and benevolent reading of ET decisions, to attempt to read the PCP as if it were a clause in chancery document is not to apply that principle. In my judgment the ET would obviously have in mind participation when it concluded that the PCP was to attend an interview. In my Judgment therefore the PCP would require the tribunal to consider not only the attendance but participation in the interview when considering the question of whether there was a substantial disadvantage. The first aspect of disadvantage to be considered is whether the tribunal applied the wrong test when considering disadvantage. The tribunal engaged in a binary decision whether the claimant could take part in the interview or not; that is not the correct approach. A tribunal in considering disadvantage applies S. 20 EA 2010 "(…) *in comparison with persons who are not disabled (…)*". The relevant matters are the effects of the disability which make it more difficult (when that difficulty is not minor or trivial) for the disabled employee to meet an expectation of the employer i.e. the PCP. The ET's findings from the medical evidence that the claimant had problems with memory and concentration and with social interaction. It seems obvious that such problems would, at the least hinder effective participation in the interview. The ET would then have had to consider whether the limitation on the ability to participate was more than minor or trivial. On that basis, subject to the matters I deal with below, this aspect of the ET's judgment is flawed.

31. The second aspect of disadvantage is, however, causation; the ET concluded that the claimant would not have taken part in the interview, and would not have done so for reasons unconnected with the claimant's disability. The basis of that finding begins with the email from the claimant set out at paragraph 7 above. In addition the ET also took account of the claimant's participation in other meetings. Paragraph 182 of the ET Judgment sets out the conclusion with clarity:

> **"the Claimant had lost and confidence in the council------he was not going to attend these interviews.**"

From the Judgment, read in its entirety, there was evidence which supported that conclusion. It was a rational judgment by the ET who had the advantage of hearing the evidence and cross examination of the claimant. The ET was best placed to draw that conclusion. Therefore it was not an effect of the disability which prevented

the claimant from complying with a PCP, it was a choice he made because of his belief, still expressed before me in his submissions, that this process was just a means of managing and disguising the reason for his dismissal. On that basis alone this appeal cannot succeed. However as matters have been argued before me as to the question of reasonableness I shall consider that.

32. The tribunal based its conclusion that it was not reasonable for the respondent to have to make any other adjustment. It appears to me that must start with the question as to whether the delay amounted to an adjustment. The relevant part of the **EqA** 2010 is s.20(3) "(…) to *take such steps as it is reasonable to have to take to avoid the disadvantage (…)*". Therefore, in order to be an adjustment within the meaning of the statute such a step must avoid the disadvantage. To avoid a disadvantage an adjustment must have the potential to alleviate the effect which creates the comparative disadvantage. Here, any adjustment which allowed sufficient time for the claimant to recover from the effects which would hinder his participation in an interview, could be considered an adjustment within the meaning of the statute. However, the evidence before the ET pointed to a significant impairment from which recovery would be protracted. It appears to me therefore that the short delay which was applied to the date of the interview could not be considered an adjustment in the circumstances.

33. The next question is whether, in respect of other adjustments, it would not be reasonable for the respondent to have to make any one of them. I should at this point make it clear that as far as the adjustments advanced by the claimant before me, I am not clear (having considered the amended ET1 and the schedule attached to the ET Judgment) that they were suggestions before the ET. If they were not then the ET cannot be criticised for not drawing conclusions about them; an ET is not required to make decisions about adjustments that were not raised before it. The adjustments suggested by the claimant, apart from slotting him into a role, do not appear to avoid the disadvantage of him being required to participate in an interview, most seem more related to resolving the other employment matters he was engaged with at the time. The ET, leaving aside the question of the interview delay not amounting to an adjustment, decided that there was no other step it was reasonable for the

respondent to have to take. The ET had evidence that this was a collective redundancy process where selection for retention applied to at least thirteen employees, where funding was being reduced and there was a time element to the decisions to be made. The ET had accepted the evidence of Veronia Charles, summarised above, that there was no other reasonable step. The tribunal's decision was based on that evidence, it was a rational decision. The question of reasonableness is an objective test which the ET applies. Slotting in, was objectively, a step which would have alleviated the disadvantage. However, that was a step which would have impacted on others who had taken part in a process of selection. Making a reasonable adjustment is not a vehicle for giving an advantage over and above removing the particular disadvantage. If there is a vacancy which can be filled (see **Archibald v Fife Council** [2004] IRLR 651) to fill that role as adjustment can be, but will not necessarily be, a reasonable step. In the circumstances of this case the ET was entitled to consider that, given the surrounding circumstances and impact on other employees, no step, including slotting in, would be a reasonable step for the respondent to *have* to take.

34. On that basis the appeal is dismissed.