EMPLOYMENT TRIBUNALS

Claimant: Mr A Carr

Respondent: Network Rail Infrastructure Limited

Heard at: London Central (via Cloud Video Platform)

On: 13, 14, 15 and 16 December 2022 and 3 January 2023 (in chambers)

Before: Employment Judge Joffe
Ms D Keyms
Ms N Sandler

Appearances
For the claimant: In person
For the respondent: Mr S Liberadzki, counsel

JUDGMENT

1. The claimant's claims of direct disability discrimination, contrary to Section13 Equality Act 2010, are not upheld and are dismissed.

2. The claimant's claims of unfavourable treatment because of something arising in consequence of disability, contrary to Section 15 Equality Act 2010, are not upheld and are dismissed.

3. The claimant's claims of indirect disability discrimination, contrary to Section 19 Equality Act 2010, are not upheld and are dismissed.

4. The claimant's claims of failure to comply with a duty to make reasonable adjustments, contrary to Sections 20 and 21 Equality Act 2010 are not upheld and are dismissed.

REASONS

Claims and issues

1. The claims were partly identified at a case management hearing in front of Employment Judge Heath on 5 May 2022 and then further agreed between the parties. They are as follows, subject to the amendment discussed below:

   Claim(s) under Equality Act 2010 s120

   Disability discrimination/harassment

   1. Whether Claimant was a disabled person

   It is agreed that, at the material time(s), the Claimant was a disabled person within the meaning of the Equality Act 2010.

   Direct discrimination: Equality Act 2010 s13

   2. The Claimant alleges that the Respondent did the following things which constituted direct disability discrimination:

   2.1 gave the Claimant a far lower score at interview compared to the other two applicants;

   2.2 rejected the Claimant's application for the role of Signaller; and

   2.3 told the Claimant that he should not apply for safety critical roles in the future.

   3. Whether treatment was less favourable

   3.1 In doing the acts complained of at paragraphs 2.1 - 2.3 above, did the Respondent treat the Claimant less favourably than it treated the other role applicants and/or a hypothetical comparator?

   3.1.1 If so, was there any material difference between the circumstances relating to the Claimant and the other applicants and/or a hypothetical comparator?

   3.2 In doing the act complained of, did the Respondent treat the Claimant less favourably than it would have treated others in comparable circumstances?

   4. Reason for less favourable treatment

   4.1 If the Respondent treated the Claimant less favourably, was this because of the Claimant's disability?

   Discrimination arising from disability: Equality Act 2010 s15

   5. The Claimant alleges that the Respondent did the following things which constituted discrimination under section 15 of the Equality Act 2010:

5.1 gave the Claimant a far lower score at interview compared to the two other comparators;

5.2 rejected the Claimant's application for the role of Signaller; and

5.3 told the Claimant not to apply for safety critical roles in the future.

6. Whether Claimant treated unfavourably

6.1 Did the Respondent do the acts complained of at paragraphs 5.1 – 5.3 above because of something arising out of the Claimant's disability?

6.2 Was this unfavourable treatment?

7. Reason for treatment

7.1 Was the unfavourable treatment because of something arising in consequence of the Claimant's disability? This gives rise to the following sub-issues:

7.1.1 Was the unfavourable treatment because of the perception that the Claimant could not carry out the role of Signaller?

7.1.2 Was the alleged perception that the Claimant could not carry out the role of Signaller something arising in consequence of the Claimant's disability?

8. Whether treatment justified

8.1 Was the treatment a means of achieving a legitimate aim?

8.2 If so, was it a proportionate means of achieving that aim?

Indirect Discrimination: Equality Act 2010 s19

9. The Claimant alleges that the Respondent did the following things which constituted indirect disability discrimination:

9.1 applied a provision, criteria or practice (PCP) of not making reasonable adjustments to safety critical roles.

10. Whether Claimant subjected to a relevant detriment

10.1 Did the Respondent do the act alleged at paragraph 9.1 above?

11. Whether Respondent applied a PCP

11.1 Did the Respondent apply the PCP at paragraph 9.1 above?

11.2 Did the Respondent apply the PCP in question to the Claimant?

11.3 Did the Respondent apply, or would the Respondent have applied, the PCP in question to people who did not have the same disability as the Claimant?

12. Whether PCP caused disadvantage

12.1 Did the PCP in question put, or would it have put, people who have the same disability as the Claimant at a particular disadvantage when compared with people who do not have the same disability as the Claimant?

12.2 Did the PCP in question put, or would it have put, the Claimant at that disadvantage?

13. Whether PCP justified

13.1 Was the PCP a means of achieving a legitimate aim?

13.2 If so, was it a proportionate means of achieving that aim?

Duty to make reasonable adjustments: Equality Act 2010 s21

14. The Claimant alleges that the Respondent failed to comply with a duty to make reasonable adjustments in the following ways:

14.1 applying a PCP of not making reasonable adjustments to safety critical roles;

14.2 applying a PCP of interviewing candidates for roles without first undertaking an occupational health assessment; and

14.3 applying a PCP of recruiting managers making assessments of medical fitness for a role, when recruiting for safety critical roles, without seeking occupational health advice.

15. Whether Claimant disadvantaged by a PCP

Did the Respondent apply the PCPs at paragraphs 14.1 – 14.3 above (or was such a PCP applied on behalf of the Respondent)?

15.1 Did the PCPs in question put the Claimant at a substantial disadvantage in comparison with persons who are not disabled?

16. Whether Respondent had knowledge of disadvantage caused by PCP

16.1 Did the Respondent know that the PCPs in question put the Claimant at a substantial disadvantage, in comparison with persons who are not disabled, in relation to employment by the Respondent?

16.2 If not, could the Respondent reasonably have been expected to know that the PCPs in question put the Claimant at a substantial disadvantage, in comparison with persons who are not disabled, in relation to employment by the Respondent?

17. Whether Respondent took reasonable steps to avoid disadvantage caused by PCP

17.1 Did the Respondent take such steps as it was reasonable to have to take to avoid the disadvantage caused by the PCPs?

18. Remedy

18.1 Is it just and equitable to award compensation?

18.2 In the case of any indirect discrimination, was the PCP applied with the intention of discriminating against the Claimant?

18.3 What amount of compensation would put the Claimant in the position he would have been in but for the contravention of the Equality Act 2010?

18.4 Has the Claimant taken reasonable steps to mitigate his loss?

18.5 Was the Claimant guilty of contributory fault and, if so, to what extent should any compensation be reduced?

Findings of fact

The hearing

2. We heard evidence from the claimant on his own behalf and, for the respondent from Mr C Proctor, local operations manager, and Mr S Pearson, also a local operations manager. By agreement, we heard evidence from the respondent's witnesses first as the respondent's witnesses were required operationally later in the week due to issues resulting from the national train strikes.

3. We were provided with an electronic bundle of 913 pages. We had regard to those pages in the bundle we were referred to. There were numerous documents we were not taken to and have not had regard to in reaching our findings.

Adjustments

4. We discussed with the claimant at the outset what adjustments he might require as a result of his disabilities. He explained that he might need more breaks and might require more time to formulate questions or might get to the point of questions in a more roundabout way. We agreed that we would be mindful of that during the claimant's cross examination of other witnesses and during his own evidence and would avoid interrupting as much as possible and only where it was clear that the claimant was pursuing matters which would not be relevant to the Tribunal. We did not find that much intervention by the Tribunal was necessary and the claimant was able to ask relevant questions and to give relevant evidence without much assistance from the Tribunal. We were happy for the claimant to have additional breaks as required but few were necessary.

Application to amend

5. It can be difficult even for experienced lawyers to identify the issues in disability discrimination claims, particularly in a case of complex disabilities, such as this one. We were also concerned at the outset of the hearing that some of the PCPs set out in the list of issues gave rise to adjustments which were not adjustments in law, such as occupational health assessments.

6. During the course of cross examination of the respondent's witnesses, it became apparent that there were other issues which were important to the claimant which had not found their way into the list of issues and were not articulated in the claim form.

7. These potential new issues were claims of failure to make reasonable adjustments. The new claims were as follows:

    a) *The respondent applied a PCP of marking down the answers to questions where a significant number of prompt questions were required to elicit information.*
    The substantial disadvantage was said to be that the claimant struggled to speak fluidly and because of his Asperger's would get the wrong end of the stick quite a lot, so he required prompting to get on the right track and therefore was marked down.
    The reasonable adjustment contended for was not marking the claimant down for requiring the prompts;
    b) *The respondent applied a PCP of asking prompt questions in the interview rather than providing them in advance so the claimant could write out the answers.*
    The disadvantage was that the claimant struggled to speak fluidly especially in situations he was not trained for and got the wrong end of stick when he had to think on his feet and stumbled over words.
    The reasonable adjustment contended for was providing prompt questions in advance so the claimant could write out the answers.

8. The respondent took a pragmatic approach to these new issues and objected to the first but not the second proposed amendment. Mr Liberadzki accepted that the Tribunal had the evidence required to deal with the first amendment and that the respondent was not disadvantaged. To a degree the issue had been foreshadowed in the claimant's internal grievance.

9. So far as the first proposed amendment was concerned, however, he said that, had this issue been pleaded, the respondent would have been likely to have adduced further evidence. The issue was not one which the respondent could have anticipated arising. The respondent had understood that the claimant's aphasia caused issues with him answering questions fluidly but not that the claimant was saying that his Asperger's caused him to have difficulty in understanding what was meant by written questions and giving a pertinent response. The claimant's impact statement did not make it clear that the

claimant contended that this was an effect of his Asperger's and there was nothing else which would have tipped the respondent off that this was the basis of one of the issues the claimant was pursuing. This was an issue on which expert medical evidence might be required. There was no such evidence and the respondent was prejudiced.

10. Mr Liberadzki also submitted that the claim was one which did not appear to have merit. He suggested that the claimant would have difficulty in showing that the disadvantage was caused by his disabilities and would struggle to persuade the Tribunal that it would be a reasonable adjustment to disregard the fact that a candidate had required a great deal of assistance to articulate a satisfactory answer.

11. We had regard to the case law on amendment which is outlined below. Ultimately what was important to us was the balance of hardship if the amendments were allowed or not allowed. So far as the second amendment was concerned, we considered that there would be no real hardship to the respondent, which accepted it was able to deal with the case put in this way, if the amendment were allowed, and that there would be hardship to the claimant if it were not allowed as this represented a significant concern which he had attempted to articulate without the benefit of legal advice.

12. We accepted, however, that there would be significant hardship to the respondent if it had to deal at this late stage with the first amendment. It seemed to us that not only was the causation issue one on which the respondent might reasonably have sought expert medical evidence, but that it may be that the respondent would have sought to give further evidence about the practicability of making the adjustment contended for, had the issue been identified at an earlier stage. We were not able to form any very clear view on the potential merits but we could see that there would be credible arguments as to how far an interview and a scoring process can be adjusted before they cease to meaningfully test the competences required for the role. We did not allow the first amendment.

13. Neither party suggested that we allow the amendment and adjourn the hearing to allow new evidence to be adduced and we considered in any event that such a course would not have been in the parties' interests.

14. We raised with the claimant early in the hearing the question of whether he had intended to identify features of the signaller role which put him at a disadvantage because of his disabilities. He very fairly said that he did not have the expertise to identify any such features or adjustments and was pursuing his claims on the basis of adjustment to the recruitment process only.

Claimant's disabilities

15. It was not in dispute that the claimant had disabilities within the meaning of the Equality Act 2010. The claimant had had a brain tumour as a child and had a range of impairments:
    - Cerebral palsy. Right sided hemiparesis affecting fine motor skills and weakness in his right leg;
    - Right sided hemanopia – loss of right half of the visual field in both eyes;
    - Aphasia: inability to find words at 'stereotypical' speed. The claimant said that he had to choose his words carefully and, if rushed, would say the wrong thing. He said that this was likely to affect his telephone communications and that flash cards could be used which would tell him what to say in all situations and contain prompts;
    - Asperger's Syndrome. The claimant referred in particular to his inability to pick up on social cues and prompts in both oral and written communications and difficulties with slang and synonyms;
    - Amnesia: The claimant has to write things down to jog his memory. He considered that he might have difficulty remembering the different bell codes used to communicate between signal boxes but thought that he could use flashcards to overcome this difficulty;
    - Panic disorder: The claimant said that he suffered from stress and depression due to the discrimination he suffered as a result of his disabilities.

16. The claimant accepted that he would require an occupational health assessment as to whether his physical conditions would mean he could not perform the signaller role, with or without adjustments. The focus for the purposes of the claims before the Tribunal was on the effects of the claimant's neurological and mental conditions.

17. The claimant said in evidence that his aphasia did not limit his ability to operate a signalling system but did limit his ability to communicate. He said that he had difficulty communicating in interviews, because he was slower to find words. The claimant said that his Asperger's syndrome affected his ability to answer questions because he might misinterpret the question and therefore give an answer which was not correct or went off at a tangent.

18. It was clear to the Tribunal that the claimant has in many ways successfully managed a significant range of impairments and has impressive educational and work achievements.

Medical evidence

19. The information we had about the claimant's disabilities was largely contained within his impact statement. We also saw a report commissioned by the respondents from a psychologist dated 30 September 2021. This did not relate to the signaller recruitment process but gave advice to the claimant's manager to assist in making adjustments in the workplace with respect to the claimant's Asperger's and on how to support the claimant with his mental health. We did not have any other report on the claimant's neurological impairments.

20. We had very little evidence as to what the respondent knew generally about the claimant's impairments. We were not told what the respondent was told when the claimant commenced his employment with the respondent and what if any occupational health advice the respondent had received at an earlier date. There were some documents in the bundle which referred to the fact that the claimant had declared his Asperger's and had told the respondent that he had had a brain tumour which might affect his memory but we had no detail and no documents contemporaneous with the start of the claimant's employment which indicated what had been disclosed at that stage.

21. It appeared from the claimant's own evidence that he had not shared with the respondent some of the details about how his impairments affected him. He understandably took the view that his disabilities were complex and the overall effect of his impairments was unique to him.

The signaller role

22. Mr Pearson described signalling as a 'sophisticated traffic light system for the railway'. Signallers keep track of trains, maintenance work and other unexpected issues to decide whether their section of track is safe at any particular time. An individual signaller is responsible for a section of track and must communicate information to train drivers and other colleagues. They have to react quickly and stay calm under pressure. The role is unsurprisingly considered safety critical.

23. Mr Proctor told us that a signaller can work for weeks or months with no event of note occurring. The signaller must always be prepared to react to events as a wrong or slow response in the event of an emergency can result in fatalities.

24. Mr Proctor gave the example of an obstruction on a rail track. The signaller would be informed by a six beat emergency bell code. The signaller needs to recognise the code and replace signals on the line to 'danger'. This alerts train drivers not to enter the relevant zone. Mr Proctor said that seconds can count and signallers need to be controlled under pressure.

25. Applicants who are successful at interview for a signaller role have to undergo a medical to confirm that they are fit for the role and then undergo eleven weeks of initial signallers training which includes the taking of exams.

The claimant's previous applications for signaller roles

26. The claimant said during the grievance he brought about the matters the subject of these claims that he had applied for some 117 signaller roles with the respondent.

27. The claimant told the Tribunal that he wanted to be a signaller because he wanted to be in a situation where he had to make decisions every day which affected the safety of many people. He felt he would excel at the type of concise communication necessary for the role. It was also apparent that he saw the role as a stepping stone to a broader role suggesting improvements in the whole system of movement in the railway. He felt that he needed to see how signalling operated in practice and not just in theory to properly understand the whole system.

28. The claimant estimated that he had attended forty or fifty interviews for signaller roles. He has never been appointed to a signaller role.

29. The feedback he received after previous interviews was feedback on the questions, he told us. He told the Tribunal that he was suspicious that he was not getting through the interview because of some form of disability discrimination but did not feel he had evidence he could take to a Tribunal in relation to earlier recruitment exercises.

30. The claimant had been given adjustments for previous interviews including receiving the questions in advance. On one occasion at least he had been given the whole interview pack which included the probe or prompt questions and also the positive and negative indicators for the various questions / competences.

Policies and procedures

31. We were not referred to much by way of policies and procedures. We saw a signaller competence overview document which included a list of non technical skills identified as necessary for the role and which we saw reflected in the competence assessment at the interviews for the role the claimant applied for. We were not referred to any policies and procedures the respondent may have about recruitment and/or disability.

Respondent's recruitment processes

32. We were told that, at the relevant time, there was a difference between how recruitment for signaller vacancies was carried out in relation to internal and external candidates. At the time external candidates had to take aptitude tests which assessed suitability. One part of these tests was behavioural questions and one part assessed concentration, reaction speed and multi tasking abilities. To be invited to interview, an external candidate would have to pass the aptitude test.

Relevant training managers had

33. Mr Proctor told the Tribunal that he had done an e-learning module on diversity and inclusion in recruitment covering race, sex, disability etc. Mr Pearson, who was relatively new to Network Rail at the relevant time, said that he had had diversity and inclusion training in previous roles and had recruitment experience in previous roles for the best part of twenty years.

Chronology

34. The claimant has a BEng in railway technology. He has other specialist qualifications including one in advanced signalling technologies.

35. On 25 October 2017, the claimant commenced employment with the respondent as an assistant design engineer in signalling. He has been employed in that position to date but has moved within that role and undertaken secondments

36. In July 2021, the claimant applied for a grade 7 signaller role in Cambridge. He undertook the process for external applicants. On 4 August 2021, Mr J Coote, senior resourcing advisor, wrote to the claimant about reasonable adjustments in that recruitment process. The claimant was given 50% additional time for the aptitude tests for that role.

37. On 9 August 2021, Mr Coote emailed the claimant to say that the claimant had not met the benchmark for consideration for any signaller vacancies. The test scores would stand for six months. Mr Coote offered the claimant a meeting with the assessment specialist. The claimant emailed back to say that he knew he would not meet the benchmark as there were a number of areas of the test where he was at a severe disadvantage and he did not think the reasonable adjustments in place would in any way help.

38. The claimant had a phone call with Ms Conacher, assessment consultant. The claimant said that Ms Conacher said that his test suggested he would not be good for any signaller role. He told the Tribunal that the adjustments had not been reasonable; he was being given more time to make the same mistakes. He said that the aptitude test was not fit for purpose and was not geared towards people with neurodiverse qualities.

39. On 25 August 2021, the claimant applied for a vacancy of signaller grade 3 at Oakham signal box as an internal candidate. He made the application via the respondent's online job vacancy portal. As an internal candidate, he was not required to undertake an aptitude test.

40. Mr Pearson was the manager responsible for this role, which was a relief signaller vacancy covering nine signal boxes and two level crossings.

41. In his application, the claimant ticked that he had a disability. This triggered a discussion about adjustments with Ms N Cooper, resourcing adviser, on 13 September 2021. An agreement was made that claimant would have longer interview time and would receive the interview questions 48 hours in advance. He would have the opportunity to write down the answers and bring the written answers to the interview.

42. The claimant did not expressly ask to have the probe or prompt questions also provided in advance. He said that he had tried to ask 'subliminally' by asking for the full questions. It was put to him in cross examination that it would have been straight forward to ask for the prompt questions if he genuinely felt he needed them. The claimant said he felt implicit pressure not to ask for further adjustments as he felt it would count against him and lead to confirmation bias. He said that he had hoped to get the whole interview pack as he had on a previous occasion.

43. The claimant agreed that it might be easier for an interviewer to get someone back on track with oral questions than with written questions but said that he would struggle with trying to speak fluidly in the situation where the prompt questions were oral. He agreed that the extra time was provided to deal with that issue but said that he wanted 'belt and braces', the extra time and the prompt questions in advance.

44. Ms Cooper spoke with Mr Pearson. Mr Pearson told the Tribunal that Ms Cooper mentioned that the claimant had a neurological condition and set out the adjustments he required. Mr Pearson agreed to the adjustments and commented to Ms Cooper that it was right to give everyone a fair chance. Mr Pearson said that if the claimant had divulged more about his conditions in advance of the interview, he would have sought further advice. Mr Proctor said that they were guided by HR about what reasonable adjustments were required. Both said they had noted from the claimant's CV that he had a neurological disability.

45. At some point, Mr Pearson and Mr Proctor had a conversation about the fact that the claimant's disability was neurological in nature and that it might have an impact on his ability to make quick judgements. They discussed concerns about the possible impact of the claimant's disability on his ability to make quick decisions in a high pressure environment. In his witness statement, Mr

Proctor was unsure whether that conversation was before or after the claimant's interview. In oral evidence, both managers believed that the discussion occurred after the interview and reflected their assessment of the claimant in the course of the interview. We accepted that evidence; it made sense that that discussion would have happened as part of an assessment after the managers had seen the claimant rather than having occurred spontaneously prior to the interview, at a time when the managers had neither been provided with any real information about the claimant's disability nor had a chance to assess him.

46. The claimant was provided in advance with the main questions which Mr Pearson planned to ask. He was not provided with the follow up questions. Mr Pearson had believed when he sent the entire interview pack to HR with the questions he intended to ask highlighted that the whole pack would be sent on to the claimant. Instead, someone in HR extracted the questions and sent these to the claimant in a separate document.

47. The claimant prepared written answers to the questions and he emailed these to the interviewers at the outset of the interview.

48. On 24 September 2021, the claimant attended the interview with Mr Proctor and Mr Pearson. It was the respondent's practice to have two managers on the panel. Mr Pearson had asked Mr Proctor as he had long experience with the respondent whereas at that point Mr Pearson had only been in post some eighteen months. This was Mr Pearson's first recruitment process for the respondent.

49. We saw scoring sheets which included guides for managers on how to carry out the scoring. What Mr Pearson described as the interview pack included questions, space for notes and scores and guidance on the scoring. It was structured so that there was a section relating to each competence.

50. The instructions told the managers that the purpose of the interview was to assess the extent to which the candidate demonstrated competence in:
    - Understanding of and research into the role;
    - The eight non-technical skills areas;
    - Speaking and listening skills.

51. The interview started with a question selected from a list of overview questions such as 'What are you interested in [about] this post'.

52. In each competence area, questions were provided designed to test the competence and examples of probing questions were also provided. The selection of probing questions clearly depended on the content of the original answer.

53. The speaking and listening assessment comes at the end of the interview and 'will take account of how well the candidate has answered the questions, how well they have formulated a response and whether the candidate demonstrated effective listening'.

54. The competences were marked on a scale of 1 - 5, using positive and negative indicators provided for each question.

55. If a candidate had a 1 or 2 for any competence, the interviewer was required to deduct marks; for a 2, the deduction from the overall marks was 3 marks.

56. There were two other candidates interviewed: Ms A Dowdall, who was not in a signaller role but was employed by the respondent in another role, and Mr R Sprigg who was already in a signaller role with the respondent.

57. Neither of the interviewing managers knew the claimant. Mr Proctor knew of Ms Dowdall but did not know her well. He did not know Mr Sprigg. Mr Pearson did not know Ms Dowdall but did know Mr Sprigg, who was a signaller in his team.

58. The claimant and Ms Dowdall had the interview pack for external candidates and Mr Sprigg the pack for internal candidates. This was intended to level the playing field. Mr Sprigg was asked questions about signalling scenarios whereas the other two candidates were asked questions which did not require specific signalling experience and knowledge. Ms Dowdall was asked the same initial questions as the claimant although her prompt questions depended on the contents of her responses to the initial questions.

What Mr Pearson and Mr Proctor knew before the interview

59. Mr Pearson and Mr Proctor had limited information about the claimant's disabilities. They knew from the claimant's CV and Ms Cooper that he had a neurological condition. They were not aware of any details of the claimant's impairments.

60. Mr Pearson did not know that the claimant had failed the aptitude test for the grade 7 role. He said in his witness statement that he might not have agreed to interview the claimant had he been aware as the aptitude test was the minimum requirement. However, it appeared in his oral evidence, that that was his view when he believed that the earlier application had been for the same role. When he understood that it was for a different role, he said that it would not have affected his view on interviewing the claimant for the grade 3 role.

In the interview

61. The interview ran for about two hours rather than the 45 minutes allowed for other candidates. The claimant said that he was not aware of how much extra time he would be allowed.

62. The claimant read out his prepared written answers. The claimant was asked a number of probe or prompt questions. He told the Tribunal he felt disadvantaged by these.

63. Mr Pearson said that the questions were asked to help the claimant where he had not provided a full enough answer or had not understood what was being looked for. Mr Pearson said that the probe questions could not have been provided before he knew what answers the claimant had given to the initial questions. Some of the questions were standard prompts selected from the interview pack and some were ad hoc questions which arose from the claimant's answers.

64. There was a question about the derailment of a train. The claimant said that he said that he would place the signals to danger and call his manager in those circumstances. The claimant said that Mr Pearson subsequently told him that the model answer also included calling 999. The claimant took issue with that in his witness statement but the matter was not explored with Mr Pearson in evidence and we were not able to reach any conclusions about it.

65. The claimant said that he was asked what he would do in times of inactivity and his answer was that he would take time to check and test the signalling system. Mr Proctor's account was that the claimant said that he would spend periods between trains passing attempting to test routes which were not frequently used or testing the integrity of the interlocking. He said that signallers should have strategies for maintaining alertness but that operating signalling equipment without the need to do so can create risks. There are certain mandatory routine tests of the signalling equipment but otherwise a signaller should not be touching it unless he or she had to.

66. Mr Pearson said that that, whilst the claimant gave some good answers, he felt that some of his answers were unsafe. He said that the claimant had said that he would go on the track in response to a question about a points failure or level crossing failure. Mr Pearson said that signallers never walk on the track. The fact that claimant said this was a 'massive concern' for him. Mr Pearson was looking for candidates to say that they would do whatever they had learned in signalling school. What was important to him was that the candidates demonstrated that they understood the importance of relying on their training and established processes and policies.

67. Mr Pearson said that when he told the claimant that he could not walk out on the track, the claimant said that he could walk on the track. Mr Pearson was

concerned by this as he said that it suggested that the claimant would not comply with training.

68. Mr Pearson said that the claimant asked about reasonable adjustments and said that he would require an adjustment of stopping all trains and phoning his manager for guidance when issues arose. Mr Pearson said that stopping all trains would not be the correct approach to every possible incident. In oral evidence he said that a signaller would only stop all trains in extreme circumstances

69. Mr Pearson went through the answers given by the claimant for each competency and told the Tribunal about issues with some answers in particular:

Overview questions: In response to questions about the challenges of the role, the claimant did not highlight fatigue or the boredom of lone working. He repeatedly talking about checking the signalling system was working correctly and rehearsing what to do in unexpected situations. Mr Pearson said that rehearsing in the signal box was inappropriate and might slow down the claimant's response to an emergency.

Conscientiousness: The claimant was asked about a time when he uncovered a mistake which he was responsible for. He spoke about an error which had been highlighted by someone else.

Attention management: The claimant was asked about processes he used to keep focussed on a job which was boring or where not much was happening. He spoke about making cups of tea and testing equipment.

Controlled under pressure: The claimant's answer was about redistributing workload rather than managing pressure in a situation where forward planning was not possible.

Communications: After prompting, the claimant engaged in a discussion about safety critical communication, including 'repeat back' but did not mention use of the phonetic alphabet. The claimant spoke about his skill as a persuader. Mr Pearson felt that could lead to an unsafe situation if the claimant focussed on persuading rather than following process.

For speaking and listening the claimant received a score of 3. This reflected some strong features such as good vocabulary and active listening but also some weak aspects such as digression and the need for a lot of prompting.

The claimant scored strongly on the questions in safety, planning and decision making and willingness and ability to learn.

70. Each candidate was scored separately by each interviewer and they then discussed the scores and gave a final score for each answer. Mostly they gave the claimant the same scores. We could see from the sheets that the

interviewers had ticked positive and negative indicators where they felt these applied.

71. Mr Pearson told us that the amount of prompting required would be taken into account in the scoring. Someone who required a lot of prompts to get to the right answer would lose marks. Mr Pearson said that he had always followed this approach in twenty years of recruiting.

72. Mr Proctor said that if the claimant had asked for adjustments to be made relating to the contents of his responses or the scoring of the responses he would have had concerns about that, given the nature of the role.

73. Overall, Mr Proctor said that the claimant's responses were verbose and frequently digressed from the point being discussed. He said that he commented to Mr Pearson that Mr Pearson had had been very patient with the claimant, given that his responses had often been off topic. Mr Pearson also described the claimant as digressing a great deal. He asked a number of probe questions to try to get him back on track.

74. Mr Proctor said of the prompting questions that if a candidate went off on a tangent and did not return when prompted, that would be a negative indicator. If a candidate was asked prompting questions and then hit the positive indicators, that might make the difference between a 4 and a 5 in the respondent's marking system. This seemed to be a slightly different approach from that of Mr Pearson, who seemed to suggest that someone who required a lot of prompts would not be awarded the highest mark.

75. Mr Proctor said that the signalling role was very dependent on following laid down regulations, rules and procedures so if he asked a specific question and got an answer which did not relate to that question, he would mark it down.

76. Mr Proctor was asked if it would have been reasonable for the claimant to have and respond to the prompt questions in advance. He said that he 'would not call it unreasonable, with the caveat that that if the claimant had got on the wrong track, it would not give us the opportunity to use prompts to get him on the right track.'

77. Mr Proctor said that the signaller role involves a lot of telephone work. A person needs to not digress and be clear, to get it right 'the first time and every time'.

78. The claimant scored 29. The two other candidates both scored 46. The successful candidate was Mr Sprigg, as he already worked as a signaller and

so could step into the vacancy immediately without requiring months of training. Furthermore Mr Pearson said he took into account the fact that Ms Dowdall did not yet have a driving license, which would make getting to different signal boxes more difficult,. He also considered it would be appropriate for her to start as a resident signaller to learn the details of one signal box thoroughly before undertaking the relief role which would require working in a number of different signal boxes.

79. Mr Pearson told the Tribunal that he had phoned Ms Dowdall to offer her feedback and to encourage her to apply for Mr Sprigg's vacant resident signaller role, which she was subsequently successful in obtaining.

80. Mr Pearson's evidence was that there was no threshold score for appointment to the signaller role. However, he said that if the highest score had been 29, he would have readvertised the role.

81. Both Mr Pearson and Mr Proctor said that whilst they had concerns about the claimant's ability to do the role, they nonetheless scored his responses in interview objectively without taking his disability into account. Mr Pearson said that he knew that if the claimant had a cognitive impairment which impacted his ability to safely perform the role, this would be picked up in the medical which all appointees to a signaller position are required to undergo after the interview process.

82. After the interviews, Mr Pearson and Mr Proctor went to see their line manager (Mr Strickland) to raise concerns about the claimant's interview. Both said they remembered very little about what concerns were discussed. Mr Pearson said that the discussion was about the interview and safety aspects in general, including what the claimant had said about going on the track. The purpose was to make the line manager aware that they had had a difficult interview, to keep him in the loop. They had a concern about how the claimant had got through to interview.

83. Mr Proctor could not remember definitely having gone to see Mr Strickland.

84. On 8 October 2021, the claimant was informed his application had been unsuccessful.

85. On 11 October 2021, the claimant emailed Helen Darlington in HR about the interview. He expressed frustration about the many interviews he had been to (he said about 400, which we understood to include some roles other than signaller roles) and his lack of success in almost all of these interviews. He wanted assistance with how to do better in interviews and he wanted better feedback. He expressed concern that his conditions were holding him back in interviews.

86. Mr Pearson gave evidence that he had been told by HR not to provide the claimant with feedback directly and that his comments would be provided by HR to the claimant. He was not able to tell the Tribunal the reason why he had been told not to give the feedback directly. No explanation was provided on the respondent's behalf. The Tribunal could imagine a range of possible reasons – from a concern about relaying the feedback sensitively to a concern that the managers would reveal a discriminatory approach. However we had no actual evidence on the issue.

87. As a result of the advice he received from HR, Mr Pearson said he avoided some phone calls from the claimant. However on 20 October 2021, he was dealing with a serious safety incident and received a call from a number he did not recognise. He thought the call might relate to the safety incident and so he picked up. It was the claimant asking for feedback. Mr Pearson explained that the feedback would come via HR but he said that the claimant continued to push for feedback so he gave him some brief comments, focusing on the safety aspects of the claimant's responses.

88. The claimant made some complaints about what Mr Pearson had said in this phone call. In his witness statement he said that Mr Pearson said 'that he was concerned about whether I was medically able to do the role'. In cross examination the claimant accepted that Mr Pearson had not used those words but said that was his understanding of what Mr Pearson meant.

89. The claimant said that Mr Pearson said words to the effect: 'We think you would struggle with going bang bang bang bang' because the claimant had stuttered on questions. He said that Mr Pearson had said his answers were good but that they did not think he could do the role.

90. The claimant's interpretation of the 'bang bang bang' remark was that Mr Pearson was questioning whether he would be able to replace signals to danger in the correct sequence as a function of his neurological condition.

91. Mr Pearson accepted that he had made the 'bang bang bang' remark and that it related to fluidity of speech. He said that he did not recall saying anything about stuttering. It was not put to Mr Pearson that he was referring to the claimant's ability to put the signals to danger and the gist of his evidence was that he was concerned about safety critical communications, which he said were a massive part of the role.

92. We accepted that Mr Pearson's concerns were about speedy and clear communications. This tallied with the concern he had expressed in his interview for the claimant's grievance.

93. The claimant said that Mr Pearson said: 'I would highly discourage you from going for safety critical roles [or signalling] roles in future'. The claimant could not remember whether it was safety critical roles of signalling roles that Mr

Pearson referred to. Mr Pearson told the Tribunal that he absolutely had not said that. He said that a person could have a bad interview and then a strong one the next time.

94. We noted however that Mr Pearson did seem to hold the view that the claimant was not suitable for a signaller role. He said later when interviewed in respect of the claimant's grievance: 'The feedback was he couldn't respond to emergency situations, he is not a good candidate for a signaller role.'' In his witness statement, he said about this remark that it reflected his view at the time, although he nonetheless denied making the remark.

95. It seemed to us that what was in his statement and the grievance notes was a more accurate reflection of his views about the claimant's ability to do the signaller role than what he said in oral evidence to the Tribunal and we concluded that he had told the claimant on the phone call that he would discourage him from going for signaller roles in the future. Indeed in the grievance interview, he appeared to acknowledge that he had given that feedback to the claimant.

96. The claimant also said that Mr Pearson said, when asked whether there could be any reasonable adjustments to his working environment: "Are you kidding? This is a safety critical role."

97. In his grievance interview, the claimant's account of what Mr Pearson said was: 'I said to him because I have a disability you must apply reasonable adjustments, he said we can't do that as it is a safety critical role. He said it twice.'

98. That particular statement was not put to Mr Pearson for his response and in any event we concluded it was an unlikely remark for him to have made. He was aware of other signallers for whom adjustments were made and also of the fact that the claimant would have undergone a medical assessment if he had got through the interview which might have led to adjustments being made.

99. It may well be that Mr Pearson said something about there being a limit to the adjustments which could be made to a safety critical role but we did not conclude that he suggested that there could be no adjustments.

100. On 21 October 2021, the claimant submitted a grievance. He said that the grievance was against Mr Pearson as Mr Pearson had not taken his reasonable adjustments into account but assumed that because he could not communicate fluidly, he could not do other things fluidly like replace a signal to danger. He said that the assessment of his competence to do these tasks

should have been the role of an occupational health professional and not a hiring manager.

101. Ms Connacher wrote to Ms Darlington and Mr Coote:

The first role he applied for was a grade 7 role in Cambridge in August 2021. A member of the team spoke to him on the 5th August to understand his disability and needs, took him through the process and agreed reasonable adjustments for the next stage of the process which includes aptitude testing and safety and risk profile questionnaire (standard process for all Signallers externally). He was provided with additional time as per his own request. He was regretted from this vacancy as he didn't meet the standard for the tests. He was given the opportunity to apply again after 6 months (this is the minimum period of time that is recommended for test retakes by the British Psychological Society, the test provider and also is in line with our policies).

We provided him with the option to speak to me as a psychologist to give him some feedback on the tests, explore his rationale for wanting to become a Signaller and to find a way forward for him regarding Signalling but also other roles within the organisation where he could be happy, flourish and use his skills to his best advantage. During our feedback session, he disclosed that he felt he would struggle with many aspects of the Signaller role as well as Initial Signaller Training. He also, at times, didn't seem to understand that as a Signaller, he would need to be able to communicate with others continuously, respond to situations quickly, be responsible for the safety of his colleagues and customers and that he would need to follow rules set for him as an operator of the system rather than challenge them as he knows how the systems works from an engineering perspective.

Also, during the feedback session, he disclosed that he was not being supported in his current role, he said he was being given nothing to do and was being ignored by both his line manager and HR. He said he had no reasonable adjustments in place. Due to this, I sought the advice of the D&I team to see what their suggestions were in terms of supporting him in the workplace and beyond and also on next steps that should be taken in terms of him applying for further Signaller roles and there being a concern about his own / others safety within such a safety-critical role.

102. Cross examined about the content of this email, the claimant said that what he was saying was that he would struggle with the role without reasonable adjustments. He said that there was an off the cuff offer of a discussion with the psychologist, but nothing came of it.

103. On 8 November 2021, there was a grievance hearing between the claimant and Mr C Etherington, HR business partner, who had been appointed to investigate his grievance. The claimant reported to Mr Etherington that Mr Pearson had said: "You are not fit for this or any other signaller role."

104. Another issue raised by the claimant during the hearing was that he believed nepotism played a role in this and other appointments.

105. On 12 November 2021, Mr Etherington interviewed Ms Conacher, assessment consultant, and Mr Coote.

106. We noted the following from the interview notes:

JC [Mr Coote] : Initially the key findings was that there were two systems that we tried to deliver with one process. One section was internal Signallers going grade 4-7 or externals. There were resource practicalities and externals were seen as a quick win, so we did that first. When applying externally we picked him up as a reasonable adjustment candidate. I spoke to him and explained to him the process and explained that the testing is much more relevant to a Signaller role. We now monitor aptitude, personality, safety and ability to multitask which is essential for a Signaller. AC's difficulty is he would have gone through the tests and didn't hit anywhere near the benchmark with reasonable adjustments and then he applied internally where we don't administer testing.

CE: He applied externally and failed the tests considerably?

JC: We have different bandings for scores in relation to grades and his was well below the absolute cut off benchmark where a Signaller role is not for you. We have months of training for Signallers, and it is a significant investment, and we want people who will make the cut

TC [Ms Conacher] : For a duty of care, we need to make sure they are competent, and we have to consider safety for the members of the public. There is a duty of care to ensure the employees are happy in the role and can perform it safety. There were concerns around the level of aptitude which we have taken legal advice on. Recently we had two people with autism go through the process who have been successful in roles. We took the same approach with these two individuals. Where we can mimic the process, we would go down that avenue but where the stakes are so high it is so important to choose the right individual for the role.

TC: And from the emails it said something similar. Where we know someone has ASD we would manually look at the scales e.g with personality questions they may struggle but we can isolate those scales, but in AC situation he scores in the first percentile. He couldn't have got a worse score.

JC: They are safety critical roles, we have decided and made the case to the Trade Unions and we know that the tests work. With external recruitment we want a benchmark and some baseline for all signallers to ensure a certain degree of safety behaviours. It is critical.

JC:…we do have disabled signallers. It is about being realistic to the level of reasonable adjustments that can be put in place with a safety critical role.

107. On 13 November 2021, Mr Etherington interviewed Ms Cooper. Ms Cooper said:

NC shared that the recruiting hiring manager for the role, Stephen Pearson (SP), wanted to thank AC for taking part in the interview and wanted to get across that he was impressed by some of the answers that he had given. He also wanted to express that AC was pipped at the post by another candidate who had performed better on the day.

NC said that she was disappointed that AC received his rejection notice before she had an opportunity to speak with him and to pass long SP's afore mentioned feedback. After he received his rejected letter from the role, NC felt that AC did not want to speak with her about his feedback as he was upset by the outcome.

NC reflected that the company had made a number of reasonable adjustments for AC and could not think of what other support could have been offered. She suggested that AC may have struggled with the real time reactions required by the role.

NC also highlighted that there were other colleagues with similar disabilities who were performing similar roles to the one that AC applied for. She argued that they can't be discriminating against this specific disability if other colleagues with the same disability are already employed in similar roles.

CE speculated that AC was given an advantage as he was invited to interview despite failing the psychometric tests. NC agreed and said that internal candidates in general were at an advantage as they were not subject to the psychometric profiling that external candidates are.

108. We note in passing that the feedback which Ms Cooper believed Mr Pearson wanted passed on to the claimant did not reflect Mr Pearson's real views and would not therefore have been helpful to the claimant.

109. 24 November 2021: Mr Etherington interviewed Mr Proctor:

SP [should be CP] confirmed that both himself and CP [should be SP] raised concerns about AC's suitability to undertake the role given the concerns about AC's ability to make quick decisions in a high pressure environment.

CP stated that they have other colleagues with disabilities within the signalling team, and they do not discriminate on the grounds of disability

CE asked CP if he was aware of AC's disabilities, CP confirmed that they had some awareness that it was primarily a condition which impacted on his decision making skills, and ability to make quick judgments, CP did say though that this was some time ago and he could not recall more specifically.

110. On 2 December 2021, Mr Etherington interviewed Mr Pearson. Mr Pearson said that he had a chat with Ms Cooper to discuss the claimant but he did not know the claimant's disabilities. He was asked if the claimant could have

longer for the interview questions in advance and an interview by zoom and he said that would not be a problem. He said that the claimant had done all right and had some good answers but he went off on a tangent and it was difficult to pull him back. He said: 'The feedback was he couldn't respond to emergency situations, he is not a good candidate for a signaller role…He should never have got through to me as he failed the signalling competencies. I didn't know the depth of his disability at the time. If I knew he had failed SHL I wouldn't have interviewed him just for fairness and consistency.'

111. As discussed earlier in these Reasons, in oral evidence, Mr Pearson said that at this point he thought that the claimant had failed the test for the same role not for the grade 7 role. He would not have excluded him from this interview for failing the aptitude test in relation to the grade 7 role.

112. On 10 December 2021, the claimant attended a further grievance hearing. Mr Etherington did not uphold his grievance.

113. On 24 January 2022, the claimant submitted his claim form.

Evidence about signallers with disabilities

114. Apart from the evidence about autistic signallers from the interview notes of Ms Conacher and Mr Coote, we heard the following evidence. Mr Pearson told us about a diabetic signaller, who had an adjustment of having a phone in the signal box at all times (not a facility allowed for signallers in general), Mr Pearson told the Tribunal about interviewing a candidate who was deaf in one ear. The candidate made it through to the medical assessment and was asked to do a risk assessment in a signal box. The candidate withdrew of his own accord when he was unable to hear the six bells signal. Mr Pearson said that he was an outstanding candidate and that he would have loved to work with him.

115. Mr Proctor gave evidence that he managed a shift signaller manager with one arm.

Submissions

116. We heard detailed and helpful oral submissions from both parties. We took all of the submissions into account but refer to them below only insofar as is necessary to explain our conclusions.

Law

Direct disability discrimination

117. In a direct discrimination case, where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of mental processes of the individual

responsible; see for example the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31 to 37 and the authorities there discussed. The protected characteristic need not be the main reason for the treatment, so long as it is an 'effective cause': O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372.

118. This exercise must be approached in accordance with the burden of proof provisions applying to Equality Act claims. This is found in section 136: "(2) if there are facts from which the Court could decide, in the absence of any other explanation, that person (A) contravened the provision concerned, the Court must hold that the contravention occurred. (3) but subsection (2) does not apply if A shows that A did not contravene the provision. "

119. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975). They are as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden 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, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

120. We bear in mind the guidance of Lord Justice Mummery in Madarassy, where he stated: 'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.' The 'something more' need not be a great deal; in some instances it may be furnished by the context in which the discriminatory act has allegedly occurred: Deman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279, CA.

121. The tribunal cannot take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

122. The distinction between explanations and the facts adduced which may form part of those explanations is not a watertight division: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. The fact that inconsistent explanations are given for conduct may be taken into account in considering whether the burden has shifted; the substance and quality of those explanations are taken into account at the second stage: Veolia Environmental Services UK v Gumbs EAT 0487/12.

123. In Chief Constable of Kent Constabulary v Bowler EAT 0214/16, Mrs Justice Simler said: 'It is critical in discrimination cases that tribunals avoid a mechanistic approach to the drawing of inferences, which is simply part of the fact-finding process. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal; or they may be explanations that arise from a tribunal's own findings.'

124. Although unreasonable treatment without more will not cause the burden of proof to shift (Glasgow City Council v Zafar [1998] ICR 120, HL), unexplained unreasonable treatment may: Bahl v Law Society [2003] IRLR 640, EAT.

125. We remind ourselves that it is important not to approach the burden of proof in a mechanistic way and that our focus must be on whether we can properly and fairly infer discrimination: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. If we can make clear positive findings as to an employer's motivation, we need not revert to the burden of proof at all: Martin v Devonshires Solicitors [2011] ICR 352, EAT.

126. For an individual to be an actual comparator for the purposes of a direct discrimination claim, there must be no material difference in their circumstances: s 23 Equality Act 2010. Whether the situations of a claimant and his or her comparator are materially different is a question of fact and degree: Hewage v Grampian Health Board [2012] ICR 1054, SC.

Discrimination arising from disability

127. In a claim under s 15, a tribunal must consider:

- Whether the claimant has been treated unfavourably;

- Whether the unfavourable treatment is because of something arising in consequence of the employee's disability;
- Whether the employer knew, or could reasonably have been expected to know, that the employee or applicant had the disability relied on.

128. There are two aspects to causation:

- Considering what caused the unfavourable treatment. This involves focussing on the reason in the mind of the alleged discriminator;
- Determining whether that reason was something arising in consequence of the claimant's disability. That is an objective question and does not involve consideration of the mental processes of the alleged discriminator: Pnaiser v NHS England and anor 2016 IRLR 170, EAT.

129. An employer has a defence to a claim under s 15 if it can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

130. Assessing proportionality involves an objective balancing of the discriminatory effect of the treatment and the reasonable needs of the party responsible for the treatment: Hampson v Department of Education and Science [1989] ICR 179, CA.

131. If there is a link between reasonable adjustments said to be required and the disadvantages or detriments being considered in the context of indirect discrimination and/or discrimination arising from disability, any failure to comply with the reasonable adjustments duty must be considered 'as part of the balancing exercise in considering questions of justification': Dominique v Toll Global Forwarding Ltd EAT 0308/13. The EAT commented that it was difficult to see how a disadvantage which could have been alleviated by a reasonable adjustment could be justified.

132. Mr Liberadzki referred us to the case of Private Medicine Intermediaries Ltd v Hodkinson and others UKEAT/1034/15/LA for the guidance of Eady J that unfavourable treatment suggests the placing of a hurdle in front of or creating a particular disability or disadvantage for a person. Treatment which is advantageous will not be unfavourable merely because it might have been more advantageous.

Failure to comply with a duty to make reasonable adjustments

133. Under s 20 Equality Act 2010, read with schedule 8, an employer who applies a provision, criterion or practice ('PCP') to a disabled person which puts that disabled person at a substantial disadvantage in comparison with persons who are not disabled, is under a duty to take such steps as are reasonable to avoid that disadvantage. Section 21 provides that a failure to comply with a duty to

make reasonable adjustments in respect of a disabled person is discrimination against that disabled person.

134. In considering a reasonable adjustments claim, a tribunal must consider:

- The PCP applied by or on behalf of the employer or the relevant physical feature of the premises occupied by the employer;
- The identity of non-disabled comparators (where appropriate) and
- The nature and extent of the substantial disadvantage suffered by the claimant.

Environment Agency v Rowan [2008] ICR 218, EAT.

135. The concept of a PCP does not apply to every act of unfair treatment of a particular employee. A one-off decision can be a practice, but it is not necessarily one; all three words connote a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again: Ishola v Transport for London [2020] EWCA Civ 112.

136. A claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred, in the absence of an explanation, that the duty has been breached. There must be evidence of some apparently reasonable adjustment which could be made, at least in broad terms. In some cases the proposed adjustment may not be identified until after the alleged failure to implement it and this may exceptionally be as late as the tribunal hearing itself: Project Management Institute v Latif [2007] IRLR 579, EAT. There is no specific burden of proof on the claimant to do more than raise the reasonable adjustments that he or she suggests should have been made: Jennings v Barts and the London NHS Trust EAT 0056/12. The burden then passes to the respondent to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one.

137. By section 212(1) Equality Act 2010, 'substantial' means 'more than minor or trivial'.

138. When considering what adjustments are reasonable, the focus is on the practical result of the measures that can be taken. The test of what is reasonable is an objective one: Smith v Churchills Stairlifts plc [2006] ICR 524, CA. The Tribunal is not concerned with the processes by which the employer reached its decision to make or not make particular adjustments nor with the employer's reasoning: Royal Bank of Scotland v Ashton [2011] ICR 632, EAT.

139. Carrying out an assessment or consulting an employee as to what adjustments might be required is not of itself a reasonable adjustment: Rider v Leeds City Council EAT 0243/11, Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664, EAT.

140. Although the Equality Act 2010 does not set out a list of factors to be taken into account when determining whether it is reasonable for an employer to take a particular step, the factors previously set out in the Disability Discrimination Act 1995 are matters to which the Tribunal should have regard:

- The extent to which taking the step would prevent the effect in relation to which the duty was imposed
- The extent to which it was practicable for the employer to take the step
- The financial and other costs that would be incurred by the employer in taking the step and the extent to which it would disrupt any of its activities
- The extent of the employer's financial and other resources
- The availability to the employer of financial or other assistance in respect of taking the step
- The nature of the employer's activities and the size of its undertaking
- Where the step would be taken in relation to a private household, the extent to which taking it would (i) disrupt that household or (ii) disturb any person residing there

This is not an exhaustive list.

Knowledge

141. An employer is not subject to a duty to make reasonable adjustments if it did not know or could not reasonably be expected to know:
- That the employee has a disability; and
- That the employee is likely to be placed at a disadvantage by a PCP: Schedule 8, para 20(1)(b) Equality Act 2010.

142. An employer has a defence to a claim under s 15, if it did not know or could not reasonably have been expected to know of the employee's disability: s 15(2) Equality Act 2010.

143. Lack of knowledge that a disability caused the 'something arising in consequence' of which the employee was subjected to unfavourable treatment is not a defence to a claim under s 15: City of York Council v Grosset [2018] ICR 1492, CA.

144. An employer must do all it can reasonably be expected to do to find out whether an employee has a disability: EHRC Employment Code, para 5.15.

Amendment

145. In considering an application to amend a claim, a Tribunal will have particular regard to the balance of hardship and injustice in refusing or allowing the amendment, together with any relevant factors. Those include the factors set out in Selkent Bus Co Ltd v Moore [1996] ICR 836, EAT:

- The nature of the amendment: The Tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action.
- Applicability of time limits: If a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim/cause of action is out of time and, if so, whether the time limit should be extended.
- Timing and manner of the application: Delay in making the application is a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the identification of new facts or new information from documents disclosed on discovery.

146. The merits may be relevant to an amendment application; if a proposed claim is obviously hopeless, that consideration affects the assessment of the injustice caused to a claimant by not being able to pursue it. Nothing is lost in not being able to pursue a claim which cannot succeed: Herry v Dudley MBC and anor EAT 0170/17.

147. Time limits are simply a factor in the exercise of the discretion although they may be an important and potentially decisive one. The fact a time limit has expired will not prevent the tribunal exercising its discretion in favour of allowing an amendment, although it will be an important factor in the scales against allowing the amendment: Transport and General Workers' Union v Safeway Stores Ltd EAT 0092/07.

148. The core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The parties must therefore make submissions on the specific practical consequences of allowing or refusing the amendment. If the application to amend is refused, how severe will the consequences be, in terms of the prospects of success of the claim or defence? If permitted, what will be the practical problems in responding? Where the prejudice of allowing an amendment is additional expense, consideration should be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party can meet it: Vaughan v Modality Partnership [2021] ICR 535, EAT

Conclusions

Disability discrimination/harassment

Issue: 1. Whether Claimant was a disabled person

149. It was agreed that, at the material time, the claimant was a disabled person within the meaning of the Equality Act 2010.

Direct discrimination: Equality Act 2010 s13

Issue 2. The Claimant alleges that the Respondent did the following things which constituted direct disability discrimination:

2.1 gave the Claimant a far lower score at interview compared to the other two applicants;

2.2 rejected the Claimant's application for the role of Signaller;

150. There is no dispute that the respondent gave the claimant a lower score than the actual comparators he relies on and rejected the claimant's application for the role of signaller.

Issue: 2.3 told the Claimant that he should not apply for safety critical roles in the future.

151. We found that Mr Pearson had advised the claimant that he was not suitable for signaller roles (rather than all safety critical roles) during the phone call where he provided feedback. This was a modest difference from the case as identified in the list of issues and the respondent had the opportunity to deal with it in evidence.

Issues: 3. Whether treatment was less favourable

3.1 In doing the acts complained of at paragraphs 2.1 - 2.3 above, did the Respondent treat the Claimant less favourably than it treated the other role applicants and/or a hypothetical comparator?

3.1.1 If so, was there any material difference between the circumstances relating to the Claimant and the other applicants and/or a hypothetical comparator?

3.2 In doing the act complained of, did the Respondent treat the Claimant less favourably than it would have treated others in comparable circumstances?

4. Reason for less favourable treatment

4.1 If the Respondent treated the Claimant less favourably, was this because of the Claimant's disability?

152. On the issue of whether Ms Dowdall and Mr Sprigg were actual comparators, Mr Liberadzki referred us to section 23(2) Equality Act 2010 for the principle that in a direct disability discrimination case the relevant circumstances include a person's abilities and said that there was evidence of a difference in abilities between Ms Dowdall and Mr Sprigg on the one hand and the claimant on the other.

153. The difficulty we had with that proposition is that it would have required us to take as an objective fact that the comparators were more able to do the signaller role than the claimant because they scored higher than he did in interview, in circumstances where the claimant's case was in essence that that perception on the part of the managers was caused by his disabilities.

154. It seemed to us that we could not take as objective fact the very finding the claimant sought to impugn. It did however also seem to us that that the fact that Mr Sprigg already worked as a signaller and therefore by definition had already succeeded in an interview for that role and had skills and experience acquired in the training for the role and in the role itself was a material difference in circumstances and meant that he was not an actual comparator.

155. We concluded that Ms Dowdall was an actual comparator, alternatively that we should consider the treatment of a hypothetical comparator.

156. So far as Ms Dowdall was concerned, there was a difference in disability status and a difference in treatment in the following respects:

- Ms Dowdall received a much higher score in interview than the claimant;
- Ms Dowdall was not told she should not apply for other signaller roles but was encouraged to apply for Mr Sprigg's vacated role.

157. Were there facts in addition to the difference in status and treatment from which we could reasonably conclude that the claimant's disabilities had played a material role in the less favourable treatment he received than Ms Dowdall? Alternatively were there facts from we could conclude he was treated less favourably than a hypothetical comparator would have been in relation to all three matters he complained of?

158. We carefully considered a number of features which might have caused the burden to shift, taken individually or together. As to the meeting Mr Pearson and Mr Proctor had with their line manager after the claimant's interview, we formed an impression that the witnesses were potentially being cagy with the Tribunal. We did not get a clear idea of what was raised and why and there was some tension between some of Mr Pearson's apparent remarks about the claimant possibly being appointable and having just been beaten by higher scoring candidates and the fact that he had sufficient concerns about the interview to go and see his manager about the claimant.

159. We were not able reasonably to conclude that the source of that tension was the fact that Mr Pearson had doubted the claimant's abilities because of his disability and that that was the reason or part of the reason for seeing his line manager. We bore in mind that he and Mr Proctor would have been well aware that the claimant would have to be assessed as medically fit for the role had he been selected in interview. Mr Pearson in particular seems to have had some confusion in his own mind about the claimant's appointability caused by the fact that, on the one hand, the claimant had had a reasonable interview overall and on the other hand had given some answers which caused concern about whether he might be a safety risk. We formed the impression that both managers were cagy in evidence about this discussion because they worried they might say the wrong thing in the context of a disability discrimination claim, but there was nothing in the evidence which would cause us to infer that that was because they were conscious of guilt as opposed to being in an unfamiliar context where they may have felt at risk of incriminating themselves.

160. We considered also whether there was any inference reasonably to be drawn from the fact that HR were to be gatekeepers of the claimant's feedback and the fact that no explanation was given for this arrangement.

161. We were left in a position where we could only speculate about possible reasons for this decision. We had to consider whether we could reasonably conclude that the reason was that HR and/or the managers were conscious that if the managers were to give feedback, they would reveal that they had been discriminatory.

162. We considered that we could not; there were any number of possible explanations, a number of which seemed to us to be more likely: the fact that the claimant had been identified as having some vulnerabilities leading to the psychologist's report was one possible reason to want HR to have control over the way feedback was presented to him. Another possible reason was that there was clearly an awareness that the claimant had by this point unsuccessfully applied for a number signaller roles and it is possible that HR had taken charge of feedback to the claimant for that reason.

163. We would comment that it would have been better had the respondent provided some evidence on this issue.

164. We considered whether there were any inferences to be drawn from what Mr Pearson actually said in feedback – the 'bang bang bang' remark and the comments about the claimant's suitability for any signaller role in particular. However we found him consistent and credible in the evidence he gave about how his concerns arose from the claimant's answers to questions rather than from the fact that the claimant had an (unspecified) neurological

disability. When we considered what would have happened had a candidate gone to the interview with the same information about a neurological condition, but proceeded to answer the questions in a way which more closely mirrored the positive indicators and did not make remarks such as the remark about going on the track or needing to stop all trains which the claimant made, it seemed to us that such a candidate would have received a much higher score and would not have received the feedback the claimant did.

165. We were concerned also about the account given by Ms Cooper in the grievance interview as to the feedback she said Mr Pearson was intending to give, which feedback seemed to us to be highly disingenuous. The notes were not however raised with Mr Pearson and we concluded we had to treat them with some caution. They may not have reflected very accurately or completely what Mr Pearson had said to Ms Cooper. Even if they did, it is quite possible that Mr Pearson was misguidedly seeking to soften the message out of sympathy for the claimant. In any event, it did not seem to us that we could fairly draw any inference from material not put to Mr Pearson.

166. We also bore in mind other contextual factors including the evidence we had that there were disabled signallers, including some with autism. We considered that it was important that the recruiting managers were aware that any appointee would be subject to an occupational health assessment; that would it seemed to us reduce what otherwise might be a sense that they might have that they needed to screen for impairments which could have safety implications.

167. We were not persuaded that the burden had passed to the respondent to prove that the treatment complained of was not materially caused by the claimant's disabilities. However, if we were wrong about that, we also concluded that, having regard to the respondent's explanation, we were satisfied that the fact of the claimant's disabilities did not play a material role in the treatment complained of.

168. We were provided with detailed and cogent explanations in writing and reflected in the oral evidence of the recruiting managers for the scores which the claimant received and which led to his not being appointed to the signaller role. He did well in relation to some competences for reasons which were apparent looking at his answers and the positive indicators and less well in relation to other questions for reasons which were also clearly set out and credibly explained.

169. So far as the feedback which Mr Pearson gave, we were satisfied that the reason for the feedback was the safety concerns which arose from the answers which the claimant gave to questions. The form of the feedback may have been a bit unpolished and clearly gave rise to ambiguities of

interpretation. The reason for this, we concluded, was that Mr Pearson was taken by surprise in the middle of dealing with a safety incident.

170. For these reasons, we did not uphold the claims of direct disability discrimination.

Discrimination arising from disability: Equality Act 2010 s15

Issue: 5. The Claimant alleges that the Respondent did the following things which constituted discrimination under section 15 of the Equality Act 2010:

5.1 gave the Claimant a far lower score at interview compared to the two other comparators;

5.2 rejected the Claimant's application for the role of Signaller; and

5.3 told the Claimant not to apply for safety critical roles in the future.

171. Again, a matter of fact, the claimant did receive a much lower score than Ms Dowdall or Mr Sprigg and his application for the signaller role was rejected.

172. We also accepted that the claimant was discouraged by Mr Pearson in his feedback from applying for signaller roles rather than all safety critical roles.

Issues 6. Whether Claimant treated unfavourably

And 6.2 Was this unfavourable treatment?

173. We concluded that the treatment identified was unfavourable. Mr Liberadzki argued that in respect to the scoring itself, there was no unfavourable treatment simply because the treatment might have been more favourable. On that analysis, receiving any points would be treatment outwith Section 15 because receiving any points at all is regarded as favourable treatment. It seemed to us that that analysis was misconceived where the complaint was of having received a lower score than other candidates. Receiving a low score is not properly understood as a benefit which could have been a more significant benefit. Scoring in recruitment is inherently about ranking or comparing, and ranking someone lower than other candidates is properly to be regarded as unfavourable treatment.

Issues: 6.1 Did the Respondent do the acts complained of at paragraphs 5.1 – 5.3 above because of something arising out of the Claimant's disability?

7. Reason for treatment

7.1 Was the unfavourable treatment because of something arising in consequence of he Claimant's disability? This gives rise to the following sub-issues:

7.1.1 Was the unfavourable treatment because of the perception that the Claimant could not carry out the role of Signaller?

7.1.2 Was the alleged perception that the Claimant could not carry out the role of Signaller something arising in consequence of the Claimant's disability?

174. Mr Liberadzki in his submissions posited that there were two possible interpretations of this issue:
- That there was an unfair perception that the claimant could not perform the role;
- That there was a fair perception that the claimant could not perform the role.

175. In the first instance, if there was an unfair perception that the claimant could not do the role, and that perception arose from the claimant's disabilities, that was in essence the same as the direct discrimination claims.

176. We agreed with that analysis. If the claimant's complaint is that he was subject to the unfavourable treatment because of an unjustified / unfair perception that he could not perform the role because of his disabilities, we consider that we have already considered and dismissed those claims. In any event we did not find that Mr Pearson and Mr Proctor had formed the view that the claimant could not do the job because of his disabilities.

177. If the complaint is that the unfavourable treatment occurred because Mr Pearson and Mr Proctor had a justified / fair perception that the claimant could not perform the role because of his disabilities, there would also be conceptual problems with the claim as so formulated. If someone received a lower score and then was rejected for a role because of a justified perception that they could not perform the role, the treatment would almost certainly be justified unless there was an identified failure to make reasonable adjustments which would have enabled the person to carry out the role satisfactorily.

178. We are not in a position to analyse the claim in that way, because there is no claim for failure to make reasonable adjustments to the signaller role itself as opposed to the recruitment process for the role.

179. In any event, we were not satisfied as a matter of causation that any perceptions that Mr Pearson and Mr Proctor had as to the claimant's ability to do the role arose from his disabilities rather than from his performance in interview. We were satisfied that after they had completed the scoring process, they did discuss whether the issues with the claimant's performance in interview may have arisen from his neurological disability. That connection

was made after they had concluded that his performance in the interview demonstrated, at least on this occasion, less aptitude for the signaller role than the other candidates had shown and in particular that the claimant might struggle to act quickly and communicate effectively in emergency situations.

180. If one adds a link to the chain and asks whether the claimant's performance in the interview was caused by his disabilities, it is not clear to us that his disabilities had an effect on the interview which led to the claimant receiving a lower score than the other candidates and/or to Mr Pearson concluding that he was not suitable for signaller roles in general. We had no expert evidence that linked the claimant's tendency to go off at a tangent with his disabilities although we could see that his need for prompts had depressed his scores to some unquantified extent. His listening and speaking score was only mildly depressed so the speed of communication, which was clearly linked to his aphasia, did not appear to have had a significant effect on his scores.

181. A factor which had had a significant effect on scoring were answers which caused concern to the recruiting managers about safety, such as the proposal to go on the tracks. We had no evidence that the answers given by the claimant in this respect were caused by his disabilities.

Issues: 8. Whether treatment justified

8.1 Was the treatment a means of achieving a legitimate aim?

8.2 If so, was it a proportionate means of achieving that aim? The aim put forward by the respondent was ensuring the health and safety of other staff, the public and the claimant

182. There can be no question that ensuring the health and safety of the public and staff is a legitimate aim for the respondent.

183. As we have observed above a justified decision that the claimant was not capable of carrying out a role which was itself safety critical would clearly be a means of achieving that aim. In the absence of findings (or an issue before us on which we could make such findings) that there were reasonable adjustments which the respondent could make which would enable the claimant to carry out the role safely, we would be unable to find that the treatment was not proportionate.

184. If we had found as a matter of causation that the treatment arose from a justified perception that the claimant could not perform the role, we would also have found that the treatment was justified.

185. For the above reasons, the section 15 claims did not succeed and are dismissed.

Indirect Discrimination: Equality Act 2010 s19

Issues: 9. The Claimant alleges that the Respondent did the following things which constituted indirect disability discrimination:

9.1 applied a provision, criteria or practice (PCP) of not making reasonable adjustments to safety critical roles.

186. We concluded that we simply had no evidence that the respondent applied such a PCP. There was, unsurprisingly, no evidence of an express policy but nor was there evidence of an unwritten practice.

187. We had some evidence that there were some disabled individuals who were employed in safety critical signaller roles. We were told of the adjustments made for the diabetic signaller although not details of any adjustments made for other disabled people in similar roles.

188. We had evidence that the claimant had applied unsuccessfully for many signaller roles but that was not of itself evidence that the respondent had a policy of not adjusting such roles for disabled candidates. We did not accept that Mr Pearson, had during the course of the feedback given to the claimant, made a generalisation about making adjustments in safety critical roles. If we had accepted that he made such a statement, it would not in any event have been very compelling evidence as to a wider policy or practice.

Issues: 10. Whether Claimant subjected to a relevant detriment

10.1 Did the Respondent do the act alleged at paragraph 9.1 above?

11. Whether Respondent applied a PCP

11.1 Did the Respondent apply the PCP at paragraph 9.1 above?

11.2 Did the Respondent apply the PCP in question to the Claimant?

11.3 Did the Respondent apply, or would the Respondent have applied, the PCP in question to people who did not have the same disability as the Claimant?

12. Whether PCP caused disadvantage

12.1 Did the PCP in question put, or would it have put, people who have the same disability as the Claimant at a particular disadvantage when compared with people who do not have the same disability as the Claimant?

12.2 Did the PCP in question put, or would it have put, the Claimant at that disadvantage?

13. Whether PCP justified

13.1 Was the PCP a means of achieving a legitimate aim?

13.2 If so, was it a proportionate means of achieving that aim?

183. It dd not seem to us to be a useful exercise to attempt to consider these issues in respect of a PCP which we did not find that the respondent applied.

184. It seemed to us in any event that formulating the PCP in this way would have presented difficulties of analysis and on the evidence in this case. To show disadvantage to himself as a result of such a PCP, the claimant would have had to show that there were reasonable adjustments which should have been made to the role and that the policy or practice of not making any such adjustments had prevented them being made. However, as he fairly and frankly told us, he did not know what adjustments could be made to the signaller role which would have made it possible for him to perform it safely. This claim would therefore have foundered at the stage of showing individual disadvantage. Had the claimant been able to point to adjustments which could and should have been made to the signaller role to enable him to take it up, the logical cause of action would have been a claim for failure to make reasonable adjustments.

185. On the other hand, if a respondent did have such a blanket policy, it is difficult to see any circumstances in which such a policy could possibly be justified.

186. We did not find that the claim of indirect discrimination was made out.

Duty to make reasonable adjustments: Equality Act 2010 s21

Issue: 14. The Claimant alleges that the Respondent failed to comply with a duty to make reasonable adjustments in the following ways:

14.1 applying a PCP of not making reasonable adjustments to safety critical roles;

187. We did not find that this was a PCP which the respondent applied, as per our conclusions in relation to the claim of indirect disability discrimination above.

Issue: 14.2 applying a PCP of interviewing candidates for roles without first undertaking an occupational health assessment; and

188. It was our understanding of the evidence we heard that it was the general practice of the respondent that candidates would be interviewed for the signaller role and undergo an occupational health assessment after having been selected. It may be that there could be situations in which an occupational health assessment was carried out at some other point but we did not hear any evidence about such situations.

189. We therefore concluded that this was a practice the respondent had and which it applied to the claimant.

190. The difficulty with this as a PCP was that the proposed adjustment which naturally flows from the PCP and which was put forward by the claimant was to have conducted an occupational health assessment of the claimant prior to the interview process. The difficulty is that such an assessment or consultation is not a step taken to avoid the disadvantage created by a relevant PCP according to the case law we refer to above.

191. It did not seem to us that it was a legitimate way of sidestepping that case law to seek to define the PCP as a failure to carry out consultation or assessment. As the case law emphasises, when looking at adjustments, the adjustments must relate to the role and not to the assessment of adjustments to the role. It follows that a PCP which relates wholly to the process for assessing or consulting about adjustments is not a PCP which falls within section 20.

192. We emphasise, as does the case law itself, that such consultation and assessment may be an important part of an employer complying with its duties and demonstrating to a Tribunal that it has done so. See Elias J in Tarbuck:

Accordingly whilst, as we have emphasised, it will always be good practice for the employer to consult and it will potentially jeopardise the employer's legal position if he does not do so— because the employer cannot use the lack of knowledge that would have resulted from consultation as a shield to defend a complaint that he has not made reasonable adjustments— there is no separate and distinct duty of this kind.

193. It is important also for employers to bear in mind that the EHRC Code of Practice contains a great deal of helpful guidance on the sorts of enquiries and assessments which an employer should make. Although, as Mr Liberadzki pointed out in submissions, there are statutory restrictions on the health and disability-related enquiries an employer may make before offering an employee a role (section 60 Equality Act 2010), questions are permitted where necessary for determining whether reasonable adjustments need to be made in relation to assessments, including an interview.

194. There is useful guidance at paragraph 6.27 about conducting a risk assessment to consider whether adjustments would present a risk to health and safety. Paragraph 6.32 emphasises that the starting point for making reasonable adjustments will frequently be consultation with the disabled person in question. There is useful guidance as to reasonable adjustments to recruitment processes at paragraphs 10.29 – 10.38.

195. We recognise that neurological disabilities such as the claimant has may present particular challenges in terms of how a fair recruitment process can be conducted. Impairments of this sort may have significant effects on how a candidate performs in interview and it may be difficult to form a conclusion as

to the extent to which the process and the assessment of performance can be adjusted without depriving the assessment process of any efficacy as a tool for determining suitability for the job. It seemed to us that in those circumstances, there is an argument for assessing very carefully what adjustments to the recruitment process would be reasonable and that in some cases expert medical evidence may have a role to play in determining what adjustments would be appropriate.

195. In some cases questions as to what adjustments to the recruitment process are reasonable may be intertwined with questions as to what adjustments to the role itself would be reasonable. In such a case, there might again be an argument for an earlier rather than a later occupational health assessment. We recognise that determining whether adjustments could properly be made in the case of a complex disability and a safety critical role might involve considerable liaison between the hiring manager and the occupational health adviser.

196. So whilst as a matter of law, we cannot find that the claimant succeeds in this claim, we recognise that he has raised an important point about a difficulty he faces with the respondent's recruitment process.

Issue: 14.3 applying a PCP of recruiting managers making assessments of medical fitness for a role, when recruiting for safety critical roles, without seeking occupational health advice.

197. The claimant believed that Mr Pearson in particular had assessed that he was unable to places signals to danger quickly and correctly in an emergency and that this was a medical judgment as it related to the claimant's disabilities.

198. We accepted Mr Pearson's evidence that this was not what he was seeking to convey when he said that the claimant could not go 'bang, bang, bang'. In any event and more broadly, it was clear to us that the managers were assessing candidates' performance against various competences required for the role. This was not intrinsically a medical assessment although in relation to some of the matters, a medical practitioner could have offered an opinion (eg on speaking and listening skills) and of course, it may be that the performance was affected by underlying impairments. That does not mean that the assessment of performance is an assessment of medical fitness.

199. There was therefore no evidence that the respondent applied any such PCP to the claimant or to any other candidate for a role. In essence, this was the same complaint as in respect of the previous PCP, that the claimant was assessed for the role without having had a prior occupational health assessment.

Issues 15. Whether Claimant disadvantaged by a PCP

Did the Respondent apply the PCPs at paragraphs 14.1 – 14.3 above (or was such a PCP applied on behalf of the Respondent)?

15.1 Did the PCPs in question put the Claimant at a substantial disadvantage in comparison with persons who are not disabled?

16. Whether Respondent had knowledge of disadvantage caused by PCP

16.1 Did the Respondent know that the PCPs in question put the Claimant at a substantial disadvantage, in comparison with persons who are not disabled, in relation to employment by the Respondent?

16.2 If not, could the Respondent reasonably have been expected to know that the PCPs in question put the Claimant at a substantial disadvantage, in comparison with persons who are not disabled, in relation to employment by the Respondent?

17. Whether Respondent took reasonable steps to avoid disadvantage caused by PCP

17.1 Did the Respondent take such steps as it was reasonable to have to take to avoid the disadvantage caused by the PCPs?

200. We did not need to go on to consider these issues because of the findings we have made above in respect of the PCPs contended for.

Issue added by amendment: Did the respondent apply a PCP of asking prompt questions in the interview rather than providing them in advance so that the claimant could write out an answer?

201. We concluded that there was such a PCP. The other candidates in this recruitment process, and, we understood, candidates more generally in the respondent's recruitment processes, would answer initial questions and then be asked prompt questions in interview.

202. This PCP was applied to the claimant in this recruitment process as he was not provided with the prompt questions in advance but was asked them in the course of the interview itself.

Issue: Did the PCPs put the Claimant at a substantial disadvantage in comparison with persons who are not disabled

203. The disadvantage pointed to by the claimant was that because he struggled to speak fluidly and got the wrong end of the stick when he had to think on his feet, not having the prompt questions in advance meant he stumbled over

words and did get the wrong end of the stick. By extension his performance was worse than it would otherwise have been.

204. We considered carefully whether we could conclude that not having the prompt questions in advance had put the claimant at a substantial disadvantage. We noted that on the previous occasion when he had the whole interview pack in advance, he had not been successful and that he had not asked for this adjustment in terms on this occasion. Whilst we accepted that the claimant would have felt inhibited in requesting more adjustments, it also seemed to us that if he had really believed it was likely to make a real difference he would probably have asked for them.

205. We also had considerable doubts as to whether it would have been useful for the claimant to have had all the possible prompt questions in advance. It seemed to us that this might have just led to him writing large amounts by way of additional answers which might or might not have been helpful and might or might not have been necessary. The point about targeted prompting within an interview is that it can focus on what is missing from the initial answer.

206. If the PCP relates to a failure to send the claimant follow up prompt questions after he provided initial written answers, again there is a question as to whether that would have advantaged the claimant as compared with real time prompting which could take account of where the claimant was digressing or misunderstanding a question and the interviewer could help to get him back on track more quickly and effectively.

207. We were not persuaded that the PCP put the claimant at substantial disadvantage compared with persons without his disability.

Issues: Whether Respondent had knowledge of disadvantage caused by PCP

Did the Respondent know that the PCPs in question put the Claimant at a substantial disadvantage, in comparison with persons who are not disabled, in relation to employment by the Respondent?

If not, could the Respondent reasonably have been expected to know that the PCPs in question put the Claimant at a substantial disadvantage, in comparison with persons who are not disabled, in relation to employment by the Respondent?

Whether Respondent took reasonable steps to avoid disadvantage caused by PCP

Did the Respondent take such steps as it was reasonable to have to take to avoid the disadvantage caused by the PCPs?

208. We did not have to go on to consider these issues due to our findings as to disadvantage. We would observe, in relation to knowledge, that this was a situation in which just asking the claimant what adjustments he required may not have been sufficient.

209. Had we had to consider whether providing prompt questions in advance (or the whole interview pack in advance) was a reasonable adjustment, we would have had to consider very carefully arguments about the need to assess some competences in real time, particularly where the role required a particular standard of communication in emergency situations. We understand that the claimant says that the type of communication required in those situations differs from that in an interview situation but we would have needed more detailed evidence and submissions on those points to resolve that issue.

210. For all of these reasons we did not uphold the complaints of failure to make reasonable adjustments.

210. Because the claimant did not succeed in respect of any of the complaints before us, we did not have to go on to consider issues relating to remedy.

211. For all of the reasons set out above, we have not upheld any of the claimant's claims.

212. We considered it was important to record however that the claimant presented his case with considerable skill and complete civility and spoke articulately and movingly of the issues he faced. The claimant clearly has considerable skills and a desire to make a real contribution to the railway industry. It seemed to us that there was much to be said for the respondent and claimant coming together to consider what career opportunities or forms of career support there were for the claimant in a more holistic way than was apparent from the evidence we had seen for the purpose of these proceedings. It may be that there have already been such discussions; we are conscious that the evidence we have had to consider relates only to one recruitment exercise.

213. We should also record that Mr Liberadzki managed the proceedings in such a way as to properly advance his client's interests whilst cross examining the claimant with appropriate sensitivity and regard for his disabilities and we were very grateful for his approach.

Employment Judge Joffe
13th Jan 2023

Sent to the parties on:

13/01/2023

For the Tribunal Office: