CASE NUMBER: 1402835/2021

EMPLOYMENT TRIBUNALS

Claimant: Stephen Jones

Respondent: Driver & Vehicle Standards Agency

Heard at: Southampton **On:** 16, 17, 18, 19 January 2023

Before: Employment Judge Dawson, Mr Shah MBE, Mr Knight

Appearances
For the claimant: Mr Chegwidden counsel
For the respondent: Ms Simpson, counsel

JUDGMENT

The claim is dismissed.

REASONS

Introduction

1. By a claim form presented on 11 August 2022 the claimant brings a claim of disability discrimination.

2. It is not in dispute that the claimant is paraplegic and is thereby disabled. He uses a wheelchair.

3. By way of very brief summary (and subject to what we say below), the claimant applied for a job with the respondent as a Vehicle Standards Assessor and was offered the job. The job offer was subsequently withdrawn when the respondent decided that, as a wheelchair user, the claimant could not carry out the functions of the job. The claimant brings a claim of direct discrimination and discrimination because of something arising from disability in respect of the withdrawal of the job offer and a claim of failure to make reasonable adjustments. He also brings a claim of harassment arising out of comments

made on a telephone call and in emails as well as the withdrawal of the job offer and, what he says was, a failure to adequately address the points raised in his grievance.

4. We heard from the claimant and, for the respondent, we heard from Louise Sanders, Stephen Moore, Simon Jackson and Roland Williams. We also received a bundle running to 680 pages and, except where stated, references below to page numbers are to the bundle unless stated otherwise.

The issues

5. The parties had submitted an agreed list of issues which appears in the bundle before the tribunal at page 61. On the Friday before the hearing commenced, the claimant sought to amend the list of issues, the respondent objected to some of the amendments and the tribunal made a ruling at the outset of the hearing and gave oral reasons at the time. Some of the amendments were permitted but not all of them. Our reasons appear at appendix 1 to this judgment.

6. Following delivery of our decision, the claimant's solicitor helpfully provided an updated list of issues to the tribunal which appears at appendix 2 to this judgment. Those are the issues in the case.

7. An issue then arose during closing submissions as to what had been meant by the reference to a hoist in paragraphs 17b and 17c of the List of Issues. The claimant submitted that it included a method to hoist the claimant into a cab or lower him into an inspection pit, the respondent submitted that it had always understood the reference to a hoist to be an alternative to a mobile column lift, and was therefore something to lift a lorry to allow inspection to its under side.

8. The respondents understanding had been shared by the tribunal on the first morning of the hearing. We return to this point in our conclusions below.

The Law

Direct discrimination

9. As for the claim for direct disability discrimination, the following section of the Equality Act 2010 is relevant:

> 13 Direct discrimination
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> A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

10. In the victimisation case of Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830, Lord Nicholls considered that the test (in the context of victimisation) must be what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously was their reason?

11. In considering questions of causation, in Nagarajan [1999] IRLR 572, the House of Lords held that that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case was, 'why the complainant received less favourable treatment … Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'

Discrimination because of Something Arising from Disability

Discrimination because of something arising from Disability

12. In respect of a claim for discrimination arising from disability, under section 15(1) of the Equality Act 2010 a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

Proportionate Means of Achieving a Legitimate Aim

13. In Dr J Ali v Drs Torrosian, Lechi, Ebeid & Doshi t/a Bedford Hill Family Practice Appeal No. UKEAT/0029/18/JOJ, HHJ Eady QC helpfully summarised the principles in relation to justification as follows:

> 15. Section 15(1)(b) thus allows that the unfavourable treatment relevantly identified for the purposes of section 15(1)(a) - here, the Claimant's dismissal - might be justified if it is a proportionate means of achieving a legitimate aim. To be proportionate, the conduct in question has to be both an appropriate means of achieving a legitimate aim and a reasonably necessary means of doing so (see *Chief Constable of West Yorkshire Police & Another v Homer* [2012] ICR 704 SC , and *Allonby v Accrington & Rossendale College & Other*s [2001] ICR 1189 CA).
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> 16. Justification of the unfavourable treatment requires there to be an objective balance between the discriminatory effect and the reasonable needs of the employer (see Ojutiku v Manpower Services Commission [1982] ICR 661 CA per Stephenson LJ at page 674B-C, Land Registry v Houghton & Others UKEAT/0149/14 at paragraphs 8 and 9, and Hensman v Ministry of Defence UKEAT/0067/14 at paragraphs 41, 42 and 44).
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> 17. It is, further, common ground that when determining whether or not a measure is proportionate it will be relevant for the ET to consider whether or not any lesser measure might nevertheless have served the employer's legitimate aim (see the EAT's judgment in Naeem v Secretary of State for Justice [2014] ICR 472).
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> 18. More specifically, the case law acknowledges that it will be for the ET to undertake a fair and detailed assessment of the

> working practices and business considerations involved, and to have regard to the business needs of the employer (see Hensman at paragraph 44). In that context, the severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence will, no doubt, be a significant element in the balance that will determine the point at which their dismissal becomes justified, albeit, the evidence that may be required in this respect will be primarily a matter for the ET (see per Underhill LJ at paragraph 45 of O'Brien v Bolton St Catherine's Academy [2017] ICR 737 CA).
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> 19. In O'Brien , a particular concern was raised as to what was said to have been the conflation by the ET in that case of the test applicable under section 15 of the EqA and that in the unfair dismissal claim, brought under section 98 of the Employment Rights Act 1996 ("ERA"). As Underhill LJ acknowledged in O'Brien , in carrying out the assessment required for the purposes of section 15 EqA , the ET is applying a different legal test to that arising in the context of an unfair dismissal claim under section 98 ERA . That said, Underhill LJ went on to deprecate the introduction of additional complexity where the substantive assessment is likely to be the same. Specifically, as he identified, where an ET is concerned with both such claims in the context of a dismissal for long-term sickness absence, the factors that are relevant for its determination of one claim are likely to be substantially the same as those to be weighed in the other (see paragraphs 53 to 55 of O'Brien).
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> 20. As to the time at which justification needs to be established, that is when the unfavourable treatment in question is applied (see Trustees of Swansea University Pension and Assurance Scheme v Williams [2015] ICR 1197 EAT at paragraph 42). When the putative discriminator has not even considered questions of proportionality at that time, it is likely to be more difficult for them to establish justification (see Ministry of Justice v O'Brien [2013] UKSC 6 , see in particular the judgment of the Court at paragraph 48; although the test remains an objective one, see O'Brien at paragraph 47).

14. In Crime Reduction Initiatives (CRI) v Lawrence UKEAT/0319/13/DA, UKEAT/0321/13/DA the EAT held that the question of justification is objective and purely procedural questions are irrelevant to dealing with justification. It quoted Belfast City Council v Miss Behavin' Ltd [2007] UKHL 19 that “what matters in any case is the practical outcome, not the quality of the decision-making process that led to it” (para 13)

Reasonable adjustments

15. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the Equality Act 2010.

16. Section 20 of the Equality Act 2010 provides in respect of the duty to make reasonable adjustments as follows:

> "(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage
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> (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

17. Section 21(1) provides that a failure to comply with the first or second requirement is a failure to comply with the duty to make reasonable adjustments.

18. In Environment Agency v Rowan [2008] IRLR 20, the EAT gave guidance on how an employment tribunal should act when considering a claim of failure to make reasonable adjustments. The tribunal must identify:

> "(*a*) the provision, criterion or practice applied by or on behalf of an employer, or;
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> (*b*) the physical feature of premises occupied by the employer;
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> (*c*) the identity of non-disabled comparators (where appropriate); and
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> (*d*) the nature and extent of the substantial disadvantage suffered by the claimant'.'

19. The Equality Act 2010 provides that a substantial disadvantage is one which is more than minor or trivial: see s 212(1).

20. In Royal Bank of Scotland v Ashton [2011] ICR 632 the EAT held:

> 15 The duty, given that disadvantage and the fact that it is substantial are both identified, is to take such steps as are reasonable to prevent the provision, criterion or practice (which will, of course, have been identified for this purpose) having the proscribed effect – that is the effect of creating that disadvantage when compared to those who are not disabled. It is not, therefore, a section which obliges an employer

> to take reasonable steps to assist a disabled person or to help the disabled person overcome the effects of their disability, except insofar as the terms to which we have referred permit it
>
> It went on
>
> **24** Thus, so far as reasonable adjustment is concerned, the focus of the tribunal is, and both advocates before us agree, an objective one. The focus is upon the practical result of the measures which can be taken. It is not—and it is an error—for the focus to be upon the process of reasoning by which a possible adjustment was considered. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons.

21. In County Durham and Darlington NHS Foundation Trust v Dr Jackson and another,the EAT held

> As set out above it is clear that: (a) the position of each Respondent to a claim under s 20 needs to be considered separately; (b) any PCP relied on must be that Respondent's PCP; (c) the step(s) required must be practical step(s) to be taken by the relevant Respondent to avoid the disadvantage caused by its PCP; and (d) the question whether it is reasonable to have to take the step(s) includes a consideration of the practicability of taking the step(s): that must include a consideration of whether it is within the legal power of the relevant Respondent (paragraph 34).

Harassment

22. The definition of harassment is found in section 26 of the Equality Act 2010. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.

23. By virtue of section 26 (4) in deciding whether conduct has the effect referred to it is necessary to take into account the perception of the employee, the circumstances of the case and whether it is reasonable for the conduct to have had that effect.

24. In Richmond Pharmacology v Dhaliwal [2009] ICR 724, the EAT held "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially

offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase" (paragraph 22).

General Provisions

25. Some parts of the Equality Act 2010 apply to more than one type of discrimination. They include the following sections:

> 39 Employees and applicants
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> (2) An employer (A) must not discriminate against an employee of A's (B)
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> as to B's terms of employment;
>
> in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
>
> …;
>
> by subjecting B to any other detriment.
>
> 109 Liability of employers and principals
>
> Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
>
> Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

Burden of Proof

26. Section 136 Equality Act 2010 deals with the reversal of the burden of proof and states

> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

27. In Madarassy v Nomura International plc [2007] IRLR 246, the Court of Appeal held, at paragraphs 56-57,

> "The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. 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.
>
> 'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by s.5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

28. In Hewage v Grampian Health Board [2012] UKSC 37, the Supreme Court held "Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352 (para 39) it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

29. Counsel for the claimant referred us to the case of Efobi v Royal Mail Group Ltd [2021] IRLR 811and, as we understood her submission, submitted that it was authority for the proposition that few people admit discrimination, even to themselves and often a discriminatory attitude is found simply in an assumption that somebody would not have fitted in. Further, the tribunal will expect cogent evidence to discharge the burden of proof. She did not refer us to any particular paragraphs of Efobi and, although we entirely accept that the propositions cited by counsel are correct, we are not sure that they are derived from the judgment of the Supreme Court in that case.

30. Efobi is authority for the proposition that an adverse inference can be drawn from the failure to call the decision maker to give evidence at the stage when considering whether the burden of proof shifts. The Supreme Court stated:

> So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given

evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules.

31. In Bennett (appellant) v MiTAC Europe Ltd (respondent) - [2022] IRLR 25 the EAT held

> While documentary evidence is likely to be important, because express evidence of discrimination is rarely available, much is likely to turn on the evidence of the decision maker(s). An important consequence of s136 EqA 2010 is that if the respondent chooses not to call the relevant decision maker it puts itself at considerable risk of an adverse finding, should there be sufficient evidence to shift the burden of proof, because it will face substantial difficulty in discharging the burden (para 51).

32. In Project Management Institute v Latif [2007] IRLR 579 the Employment Appeal Tribunal considered the burden of proof in relation to reasonable adjustments claim. The tribunal cited counsel's submissions as follows

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> She submits that merely establishing that an arrangement (to use the general word) places a disabled person at a substantial disadvantage does not amount to a sufficient prima facie case to shift the burden on to the respondent to demonstrate that no reasonable adjustment was possible. Under s.17A(1C) the burden only shifts when the tribunal could properly infer the failure to make the adjustment in the absence of some explanation. She submits that there is no breach unless some reasonable adjustment which ought to have been made has not been.
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> 49
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> Accordingly, unless there is evidence before the tribunal of an adjustment which at least on its face appears reasonable and would mitigate or eliminate the disadvantage, the burden does not shift. Furthermore, a respondent is entitled to know what it is alleged he has unreasonably failed to do. It would place an impossible burden on a respondent to have to prove that there were no other steps which he might reasonably have taken when none was identified.

33. At paragraph 53 the EAT stated that it agreed with Ms Clement (whose submissions have been cited) and went on "It seems to us that by the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible

burden to place on a respondent to prove a negative; that is what would be required if a respondent had to show that there is no adjustment that could reasonably be made. Mr Epstein is right to say that the respondent is in the best position to say whether any apparently reasonable adjustment is in fact reasonable given his own particular circumstances. That is why the burden is reversed once a potentially reasonable adjustment has been identified."

Findings of Fact

34. The claimant applied for a role as a Vehicle Standards Assessor (VSA) on 4 December 2020. The job advertisement appears at page 64 and includes a summary of the job as follows "our vehicle standards assessors carry out technical examinations on vehicles to ensure they meet legal roadworthiness requirements. The vehicles they examine include lorries, buses, coaches and trainers. They work nationwide out of customer premises called authorised testing facilities."

35. It is not in dispute that a large part (if not all) of the job involved working at customer premises called authorised testing facilities or ATFs. It is there that the claimant would have done the inspection of vehicles. It is also not in dispute that, in general, the role of a VSA is to inspect vehicles, including heavy goods vehicles. A substantial part of the test requires the assessor to inspect the underneath of a lorry or other vehicle, usually done whilst standing in a pit. It also requires the person to go into the cab of lorries. Those physical requirements of the role were not apparent from the job advertisement which, combined with the photograph of a person sitting in a wheelchair, may have given a misleading impression as to the nature of the job. The claimant has criticised the job advertisement and while we do not need to make findings of fact in that respect for the purposes of this judgment, it seems to us that the job description in the advertisement could have been more carefully prepared.

36. The claimant, in his evidence, accepted that there is both a visual and physical aspect to the checks that must be carried out by the assessor and someone who was not physically present and able to psychically test components could not do the checks safely.

37. The claimant applied for the job and in his application stated that he was a full-time wheelchair user and that his first choice of work location was Poole. He was interviewed on 7 January 2021 by video and, as is apparent from the feedback sheet at page 121, was a good candidate. The overall comments stated "a very good interview with a strong level of competence… Steve was strong in knowledge and gave very good descriptions of the defects and components".

38. On 25 January 2021 Mr Jackson, Frontline Recruitment Manager for the respondent, wrote to the claimant offering him the job. He stated that the likely start date was May due to the lockdown situation.

39. On 2 February 2021 Mr Jackson wrote to Ms Wedgwood, a Resourcing Specialist with the respondent, stating "we have made a provisional job offer to a candidate who is paraplegic. It is highly likely that they won't be physically

able to carry out the duties of the role (not sure how they'd get in and out of the pit etc). My question is – would this be dealt with/picked up via the onboarding process… Or does this have to be raised elsewhere as a potential risk." (Page 142). Following a series of emails, Laura Lewis, a Resourcing Partner stated that referring the situation to Health Management was a sensible move. (Page 138).

40. The claimant received an online health check questionnaire from Health Management Limited on 5 February 2021 and spoke to Kay Barnes on the telephone during which she carried out a health assessment. The claimant agrees with the respondent that whilst he told her that he was in a wheelchair, she did not discuss the practicalities of the role with him. On 10 February 2021 a fitness for work certificate was prepared by Kay Barnes which stated that the claimant was fit for work but that he was a wheelchair user so would need wheelchair access to areas at work (page 143). It is not in dispute that the writer of that certificate was unaware of the nature of the role that the claimant was carrying out but, it seems to us, that was unfortunate. Subsequently the respondent has contradicted what is set out in that work certificate and the fact that Ms Barnes was not aware of the requirements of the role which the claimant was applying for has only caused difficulty and confusion.

41. Following further email correspondence, on 24 February 2021, Simon Jackson wrote to Ms Wedgwood stating "Steve's suggestion is that we ask the intended line manager to complete a health referral for this candidate (as if they were a current employee). Before I do this I wanted to check whether or not you've had a chance to do anything with it." (page 145)

42. Ms Wedgwood replied to say that she had not managed to do anything because she was off last week but, on the same day, wrote a further email stating "I have very quickly asked Beth on this one as it's quite unique! The advice would be to go back to health management and request a case conference to confirm the situation. It would also be good to involve health and safety… as they can support on the issue around not being able to make changes as they are not our sites." (Page 144)

43. On 24 February 2021 Mr Jackson had a telephone conversation with the claimant. There is a dispute about what was said in that conversation. The claimant says "During the call, Simon said, 'I have never had to deal with someone like you before'. I firmly believe he was referring to my disability. I was taken aback at the time but carried on the conversation because I felt I had no choice and was shocked. I have never been faced with a comment like that before."

44. Mr Jackson's version of events is different, he says "I can categorically say that those words would never come out of my mouth. I may well have referred to the fact it was, in my experience, a unique situation and said something like 'I have not dealt with a situation like this before' but I would never use the phrase 'someone like you'."

45. The surrounding correspondence, it is accepted by all parties, indicates that Mr Jackson was not irritated by the situation he found himself in or unhappy with

the claimant. He was not antagonistic towards the claimant. The purpose of the call was to tell the claimant that further consideration as to the situation would need to take place.

46. Neither participant in the call took notes and no complaint was made at the time.

47. We accept that both Mr Jackson and Mr Jones were attempting to be honest and frank with the tribunal and do not find that either of them were trying to mislead us.

48. Mr Jackson's role is as a recruitment manager and Mr Moore, his line manager, told us that customer services is one of his strengths. He told us there had never been any allegations of the type alleged before.

49. Having heard Mr Jackson, we are satisfied that he would not have willingly said something of the type alleged, it is, however, possible that he misspoke in the circumstances of the telephone call. It is equally possible that Mr Jones, receiving unhappy news about the present position, misheard or mis-recollected what Mr Jackson said to him.

50. Both counsel, realistically, accept that we are in the situation of "he said – he said". Although it is always both unattractive and undesirable for a fact-finding body to fall back on the burden of proof, rather than make positive findings of fact, this is a situation where we have found ourselves forced to rely upon the burden of proof. In circumstances where there is no contemporaneous evidence which would indicate that either participant is not telling us the truth or even that one recollection is to be preferred above another, and where both witnesses are equally credible, we find that the claimant has not satisfied us that the words he alleges were used by Mr Jackson.

51. It is clear that in that conversation Mr Jackson said to the claimant that there would need to be further investigation into the situation.

52. On 25 February 2021 Mr Jackson wrote to Ella Storey, Health and Safety Compliance Manager with the respondent, stating that he needed help with a "fairly unique situation" and setting out the situation and asking for her support. (Page 148).

53. She replied on 2 March 2021 stating;

> Under the ATF contract I can't imagine we'd be able to insist on adjustments to them [ATF premises] as they are not our premises, I think you'd need to speak to someone like Jo Ratcliffe-Lewis for advice on the ATF contract side of things.
>
> In terms of the requirements of the role from a day to day aspect, the following needs to be taken into consideration:
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> - * All ATFs have inspection pits as the method of vehicle inspections, there are different site layouts and no two are the same

- * Pits have varying depth – I believe the range is 1.2m to 1.6m, this means that from the floor of the pit (depending on the height of the vehicle from the floor) there is a significant height to be able to reach to carry out an underside inspection. For 1.6m pits often step stools or stepladders are provided
- * Pits have varying widths, however I can imagine will be too narrow to manoeuvre a wheelchair and at the very least not allow for turning
- * Access into pits are via steps which are not of standard tread, depth etc., they can also follow a right-angle
- * Emergency escape egress from pits are mostly from vertical ladders, sometimes with a 'trap door' type cover needing to be pushed open whilst on the ladder on escape
- * VSAs also will need to get into a range of vehicle cabs, so LGVs with cab steps, horse boxes etc.

My main safety concern would be egress from the pit in an emergency, there must be at least 2 methods of escape from a pit at all times in different directions – the VSA must be able to vacate the pit quickly, a large amount of ATF sites use a vertical ladder for the secondary escape. I would recommend involving Joe Wildash from a reasonable adjustments point of view (apologies I didn't want to copy him in due to the sensitive nature of the email).

54. On 2 March 2021 Mr Jackson wrote to the claimant stating although he was not yet a DVSA employee he had been advised by his Health Management providers that the claimant should be referred to occupational health. Mr Jones agreed to that.

55. Thereafter there was a number of emails involving a number of people.

56. On 2 March 2021, Louise Sanders, HR Operations Team Leader sent an email to a number of people including Andrew McLean, an Equality and Inclusion Specialist for the respondent, Melanie Wedgwood, Sahira Ahmed and Jackie Arnold, an HR operations manager, explaining her concerns as to whether the claimant would be able to enter and exit the inspection pits at an ATF and get into vehicle cabs safely stating "I have written this to all 3 of you as I think there are crossovers in the responsibility here and we clearly need to be careful with how we manage the situation… I strongly suspect that when OH to look at this case that he will be declared unsuitable for the role as with the best will in the world, I don't believe we can force any ATF to make the pit disabled friendly, although you may think otherwise?" She concluded the email stating "Whilst I am awaiting the information from Si to completed the referral I wanted to alert you to the issue and confirm that we are taking the correct initial steps and also ensure we are treating him fairly? Maybe a call with everyone would help bottom this out? "(Page 160)

57. It was put to Ms Sanders in cross examination that there was a host of assumptions in that email. She replied robustly, stating that the context was

that the email was being written to well-being specialists including the head of inclusion and diversity and the head of recruitment. She was concerned about the limbo in which the claimant was being held and so she wanted the right people to get together at the right time. She admitted that she may have made assumptions about the likely outcome but she said that she raised the points so that the agency could look at the issues and see what they could do. She stated that she wanted to give an honest appraisal of where they were and get senior people involved.

58. Having heard Ms Sanders give evidence and considered the contemporaneous documentation, we accept that evidence is truthful. It is consistent with what she wrote at the time. It seems to us that Ms Sanders was genuinely trying to bring together the right people to make a decision on the claimant's case. The fact that she had an opinion as to the likely outcome does not mean that her actions were not genuine or properly intentioned. We do not find that she was acting in anything other than good faith and out of a genuine sense of concern that the claimant was, as she said, being left in limbo.

59. On the same date Mr McLean replied stating that he was happy to be part of a call, he suggested involving Joe Wildash (another Equality and Inclusion Support officer, who we are told was a specialist in reasonable adjustments) and stating "I am keen to ensure we have explored whether there are reasonable adjustments that can be put in place, or not" (page 165).

60. An occupational health referral was prepared and details sent to the claimant on 8 March 2021. Thereafter a report was provided by Dr Bastock dated 15 March 2021.

61. The report points out that the claimant had been previously involved in a role where he was able to undertake some inspection work if the vehicle was lifted up on a 4 post lift. The report went on to say

> He could transfer from the wheelchair into an office chair but could also stay in the wheelchair if he needs to be mobile during the day. He stated that he would require some adjustments and support measures for the role of vehicle standards assessor. He is able to undertake all of the appropriate office-based duties and he stated that he does have the appropriate knowledge for the role. He is able to inspect the underside of the vehicle if the vehicle is lifted on a 4 post vehicle lift. He is not able to climb in and out of vehicle pits and not able to climb into HGV cabs. He would be able to transfer from his wheelchair into a HGV cab if this was at the same level as the wheelchair.
>
> …
>
> He would be able to undertake inspection duties if the vehicle is raised on a 4 post vehicle lift. He would not be able to climb in and out of the inspection pits and not climb into the cabs. He would be able to climb into the cab if his wheelchair was at the same level as the HGV cab. He would only be able to work at a work premises that has the appropriate

> adjustments implemented. It is also recommended that he does contact Access to Work as they would be able to undertake a workplace assessment and may also be able to allocate some funding for the implementation of any required adjustments and accommodations. He may require longer breaks as he does have special arrangements to empty the bladder. He should have regular contact with his manager. He may require time off work for his medical appointments.
>
> …
>
> I would now recommend that he does have some discussion with his employer regarding the recommendations which have been stated in this report.

62. Regrettably the respondent, despite a significant amount of email correspondence between various people, did not speak to the claimant about potential reasonable adjustments to enable him to carry out the job which he had been offered. We find that particularly surprising given the number of participants in the conversation who were known as having a specialism in equality and diversity. In the context of disability, it is well known that the best person to ask about adjustments which may be necessary for a role is often the person who will be carrying the role out; the best source of information about ways to help a disabled person is the disabled person themselves. Mr Jackson indicated in answer to questions from the tribunal that he had had training to that effect. We are critical of the respondent in this respect, if the claimant had been consulted the claimant's experience of the process would have been very different, even if the outcome would have been the same.

63. Ms Sanders then summarised the report of Dr Bastock and emailed that summary to a number of individuals, including Mr Moore, Ms Wedgwood, Mr Wildash and Mr McLean. For reasons which were not explained to us, she did not send a copy of the actual report but only her summary. Regrettably in some respects her summary was inaccurate. She stated that, in respect of the proposal that vehicles should be raised to enable inspection of the underside, "Mr Jones was using his previous experience of cars to reflect on who he would be able to deal with the challenges and I am not convinced that there was too much thought given to the feasibility of raising a lorry…". That statement was not taken from the occupational health report and is factually inaccurate. Mr Jones had worked in a workshop where lorries were raised safely on column lifts[1]. She also stated that Mr Jones had had conversations with Access to Work who had provisionally agreed to complete an assessment. That was also incorrect. (Page 188)

64. We understand the claimant's frustration with that email and we also consider it would have been far better for Ms Sanders simply to send the report to her colleagues rather than her summary of it. However we do not find that the exercise being carried out by Ms Sanders was designed to justify an outcome of not completing the claimant's job offer. She concludes the email stating "I

[1] His work had not been as an assessor, but he had inspected lorries to carry out a troubleshooting role.

believe that we are now in the situation whereby we need to consider the job offer made to him and whether or not it remains a viable option so over to you." We accept that statement reflects her position, she had a view but was turning the decision over to others in the organisation.

65. On the following day she wrote to Mr Moore, Mr Jackson's line manager because Mr Jackson was on leave. She asked whether the matter needed to be dealt with ahead of Mr Jackson's return stating "I am concerned that we are delaying the bad news that he is not fit, and the potential ramifications for him?" (Page 188). We find this is a further example of Ms Sanders being concerned about the "limbo" which she perceived the claimant to be in.

66. In answer to Ms Sanders' summary of the occupational health report, Mr Jackson wrote to Mr Wildash and Mr McLean, amongst others, stating "whilst it appears fairly clear we should probably withdraw the job offer, who has the final say in this decision?"

67. Mr McLean answered "before communicating anything, Joe, from your perspective as the SME on adjustments, is there an adjustment we can consider for this applicant in this role? Simon once we bottom out whether there is an adjustment that is reasonable and doable, I believe the outcome should be communicated by the recruiting manager…" (Page 190)

68. Mr Moore (who had been copied into that email) replied stating that he wished to reiterate that the critical part was that the role was not performed at DVSA premises and any adjustments would have to consider the reasonableness and the practical implications/costs for ATF owners. He asserted that could impact every site that the claimant could be deployed to and asked, rhetorically, can we really ask that and make sure it's done effectively?" He also stated that it was not operationally preferred for the same VSA to serve at only a single ATF as they would be the sole tester of a single proprietor's vehicles. He went on to state "the lifting of vehicles for me as a layman itself sounds very risky… And it's unclear how we could raise a wheelchair alongside the door to allow cab entry in a safe and practical manner." (Page 190).

69. In his witness statement Mr Moore elaborates on the question of the desirability of one VSA going to the same ATF each day. He says that he had spoken to Mr Barlow (Head of Heavy Vehicle and MOT Policy) who had explained to him that there were regulatory reasons why that would not be workable, related to the fact that it would potentially create too close a relationship between the vehicle tester and the client who used the ATF which would jeopardise the independence of the test. The logic of that proposition seems sound to us and it is a practice which, we accept, the respondent uses across its authorised testing facilities.

70. In cross examination the claimant agreed that assessors did move around to different ATF premises and that it was not operationally preferred for one tester to be at one ATF. It was put to him that that was a standards point and he replied that he "could see that side of things".

71. On 22 March 2021, Mr Wildash wrote to the group stating that there was an onus on the respondent to consider changes to physical features of the building or other premises which made it difficult for a disabled person to access or use them. He pointed out there is a need to consider what aids or services could be supplied to help the disabled employees he stated "I am really struggling to think of what we could do. Somebody knowledgeable of the VSA role could consider whether the employee can be restricted to certain sites or if it's feasible they can use a creeper board… Out of interest has this been discussed with the employee and did OH have an opinion?" (Page 196).

72. On 22 March 2021 Linda Gisbey , Operations Manager for Zone C wrote stating that subject to Mr Wildash's response "I don't think the adjustments needed here would be deemed reasonable?" She also stated that it would be necessary to check the contract with ATFs in respect of reasonable adjustments.

73. On the next day, Amanda Lane, operational delivery manager (reporting to Ms Gisbey) wrote stating "Something else to consider is, the walkways at the ATF's I have visited have become very narrow in places, and the VSA office is occasionally up steps, and so this would also add additional cost for the ATF's and would require them to reconfigure the lane at quite an expense. It would be good to know what the ATF contract states, about reasonable adjustments and what is expected of them". Mr Wildash replied reiterating that the respondent was responsible for reasonable adjustments.

74. On 26 March 2021 Nicola Mortimer, Head of Deployment & Planning, wrote to the email group which by now consisted of around 13 recipients stating that a decision need be made quickly and it was not a recruitment team decision. She stated that she had had an initial conversation with Neil Barlow who was Head of Heavy Vehicle and MOT Policy and said he would be happy to sit down with the decision-maker but "as a starter for 10" suggested consideration of the following things:

    "VSAs do not work in DVSA (ATF) premises, they are a mobile role and as such can be deployed up to a 1:15 drive time and occasionally further

    - ATFs provide a testing facility for us to use under contract with the testing area specification contained in schedule 5
    - As little as 1% of ATFs use a hoist to look at the underneath of a HGV with the majority viewed via accessing a pit – which is down a set of narrow steps and with a standing depth of between 1.4 and 1.6 metres - so once in the pit the individual would need to be lifted again
    - DVSA cannot specify the equipment that an ATF uses as long as it is compliant with schedule 5 of the current ATF contract
    - To gain access to a vehicle cab can be a height between 2ft and 6 ft off the ground would require an additional hoist

(not sure if anything is available on the market) additionally some vehicles require an individual to climb sideways before getting into a cab e.g. Renault magnum– it should also be noted that DVSA have no control over the type of HGVs presented at a class A site as an example

- Contractually ATFs are expected to fully utilised their testing day (s) therefore any additional requirements such as using a hoist to access a cab is likely to increase the time to test a vehicle

- H & S – Consideration of how an individual in a wheelchair could quickly and safely remove themselves from a situation should be considered, e.g. should there be a vehicle fire would there be sufficient measures that we could put in place to ensure any risk were managed".

(Page 221)

75. Ms Gisbey then, on 26 March 2021, asked for a call to be set up on the following Monday with the right people to work through as a collective.

76. Mr Barlow replied stating that he was happy to be involved but that he thought there was a degree of overthinking. To him it was 100% clear from Ms Sanders' note of 17th that there were no reasonable adjustments which could be made for testing heavy vehicles and, to be fair to the candidate, the offer should be withdrawn sooner rather than later. He stated that he did not see what there was to talk about.

77. Mr McLean replied, on 26 March 2021, to state that he understood where Mr Barlow was coming from however to ensure that the respondent had taken the proper steps the hiring/recruiting manager needed to be clear that they had considered whether a reasonable adjustment was possible. He stated that manager would have the OH report, the role descriptor and preferably insight from a conversation with the candidate to arrive at a decision. (Page 221).

78. Mr Barlow replied stating that he completely understood he was just conscious that some weeks had passed.

79. Later the same day Mr McLean then wrote to Mr Barlow and others

> So are you (and/or the hiring manager) confident that the ATFs within a 1.15hr drive have no facilities or hoists to enable access to a cab and under a vehicle? Nikki, you mentioned about 1%. Any within this radius? Next question, have we considered the cost of installing the necessary equipment to enable safe access? Obviously this would be extremely costly, but do we have any idea of the cost? If challenged, can we demonstrate we 'considered' this?

> As I mentioned this does feel like an adjustment/s is not reasonable, so my advice is to document this to demonstrate we've paid due regard and taken the correct steps to arrive at a fair decision.
>
> Finally, right back at the start, do we know whether anyone had the conversation with the candidate about their disability, and what they felt could be done to enable them to do the role? Again, as part of the documentation behind our decision, it would be good to capture this to demonstrate our thinking on the matter.

80. It is regrettable that, once again, Mr McLean's suggestion of speaking to the claimant was ignored.

81. On the same day Mr Barlow replied to state

> I have just looked on-line (example site at HGV Lifts: In Ground - Garage Equipment (jbsequipment.co.uk)) and a basic hoist cost for a HGV would be circa £35k. But – we do not own the facilities so would need permission from an ATF to install or need them to install. That would add an additional cost. On top of that we would have maintenance (a pit is pretty simple and easy to maintain – hence why virtually every ATF has a pit and not a hoist.)
>
> I am not aware of any designed equipment to allow in-cab access safely for someone in this position. So something would need designing and building.
>
> We would also need to consider the rate of work. It would seem that this dual hoist arrangement would make a test take longer. My estimate would be 20 mins longer per test – so 30-40% longer. This will mean us charging an ATF less for the tester time and/or having to supplement with additional testers (page 225).

82. Following that, and on the same day, Ms Gisbey wrote to the group "assume we are clear now and can notify the individual?" (Page 228).

83. In fact the meeting which had been planned for the Monday 29th of March with a number of attendees did take place. It appears to have been a call, it was not face-to-face. On the balance of probabilities, it appears that Linda Gisbey was not there (no one can remember her attendance) but the person who she line managed, Amanda Lane, did attend. No notes were taken of that meeting.

84. We find it likely that Amanda Lane was present because of the email which appears at page 334 of the bundle where Linda Gisbey asks her to go because the meeting clashed with something else which she (Linda) was doing. In that email she stated that she would recommend the recruitment team now draft a decline to the individual on the basis of Neil's comments.

85. The evidence of the respondent is in disarray as to who made the decision to withdraw the claimant's job offer. Mr Jackson says it was Ms Gisbey, as the

operations manager for Zone C, to which the claimant was being recruited. However, it was Mr Jackson who wrote to the claimant withdrawing the offer, which he did on 1 April 2021. That followed a conversation on the 29th March with the claimant after the meeting had taken place.

86. In cross-examination Mr Jackson accepted that it appeared that Ms Gisbey had made the decision prior to the call on 29 March but then denied that the discussion on 29 March was just paying lip service to what had been decided. He said the meeting was to run through everything, to ensure nothing had been missed and that they had considered everything which was reasonable. He also said, in answer to the questions of the tribunal, that the decision had "kind of been made by Linda Gisbey on the Friday, to all intents and purposes, and the meeting was just talk things through".

87. That, however, is not consistent with the email sent by Amanda Lane to Linda Gisbey after the meeting which states "well, they tried on a few occasions to make this an ops responsibility!!" The email goes on "the outcome is: Simon Jackson, who has already had communications with him will pick up a conversation with him and explain that we wouldn't be able to make the reasonable adjustments required and so couldn't offer him a role, but at the same time just check he doesn't have more mobility than we are led to believe. Jo Wildash is then going to put the letter together with Simon and send it out. They said it has always been ops managers that had written previously but that doesn't seem right to me as we haven't had any dealings with him, so I disputed this!" (Page 332).

88. It is clear that no one person was taking the lead in the situation, indeed the situation, at this stage, appears to have been one of everyone trying to make somebody else take the decision. There is no suggestion that Mr Jackson did check that the claimant had more mobility than the respondent had been led to believe. There was a regrettable failure of leadership in this respect.

89. We have concluded that the decision to withdraw the claimant's job offer was, ultimately, one taken by the collective meeting on 29 March 2021, although they may well have believed they were confirming a view which had already been reached by Linda Gisbey. She was represented in the meeting by Ms Lane. At that meeting, according to the witnesses that we have heard, everyone agreed that there were no reasonable adjustments that could be made and the job offer should be withdrawn.

90. We find that the people who took part in that meeting were genuine in the beliefs that they advanced. There is no evidence which suggests that anybody was deliberately misrepresenting the position as they saw it, whether because of the claimant's disability or otherwise. We find that the investigations carried out to reach those views were less extensive than they should have been. At the very least somebody should have spoken to the claimant to ask his views. It would also have been useful if somebody had spoken to the ATF operators to find out whether they would be willing to allow the insertion of column lifts etc. and whether they already had any disabled employees. We reject the argument of the respondent that that was not possible because of covid restrictions. Telephone calls could be made even in times of coronavirus restrictions. We

find that certain assumptions were made during the process, such as whether it was possible to lift lorries in order to inspect under them but the views expressed by the participants in the emails appear to be genuine and we accept that they were. In particular there is no evidence which would support a suspicion that those who were partaking in the process did not want to employ the claimant simply because he was disabled. Even Mr Barlow who, it might be suggested, was the most bullish in his view that the claimant's disability could not be accommodated, was willing to be challenged by Mr McLean and to check his views (see page 225).

91. On 30 March 2021, Mr Wildash wrote to Mr Mclean Mr Jackson and Mr Moore, copying in others, stating "as you are all aware we are well within our rights to withdraw a conditional job offer especially if the applicant hasn't met our conditions, (in this case, health issues)." The email appears to have been written in the context of an email chain setting out what should be said by Mr Jackson when he conveyed the decision to the claimant. The email was sent at 07:36 and at 15:08 Mr Jackson replied to say that he had spoken to Mr Jones and explained the reason for withdrawing the job offer.

92. On 15 April 2021 claimant made a formal complaint about the way the advert and application was processed and the respondent's failure to make reasonable adjustments under the Equality Act 2010. His complaint is lengthy and lists 13 issues which he asked for a response to. He also stated that he would consider an alternative role in the Civil Service which he would consider a reasonable adjustment (page 267).

93. Although the claimant described his document as a complaint it appears to have been treated as both a complaint and a grievance, those 2 words being used interchangeably. It was not suggested by the claimant that anything turned on that point.

94. Jayne Stone, Head of People Partnering, Change and Improvement, was appointed to decide the grievance

95. Mr Williams, the Operations Manager for zone D was appointed to investigate the complaint. He carried out an interview with Mr Jones on 19 May 2021 and discussed with him the skills that he had for an alternative civil service role (page 304).

96. Mr Jones had the opportunity to raise matters in that interview and discussed the use of video and audio technology to relay areas of vehicles that he was not able to access and said that he had contacted Access to Work himself and they had said they had £62,900 per person to support them in the workplace for adaptations. He was asked whether he had any other adjustments he could suggest and the minutes record that Mr Jones said that in his discussions with Access to Work only the hoists were discussed to get in and out of the cab or pit. He said that until he was in the workplace, Access to Work will not be able to arrange a visit or know what to put in place as every ATF is different. There was no reference to scissor lifts, mobile wheelchair lifts or a manual standing wheelchair.

97. Mr Williams also interviewed Mr Jackson and had email correspondence with a number of other people who had been involved in the situation. He carried out his investigation by reference to what he described as the recognised best practice guide published by the Business Disability Forum. His investigation was thorough and, in respect of the email chain to which we have referred above, he summarised that it included 27 responses over a two-week period between 15 contributors (page 362). That summary was put to the claimant in evidence and not challenged and we accept it as a helpful summary of the email chain from which we have quoted above. He completed a 23 page report which, at the end, dealt sequentially with the 13 points which had been raised by the claimant. He was not uncritical of the respondent but confirmed that he had been told that there was only one ATF site that used a lift rather than an inspection pit which was at Henley in Arden. He sent his report to Ms Stone on 3 June 2021.

98. Although the claimant does not concede that there was only one such ATF in the region, he has not brought any evidence to the contrary and we find that was the position.

99. Mr Williams was asked to gather some more information in relation to supplementary questions raised by Ms Stone and sent that further information on 18 June 2021 (page 384.) In particular he had been asked whether there was any reason a physical assessment could not be replaced with a technological assessment and asked why a job share would not work.

100. Ms Stone asked further clarifying questions on 25 June 2021 which were responded to.

101. Although in cross examination counsel for the claimant sought to show that Mr Williams had not carried out a proper investigation into the claimant's grievance, we do not accept the allegations which were put to him. It seems to us that Mr Williams had approached his task conscientiously and sought to carry out a careful analysis of the email correspondence and circumstances of what had gone on. He did not unquestioningly accept what he was told and was prepared to make findings which may have been unpalatable to those who had been involved in the case before him.

102. A letter setting out the outcome to the claimant's complaint was sent by Ms Stone. The letter is undated but according to the index to the bundle was sent on 2 July 2021. At the outset of the letter Ms Stone offered her apologies for the fact that the experience he had had of the DVSA and its recruitment process had been below standard. She answered the claimant's specific questions.

103. In the same letter Ms Stone noted that the claimant had asked for alternative vacancies to be considered and she had researched those and made reference to, as well as another role, the role of a Compliance Support Officer (Remote Enforcement Office). She explained that the roles had been advertised and one had closed to applicants and therefore she would like to know as soon as possible if he was interested in the role (page 426). It was

apparent he would not need to go to a full selection process but, it is accepted, that he had to go through an onboarding process including health checks.

104. On 3 August 2021 Mr Jones wrote to the respondent about backdated salary/benefits and explained that he would need to issue his claim at the employment tribunal to protect his position. Ms Stone confirmed that the respondent was exploring an alternative role for him and that was the focus at the moment.

105. On 9 August 2021, the claimant's solicitor wrote to Ms Stone stating that their client was interested in the REO role (page 443) and Mrs Stone replied stating that they were actively pursuing the role.

106. On 10 September 2021 the claimant was offered employment as a Remote Enforcement Compliance Officer at the same salary as the role he had been carrying out. It was at the same grade as his previous employment. The start date was 4th October 2021.

107. At this hearing we were presented with the details of the contracts which were entered into between DVSA and ATF providers. There is an individual contract for each ATF party which sets out the basis for authorisation of authorised testing facilities for statutory and other testing in respect of certain categories of heavy goods vehicle, public service vehicles and/or Specialist Schemes. Schedule 5 sets out the physical, technical and other requirements to be complied with at the ATF site. At paragraph 5.4 it is stated that "in order to inspect the underside of the vehicle the site must have either an inspection pit or platform hoist situated within the building." (Page 665).

108. It was not disputed that the control of the ATF site remains under the 3rd party, the DVSA does not have control of the site and does not obtain a licence or lease in respect thereof.

109. The Access to Work scheme is a government scheme which provides funding for support to enable people who are disabled access work or to remain in work. We have been provided with a fact sheet which appears at page 604 of the bundle. An application for Access to Work is made by the employee or applicant who must have a disability or health condition that means they need an aid, adaptation or financial human support to do a job. There is no set amount for an Access to Work grant, how much a person gets depends on their specific case and it appears to be implicit from the literature (and explicit from what we were told by the claimant) that there needs to be an assessment.

110. The respondent submitted that a reasonable adjustment needed to be identified before Access to Work would pay for assistance. It was submitted that Access to Work will not simply devise adjustments for a claimant. Although that point is not expressly made in the literature, the literature does state "Access to Work can help pay for support you may need because of your disability or long term health condition… You may need to give us proof of costs". That statement appears to support the respondent's assertion and we accept the respondent's argument in this respect.

111. A mobile column lift is a lift which is mobile and can be used to lift an HGV into the air to look at the underside of the vehicle whilst the inspector is situated at floor level.

112. The claimant told us that he would not be willing to work on Henley in Arden.

Analysis and conclusions

113. We state our conclusions by reference to the list of issues. References to paragraph numbers below, except where stated, are to the list of issues copied and pasted into appendix 2 hereto.

Direct Disability Discrimination

114. In respect of paragraph 1, there is no dispute that the respondent withdrew the job offer on 1 April 2021.

115. In respect of paragraph 2, in constructing the appropriate comparator we must consider someone in respect of whom there are no material differences between the circumstances relating to them and the circumstances relating to the claimant.

116. Such a person would be a person who had excelled in interview, been offered the job and during, what the respondent has termed, the onboarding process is discovered to be unable enter or leave a pit to inspect the underside of vehicles without some sort of auxiliary aid or enter or leave a lorry cab without some kind of assistance lifting them to and from that height.

117. There are no facts from which we could conclude that such a person would have been treated differently to the claimant. In any event we have no doubt that such a person would have been treated in the same way as the claimant. The respondent's concerns were all centred about whether or not the claimant could safely carry out the tasks of a Vehicle Safety Assessor. Somebody who was in the same circumstances as the claimant but not disabled would have caused the same concerns to arise in the minds of those who were involved with the claimant. In respect of such a person the respondent would have believed that there was no alternative but to withdraw the offer and the offer would have been withdrawn.

118. Thus question 3 does not arise, the claimant was not treated less favourably than the respondent would have treated a hypothetical comparator.

119. This claim, therefore, fails.

Harassment

120. In respect of paragraph 4a we are not satisfied that the comment was made and, therefore, there was no unwanted conduct in that respect.

121. In respect of paragraph 4b we accept that the email was sent. It is accepted by the respondent that the claimant saw that email at some point and no issue is taken as to the fact that an act of harassment could have arisen at the time the claimant saw the email.

122. We move, therefore, in respect of this allegation to consider paragraphs 5, 6 and 7 of the list of issues.

123. We accept that the email may amount to unwanted conduct. The claimant took exception to being described as “not fit” and did not wish to be described in that way.

124. We also accept that the conduct related to the claimant’s disability. It was because of the claimant’s disability that Ms Sanders was writing in the terms that she did.

125. It was not suggested by the respondent (and not put to Ms Sanders) that Ms Sanders had written the email with the purpose of violating the claimant’s dignity or creating the proscribed environment for the claimant. In any event, we are satisfied that was not the position. Ms Sanders intention was to prevent the claimant from being left in limbo and to drive a resolution of his situation. She was not seeking to intimidate him, degrade him or humiliate him. She was not seeking to create a hostile or offensive environment for him, indeed quite te reverse.

126. The claimant told us in evidence that he took exception to the reference to “not fit” because he is fit, he told us that he was not unfit for work. In so saying he goes further than he did in paragraph 68 of his witness statement where he does not really set out his objection to the email, but we to accept what he says as true.

127. We observe that the phrase “not fit” has more than one meaning. It can mean lacking in the ability to do exercise or it can mean that someone or something is not suitable for something. The most obvious reading of the email is that Ms Sanders is using the term in the latter sense.

128. We must consider whether the effect of the email was to violate the claimant’s dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him.

129. Those words should not be deprived of their meaning and the email must be seen in the context that it was being sent from Ms Sanders to Mr Moore, not to the claimant even though the claimant subsequently saw it. In business emails people often use shorthand phrases because the recipient will know what is being meant by them.

130. Whilst we would accept the claimant’s evidence that he objected to being referred to as not fit, he has not set out any evidence that he felt humiliated or offended by that phrase. However, we do accept that the claimant may well have been offended by the phrase, particularly in circumstances where he became aware of it after the job offer had been withdrawn.

131. However, even taking account of those matters, we do not think it was reasonable for the claimant to have felt that an offensive environment had been crated (or an intimidating, degrading or humiliating one) or to feel that his dignity had been violated. Ms Sanders' phrase falls into that category of phrase described by the Employment Appeal Tribunal in Dhaliwal as unfortunate but not such that it is appropriate to impose legal liability.

132. This claim, therefore, fails.

133. In respect of paragraph 4c, again it is not in dispute that the email was sent.

134. The email wrongly refers to health issues being the reason why the job offer was withdrawn, the correct reason was because there were concerns as to the claimant's ability to safely do the job because of his disability. The comment was written in the context of a letter where Mr Wildash was setting out the respondent's legal obligations

135. In the email chains which we have seen, Mr Wildash has on at least 2 occasions raised the need for the respondent to consider reasonable adjustments. It is clear that, at the very least, he was concerned to ensure that the respondent was complying with its legal obligations and that the claimant was treated fairly.

136. There is no basis on which we could find that he wrote the email with the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

137. The question then becomes whether it had that effect. There is no evidence to that effect in the claimant's witness statement. The claimant was asked about the email and when asked why he felt it was harassing he said that the job offer was retracted due to him being in a wheelchair and there were reasonable adjustments that could have been made. He accepted that the wording was not intended to cause offence but said that it did cause offence because he was a healthy and fit person and reference to his health had been made all the way through the case.

138. We remind ourselves that we must consider the claimant's perception, the circumstances of the case and whether it was reasonable for the conduct have that effect on the claimant. We have considered this point at length and understand the claimant's position. However, when we consider the question of whether it was reasonable for the claimant to feel that the email created an intimidating, hostile, degrading, humiliating or offensive environment for the claimant by the email, again we have concluded that it was not. The email has to be seen in the context in which it was written. The context was a situation where the respondent's employees had, over a period of time, discussed the possibility of making reasonable adjustments for the claimant because of his disability. They were not under a misapprehension that he had ill health and Mr Wildash , as we have said, had been clear of the need to consider reasonable adjustments. It was an incorrect phrase which was used in the letter but it was not reasonable for the claimant to see it as an act of harassment.

139. In respect of paragraph 4d, there is no doubt that the job offer was withdrawn on 1 April 2021.

140. There is also no doubt that the withdrawal of the offer would be unwanted conduct and it related to the claimant's disability.

141. We do not find that the withdrawal of the job offer had the purpose or the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

142. It is a regrettable fact that sometimes people have jobs withdrawn after they have been conditionally offered. Whilst the withdrawal of the job offer has to be seen in the context of the claimant's disability and the respondent's failure to make reasonable adjustments in respect of the job, in circumstances where we have found that the respondent's employees were acting in good faith and had reached the genuine conclusion that reasonable adjustments could not be made, we do not consider it reasonable for the claimant to feel that the withdrawal of the offer created the proscribed environment. It was reasonable for him to be disappointed, it was not reasonable for him to feel harassed.

143. Thus this allegation fails.

144. In respect of paragraph 4e, we do not accept that the grievance outcome failed to adequately address the points raised in the claimant's grievance. The outcome did address the points raised by the claimant. As we have indicated we do not consider there is anything wrong with the grievance investigation but, in any event, the grievance outcome was sent from Ms Stone. Although the claimant does not agree with the decisions reached, he does not make any specific criticisms of Ms Stone or the outcome that she wrote. His witness statement, at paragraph 83, only complains about the delay in respect of the grievance report.

145. In circumstances where we do not accept that the grievance outcome failed to adequately address the points raised in the claimant's grievance, we do not find there was unwanted conduct. Moreover, even if there have been such a failure, there has been no suggestion that was related to the claimant's disability.

146. Thus this allegation fails.

Discrimination arising from disability

147. In her closing submissions, counsel for the claimant volunteered that she was in difficulty submitting to the tribunal that it could find that even if there was no failure to make reasonable adjustments the claim under section 15 Equality Act 2010 should succeed. She submitted that it was the outcome of the process which was relevant not the process itself. She accepted that the respondent had a legitimate aim in withdrawing job offer and submitted that the question was, therefore, whether the withdrawal was a proportionate means of achieving that aim. Her submission was that turned on whether the respondent should have put in place reasonable adjustments.

148. The claimant's counsel agreed with the respondent in her submissions, that if there were no reasonable adjustments which could be made, there was no less discriminatory way to achieve the respondent's aim than dismissal.

149. In those circumstances she turned, in her submissions, to reasonable adjustments. Given the way that the claimant has put his case, we, likewise, will consider the question of reasonable adjustments below.

150. Anticipating our conclusion below, which is that the respondent has not failed to make reasonable adjustments, it follows, on the basis of the claimant's submissions, that there has been no breach of section 15 Equality Act 2010.

151. We record, in case there is any doubt, that we consider the way in which counsel for the claimant put her submissions was correct. We have quoted above the case of Crime Reduction Initiatives v Lawrence UKEAT/0319/13/DA, UKEAT/0321/13/DA and in particular paragraph 13 that procedural questions are irrelevant to dealing with the justification. Whilst we criticise the respondent for the process in this case, it is not suggested that the process itself was unfavourable treatment arising from the disability, the unfavourable treatment alleged is the withdrawal of the job offer. It is on that which we must focus and we have not found any way in which a lesser action than withdrawal of the offer could have achieved the aim advanced by the respondent and accepted by the claimant as legitimate.

152. Thus the claim under section 15 Equality Act 2010 also fails.

Reasonable adjustments

153. We record that in his closing submissions counsel for the respondent submitted that insofar as the claim is about accessing a lorry cab or a pit, this case could be seen as a case brought under section 20(4) Equality Act 2010. If that were the case the tribunal would need to consider those matters set out in section 20(9) of the Act. The list of issues was not put on that basis and counsel for the claimant did not invite us to consider the case on that basis. We approach the case on the basis of the list of issues as agreed.

154. We have reminded ourselves of the burden of proof provisions in Latif v Project Management Institute, that unless there is evidence before the tribunal of an adjustment which on its face appears reasonable and would mitigate or eliminate the disadvantage, the burden does not shift.

155. The respondent accepts that there were PCPs as set out in paragraphs 13(b) (ii) to (iv) of the list of issues. It also accepts that those PCPs placed the claimant at a disadvantage compared to employees who are not disabled.

156. The respondent takes some other points in respect of the early part of the list of issues in relation to reasonable adjustments.

    a. In respect of paragraph 13a, it does not accept that the recruitment process was applied without alteration. There is no doubt that the recruitment process was a PCP and was applied. The respondent says

that obtaining a report from an occupational health consultant was unusual and not a usual part of the onboarding process and that the emails at page 144 of the bundle show that the respondent was not robotically applying the recruitment process. Thus there was alteration to the process.

We agree with the respondent that the recruitment process was not applied without alteration. If the issue is, really, whether the respondent's recruitment process was applied, which included an onboarding process, then such a practice was applied, and the respondent accepted that. The reference to the application of the process without alteration is really another way of raising the question of whether the respondent made reasonable adjustments to the process.

We accept that there was a PCP of applying the recruitment process to the claimant.

b. The respondent also denies that there was a PCP that the claimant should fulfil the VSA role single-handedly. It argues that the very fact it was willing to consider job carving/ sharing shows that there was no such PCP. We do not consider that the respondent's submission is correct. We consider that the job was a job for one person. That is the way that it was advertised- it was never suggested before the claimant's position was considered that more than one person could do the role of VSA in respect of one vehicle at any one time. In our judgment the criteria for the job was that one person should carry out an inspection or assessment of the vehicle being inspected. That was the role of the VSA. Although the respondent did (at least at the grievance stage) consider the question of job carving, that was by way of considering an adjustment to the existing PCP.

157. Thus we accept that the respondent had all of the PCPs contended for by the claimant.

158. The respondent also suggested that whilst the claimant was put at a disadvantage by the PCPs, the disadvantage was not the VSA role being withdrawn but that the claimant could not be deployed as a VSA while the practices were insisted upon. We consider that is a distinction without a difference. The fact that the claimant could not be deployed as a VSA while practices were insisted upon is the thing that led to the withdrawal of job offer.

159. It is not in dispute that the respondent knew that the claimant was likely to be placed up disadvantage.

160. In respect of the reasonable adjustments contended for we make the following findings.

A support worker undertaking some of the physical activity of the job i.e. someone taking photographs and being them back to the Claimant to evaluate or having video equipment to enable the Claimant to see in real-time inside the cab and/or pit. This equipment would be portable and would have enabled the Claimant to use the equipment at various locations;

161. In his cross examination the claimant accepted that the VSA needed to do physical as well as visual checks. He also accepted that the adjustment contended for in paragraph 16a would not work- it was put to him on the 2nd day of cross-examination that using a person with a video was not going to work because there is a requirement to "get in there", the claimant replied that he agreed.

162. We find therefore that using a support worker would not have avoided the disadvantage suffered by the claimant. The VSA has to do the physical aspects of the inspection and it cannot be done by watching video taken by someone else. It would not have prevented the withdrawal of the the role of VSA.

163. The issue was expanded somewhat in the course of the hearing to suggest that a support worker could do the physical inspection instead of the claimant, but that would require the support worker to have the competencies of a VSA, in essence the respondent would have to employ 2 VSAs for the same job. We tend to agree with the respondent that would not be a reasonable step for it to have to take, but in any event, that is not the adjustment contended for in the list of issues.

For the Claimant to only work at those ATFs which do have a hoist and/or mobile column lift;

164. The next adjustment contended for is that the claimant should only work at those ATF's which had a hoist and/or mobile column lift (paragraph 16b).

165. The evidence of the respondent was that there is only one ATF in the area in which the claimant would have worked which had a column lift for heavy goods vehicles, which is in Henley in Arden. The claimant had not adduced any evidence to suggest that is wrong and we accept it.

166. The respondent has a policy of not leaving one VSA at a single authorised testing facility because of the risk of a too close relationship being established. We remind ourselves that the role of the DVSA is one of inspection and testing. It is to ensure rigorous safety standards are maintained for the safety of the public (that was not disputed by any party to the case). We do not think it would be a reasonable adjustment to require the respondent to breach that policy, the public safety considerations outweigh the benefit to the claimant.

167. However, even if it would be an adjustment which the respondent should have made, the claimant confirmed in his evidence that he would not have been willing to work in Henley in Arden which was a substantial distance from his home.

168. Thus this is not an adjustment which would have alleviated the disadvantage suffered by the claimant.

169. At this point it is necessary to consider the wording of the issue which refers to a hoist and/or mobile column lift. The claimant's case, at least in closing, was that he could have been hoisted down into a pit or up into a lorry cab.

170. The claimant's witness statement in this respect ,at paragraph 58, states that a lift could have been fitted to enable him to get in and out of cabs. He states, in paragraph 59, that he had done some research and was aware that there were scissor lifts available which enable reduced mobility passages to enter an aircraft with level access were not using an air bridge. He states that alongside the scissor lift example, a mobile wheelchair lift can be used or even modified to suit the raising of the wheelchair to cab height.

171. This issue was allowed to be raised as an amendment to the list of issues on the morning that the hearing commenced. We did not allow the claimant to amend the list of issues to allege that he should have been able to use a scissor lift and/or mobile wheelchair lift to get in and out of the cab because we accepted that the respondent was placed at a disadvantage by such a significant amendment to the list of issues. We also did not permit the claimant to amend his list of issues to say that a reasonable adjustment would have been the use of a manual standing wheelchair to inspect the underside of the vehicle.

172. We permitted the amendment to add this issue only because the respondent accepted that it was not prejudiced by it. We must, therefore, be careful not to allow the respondent to be prejudiced by straying into considerations of scissor lifts and mobile wheelchair lifts and manual standing wheelchairs. The claimant's evidence does not address a hoist as distinct from a scissor lift or mobile wheelchair lift, or explain how one would work.

173. The claimant has not adduced any evidence to show that any ATF had such a hoist or how such a system would be workable in the context of an authorised testing facility. Whilst the claimant has made a suggestion of an adjustment- using a hoist- he has not, in the words of Latif, adduced evidence that a hoist (as distinct from a scissor lift or a mobile wheelchair lift) would be reasonable in the circumstances of this case or mitigate or eliminate the disadvantage. There is simply no evidence that a hoist was available at an ATF or would enable the claimant access to a lorry cab and then enable him to move around to the extent necessary to perform checks.

174. Moreover there is no evidence that a hoist could be used to lower the claimant into a pit in such a way that he could then inspect the underside of a lorry without, at least, the use of a manual standing wheelchair (as per paragraph 38 of the claimant's witness statement).

175. In respect of a hoist, the claimant has not discharged the burden of proof which is on him.

176. Thus we do not consider that this adjustment would alleviate the disadvantage to the claimant, which was the withdrawal of the job offer, and this allegation fails.

For a hoist and/or mobile column lift to be put in place at one or more ATF(s);

177. In respect of paragraph 16c, for a hoist or mobile column lift to be put in place at one or more ATFs, the respondent contends that there are multiple difficulties including that under the agreements with ATF providers, an authorised testing facility is only required to provide either a lift or a pit and the respondent has no power to insist on both. Even if the respondent could persuade an ATF provider to allow it to install a lift, such an agreement would be a voluntary one and depend upon the grace and favour of the ATF operator which would leave the respondent in a precarious position.

178. We are not especially impressed with those arguments. Had we believed that the provision of a mobile column lift might have alleviated the disadvantage which the claimant was at, we would have considered that shifted the burden of proof. The claimant has shown that mobile column lifts exist and that they are used to lift lorries which means that an inspection pit is not required. The respondent would not have discharged the burden which was then upon it, in circumstances where it had not approached any ATF's to make any assessment of how likely they would be to accept a mobile column lift on their premises. The respondent did not contend that the cost of the lifts, themselves, would have been such to make the adjustment an unreasonable one.

179. However, the difficulty which the claimant has is that in the absence of any evidence as to how he could have gained access to a lorry cab, the fact that he may have been able to access the underneath of a lorry if a column lift was used does not avoid the disadvantage suffered by the claimant. He still could not carry out the role of a VSA because he could not enter and exit from the cab of the lorry.

180. For the reasons we have given in relation to the previous issue we do not find that the claimant has shown that a hoist (as distinct from a scissor lift or a mobile wheelchair lift) would be reasonable in the circumstances of this case or mitigate or eliminate the disadvantage.

Using the Government's Access to Work Scheme to assist with funding for reasonable adjustments;

181. The next adjustment suggested is that the respondent should have used the government's Access to Work scheme to assist with funding for reasonable adjustments.

182. In respect of this assertion the respondent submits that it is for the claimant to approach Access to Work not the respondent. Thus, it says, that approaching Access to Work is not a step which the respondent could take to remove the disadvantage.

183. Further the respondent contends that approaching Access to Work is not an adjustment itself but is a means of obtaining funding for an adjustment. The respondent contends that Access to Work does not provide funding in the absence of a step that it knows will work. In support of that assertion it relies upon the EHRC Code of Practice on Employment and, in particular, paragraph 6.28 which states "the following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take… The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work)".

184. We accept the respondent's submission that it is not for an employer to approach Access to Work. Thus that was not a step which it could take. In any event, there is no evidence that even if it could have done so, Access to Work would have suggested any adjustments which could be made apart from those which have already been discussed in this judgment. There is no evidence that approaching Access to Work would have meant that the offer was not withdrawn.

185. This we do not consider that this is a reasonable step which the respondent should have taken.

Approaching experts in the field of workplace adjustments for wheelchair users to request assistance in finding any new or innovative solutions for ways to remove or alter physical features to enable the Claimant to carry out the VSA role, and then putting these adjustments into place;

186. The next alleged adjustment, approaching experts in the field of workplace adjustments, confuses an adjustment which might be made with the means by which an adjustment might be discovered. It confuses the process by which adjustments are considered with the objective outcome. There is no evidence that had any experts been approached they would have suggested any steps which the respondent did not consider, or that those steps might have alleviated the disadvantage. Thus, even if we were wrong in our conclusion that approaching an expert cannot be said to be a step, the claimant has not discharged the burden of proof on him to show that doing so would have mitigated or eliminated the disadvantage which the claimant had.

Considering and implementing reasonable adjustments as recommended by Occupational Health

187. The next suggested step is that the respondent should have considered and implemented the reasonable adjustments as recommended by occupational health. The difficulty is that there were no adjustments suggested by Mr Bastock which would have avoided the withdrawal of the job offer. Whilst he suggested a disabled car parking space, an adapted car, a disabled toilet and a kitchen facility on the ground floor, he did not suggest any steps which would allow the claimant to climb in and out of the inspection pits or into the cabs. There was no failure by the respondent in this respect.

Offering the Claimant an alternative role

188. The final adjustment suggested by the claimant is that he should have been given an alternative role. However, the claimant was given an alternative role- the one which he wanted. He raised the suggestion of an alternative role in his grievance, it was discussed at the grievance meeting with him and followed up by the respondent. Although there was some delay between the claimant's original job application and the alternative role being offered, we do not consider that delay was sufficiently extensive to be able to say that the respondent failed to take reasonable steps as required and, in any event, delay was not a point taken by the claimant in this respect. It is inevitable that considering the suitability of somebody for an alternative role will take some time. The claimant was an applicant for a role not an existing employee, but even in respect of an existing employee redeployment as a reasonable adjustment over the timescale which took place in this case would not be considered unreasonable.

189. Thus we do not find a failure in this respect.

Overall conclusions

190. We now set out a brief summary of our conclusions, the summary does not supplant the analysis set out above.

191. Any other person in the same position as the claimant but who was not disabled would have found the job offer being withdrawn from them. The claim of direct discrimination cannot succeed.

192. The claims of harassment fail either because we do not accept the factual assertions advanced by the claimant or we do not consider it was reasonable for the claimant to feel harassed by the acts which he alleges amounted to harassment.

193. Whilst we consider that the process by which the respondent considered reasonable adjustments in this case had flaws and we are particularly critical of the failure by the respondent to consult with the claimant in respect of reasonable adjustments, we are not satisfied that the respondent failed to take such steps as were reasonable to avoid the disadvantage which the claimant had.

194. The claim of discrimination because of something arising from a disability fails because there was no less discriminatory way of avoiding the respondent's aim of meeting the reasonable business needs and standards of the Respondent and ensuring that the VSA role is performed safely for the benefit of the Claimant, the Respondent's employees and third parties.

Employment Judge Dawson
Date: 24 January 2023

Judgment sent to the Parties: 08 February 2023
FOR THE TRIBUNAL OFFICE

Appendix 1

Decision on application to amend the list of issues

1. The claimant applies to amend the list of issues as follows:

13 Did the Respondent fail to comply with its duty to make reasonable adjustments when considering the size and resource of the Respondent? In particular, did the Respondent maintain the following PCP's:-

a. The Respondent's recruitment process and application of that process without alteration;

b. The requirement <u>to carry out the VSA role in accordance with the current practice, including:</u>

   i. <u>Fulfilling the VSA role single-handedly;</u>

   ii. <u>reviewing the HGVs from within a pit;</u>

   iii. <u>Climbing in and out of a vehicle cab; and</u>

   iv. <u>Requirement to work at different Authorised Testing Facilities (ATF)</u>

   ~~v. for the Claimant to fulfil the VSA role single-handedly; and~~

c. Pre-employment checks/ processes.

…

16 Should the Respondent have taken reasonable steps to avoid the disadvantage suffered by the Claimant? The Claimant suggests the following:-

a. a support worker undertaking some of the physical activity of the job i.e. someone taking photographs and being them back to the Claimant to evaluate or having video equipment to enable the Claimant to see in real-time inside the cab <u>and/or pit</u>. This equipment would be portable and would have enabled the Claimant to use the equipment at various locations;

b. <u>using a lift (scissor lift and/or mobile wheelchair lift) to enable the Claimant to get in and out of the cabs;</u>

c. <u>using a mobile column lift to lift the vehicles;</u>

d. <u>the use of a support worker/assistant to help set up the mobile lifts;</u>

e. <u>for the Claimant to only work at those ATFs which do have a hoist and/or mobile column lift;</u>

f. <u>for a hoist and/or mobile column lift to be put in place at one or more ATF(s);</u>

g. <u>the use of a manual standing wheelchair for the Claimant to inspect the underside of the vehicle</u>;

h. using the Government's Access to Work Scheme to assist with funding for reasonable adjustments;

i. approaching experts in the field of workplace adjustments for wheelchair users to request assistance in finding any new or innovative solutions for ways to remove or alter physical features to enable the Claimant to carry out the VSA role, and then putting these adjustments into place;

j. considering and implementing reasonable adjustments as recommended by Occupational Health; ~~and/or~~

k. offering the Claimant an alternative role;

2. The respondent resists the application insofar as it relates to the suggested adjustments saying that it is prejudiced to face such an amendment, which was only made on the Friday before the hearing started on the following Monday and at noon on that day. It says that in circumstances where both parties have been represented from the outset and there has been an agreed list of issues from as long ago as June 2022, it is unfair for it to have to face a revised case today. It says that it has not dealt with the proposed adjustments to the extent that it would have wished to in its witness statements, the witnesses may have discussed some of them but only as background information, and the tribunal cannot be sure that all the documentation which it would need to see to adjudicate on those adjustments is in the bundle before it. At the very least, the respondent says, to amend the list of issues would require an adjournment to allow it to amend its witness statements and ensure that all of the relevant documents are in the bundle.

The law

3. In respect of claims of reasonable adjustments, it was held by the employment appeal tribunal in *Project Management Institute v Latif* [2007] IRLR 579 that, "It seems to us that by the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative; that is what would be required if a respondent had to show that there is no adjustment that could reasonably be made. Mr Epstein is right to say that the respondent is in the best position to say whether any apparently reasonable adjustment is in fact reasonable given his own particular circumstances. That is why the burden is reversed once a potentially reasonable adjustment has been identified." (Paragraph 53)

4. We were referred by the respondent to the cases of *Scicluna v Zippy Stitch* [2018] EWCA Civ 1320 and *Parekh v London Borough of Brent* [2012] EWCA Civ 1630.

5. Both of those cases were considered more recently by the Court of Appeal in *Mervyn v B W Controls Ltd* [2020] EW CA Civ 393 where the Court of Appeal stated that, in respect of amendments to lists of issues, the position is as follows: "I do not read the last sentence of the judgment of Underhill LJ in *Scicluna* as imposing a requirement of exceptionality in every case before a tribunal can depart from the precise terms of an agreed list of issues. It will no doubt be an unusual step to take, but what is "necessary in the interests of

justice" in the context of the tribunal's powers under Rule 29 depends on a number of factors. One is the stage at which amending the list of issues falls to be considered. An amendment before any evidence is called is quite different from a decision on liability or remedy which departs from the list of issues agreed at the start of the hearing. Another factor is whether the list of issues was the product of agreement between legal representatives. A third is whether amending the list of issues would delay or disrupt the hearing because one of the parties is not in a position to deal immediately with a new issue, or the length of the hearing would be expanded beyond the time allotted to it" (paragraph 38)

Decision

6. The application to amend the list of issues falls into 2 parts. The first part is to amend the list of PCPs which the claimant says he was subject to. The respondent does not object to those amendments and they are permitted.

7. The second part is to amend the list of reasonable adjustments which it is contended the respondent should have made. Those are in in paragraph 16 of the list of issues.

8. For the respondent no issue was taken with the proposed amendment to paragraph 16 a of the list of issues and that, is therefore, permitted.

9. In respect of paragraphs 16e and 16f, the respondent's position is that it accepts that the respondents have made comments about those suggested adjustments in their witness statements and there is not much prejudice to it, if the list of issues is amended in the way sought. Although it is very late in the day to amend the list of issues, ultimately the tribunal must apply the overriding objective and it is always preferable that cases are tried on their merits. We do not consider that to amend the list of issues would require an amendment to the pleadings where the claimant has properly pleaded a case of failure to make reasonable adjustments. In circumstances where there is little prejudice to the respondent by amending the list of issues in this way, we consider the list of issues should be amended in this respect.

10. In respect of the amendments at subparagraphs b c d and g the respondent says that it would be prejudiced if the amendments were allowed.

11. In respect of lifts into the cab, the respondent submits that until Friday, no one had thought of a practical reasonable adjustment to enable the claimant to get into the cab. The respondent's occupational health expert provides no solution to that problem and if the point is now to be taken, the respondent needs to consider it.

12. Having read the respondent's witness statements we agree that it seems unlikely that the respondent's witnesses have said everything they would want to say if they knew they were facing a case that a scissor or mobile lift should have been provided to enable the claimant to get in and out of lorry cabs, or that a mobile column lift should have been provided to lift lorries (we understand the distinction between adjustment (c) and adjustments (e) and (f) in this respect to be that under (c) the column lift would be moved around different ATFs) or that a support worker should have assisted in setting up those lifts. The same applies to the use of a manual standing wheelchair.

13. Whilst the respondent's witnesses have dealt with those point in passing, their evidence gives rise to a number of other questions which the tribunal would want to consider and which we would have expected the respondents to address in their evidence. For instance Ms Sanders briefly refers to the difficulty in ensuring a safe exit for the claimant in the event of an emergency. That is clearly relevant to the question of whether the use of a lift into an inspection pit or lorry cab was a reasonable adjustment. It seems likely to us that had this been a properly identified part of the claimant's case, both parties would have wanted to bring evidence on that point to the tribunal and the tribunal would have needed to consider it. She also refers to her lack of knowledge that it is possible to safely lift a lorry by way of a mobile column lift. In the bundle the claimant has put in a photo of a bus being lifted by column lift and some photos of lorries which appear to be being lifted by column lifts but where the claimant was required to visit different ATF sites the respondent would need to be permitted to call evidence as to the feasibility of moving the column lifts from one site to another and the feasibility of using them at all such sites (one of the members of the tribunal raises the question of the height of the roofs at the sites).

14. Those points we have made are simply intended to be examples of why the tribunal accepts the respondent's submission as being a credible and reasonable one, namely that there may well be additional evidence which the respondent wants to bring to the tribunal.

15. Applying the guidance in *Mervyn* we note that the application to amend the list of issues is made before any evidence has been called, however it is made at the start of the hearing when disclosure has taken place, witness statements have been exchanged and an agreed bundle is before the tribunal. We accept that the list of issues was the product of agreement between legal representatives following a case management hearing for the purposes of identifying the list of issues. Amending the list of issues now would delay and disrupt this final, four-day, hearing because respondent is not in a position to deal with the new issues, an adjournment would be inevitable.

16. It is not in the interests of justice to delay final hearings, to do so causes delay to other litigants and wastes tribunal resources. Adjournment of a final hearing is prejudicial to the respondent's witnesses who continue to have allegations of discrimination hanging over them. Whilst refusing to adjourn does, of course, prejudice the claimant, that prejudice is mitigated by the fact that the claimant had the opportunity to set out his case and did so as long ago as June 2022. To leave amending the list of issues until the working day before the hearing is, we regret, to leave it too late. It is not in the interests of justice to allow the amendment to the list of issues to add paragraphs 16 b, c, d and g and the application is refused to that extent.

Appendix 2- List of Issues

IN THE EMPLOYMENT TRIBUNALS **CASE NUMBER: 1402835/2021**

BETWEEN

Stephen Jones

Claimant

- and -

Driver & Vehicle Standards Agency

Respondent

Agreed List of issues

Disability

1. The Respondent accepts that the Claimant, at the relevant time, had a disability in accordance with s6 (1) of the Equality Act 2010 by reason of full-time wheelchair use due to paraplegia (level T8/T9).

Direct disability discrimination

2. Did the Respondent subject the Claimant to the following treatment:-
    a. Withdraw the job offer on 1 April 2021.

3. Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies upon a hypothetical comparator with the same abilities as the Claimant but without the Claimant's disability.

4. If so, was the treatment because of the Claimant's disability?

Harassment

5. Did the Respondent subject the Claimant to any of the following:-

    a. Comment by Simon Jackson in February 2021 during a telephone call to the Claimant: "*I have never had to deal with someone like you before*".

    b. Internal email from HR dated 18 March 2021: "*I am aware that Si has had a number of conversations with this man and I am concerned that we are delaying the bad news that he is not fit, and the potential ramifications for him?".*

    c. Internal email dated 30 March 2021: the Respondent refers to the fact that the Claimant "*hasn't met [our] conditions, (in this case, health issues)".*

    d. The withdrawal of the job offer for the VSA role on 1 April 2021.

    e. The grievance outcome – failure to adequately address the points raised in the Claimant's grievance.

6. If so, was that unwanted conduct?

7. Was the conduct related to the Claimant's disability?

8. Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? In considering whether the conduct had the relevant effect, the Employment Tribunal should take into account:-

    a. The Claimant's perception;
    b. The other circumstances of the case; and

c. Whether it was reasonable for the conduct to have that effect on the Claimant.

Discrimination arising from disability

9. Did the Respondent subject the Claimant to unfavourable treatment as follows:-

    a. Withdrawal of the job offer for the VSA role on 1 April 2021.

10. If so, was this unfavourable treatment because of something arising in consequence of the Claimant's disability? The Claimant says that the "something arising" in consequence of his disability was movement difficulties (due to the Claimant being in a wheelchair) and/or the requirement for specialist equipment.

11. If so, can the Respondent show that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

12. The Respondent says that the legitimate aim was meeting the reasonable business needs and standards of the Respondent and ensuring that the VSA role is performed safely for the benefit of the Claimant, the Respondent's employees and third parties.

13. The Respondent says that the unfavourable treatment was a proportionate means of achieving a legitimate aim, as there were no reasonable adjustments that could have been made to the VSA role in order that the Claimant could have safely and effectively fulfilled the role. Furthermore, there are safety and quality reasons for requiring VSAs to conduct assessments at a variety of sites and for more than one client.

Failure to comply with duty to make reasonable adjustments

14. Did the Respondent fail to comply with its duty to make reasonable adjustments when considering the size and resource of the Respondent? In particular, did the Respondent maintain the following PCP's:-

    a. The Respondent's recruitment process and application of that process without alteration;

    b. The requirement to carry out the VSA role in accordance with the current practice, including:

        i. Fulfilling the VSA role single-handedly;
        ii. reviewing the HGVs from within a pit;
        iii. Climbing in and out of a vehicle cab; and
        iv. Requirement to work at different Authorised Testing Facilities (ATF)

15. If the Respondent maintained the PCPs above, did the PCPs place the Claimant at a substantial disadvantage compared to employees who were not disabled? The substantial disadvantage relied upon by the Claimant is:

    a. The VSA role being withdrawn.

16. Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at a disadvantage?

17. Should the Respondent have taken reasonable steps to avoid the disadvantage suffered by the Claimant? The Claimant suggests the following:-

    a. a support worker undertaking some of the physical activity of the job i.e. someone taking photographs and being them back to the Claimant to evaluate or having video equipment to enable the Claimant to see in real-time inside the cab and/or pit. This equipment would be portable

and would have enabled the Claimant to use the equipment at various locations;

b. for the Claimant to only work at those ATFs which do have a hoist and/or mobile column lift;
c. for a hoist and/or mobile column lift to be put in place at one or more ATF(s);
d. using the Government's Access to Work Scheme to assist with funding for reasonable adjustments;
e. approaching experts in the field of workplace adjustments for wheelchair users to request assistance in finding any new or innovative solutions for ways to remove or alter physical features to enable the Claimant to carry out the VSA role, and then putting these adjustments into place;
f. considering and implementing reasonable adjustments as recommended by Occupational Health;
g. offering the Claimant an alternative role;

18. Was it reasonable for the Respondent to have to take those steps and when?

19. Did the Respondent fail to take those steps?

Remedy

20. Is the Claimant entitled to claim financial loss? If so, at what level?

21. Is the Claimant entitled to claim an Injury to Feelings Award and if so, at what level?