EMPLOYMENT TRIBUNALS (SCOTLAND)

5 **Case Numbers: 4114456/2019 & 4114915/2019**

Hearing held in Glasgow on 17 and 18 November 2022, 13 and 14 February 2023

10 **Employment Judge M Whitcombe**
Tribunal Member J McElwee
Tribunal Member L Hutchison

15 **Mr Atif Aslam** — **Claimant**
In person

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Teleperformance Limited — **Respondent**
Representedby:
25 **Mr C Gray**
(Human Resources Business Partner)

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JUDGMENT

The unanimous judgment of the.Tribunal is as follows.

(1) The claim for direct disability discrimination is not well-founded and is
35 dismissed.

(2) The claim for discrimination arising from disability is not well-founded and is dismissed.

(3) The claim for indirect disability discrimination is not well-founded and is dismissed.

(4) The claim for failures to make reasonable adjustments is not well-founded and is dismissed.

REASONS

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Introduction and background

1. We gave oral reasons for our judgment at the end of the hearing. These written reasons are provided at the claimant's request. When we had finished giving oral reasons the claimant asked whether our judgment meant that he could not work for the respondent in the future. As we explained immediately, our decision is limited to whether the respondent acted unlawfully when it decided not to offer the claimant employment in September 2020. It has no bearing on any future application that the claimant might make for employment with the respondent, or any other employer.

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2. The claimant has multiple sclerosis ("MS") and it is common ground that he is a disabled person for the purposes of the Equality Act 2010 on that basis. He is very obviously determined to return to work. He describes himself as "a fighter" and explained to us that he never gives up. We do not doubt his determination or motivation. However, our task does not depend on the view we take of the claimant. It is to decide whether the claimant's treatment by the respondent around two and a half years ago was a breach of the Equality Act 2010.

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Claims and issues

3. The remaining claims arise from the respondent's decision, communicated to the claimant on 29 September 2020, not to offer him employment as a Customer Service Representative. That role involves working in a call centre.

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Case management

4. The claim forms were received by the Tribunal on 16 and 23 December 2019. They described the claims in very brief terms. On 30 June 2020 EJ MacLean identified areas in which further information was required and set them out in a detailed note dated 3 July 2020. On 10 November 2020 EJ Kemp was able to record a detailed summary of the issues, including some jurisdictional matters, in a note and order dated 17 November 2020. At a further preliminary hearing on 24 May 2021 EJ Sorrell decided preliminary issues of qualifying service and jurisdictional time limits. Consequently, all claims were dismissed *apart from* one raised by way of amendment. That claim concerned the decision not to hire the claimant on or about 29 September 2020, and that is the claim with which we are now concerned.

Issues for this hearing

5. The claim for disability discrimination in relation to the failure to hire the claimant on 29 September 2020 is one of many claims analysed in EJ Kemp's order. It falls into the following parts.

   a. *Direct discrimination* contrary to s.13 EqA 2010. The claimant argues that a hypothetical comparator whose circumstances were not materially different would have been hired, and that the claimant's treatment amounted to less favourable treatment because of disability. The respondent argues that the comparator would have been treated in the same way, that the treatment was not less favourable, and that the reason for the treatment had nothing whatsoever to do with disability.

   b. *Discrimination arising from disability* contrary to s.15 EqA 2010. The claimant argues that the failure to hire him was unfavourable treatment arising from disability. The respondent argues that the decision was a proportionate means of achieving the legitimate aim of ensuring that employees can fulfil the requirements of their role and to deliver

satisfactory service to the public and the respondent's client.

c. *Indirect discrimination* contrary to s.19 EqA 2010. The claimant argues that he was placed at a particular disadvantage by the following PCPs:

   i. A policy of not re-employing people, including him, who had been dismissed for incapacity.

   ii. A requirement that employees should be able to meet client requirements.

d. The claimant alleges various *failures to make reasonable adjustments* contrary to s.20 EqA 2010, based on substantial disadvantage caused by physical features of the respondent's premises and/or the lack of an auxiliary aid. They are:

   i. To be able to work with his left leg raised.

   ii. To have a desk fan.

   iii. To work in a location near to toilet facilities.

   iv. To have voice recognition software provided to him.

   The respondent accepts that the first three adjustments would have been reasonable if the claimant had been attending the workplace, but its primary argument in relation to all four of these adjustments is the same: it was not reasonable to make those adjustments because the claimant was not ultimately hired and did not attend the workplace. They were all workplace adjustments, so it was not reasonable to make them unless and until the claimant started work.

6. The respondent does not rely on any defences arising from a lack of knowledge of disability.

7. The claimant added a further argument to his case during the first morning of the hearing. Although there was no formal application to amend and no written draft amendment Mr Gray very graciously consented to it being raised and said that he was happy to deal with it.

8. The additional argument was that the respondent failed to consider appointing the claimant to an adjusted role, the adjustment being allowing the

claimant to take additional breaks when he required them to deal with fatigue. Given the circumstances in which this argument arose, we pressed the claimant for as much detail as possible to ensure a fair hearing of this point. The claimant responded that he could not say how many additional breaks he would have needed, how often he would have required them, how long they would have lasted or in what circumstances they would have become necessary. All that he could say was that some calls would leave him feeling very tired, and that when that happened, he would need to take a break until he felt able to take the next call.

9. The claimant did not suggest that it would have been reasonable for the respondent to have accepted a lower standard of work, or to adjust the KPIs for the role in any other way.

10. The respondent's argument was that it would not have been reasonable to have made that adjustment because:

   a. The cost and disruption caused the business was uncertain, given that it was not clear how many breaks would be required, when, at what frequency or in what circumstances.
   b. That made it impossible to plan suitable cover for the claimant's breaks and to maintain the staffing levels necessary to meet demand.
   c. The proposed adjustment would not have been "efficacious", in that breaks alone would not have been sufficient to enable the claimant to reach acceptable levels of performance. Although this point was not clearly part of Mr Gray's oral submissions, it was the gist of the rejection email sent to the claimant by Sarah-Jane Lundy on 29 September 2020 and the same point featured in cross-examination. We therefore deal with it for the sake of completeness.

Adjustments to the Tribunal process

11. Several adjustments were made to alleviate the effects of the claimant's disability and because the claimant represented himself throughout the

process. Matters were kept under review and additional adjustments were made as a result of experience gained during the hearing.

a. The Tribunal arranged for taxis to transport the claimant to and from the hearing venue, although on one occasion three taxis were sent before the claimant was available.

b. Breaks were taken during the hearing whenever required. They were as long as the claimant requested.

c. Additional explanations of law, procedure, evidence and other arrangements were given on a regular basis. The Employment judge recapped the issues, law and evidence before the claimant made his submissions.

d. The respondent's submissions were heard first, so that the claimant would have the advantage of being able to hear and respond to them before making his own. He was allowed to rest and reflect overnight before doing so and made his own submissions at 1000 on the final day of the hearing.

e. The claimant did not have any questions at all for the respondent's first witness and had only a couple of questions for the respondent's other witness. Therefore, and with the claimant's agreement, the Employment Judge asked additional questions of the respondent's witnesses on the claimant's behalf. This was done because the claimant appeared to be tired and a little overwhelmed at the relevant times. The questions were driven by the issues recorded above and the Employment Judge checked with the claimant that all relevant issues had been covered.

f. It was not possible to provide the live transcription which the claimant requested, without warning, on the first day of the hearing. However, the claimant was allowed to record the hearing, on the strict understanding that the recording was for his own use only, would not be sent to or shared with anyone else, would not be uploaded anywhere and would be deleted once the claimant no longer required it for the purposes of the litigation.

g. Although the claimant initially indicated that a finish time of around

1600 to 1630 would be realistic, he became extremely tired by late morning every day and no day of the hearing ran very far into the afternoon. For that reason, the third and fourth days of the hearing were scheduled as half days to run from 1000 to 1300. The claimant felt that he was generally less tired in mornings than in afternoons.

h. The claimant asked to be allowed to drink coffee rather than water during the hearing. That was no problem, but the Tribunal did not require members of Tribunal staff to buy the claimant coffee during breaks, as he appeared at one stage to have thought.

i. On the first two days of the hearing, a full hour was allowed for lunch. The Tribunal did not offer to provide the claimant with lunch, as he appeared at one stage to have thought.

j. The hearing room was changed so that the claimant was as close as possible to an accessible toilet.

k. The claimant was unhappy that the Tribunal was not able to provide him with a wheelchair, although as far as the Tribunal is aware that had not been requested prior to the hearing. Arrangements were made for the claimant to be able to bring what he called an electric wheelchair, but which looked in pictures to be more of a scooter, to the hearing room on the second floor of the Glasgow Tribunals Centre. That would not normally have been allowed under the rules which apply to the building occupied by the Tribunal because of the size of the equipment, but an exception was agreed with the landlord (the Scottish Courts and Tribunals Service) and security. Ultimately, the claimant decided not to bring the device in question.

l. The claimant had been provided with a joint file of documents in electronic format. However, he did not bring to the hearing any means of displaying it. Therefore, a printed copy was used, and Mr Gray very helpfully agreed to turn the pages for the claimant as required.

12. At the start of each day of the hearing the Tribunal checked with the claimant that all necessary adjustments had been made.

Evidence

13. The claimant gave evidence and was his only witness. For the respondent, we heard from Sarah-Jane Lundy (at the relevant time a Senior Resourcing and Relations Executive) and Susan Taylor (Contact Centre Manager).

14. We were also provided with a file of documents prepared by the respondent. It originally ran to 94 pages. We requested additional documents of a type which would probably have been requested by any professional representative acting for the claimant. We did that to ensure a fair hearing and to compensate for the claimant's lack of representation. The respondent added additional pages to the file and it then had 129 pages in total.

The relevant facts

15. We made the following findings of fact. Where facts were disputed, we made our findings on "the balance of probabilities", in other words, a "more likely than not" basis. If a fact is more likely to be true than untrue, then for the purposes of this case it is deemed to be true. If a fact is more likely to be untrue than true, it is deemed to be untrue for the purposes of this case.

16. The claimant had previously worked for the respondent in a similar capacity. Those periods were from 13 June 2011 until 21 June 2013, when the claimant resigned, and then again from 9 December 2013 until 20 February 2015, when the claimant was dismissed following a capability process. The claimant made a further application for employment in July 2019 but that application process ended following the receipt of occupational health evidence to the effect that the claimant would not be able to perform the role to the required standard.

Effects of the claimant's disability at the relevant time

17. MS is a condition affecting the brain and spinal cord which potentially causes a wide range of symptoms. It is important to focus on the effects as they were at the time of the alleged act of discrimination in September 2020, rather than as they are now, or on any other date.

18. The claimant's condition has followed a slow, progressive, relapsing and remitting course. At the relevant time he experienced mobility difficulties and used a crutch. He experienced difficulties with concentration and memory. He had a tremor in his right hand which made gripping a pen or typing difficult and he typed with his right forefinger only. He did not use his left hand for typing. The claimant used a catheter. Sometimes his speech could be slurred. He felt more alert and fresher in the mornings. The difficulties experienced with mobility and concentration were more pronounced in hot weather or in hot rooms.

Application for employment

19. The claimant made a further application for employment with the respondent on 14 September 2000. He made that application online but we have not seen the application form or data. He could not remember whether he was aware of the identity of the respondent's client at the time but it was the Student Loans Company ("SLC"). The claimant applied to be a Customer Service Representative, which would mean working in a call centre hosted on the respondent's premises.

Potential adjustments under consideration

20. A desk fan would help the claimant to work better and more comfortably because his symptoms are worse when hot. In late 2020 he needed to raise his left leg because of recent surgery. A working location close to a toilet would maintain dignity and relieve stress, given the claimant's restricted

mobility and additional needs. The respondent accepts that all those adjustments could reasonably have been made and asserts that they would have been made if the claimant had been offered employment in September 2020.

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21. The claimant also argued that it would have been reasonable to have provided him with voice recognition software (the well-known "Dragon" brand). Once again, primarily, the respondent says that the failure to provide it was because the claimant was never ultimately offered employment, but
10 there is also another point. The respondent asserts that the available voice recognition software was not compatible with the computer systems operated by the client, SLC. However, that is not established on the balance of probabilities. The witness called to give evidence on that point, Sarah-Jane Lundy, said "*/ don't know if there were issues with Dragon compatibility with*
15 *SLC", so* in truth the suggestion came only from the respondent's representative while cross-examining the claimant. It was not supported by evidence.

22. In evidence, the claimant explained his view of the necessary adjustments in
20 terms of breaks in the following way. *"I don't think it is about the number of calls, it is about the timing... for example within 10 minutes I could have one strenuous call or it could be call after call... It is the break that is imperative,,, I don't know what a reasonable break would be...you would need to base the adjustment on the type of calls you were getting."* While we are free to
25 consider the reasonableness of this adjustment, it must be understood that it was not raised or considered in 2020 and so it is not considered in the contemporaneous correspondence or medical evidence.

23. This was addressed in evidence by Susan Taylor, who said, *"Yes, we are*
30 *able to increase the time for breaks. Where it becomes difficult is where it is part of the unknown. For some people, where we have made other reasonable adjustments, they can generally tell us in advance they'd need, for example, a break after a certain period. That helps us to plan. If we give*

someone additional breaks then I have to staff up accordingly.” Susan Taylor gave the example of an employee who is allowed additional breaks to deal with their stoma bag. Later, she said, *“It makes it difficult to plan for the business if we don’t know how long the breaks should be. If an individual is asking for breaks of uncertain lengths that would make it very difficult for me to plan how many people I needed…I would potentially need to adjust other people’s coaching time, break time etc to ensure we had enough people online at the right times.”*

24. We accept that evidence as a truthful account of the respondent’s general approach and the pressures on the respondent’s business. The respondent was certainly prepared to consider adjustments in terms of additional or extended breaks, but it would need to ensure that sufficient cover was in place to meet demand while those breaks were taken. Uncertainty around the precise nature of the breaks would make planning difficult. Susan Taylor contrasted the claimant’s position, where the break time needed was not known in advance to the claimant or to the respondent, with the employee using a stoma bag, who was able to indicate in advance what time he needed. The respondent was able to plan for that.

Alleged rule against re-hiring

25. The claimant believes that the respondent had a general rule which meant that *“once dismissed you are dismissed for life, so I cannot ever be rehired".* We do not accept that. The claimant could not remember the name of the member of staff who had told him of the existence of the alleged rule and he could not remember when or how he had learned about it. The claimant did not call any witness to corroborate his account and accepted that no one in management or human resources had ever mentioned such a rule. In our assessment, that undermines the reliability of the claimant’s belief.

26. We prefer the respondent’s much clearer and more specific evidence that there was at one time an error on the system used for candidates which

meant that a candidate who had previously been dismissed for capability was marked not to be re-hired for any other role. However, the error was spotted and corrected in 2019 or earlier. It had been corrected before the application for employment with which we are now concerned, it was not applied to anyone in 2020 and it was not applied to the claimant at any time.

Consideration of adjustments

27. The evidence given by the respondent's witnesses regarding discussions about potential adjustments to the SLC role was unsatisfactory. Sarah-Jane Lundy said, "*/ spoke to the Call Centre Manager, she told me it couldn't be adjusted. It was email initially and then on the phone".* The call centre manager was subsequently identified as Susan Taylor. No emails of that sort were produced following the subsequent order for disclosure of documents and Susan Taylor contradicted this evidence. She said that there had not been any emails, though there was a MS Teams message from Sarah-Jane Lundy asking for a call back, and that if there was a relevant telephone conversation, it would have been about the possibility of making adjustments generally, since she could not possibly have commented on the potential for adjusting the SLC role because that was not within her remit or experience. She had never managed that contract and simply did not know what the potential for adjustments might be.

28. At this point we make one observation on the evidence. All three members of the Tribunal were concerned by this contradiction. A respondent's case on reasonable adjustments is not limited to the discussions, ideas and reasoning carried out at the time and it is open to a respondent to run points at an Employment Tribunal hearing which were not in its mind at the time. The contradiction is by no means fatal to the respondent's case. However, it is disconcerting that two senior figures within the respondent's organisation should contradict each other on such an important point. The Tribunal would expect a careful, consistent and documented approach to be taken to the respondent's duty to make adjustments. That would give everyone involved

the necessary confidence that a sufficiently careful and thorough approach had been taken. The respondent's human resources professionals might wish to reflect on whether this could have been handled more effectively.

29. Our finding on this issue is that Sarah-Jane Lundy's evidence is incorrect and that there was no meaningful discussion of the possibility of adjusting the role working on the SLC contract, including by allowing breaks along the lines set out above. She was contradicted by the colleague with whom she claimed to have discussed the possibility of adjustments and there is a marked lack of documentation to confirm any such discussion.

Medical evidence

30. The respondent had a very short letter dated 10 September 2020 from the claimant's GP, Dr Crighton. It confirmed "enduring effects" with regard to mobility, balance, strength, stamina and some cognitive effects. Dr Crighton thought that the claimant would be fit for some "sedentary work" but that the effects of MS on cognition would require a "lighter workload" if that work involved telephone or computer work, as it did. There was no reference to breaks in the letter.

31. The respondent also considered occupational health evidence obtained by the respondent following a previous application by the claimant for employment in 2019.

32. The occupational health report dated 18 July 2019 was based on an incorrect job specification which did not relate to the role for which the claimant had then applied. Dr Jowett incorrectly thought that the tasks associated with the role were reduced compared to the previous roles from which the claimant had been dismissed.

33. The occupational health report dated 5 August 2019 had considered the correct job specification and it reached a very different conclusion from the

report dated 18 July 2019. This time, Dr Jowett noted that the job specification outlined a high rate of work with an individual having to operate between 5 complex computer systems, taking calls lasting an average of 10.5 minutes each, with two minutes of administration time. The claimant had apparently agreed that this was similar to a previous role from which he had been dismissed due to capability concerns. Dr Jowett's opinion was that the claimant was *"unlikely to be able to meet the standards required of a,role that is similar to one he has been dismissed from previously on grounds of capability."* The recommendation was that the respondent should discuss whether any less demanding alternative roles were . available. The respondent's evidence, which we accept, is that no less demanding roles were available at the time.

Rejection

34. The claimant's application for employment was rejected in an email dated 29 September 2020. The reasoning was essentially that although Dr Crighton had recommended a "lighter workload", the role in question involved the same type of work for the same client that the claimant serviced when dismissed on capability grounds in 2014. The letter states that no less demanding roles were available, and that all of the respondent's departments recruiting at that time involved heavy work in terms of KPIs and call volumes.

35. The letter went on to say *"Due to the nature of the customer service work we provide, it is not reasonably possible to change this whilst continuing to meet customer demand in the type of contact centre environment we have."* For the reasons set out above, we find that this assertion was not underpinned by any reasoned assessment by a contact centre manager with experience of the relevant client, though that does not mean that the position taken was necessarily incorrect.

Applicable law

Direct Discrimination

5 36. Section 13 of the Equality Act 2010 defines direct discrimination as follows: 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.

37. By virtue of section 23(1) of the Equality Act 2010 when carrying out that
10 comparison there must be "no material difference" between the circumstances relating to each case.

Discrimination arising from disability

15 38. Section 15(1) of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if-

a. A treats B unfavourably because of something arising in consequence of B's disability, and
b. A cannot show that the treatment is a proportionate means of
20 achieving a legitimate aim.

39. By virtue of section (2), those provisions do not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

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Indirect discrimination

40. Section 19(1) of the Equality Act 2010 provides that a person (A) discriminates against another (B) if A applies to B a provision, criterion or
30 practice ("PCP") which is discriminatory in relation to a relevant protected characteristic of B's.

41. Section 19(2) provides that a PCP is discriminatory for those purposes if -

a. A applies, or would apply, it to persons with whom B does not share the characteristic;

b. it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;

c. it puts, or would put, B at that disadvantage; and

d. A cannot show it to be a proportionate means of achieving a legitimate aim.

42. Section 23(1) applies to the comparisons in section 19, so there must be no material difference between the circumstances relating to each case.

Reasonable adjustments

43. By virtue of section 20(3) of the Equality Act 2010, where a provision, criterion or practice ("POP") 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, then A is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

44. 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, then section 20(4) provides that A is under a duty to take such steps as it is reasonable'to have to take to avoid the disadvantage. By virtue of section 20(10), "physical feature" means for these purposes a feature arising from the design or construction of a building, a feature of an approach to, exit from or access to a building, a fixture or fitting, furniture, furnishings, materials, equipment or other chattels in or on premises, or any other physical element or quality.

45. By virtue of section 20(5), 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, then A is under a duty to take such steps as it is reasonable to have to take to provide

the auxiliary aid.

46. Section 21 of the Equality Act 2010 provides that a failure to comply with any of those duties is a failure to comply with a duty to make reasonable adjustments, and that A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

Burden of Proof

47. The burden of proof in proceedings relating to a contravention of the Equality Act 2010 is governed by section 136 of that Act. The correct approach is set out in section 136(2) and (3). References to "the court" are defined so as to include an employment tribunal.

> *(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.*

48. The Court of Appeal has repeatedly stressed that judicial guidance on the burden of proof is no more than guidance and that it is no substitute for the statutory language.

49. We have taken into account the well-known guidance given by the Court of Appeal in ***Igen Ltd v Wong*** [2005] ICR 931 (sometimes referred to as "the revised ***Barton*** guidance"), which although concerned with predecessor legislation remains good law. It was approved by the Supreme Court in ***Hewage v Grampian Health Board*** [2012] ICR 1054. ***Ayodele v Citylink Ltd*** [2018] ICR 748, CA confirmed that differences in the wording of the Equality Act 2010 have not changed the test or undermined the guidance in ***Igen Ltd v Wong.***

50. First, the claimant must prove certain essential facts and to that extent faces an initial burden of proof. The claimant must establish a *"prima facie" or,* in plainer English, a "first appearances" case of discrimination which needs to be answered. If the inference of discrimination *could* be drawn at the first stage of the enquiry then it *must* be drawn at the first stage of the enquiry, because at that stage the lack of an alternative explanation is assumed. The consequence is that the claimant will necessarily succeed *unless* the respondent can discharge the burden of proof at the second stage.

51. However, if the claimant fails to prove a *"prima facie"* or "first appearances" case in the first place then there is nothing for the respondent to address and nothing for the tribunal to assess. See ***Ayodele*** at paragraphs 92-93 and ***Hewage*** at paragraph 25.

52. At the first stage of the test, when determining whether the burden of proof has shifted to the Respondent, the question for the tribunal is not whether, on the basis of the facts found, it *would* determine that there has been discrimination, but rather whether it *could* properly do so.

53. The following principles can be derived from ***Igen Ltd v Wong*** (above), ***Laing v Manchester City Council*** [2006] ICR 1519 EAT, ***Madarassy v Nomura Internationa! p/c*** [2007] ICR 867, GA and ***Ayodele v City link Ltd*** (above); which reviewed and analysed many other authorities.

   a. At the first stage a tribunal should consider all the evidence, from whatever source it has come. It is not confined to the evidence adduced by the claimant and it may also properly take into account evidence adduced by the respondent when deciding whether the claimant has established a *prima facie* case of discrimination. A respondent may, for example, adduce evidence that the allegedly discriminatory acts did not occur at all, or that they did not amount to less favourable treatment, in which case the tribunal is entitled to have regard to that evidence.

b. There is a vital distinction between "facts" or evidence and the respondent's "explanation". While there is a relationship between facts and explanation, they are not to be confused. It is only the respondent's *explanation* which cannot be considered at the first stage of the analysis. The respondent's *explanation* becomes relevant if and when the burden of proof passes to the respondent.

c. It is insufficient to pass the burden of proof to the respondent for the claimant to prove no more than the relevant protected characteristic and a difference in treatment. That would only indicate the *possibility* of discrimination and a mere possibility is not enough. Something more is required. See paragraphs 54 to 56 of the judgment of Mummery LJ in ***Madarassy.***

54. However, it is not always necessary to adopt a rigid two stage approach. It is not necessarily an error of law for a tribunal to move straight to the second stage of its task under section 136 of the Equality Act 2010 (see for example ***Pnaiser v NHS England*** [2016] IRLR 170 EAT at paragraph 38) but it must then proceed on the assumption that the first stage has been satisfied. The claimant will not be disadvantaged by that approach since it effectively assumes in their favour that the first stage has been satisfied. The risk is to a respondent which then fails to discharge a burden which ought not to have been on it in the first place (see ***Laing v Manchester City Council*** [2006] ICR 1519 EAT at paragraphs 71 to 77, approved by the Court of Appeal in ***Madarassy).*** Tribunals must remember that if and when they decide to proceed straight to the second stage.

55. It may also be appropriate to proceed straight to the second stage when the claimant compares their treatment to that of a hypothetical comparator. Sometimes the reason for the treatment, and the question whether there is a *prima facie* or "first appearances" case of discrimination, will inevitably be intertwined with the question whether the claimant was treated less

favourably than a comparator, especially a hypothetical comparator. In cases of that sort the decision on the "reason why" issue will also provide the answer on the "less favourable treatment" issue (see Lord Nicholls in ***Shamoon v Chief Constable of the RUC*** [2003] ICR 337 at paragraphs 7 to 12 and Elias LJ in ***Laing v Manchester City Council*** [2006] ICR 1519 EAT at paragraph w

56. In a similar vein, the Supreme Court in ***Hewage*** (above) observed that it was important not to make too much of the role of the burden of proof provisions. They required careful attention where there was 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.

Burden of proof- discrimination arising from disability

57. The approach to the burden of proof arises from the wording of section 15 of the Equality Act 2010. In order to establish a "first appearances" case of discrimination under section 15 a claimant must show that they have been treated unfavourably by the employer, that "something" arose as a consequence of their disability and that there are facts from which it could be inferred that this "something" was the reason for the unfavourable treatment.

58. If all of that is done, then the burden shifts to the employer to prove either that it did not know that the claimant was disabled (section 15(2)), or that the reason for the unfavourable treatment was not the "something" alleged by the claimant, or that the treatment was a proportionate means of achieving a legitimate aim (section 15(1)(b)).

Burden of proof- indirect discrimination

59. It is often said that there is less need for a separate consideration of the burden of proof in indirect discrimination cases because of the structure of

section 19 of the Equality Act 2010. The need for a claimant to show that a provision, criterion or practice ("PCP") had been applied to them which put (or would put) them, as well as persons sharing the relevant protected characteristic, at a particular disadvantage is broadly equivalent to the first stage of the burden of proof test in section 136. If the claimant establishes those things then it is for the employer to prove objective justification in the sense that the PCP was applied as a proportionate means of achieving a legitimate aim.

Burden of proof- reasonable adjustments

60. In ***Project Management Institute v Latif*** [2007] IRLR 579, the EAT established that the claimant must establish not only that the duty to make adjustments has arisen, but also that there are facts from which it could be inferred, absent a lawful explanation, that the duty had been breached by the respondent. Therefore, there must be evidence of some apparently reasonable adjustment that could have been made. Once a potentially reasonable adjustment has been identified the burden shifts to the respondent to prove that the adjustment could not reasonably have been achieved.

61. The level of detail required of the claimant will vary from case to case, but it is necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to be able to engage with the question whether it could reasonably have been achieved or not.

Submissions

62. Both sides made brief oral submissions. We were not referred to any statutory provisions or case law. Rather than set them out separately, we will deal with the key points made in our reasoning and conclusions.

Reasoning and conclusions

Direct disability discrimination

5 63. The relevant treatment was the decision not to hire the claimant. We are entirely satisfied that the reason for that treatment had nothing whatsoever to do with disability itself. This is a case in which we are able to make firm factual findings regarding the reason for treatment and the burden of proof has little role to play.

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64. It is clear from the oral and written evidence available to us that the respondent decided not to hire the claimant because, in the respondent's opinion, the claimant could not fulfil the requirements of the role working on the SLC contract or achieve the required standard of service. The appropriate

15 comparator would be another prospective employee who was not disabled, but who was similarly unable to deliver the required standard of service or to fulfil the requirements of the role. We are sure that the comparator would have been treated in exactly the same way as the claimant and would not have been hired (or re-hired) either. There was no less favourable treatment

20 because of disability and the claim for direct disability discrimination therefore fails.

Discrimination arising from disability

25 65. The decision not to hire (or re-hire) the claimant was plainly unfavourable treatment, in that a reasonable person would regard it as putting them at a disadvantage.

66. We are also satisfied that the reason for that treatment was something arising

30 from disability. The claimant's inability to reach the required level of performance arose directly from the many effects of his MS. That much is clear from the medical evidence available at the time of the decision and the claimant's own evidence to us at this hearing confirmed the position.

67. The respondent has satisfied us that it had a legitimate aim. The aim of maintaining a satisfactory level of service to clients would almost always be legitimate, certainly we find that it was in this case. The real issue is whether the respondent's means were proportionate.

68. We find that the respondent's treatment of the claimant was proportionate to the aim, because no less detrimental solution has been established during this hearing. We have not heard evidence of any viable alternative solution to the root problem, or any step which might have enabled the claimant to reach the required level of performance. We find that it was not possible to achieve the aim by any means less unfavourable to the claimant. .

69. While our reasoning on the reasonable adjustments issues (below) is quite separate, we refer also to our findings below in relation to breaks, since they also inform our finding that the failure to hire the claimant was proportionate.

70. We also accept the respondent's evidence that all of its vacancies at the relevant time were for similarly demanding roles and that no alternative employment with a lighter workload was available.

Indirect disability discrimination

71. For the reasons set out above in our findings of fact we reject the argument that the respondent applied a rule that employees dismissed for capability could never be rehired. No such rule existed and there was no PCP of that sort.

72. The relevant PCP was the need for the claimant to fulfil the requirements of the job specification and to reach a satisfactory level of performance. That PCP was applied to all employees or prospective employees working on the SLC contract.

73. The PCP put the claimant and those with a similar disability at a *particular* disadvantage because they were highly likely, if not certain, to be unable to fulfil those requirements. Consequently, they would most likely fail to secure an offer of employment or would face capability proceedings if already employed.

74. We therefore turn to the justification defence. The respondent has satisfied us that the PCP was a proportionate means of achieving a legitimate aim, and in this respect our findings mirror those set out above in relation to the claim for discrimination arising from disability. There was no other way of achieving the respondent's legitimate aim which would have been less detrimental to the claimant.

Reasonable adjustments

75. Our finding as to the PCP and disadvantage is equivalent to that set out above in relation to indirect discrimination. The relevant PCP also put the claimant at a *substantial* (in the sense of more than minor or trivial) disadvantage.

76. The respondent has satisfied us that it would not have been reasonable to have made the adjustment identified by the claimant in relation to breaks. Partly, that is because the cost and disruption associated with the proposed adjustment could not easily have been quantified or managed. Partly, that is because it is not established that the proposed adjustment would have stood a real chance of alleviating the disadvantage faced by the claimant.

77. The breaks would have been of uncertain number, timing, frequency and duration. The circumstances in which they would have been required could not easily have been predicted in advance. The associated cost and disruption was not something that the respondent, or this Tribunal, would be in a position to estimate and balance against any beneficial effect. Further, it was not realistically possible to arrange suitable cover and to maintain adequate staffing levels for breaks of that loosely specified and uncertain

type.

78. Further, there is no reason to think that the proposed adjustment in relation to breaks would have stood a real chance of having any beneficial effect in terms of alleviating the disadvantage which the claimant faced. As we have already noted, there is a mismatch between the issues raised by the medical evidence at the time and the issues raised at this hearing. Breaks were not an issue highlighted in the medical evidence from the claimant's GP or in the most recent occupational health evidence. The claimant's GP referred only to workload, suggesting that a lighter workload would be beneficial. We are satisfied that there is nothing that the respondent could reasonably have done to have lightened the demands of work on the SLC contract, even if the claimant had argued for that at this hearing. The work involved lengthy average call times and the use of multiple computer systems. The claimant did not suggest that it would have been possible to filter or change the work itself. The claimant had previously been dismissed from a role working for the same client following a capability process. It was a demanding role, and there is no evidence to suggest that breaks alone would have a real chance of alleviating the relevant disadvantage faced by the claimant. The claimant would still have been unable to perform to the required standard.

79. For those reasons, we are satisfied that it would not have been reasonable to have allowed the claimant to have taken the sort of breaks on which he based his case at this hearing.

80. The case based on the other adjustments identified at the start of the hearing (a desk fan, proximity to toilets, being able to raise one leg and using dictation software) fails for a single reason. Those adjustments only became relevant if and when the claimant started work, but he did not.

Conclusion

81. Those are the reasons why all of the claims brought by the claimant fail and

must be dismissed.

Employment Judge: Mark Whitcombe
Date of Judgment: 22 February 2023
Entered in register: 23 February 2023
and copied to parties

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