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# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs D Kelly  
**Respondent:** London Borough of Newham  
**Heard at:** East London Hearing Centre (in public)  
**On:** 6, 7, 8, 9, 10 February 2023  
**Before:** Employment Judge Moor  
**Members:** Miss S Harwood  
Mr L O'Callaghan

## Representation

**Claimant:** in person and through Miss West, friend (who attended remotely)  
**Respondent:** Mr Moher, solicitor

**JUDGMENT** having been sent to the parties on 15 February 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

## REASONS

1. These claims arise out of a restructure of the finance function in the London Borough of Newham. Mrs Kelly worked in its School's Bursar Service ('SBS'). She is a disabled person having a severe visual impairment. She is in the age group over 55 years. She contends the decision not to slot her into a new post in the finance function was an act of age or disability discrimination. She makes the same claim about the failure to appoint her, after internal interviews, to the role of Assistant Finance Manager ('AFM') or Finance Manager ('FM'). She claims the Respondent failed to make reasonable adjustments for her in those interviews. She also complains that two comments, one in an interview and one in an email, were harassment relating to disability. The Respondent denies all claims. It responds that the decision not to slot the SBS team into the new posts applied to 4 employees: 3 were under 55 years of age and 3 were not disabled. This it says shows its decision was not related to age or disability. It contends the failure to appoint was based on merit alone. It apologised to Mrs Kelly for the initial arrangements at

interview and reinterviewed her, but it denies that it failed to make reasonable adjustments. While the Respondent admits the comments it denies that they can be judged to be harassment relating to disability.

### **Adjustments at the Hearing**

2. At the beginning of the hearing, after consulting with Mrs Kelly and with her agreement, we made the following adjustments:
  - 2.1. A personal emergency evacuation plan that meant Alan Martin, our clerk, would be her 'buddy', escort her in an emergency and at other times if she wished. He gave her his personal mobile phone number and knew where she was when in the building.
  - 2.2. Longer mid-morning and afternoon breaks – our usual 5 minute break was extended to 15 minutes. We asked Mrs Kelly to let us know if this was insufficient at any stage. On occasion breaks were in fact longer.
  - 2.3. Large format (A3) copies of the documents in a larger font for Mrs Kelly to use, including the List of Issues.
  - 2.4. Alan turned pages for Mrs Kelly because of her recently fractured arm.
  - 2.5. We spoke up and clearly when, on the first day, Mrs Kelly had forgotten her hearing aid and, anyway, to ensure Miss West could hear.
  - 2.6. We thank Alan for his work in ensuring these adjustments were maintained and for managing the CVP room.
3. Miss West was described as Mrs Kelly's McKenzie friend. She took part as a representative when we agreed that she would ask some questions of witnesses. She was unable to attend in person and did so via video. Sound difficulties were ironed out early on and, when Miss West lost connection, we waited for her to return and repeated any evidence that she had missed. EJ Moor helped Mrs Kelly and Miss West focus questions on the issues, avoid repetition and structure questions. We thank them and Mr Moher for their structured and courteous approach. We were able to complete the hearing and give oral judgment.
4. Mr Moher provided written submissions with a large format copy for Mrs Kelly to read. Nevertheless, we required him to read his submissions aloud. So that she had a full opportunity to respond, we gave Mrs Kelly a break before her submissions and EJ Moor identified two points Mr Moher had raised for her additionally to cover.

## Issues

5. The issues were clarified by EJ Burgher at the Preliminary Hearing on 18 October 2022. We attach them as Appendix A to this judgment. We read them aloud on the first day of the hearing and reminded the parties that they were the questions for determination. We deleted reference to 'hearing' as Mrs Kelly confirmed it was not the disability she was relying on and hearing problems were not related to her visual impairment.

## Summary of Our Decision

6. Our reasons are, by necessity, detailed. We set out here the essence of our decision to help the parties' understanding. The summary does not replace our full reasons.
7. In the first AFM interview: we decide the Respondent should have asked about whether Mrs Kelly needed any adjustments before the video interviews. If it had done so, it would have found out about the disadvantage she faced if words were placed on the screen: she had to come very close to it to read them and this would be awkward and embarrassing. In failing to send the questions it placed on the interview screen to her in advance, it failed to make a reasonable adjustment.
8. In the second interview for FM, we decide that, in turning off the camera during the short presentation, the Respondent made a reasonable adjustment that avoided the disadvantage of Mrs Kelly having to come very close to the screen to read her presentation notes (or read paper close to her face).
9. We decide there are no facts from which we could properly draw an inference or conclude that the failure to slot-in or the failure to appoint to AFM or FM posts was direct age or disability discrimination.
  - 9.1. On the failure to slot Mrs Kelly into new finance posts: other staff who did not share her protected characteristics and who were in the same circumstances as she was, were treated the same. This was strong evidence for the treatment having nothing to do with age or disability. No other facts put forward by Mrs Kelly led us to infer or conclude that the decision was influenced by age or disability. The statistics relied upon were insufficient to raise such an inference.
  - 9.2. On the failure to be appointed to internal posts after interview, nothing in the evidence, the interview notes or background facts could properly lead us to draw inference or conclude that disability or age was part of reason for the rejections. The statistics relied upon were insufficient to raise such an inference.

10. Neither comment relied upon as harassment reasonably interpreted, could have the effect of the violation of dignity or creating the proscribed environment.
  - 10.1. Ms O'Brien's comment was off-the-cuff and not hectoring. While we can understand that it was off-putting at the beginning of an interview, it was embarrassing not humiliating, not hostile nor intimidating.
  - 10.2. The second comment by Mr Hall in his email responding to Mrs Kelly's complaint did not suggest, on a reasonable reading, that she was trying to cheat or gain an unfair advantage. Therefore it did not have the effect of violating dignity nor did it create a humiliating or intimidating environment.

### **Findings of Fact**

11. The following people gave evidence in the form of written statements and in oral answers to questions:
  - 11.1. Mrs Kelly
  - 11.2. Ms H O'Brien, Finance Manager, now Head of Finance
  - 11.3. Mr A Ward, Assistant Director of Finance and Transformation
  - 11.4. Mr D McNamara, Director of Finance, OneSource
  - 11.5. Mr C Hall, Corporate Director Resources, OneSource

We read the documents referred to us and heard closing arguments. Where there was a disputed fact we decided it by asking what is more likely to have occurred.

12. Mrs Kelly continues to be employed by the Respondent as a Principal Finance Officer at Grade PO6. She began her employment on 19 October 2000. By the time of events she had worked with the council for around 20 years. She is a qualified accountant, ICAEW. She worked in a job share, term-time hours.
13. Mrs Kelly was born in 1964 and was therefore 56 years of age when the matters about which she complains began. She puts herself in the age group 'above 55' and compares herself to those in the age group 'below 55'.

### **Disability**

14. It is agreed Mrs Kelly is a disabled person for the purposes of the Equality Act 2010 ('EQA').
15. Mrs Kelly has a lifelong, severe visual impairment. She is only able to use one eye. Even with glasses, she is only able to read documents in a larger

font or format by bringing them close to her face. She cannot read documents on a computer screen without using zoom magnification software to 300%. It magnifies part of the screen but, in doing so, limits the other parts.

16. It is apparent to anyone meeting Mrs Kelly that she has a visual impairment. As soon as she started employment, the Respondent knew that she was disabled.
17. The Respondent provided Mrs Kelly with the necessary equipment in the office at work to adjust for her impairment, with the help of funding from Access to Work. This included a 24" monitor and a dedicated desktop. Mrs Kelly has developed an excellent memory. She will sometimes memorise a document, for example, if she has to give a presentation.
18. During lockdown, staff worked from home. Mrs Kelly used her own desktop computer and 24" screen. She was able to work and attend video meetings using Zoom software and did so without the need for any further adjustments.

#### Schools' Bursar Service

19. Mrs Kelly worked in the Schools' Financial Consultancy Service, also known as the Schools' Bursar Service ('SBS'). The SBS team provided advice to school bursars in Newham. It was a 'funded service' meaning that schools contracted with and paid the Respondent for it. SBS sat in the Education directorate. We accept that SBS mainly offered services to schools, external to the council. Originally around 8 to 9 schools had contracts with the SBS but, in 2020, it was anticipated that school demand would reduce to about 2 schools. By May 2020 the Respondent anticipated that by the end of the financial year, March 2021, the SBS team were at risk of redundancy because of this reduced demand.
20. The other SBS team members were Mrs Kelly's job share partner who was under 55 and not disabled; and two other members of staff in the team who were not disabled and much younger. They had all been managed at one time by Mr Gibb.

#### Restructure

21. In about the spring of 2020, the Respondent embarked on a wide restructure of finances (not related to the reduction in demand for SBS). Previously finance services were provided to the Respondent and the London Boroughs of Bexley and Havering in a combined service called OneSource. The Respondent decided to bring finance back 'in house' just for Newham.
22. In May 2020, senior managers on the project steering board including Mr McNamara, Mr Seymour and Mr Ward (who had just accepted the offer of a senior role but was still working in Brent) considered whether the SBS

team should be slotted into finance posts in the restructure or kept as a separate team for the rest of the financial year.

- 22.1. Mr McNamara thought the SBS should be kept separate, because its work remained to be done for that year and others in the finance department could not do it. He acknowledged that the risk of redundancy was such, however, that team members should be informed and invited to apply for internal vacancies.
- 22.2. Mr Ward thought that the SBS should be kept separate. His reasoning was that it was a different case because it did specialist, transactional work. His aim, as a new manager, was to have people drawn into the finance function to give strategic finance advice to the borough across departments, which was very different work to that of the SBS.
23. Mr Gibb, not on the project steering board, and the SBS team's former manager, disagreed. He thought the fairer thing would be to slot SBS team members into the new finance roles because, by the end of the financial year, they would be likely redundant. He made representations to the project steering board along these lines.
24. The debate between managers can be seen in emails 18-21 May 2020. On 18 May 2020 Mr Seymour wrote to Mr Gibb, Mr McNamara and Mr Ward about options for the SBS team. He said, *'We've had the slotting in discussions with HR and would like to discuss the schools' bursar team with you as soon as you are able to. Our biggest concern is that, given where Donna and [her colleague] are in terms of their job descriptions and grades, should they come into the finance service they would need to come into our assistant finance manager level a professional accountant grade for which they may be expected to become qualified within a set period of time. The performance requirements at this level in terms of technical accounting knowledge, stakeholder management and financial reporting we suspect are significantly higher than what they may be accustomed to in the current roles. We therefore assume that they may be a better match at a senior accounting officer level, however this would result in a significant pay reduction which would be effective redundancy'*. He was mistaken about the level of Mrs Kelly's qualifications though not those of her job share colleague. Mr Seymour set out 4 options stating the preference was to leave the SBS team out of scope. The fourth option was to bring them in scope at professional accountant level with training and support. He acknowledged that they may not have made accurate assumptions and wanted a discussion first. There was obviously therefore no pre-decision at this stage: options were still being discussed.
25. On 20 May 2020, Mr Gibb replied correcting the assumption about qualifications, stating that Mrs Kelly had a professional accounting qualification. He recommended that the team be included in the restructure and Mrs Kelly and her job share be included as AFMs. We find he was a

strong advocate for the team's view that they should be slotted into new roles in the finance structure.

26. Mr Seymour then informed Mr Gibb that *'the project steering board met and discussed the school's bursar team they were still not convinced that the team would be a good fit given the roles and objectives of the new finance service but recognised the value of the relationships and institutional knowledge of the team as such they propose bringing the [SBS team] as it is i.e. with their existing job descriptions and activities into the finance service.'* He went on if it was not possible for them to gain customers for the SBS then they would either be faced with redundancy or transitioned in.
27. We find these emails show that there was a healthy debate at senior management level at a relatively early stage about whether or not the SBS team members could be slotted-in to AFM roles in the new finance structure. The steering board's conclusion was that they were not a good fit in the new structure: which is consistent with the evidence we have heard from Mr McNamara and Mr Ward. While qualifications were raised as a potential issue, this was not the reason the SBS team were not included.
28. Alongside this discussion, staff were consulted. A report at the end of the consultation process states at paragraph 6.13 *'Requests were made to include the schools' bursar team roles within the CYPS [Children and Young Persons Service] and Brighter Future finance team not as a stand-alone team with specific job descriptions but rather as generic staff members... The case of the schools' bursar team is unique because its trajectory is dependent on the trajectory of the traded income it generates.... Notwithstanding the above, a proposal was made to bring them into the central finance service to maintain the relationships held with schools.... After careful consideration of the consultation request, a decision was made to maintain the initial proposal position to bring the schools bursar team in as a stand-alone function largely due to the unique activities of the bursar team. These activities are not directly transferable into other discrete areas of CYPS and Brighter Futures finance.... Members of this team who wish to move to other areas of the finance service are welcome to apply for vacant roles during the internal recruitment phase of the structure implementation.'*
29. In short, the conclusion was that SBS team members would not be slotted-in to new roles but given a chance to apply internally for vacant roles.
30. Mr Ward met with Claimant and her job share colleague in late July to explain to them why he had decided to leave the SBS team as a discrete team.
31. Mrs Kelly's argument that she was in a team soon at risk of redundancy and should be brought into the umbrella of finance services is obviously a logical one. We find equally however that the reasons given by the

Respondent's steering board are also logical. It is clear to us that the SBS team's arguments were well-considered during the restructure.

32. The change management policy definition of 'slotting' at p 566 is '*where there are the same number of posts at the same grade undertaking the same type of work as **a general guide 75% or more of the duties of the post remain unchanged** in the new structure as compared with the existing structure process of slotting may be followed.*' (our emphasis)
33. Given the nature of the SBS' external advisory work as opposed to the internal strategic work in the new posts, we find it highly unlikely in any event this 75% match would be met.
34. The Claimant was vocal in her challenge internally to restructure decisions.
35. The project steering board also decided other teams were not in scope including treasury and pensions (p786).

#### Applications for vacant posts

36. On 21 August 2020, Mrs Kelly sent the Respondent her CV and a supporting statement for the AFM and FM roles. AFM was at her grade, PO6; FM was two grades above.
37. On 24 August 2020, she received an invitation to interview for AFM on 28 August. She rearranged this for 1 September 2020. Unfortunately, Mrs Kelly's web cam on her desktop had broken and she asked if she could do the interview using audio only. Mr Storry, the external consultant helping to organise the appointments, wrote on 25 August 2020 encouraging her to organise a video '*if possible*' to enable her to build rapport. He said, '*Please do reach out to IT if you have any issues accessing the video function.*' The Claimant replied saying she would '*see what she could do*'.
38. On 26 August 2020 Mrs Kelly wrote to Mr Storry asking why she had not been given a FM interview. He replied that her supporting statement was more focussed on AFM and did not demonstrate criteria in the FM job description. The Claimant queried this and Mr Storry informed her the next day that she had an interview for the FM post.
39. Meanwhile internally managers discussed by email whether to interview Mrs Kelly once for both posts or separately. Mr Storry advised, '*if it were any other candidate to mitigate risk and any possible appeal I'm erring more towards just having two interviews and minimising appeal and the feelings of being hard done by*'. While this language is clumsy, we do not find these emails show any pre-decision by managers not to appoint. They are focussed on a fair process not outcome: they talk in the emails about 'any appeal' not 'the appeal'.



40. For the AFM interview on 1 September 2020, Mrs Kelly used a laptop supplied by Respondent with 17" touchscreen. It had magnification capability.
41. The Respondent used Zoom to interview candidates by video remotely. In contrast to its usual process for external candidates, it did not ask internal interviewees beforehand whether they needed any adjustments for the interview.
42. If the Respondent had asked Mrs Kelly beforehand about adjustments we consider it likely she would have said that she had difficulties reading documents and words on screen. This is because either the magnification software reduced her screen or she had to lean in close to the screen to read. We find she is likely to have asked for any such words or document to be sent in advance. She would likely also have asked about the format for the interview. This was an important interview for her and she would have wanted to be prepared. We do not find she would have asked for a telephone interview because her web cam problem had been resolved by use of the laptop. We find Mrs Kelly would not have raised the Zoom controls as a problem because she had used the mute function before and she did not volunteer it as a problem on the laptop.

#### AFM interview

43. Ms O'Brien and another panel member knew about Mrs Kelly's disability. In any event, as soon as she was seen on the screen it would have been obvious by her appearance that she had a visual impairment.
44. Mrs Kelly struggled to unmute because could not see the touchscreen icon well. The panel chair, Mr Baldock, asked her several times to unmute. We do not accept this was hectoring. Difficulties with unmuting are still a typical experience for all who use video conferencing software and we find he was trying to direct her in order to join the audio in this context.
45. Then it is likely that Ms O'Brien said something like '*this isn't a good start*'. We doubt it is likely that Ms O'Brien went on to say, '*to an interview*'. It was not how Mrs Kelly remembered it in cross-examination. It seems too fully formed a sentence for the off-the-cuff remark that we find it probably was. The Claimant was apprehensive at the interview and could not find the mute button. This was frustrating for her. Ms O'Brien's remark also unsettled her. We do not accept her evidence in cross examination that she found it humiliating or intimidating: this is not how she had previously described it and we agree with Mr Moher that these later descriptions '*evolved*'. We do not find she could reasonably have heard that comment as hostile or intimidating. We are clear that the remark was not pointedly negative in tone. We are satisfied that Ms O'Brien, as an experienced interviewer, would not have adopted such a tone.
46. The panel had decided to put the interview questions in the Zoom chat box. Mrs Kelly says and we accept that she could not read the questions

without coming close to the screen. Ms O'Brien recalls her coming close to the screen and accepts that she knew this was because of her visual impairment. We find Mrs Kelly was embarrassed by this. It also unsettled her. During the interview the questions were spoken and she did not ask for a repeat. But she did not have the questions as easily available to her on the screen as a non-disabled person would have had as an aide memoire. We find this put her off her stride at the beginning of the interview.

47. These were internal interviews for benchmarking purposes only. They were not competitive. As long as Mrs Kelly reached 60% for the AFM then she would be given the post. The interview adopted an evidence-based approach.

#### Reasons for rejection for AFM

48. The panel adopted a structured approach looking for evidence in Mrs Kelly's answers to match the criteria. We found Ms O'Brien's explanation of how she assessed Mrs Kelly at the AFM interview to be reliable. She explained her marking by reference to her contemporaneous notes. She explained that, although Mrs Kelly answered questions appropriately, she did not provide enough detail or evidence in those answers to gain the necessary pass marks for some of the questions. The marks given by the other panel members, albeit not exactly the same, show consistency in the level at which Mrs Kelly was assessed. The notes show the panel members tried to prompt Mrs Kelly to help tease out relevant evidence from her answers. Overall, they concluded she had not provided them with enough evidence to gain the necessary pass mark. We have reviewed the interview notes and do not find anything concerning in the assessment they reached. Nothing in the notes suggests unconscious bias in relation to age or disability. We accept that there was no discussion of age or disability during the panel discussion.
49. Given that Mrs Kelly had not succeeded in the AFM interview, Mr Storry wrote on 4 September 2020 querying whether she wanted to still go ahead with the FM interview, although acknowledging she had every right to do so. Mrs Kelly said she did.

#### FM interview

50. Mrs Kelly was informed that she would have to do a presentation at the interview 24 hours in advance of it. We agree she would have needed more than 24 hours to memorise her presentation. This was not seriously disputed. She did not ask for more time to prepare.
51. At the interview Mrs Kelly asked for the camera to be turned off during her presentation. The panel agreed. This because she had to put her face close to the screen to read her presentation notes. We agree putting her face close would have been embarrassing and awkward. This would

equally have been a problem if she had printed off her notes because of the need to put them close to her face.

52. In cross-examination Mrs Kelly held to her view that being off camera made her presentation stilted. We do not accept this was likely. She is a confident person and we find would confidently have managed this part of the interview. The panel did not have any problem with the presentation being off camera, they were interested more in what she said rather than in seeing her say it.
53. Mrs Kelly alleged in her later complaint, p208, that having to ask for the camera to be turned off in the interview was *itself* embarrassing. In his response Mr McNamara acknowledged this may have been the case. Having heard the evidence, we find that, had she not wanted to ask for the camera to be turned off, it is highly likely she would have requested more time to prepare when she received the presentation topic. That she did not do so suggests to us that Mrs Kelly was quite prepared to ask for that part of the interview to be off camera and not embarrassed to have to ask for this adjustment. She was ready to raise concerns where necessary and we find she would have done if it had been a problem. The presentation was only a short part of the interview.
54. We find that if Mrs Kelly had been asked about adjustments before the interview and been told there was going to be a presentation, she is likely either to have asked for it to be given to her 48 hours in advance to have time to memorise it *or* asked that this part be off camera, as she did on the day.

#### Reasons for rejection for FM

55. In the FM assessment the pass mark was set at 80%. The role was at two grades higher and this was therefore a much stiffer test for Mrs Kelly. The two panel members whose scores we have seen scored Mrs Kelly 15 and 14 out of 40, around 37%. Their notes on the scoring spreadsheets are detailed and consistent with those scores.
56. Mr McNamara's notes do not contain scores. They are brief. He thinks he may have included scores in the pro forma spreadsheet but this has not been found on the disclosure search. He recalls he took a harder view than the other panel members. It may well be that he did not score at all because of this. We were unimpressed with his approach. We have spent time discussing the reasons for it. We consider that, because Mrs Kelly failed the AFM interview, Mr McNamara did think that there was much point in the FM interview. We do not find that his more casual approach to marking and note taking was because of conscious or unconscious bias because of age or disability. It was clearly because he was a stickler: he had set a very high benchmark and expected candidates to meet it. Also, and very importantly, we are reassured that his assessment was on merit because his 2 panel colleagues followed the process properly, their notes and marks are consistent with his view that Mrs Kelly did not reach near

the pass mark. There is therefore nothing surprising to us in the overall assessment.

57. We also accept Mr McNamara's clear explanation of the view the panel members took of Mrs Kelly's performance: she repeated the question and re-packaged it in her answers, and did not provide the in-depth evidence in her answers that they had wanted.
58. Nothing in the interview notes suggests any panel member was applying age or disability stereotyping. No comments are made in the notes that suggested a lesser view was taken of Mrs Kelly because of her age or disability.

#### Grievance

59. On 10 September 2020 Mrs Kelly complained about the AFM interview: especially that questions were placed in the chat box and about the comment made at the start. She argued it would have been equitable to have the questions 15 minutes in advance. On the FM role she complained she had not had enough time to prepare the presentation, so she had to ask to turn the camera off to hold sheets up to her face *'which was embarrassing in itself'* (p209).
60. Mr McNamara responded the on 2 October 2020. He stated, *'whilst I believe that there is justified criticism in the way that the interviews were administered'* he rejected any disadvantage. He apologised. On having to refer to preparation notes on camera he said *'whilst I appreciate the concerns that you have raised in relation to your preparation it is the case that all candidates would produce notes to support them and it was entirely appropriate for you to do the presentation off camera and whilst you might have felt some embarrassment this was not evident during your presentation ....'*
61. In summary Mr McNamara:
  - 61.1. concluded that the Respondent should have asked in advance about whether adjustments were required;
  - 61.2. concluded that turning the camera off during the presentation was the adjustment they were able to make and he did not accept therefore it was necessary to extend the time for preparing it;
  - 61.3. apologised for the way in which the process had been handled and accepted they could have done more;
  - 61.4. stated, *'Please be reassured that whilst you are understandably disappointed with the results I can categorically state that your disability played no part in the overall recruitment decision'*.

Appeal

62. On 5 October 2020 Mrs Kelly made a joint complaint with her job share colleague to the mayor and chief executive about not being slotted-in. She had also further complained to Mr McNamara about his response to her complaints about the interviews.
63. Mr Hall was tasked with dealing with both of these complaints. This was entirely appropriate given that he was a very senior manager.
64. There were two short delays in Mr Hall providing his response. We do not accept that these delays meant he was not genuinely attending to the issue. He took it seriously and indeed upheld some of the complaints. He behaved with professionalism and due courtesy.
65. Mr Hall's response was sent to Mrs Kelly on 3 November 2020, in summary:
- 65.1. he did not uphold failure to slot-in. He relied on paragraph 6.13 of the close of consultation report (see above);
  - 65.2. he apologised about the failure to ask about reasonable adjustments before interview;
  - 65.3. he accepted that someone had said 'this isn't going well' or similar;
  - 65.4. he identified the difficulty Mrs Kelly had with reading without adjustments to text;
  - 65.5. he accepted that she was unable to read the questions in the chat box as no reasonable adjustment had been made and that, combined with the earlier comment, must have unsettled her and meant she was unable to give of her best. He upheld that part of her complaint;
  - 65.6. he did not agree the questions should have been given in advance. He wrote, *'had the questions not been placed into the chat function, which of course could not have happened in an ordinary face to face interview, you would have been under no disadvantage compared to other candidates. Providing you with questions in advance would instead have conferred an unfair advantage to you and in any event your point is moot because your performance was not being judged relative to other candidates but against the benchmark.'*
  - 65.7. he agreed that the FM interview should have been carried out before the AFM interview.
  - 65.8. his remedy was to offer a reinterview for the FM and AFM roles to be chaired by Mr Ward.

Reinterview

66. If Mrs Kelly had succeeded at reinterview, we accept Mr Ward's evidence that there were vacancies.
67. Mrs Kelly was offered a reinterview on 2 December 2020, for 7 December 2020. The interview ultimately took place on 4 February 2021. She complains about this two-month delay but part of it was at her request: she was on leave from 4 December to 4 January and for personal reasons decided not to attend an interview during that time. We have read the other reasons for postponement in the documents and find they were genuine on both sides. There is nothing in these short delays that suggest the offer to reinterview was not genuine.
68. Mrs Kelly agreed adjustments in advance with Ms Graham of HR: questions would be provided 30 minutes in advance and notification of any presentation 2 days in advance and extra time for answers to questions during the interview, which questions would be repeated if required. As it turned out, Mrs Kelly was given the questions 55 minutes in advance and a presentation was not required.
69. We do not agree that the interruptions by Mr Ward in the interview were a failure to meet this agreement. More time was given than normal for the interview but, even within that time, he needed to prompt and refocus Mrs Kelly so that she had an opportunity to answer every question to her best. We found Mr Ward to be an open and careful witness. His explanation chimed with Mr McNamara's description— Mrs Kelly gave long discursive answers. She sometimes needed to be brought back to the point. Mr Ward did this to help her maximise her opportunity to give appropriate evidence at interview.
70. We entirely accept Mr Ward's reasons for Mrs Kelly not reaching the benchmark in this interview, set out at paragraph 13 of his witness statement. We have scrutinised his notes and find they are consistent with his scores. Within them we have found nothing that suggests stereotyping or unconscious bias because of age or disability.
71. This was a combined interview but the scoring for the FM post was weighted (doubled) for the questions that gathered evidence that was especially important for that role. This was appropriate.
72. Two panel members scored Mrs Kelly well below the pass mark, one panel member's scores are difficult to read but on the highest reading of them were below the 65% pass mark but borderline. We accept Mr Ward's explanation that in this type of case that would result in a failure to be appointed. In our judgment this reinterview process was not a sham. The variety of views on the panel shows a genuine assessment on the merits.
73. Mr Ward called Mrs Kelly the next day to explain. We do not accept he told Mrs Kelly she was '*terrible at interviews*'. We find his approach to

highlight the positives and included the offer of development opportunities.

#### Continuing employment

74. As it turned out Mrs Kelly was not made redundant. She is still working as principal finance officer.

#### Alleged comparators

75. Ms Aly was a much younger external candidate appointed as a Head of Finance. Mrs Kelly describes her as very talented.
76. Mr O'Leary was in the age group less than 55. His role was in the part of the finance restructure that was slotted into the new finance jobs. He was slotted in as AFM even though he was not a qualified accountant. Page 871 shows that 2 individuals were slotted in without full qualifications; and 2 were ringfenced who did not have full qualifications. This supports the Respondent's witnesses' contention that the slotting-in decision was not ultimately about qualifications but about roles. Mr Ward's evidence, which we accept, was that Mr O'Leary was in a role that was in-scope. He was not in the same circumstances as Mrs Kelly because he was not a member of the SBS team, which had been left out of scope.
77. Neither comparator has a visible disability.

#### Statistics

78. We accept that employees over 50 (not 55 as was suggested) reduced from 44% to 28% after the restructure. This reduction was undoubtedly influenced by the pension benefit for those over 55 who volunteered for redundancy: a non-reduced pension so far as employer's contributions were concerned. We find this would have been attractive to people over 55 years working in the public sector. While Mrs Kelly suggests the Respondent could have stopped such applications for voluntary redundancy, they could not have done wholesale because the Respondent had sought volunteers.
79. Mrs Kelly relies on statistics of the age of accountants in the private and public sector. We are not helped by these, given that private sector pension benefits are so different.
80. We accept that, during the year 2020, of the 17 people employed by the Respondent, 2 were over 55 years. This amounts to 12%. This percentage does not appear to us as so small as to be surprising. We have no comparison with employment take-up generally in the age group. The sample size is probably not safe from which to draw a conclusion that the Respondent had a policy against older workers.

## Legal Principles

### *Direct disability/age discrimination*

81. To establish direct discrimination contrary to section 13 of the EQA Mrs Kelly must show that she has been treated less favourably by the Respondent than it treated or would have treated someone without the protected characteristic (of age or disability) but whose circumstances are not materially different.
82. The Equality and Human Rights Commission Code of Practice on Employment 2011 ('the Code') puts it this way '*direct discrimination occurs when the employer treats someone less favourably because of disability itself*.'
83. First, Mrs Kelly must show facts from which the Tribunal could properly conclude that the Respondent has treated her less favourably because of age or disability. We look at this before considering the Respondent's explanation for the treatment.
84. It is rare for discrimination to be clear or admitted. In some cases the discrimination will not be based on malicious intention but merely because an assumption has been made or because an employer has unwittingly applied a different standard to a disabled or older employee. The outcome at this first stage will often depend on what inferences it is proper for us to draw from the facts including whether there has been a difference in treatment and the background statistics.
85. In looking for difference in treatment, 'statutory comparators' are those in the same or not materially different circumstances, see section 23(1) EQA. Statutory comparators help Mrs Kelly prove her case if they were treated **differently** and did **not** share her protected characteristics. They help the Respondent if such comparators were treated in **the same** way as Mrs Kelly but had **different** protected characteristics.
86. Other comparators, in similar but not the same circumstances, may still help a claimant to build a picture that persuades us to draw an inference of discrimination in conjunction with other material, depending upon the context and circumstances, see Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UUKHL 11, Lord Scott, paragraphs 109-110. They are known as 'evidential comparators'.
87. The bare facts of a difference in treatment and a difference in status only indicate a possibility of discrimination, they are not 'without more' sufficient material from which a Tribunal can conclude that there has been discrimination, see Madarassy v Nomura International PLC [2007] IRLR 246 CA, paragraphs 54-57. Likewise, that the employer's behaviour calls for an explanation is insufficient to get to the second stage. There still has to be reason to believe that the explanation could be that the behaviour was '*attributable (at least to a significant extent)*' to the protected



characteristic, see B v A [2010] IRLR 400, per Underhill P at paragraph 22. Therefore ‘*something more*’ than a difference of treatment and a difference of age/disability is required. (This is logical given that in some cases, a difference in treatment may merely be because of a small sample size.)

88. If Mrs Kelly does show facts from which we could properly conclude her treatment to be because of the protected characteristic, then the second question is to ask whether the Respondent has shown that the treatment was in no sense whatsoever for a non-age/disability-related reason. A cogent explanation is normally required.

*Establishing a Duty and a Failure to Make Reasonable Adjustments*

89. Contrary to popular belief, a duty to make reasonable adjustments does not always arise in disability cases. Under section 20 of the EQA the duty arises where:

*‘a provision, criterion or practice of [the employer’s] puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled...’*

90. The duty is:

*‘...to take such steps as it is reasonable to have to take to avoid the disadvantage. ...’*

91. We must take a structured approach.

92. First, we must look for a comparative substantial disadvantage. Substantial means ‘*more than minor or trivial*’. We must identify the specific disadvantage and that the employee was placed at it by the PCP.

93. Second, we must also ask whether the employer knew or reasonably ought to have known about that disadvantage (the latter is sometimes referred to as ‘constructive knowledge’). The Code at paragraph 6.19 states, ‘*The employer must, however, do all they can reasonably be expected to do to find out whether this is the case*’. A failure to ask or consult about adjustments is not a breach of the EQA, but it may affect our finding on constructive knowledge.

94. Third, we ask whether the proposed adjustment had a real prospect of avoiding the substantial disadvantage in question. This is an objective question focussed on the practical result.

95. Fourth, we ask whether the proposed adjustment was reasonable. We consider, for example, the size and resources of the employer; what proposed adjustments might cost; the availability of finance or other help in making the adjustment; the logistics of making the adjustment; the nature of the role; the effect of the adjustment on the workload of other

staff; the other impacts of the adjustment; the extent it is practical to make (see 7.29 of the Code).

96. In Linsley v Revenue and Customs Commissioners [2019] IRLR 604, Choudhury P confirmed, at paragraph 38:

*‘An employer is not required to select the best or most reasonable of a selection of reasonable adjustments, nor is it required to make the adjustment that is preferred by the disabled person. The test of reasonableness is an objective one: see the case of Smith v Churchill’s Stairlifts plc [2005] EWCA Civ 1220, [2006] IRLR 41 at [44], in which it is said that, “So long as the particular adjustment selected by the employer is reasonable it will have discharged its duty”’.*

#### Harassment

97. Section 26 EQA provides, so far as is relevant:

*‘(1) A person (A) harasses another (B) if—*

- (a) A engages in unwanted conduct related to [disability], and*
- (b) the conduct has the purpose or effect of—*
  - (i) violating B’s dignity, or*
  - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. ...*

*(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*

- (a) the perception of B;*
- (b) the other circumstances of the case;*
- (c) whether it is reasonable for the conduct to have that effect.’*

98. We must ask the questions posed by the statute in turn.

99. To establish that the unwanted conduct is ‘related to’ disability, Mrs Kelly does not have to show that the unwanted conduct was directed to her ‘because’ she was disabled, simply that there was a connection between the conduct and her disability, see paragraph 7.9 of the Code. This a broad test, requiring an evaluation by the Tribunal of the evidence in the round. The alleged perpetrator’s and victim’s perceptions of whether it is related are not conclusive. The precise words and the context are important. It is also open to us to draw inferences if necessary.

100. The question whether an act is ‘sufficiently serious’ (to quote from the Code at paragraph 7.8) to support a harassment claim is essentially a question of fact and degree.

101. In Weeks v Newham College of Further Education EAT 0630/11 Langstaff P considered that ‘environment’ means a state of affairs. At paragraph 17:

*‘Thus, although we would entirely accept that a single act or a single passage of actions may be so significant that its effect is to create the*

*proscribed environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding.'*

102. Whether the conduct violates a person's dignity is also a question of fact and degree. In Richmond Pharmacology v Dhaliwal [2009] ICR 724 (EAT) at paragraph 22 (in a harassment related to race claim but the principle is relevant to any protected characteristic) Underhill P 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 [related to other protected characteristics]), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase....'*

#### *Time Limits*

103. The primary time limit is that the claim must be brought within 3 months of the act or omission complained of, section 123(1)(a) EQA, as extended by the Early Conciliation provisions.
104. For omissions, time starts to run from the end of the period in which the employer might reasonably have been expected to comply/act.
105. If the claim is outside the primary time limit, we may extend time if it is '*just and equitable*' to do so, section 123(1)(b) EQA. This basically means whether it is 'fair' to do so. We weigh all relevant factors. If there is no good reason for delay that is not determinative, but is a factor against extending time. Other factors include the length of the delay; whether a fair trial of the issues is possible or whether there has been prejudice caused by the delay, for example in the gathering of documents or the fading of memories. We can take into account the merits of the claim. We must consider where the balance of hardship lies. (What is strict or what is an exception can mean different things to different Tribunals. These words are an unhelpful gloss on the statute and we do not apply them.)

#### **Submissions**

106. We were helped by both parties' submissions. We do not repeat Mr Moher's careful, written submissions here but have dealt with his main arguments in our analysis below.
107. Mrs Kelly made intelligent and well-structured submissions and clear points in response to Mr Moher. Again, we refer to her main arguments in our analysis below.

## Application of Facts and Law to Issues

### Reasonable Adjustment Claims

108. The Respondent accepts that it knew that Mrs Kelly was a disabled person within the meaning of the EQA because of her visual impairment.

### ***Practice Criterion or Policy***

109. The Respondent accepts that it applied a practice of requiring interviews for redeployment positions to take place on Zoom.

***Did that practice put Mrs Kelly at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?***

***The Claimant relies upon the difficult reading documents on screen***

***The Claimant relies upon the difficulty of manipulating the Zoom controls and the mute function.***

### *The First AFM Interview*

110. At the first AFM interview we consider Mrs Kelly was placed at a disadvantage by the questions being written in the chat box on screen. The disadvantage was that she could not read the questions without putting her face close to the screen or magnifying them so as to lose much of the rest of the screen. This embarrassed and unsettled her at the start.
111. We find Mrs Kelly was put at that disadvantage by the practice of using Zoom because the chat box was provided within the Zoom software and used by the panel.
112. We find this disadvantage to be one a non-disabled person in her situation would not have faced because a non-disabled person would have been able to read the questions in the chat box. It was therefore a comparative disadvantage. Mrs Kelly is correct in her submission that it did not matter that she was not competing with any other actual candidate: we look at how a non-disabled person would have fared in her situation i.e. at her interview.
113. We find the disadvantage to be substantial in that it was more than minor or trivial. An interview is an important process. Any interviewee is bound to be nervous and many stressed. But to be further embarrassed and unsettled at the beginning of an interview by not being able to read easily important words on the screen is not a trivial or minor matter. This was an unexpected problem for Mrs Kelly at an important time.
114. We do not consider Mrs Kelly's difficulty of manipulating the mute function created a substantial disadvantage. It is correct that Mrs Kelly experienced a greater disadvantage compared to non-disabled persons because she

could not so easily find the mute button because of her visual impairment (albeit that many non-disabled persons have difficulty with this, too). But, overall, we do not judge this disadvantage to be substantial: it was no more than a minor hitch at the outset. Mrs Kelly was not hectored about it and did unmute herself.

*The First FM Interview*

115. At the first FM interview, the requirement to do a presentation did place Mrs Kelly at the disadvantage of having to come very close to the screen to read her notes. She had not had enough time to memorise it and therefore needed to refer to her notes. This was a comparative disadvantage because a non-disabled person would not have had this difficulty.
116. Mrs Kelly was put to this disadvantage by the practice, the use of Zoom, because it was the screen she had to come close up to. Her notes were on screen and the interview was on the screen through the use of Zoom. By reading her notes, she would come uncomfortably close to the camera and therefore the interviewees via Zoom. (She would also have been disadvantaged by the practice of a face-to-face interview if she had had insufficient time to memorise by having to hold her notes up to her face. But this was not the situation she found herself in.)
117. This was a substantial comparative disadvantage because it was embarrassing to come close to the screen (to read her notes) and hence the camera while using the video function. This was not a minor embarrassment: her face would have loomed large at a time when Mrs Kelly was expected to be confidently presenting.

*The Re-interview*

118. The practice of using Zoom did not create a problem at the re-interview. Mrs Kelly was happy to do a video interview. No words were put on the screen and no presentation was required. She had no problem with the mute function.
119. Mrs Kelly relies on Mr Ward's alleged interruptions as interfering with an agreed adjustment agreed, namely that of having more time to answer questions. We have rejected that argument as a matter of fact. In any event this was not a practice that placed her at a substantial disadvantage in comparison to disabled people. She was well able to conduct a verbal interview. There was nothing about her visual impairment that required her to have more time, or that made it more difficult for her to deal with interruptions than a non-disabled person. While it was agreed Mrs Kelly be given more time to respond to questions in the combined interview, as a matter of law, the Respondent had no obligation to do so because there was no practice, criterion or policy that put her to a comparative substantial disadvantage that being given more time to answer questions would have avoided.

***If so, did the Respondent know or could it reasonably have been expected to know, that Mrs Kelly was likely to be placed at any such disadvantage?***

*The chat box*

120. We decide the Respondent reasonably ought to have known that Mrs Kelly had difficulty with reading words on the screen. This is because it was reasonable to expect the Respondent to have asked her before the interviews what reasonable adjustments she needed. This was not only good practice but their usual practice and one we would have expected it to adopt when it knew it was going to interview a disabled candidate. While we understand the pandemic created difficulties for all, such a question could and should have easily been asked when the arrangements were made.
121. Mr Moher makes the point at paragraph 22 of his submissions that Mrs Kelly had been involved in emails about the interview and she could have raised her problems with the Respondent. But this submission disregards the question for us, which is what the Respondent reasonable ought to have done itself. A question about adjustments, one they usually asked, would have flushed out the difficulties. Further, Mrs Kelly would not necessarily have expected the chat box function to be used.
122. If asked, we have found Mrs Kelly would likely have told the Respondent about her difficulty with documents and words on the screen and would have asked for any such documents or words to be provided in advance.

*The mute function*

123. We do not find that the Respondent reasonably ought to have known about any difficulty with the mute function. This is because we have found the Claimant would not likely have raised this problem in answer to the adjustments question because she had used the mute function before without difficulty. There was therefore no failure to make a reasonable adjustment in relation to it.

*The presentation*

124. In our judgment, if it had asked about adjustments beforehand, as we consider it should, Mrs Kelly is likely to have told the Respondent about her problem of reading her presentation notes and having to come close to the screen to do so. She would either have asked for more time to memorise or to turn the camera off during the presentation. The Respondent therefore had constructive knowledge of the disadvantage in relation to presentations via Zoom.

*The use of Zoom itself*

125. We do not consider the Respondent would have known, or reasonably ought to have known, about any difficulty with using Zoom at all. This is because her initial request for an audio interview was not because of the

Claimant's disability but because of her broken web cam, which problem was solved by the use of the laptop. There was therefore no breach of the duty to make reasonable adjustments by requiring a video interview.

***If so, were there reasonable steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage?***

***The Claimant says that the following steps would have been reasonable to take for each of the interviews on 1 September 2020, 4 September 2020 and 5 February 2021:***

***11.1.1 Providing questions in advance;***

***11.1.2 Not displaying material relevant to the interview on the screen;***

***11.1.3 Conducting the interview by telephone;***

***11.1.4 Giving her more time to respond to questions in the interview.***

126. We have found constructive knowledge of substantial comparative disadvantages in relation to the use of the chat box function of Zoom; and the giving of the presentation via Zoom. We now look at whether there was an adjustment that avoided the disadvantage and whether it was reasonable.

*First AFM interview – chat box*

127. In relation to questions in the chat box, it was an insufficient adjustment to rely on the panel repeating questions, if required. This is because that did not reasonably replicate the silent, aide memoire function that the questions in the chat box served no-disabled candidates. They would not have had to interrupt their interviews to ask for repetition.

128. In our judgment, the reasonable step to take to avoid the disadvantage we have identified was to give Mrs Kelly the questions shortly in advance so that she could remember them. This step was not taken and therefore the Respondent had failed in its duty to make reasonable adjustments.

*First FM interview - presentation*

129. First, we agree with the Respondent that the adjustment of turning off the camera avoided the disadvantage, because it avoided Mrs Kelly having to put her face close to the screen.

130. Second, was it a reasonable adjustment? Our findings of fact are that Mrs Kelly experienced no more than minor embarrassment in having to ask for the camera to be turned off. Nor was her presentation stilted. Therefore, in removing the disadvantage and not creating any more than minor additional problem, in our judgment turning the camera off for the

presentation was a reasonable adjustment – a practical way of solving the problem.

131. Plainly, being given time to memorise would have been another reasonable adjustment, but the test of whether the duty has been satisfied is objective and we apply Linsley.
132. In summary, the Respondent failed in one respect its duty to make a reasonable adjustment: by failing to provide questions in advance of the first AFM interview. We deal with the question whether this claim was brought in time below.

### **Direct Discrimination (Age or Disability)**

#### ***Refusal to slot Mrs Kelly into a finance role in May to July 2020 when considering the restructure***

133. In our judgment Mrs Kelly has not proved facts from which we could properly conclude that she was treated less favourably because of age or disability in relation to the decision not to slot her in to the new finance structure
134. The strongest argument in the Respondent's defence is that this decision applied to the other members of the SBS team who did not share Mrs Kelly's protected characteristics. In legal language: it treated statutory comparators the same. The other team members were in the same circumstances by virtue of their employment within SBS. They did not share her characteristics they were all under 55 years of age and were not disabled.
135. Mrs Kelly's strongest point was that she was at the same grade as the AFM role and at risk of redundancy in the following year. We have carefully considered whether this means it was so surprising that she was not slotted-in to an AFM role in the new structure that there must have been another reason for the decision, which related to her protected characteristics. We have concluded this is not the case for the following reasons.
  - 135.1. In the debate amongst managers about what to do there is no suggestion that those against slotting-in had any difficulty with Mrs Kelly's age or disability.
  - 135.2. The slotting-in policy definition does not support the argument that there was anything surprising about the decision, because it was unlikely that the SBS team doing different external transactional work had a 75% match with strategic jobs in the new structure.
  - 135.3. While, during debate about the decision, concerns were raised about Mrs Kelly's qualifications and those of her job share partner, their qualifications were not the reason for the ultimate decision.



The error about qualifications was corrected before the decision was made.

- 135.4. That other teams were not in scope supports our view that this was a decision that was not personal to Mrs Kelly but organisational.
  - 135.5. The argument that the other members of the SBS team were 'collateral damage' in a decision relating to Mrs Kelly's disability or age has not been made out and shows a loss of perspective.
  - 135.6. Mrs Kelly has alleged that the Respondent has failed in its disclosure obligations and we should draw an inference from that. We went through the outstanding disclosure requests with Miss West for 30 minutes during the hearing and found that each had been answered satisfactorily by the Respondent or, where questions were raised, they were satisfactorily answered by the relevant witness when asked. We do not consider the Respondent has failed to disclose relevant documents.
136. Further in relation to disability:
- 136.1. there is nothing in the statistics from which we could properly draw an inference about disability; and
  - 136.2. the background facts show that Mrs Kelly had been happily employed for 20 years, with adjustments. This was not obviously an employer who had had difficulty with her disability.
137. Further, in relation to age, the statistics do not assist us because of the obvious pension advantage for the over 55s in leaving early.
138. In any event we would have found that the reason for not slotting-in the SBS team was not related to age or disability whatsoever. We have set out our findings of fact on this above and do not repeat them here except to say that it was a decision about roles not people and an organisational one.

***Failure to offer Mrs Kelly the Assistant Finance Manager role (from July 2020 and 5 February 2021)***

139. Mrs Kelly has not proved facts from which we can properly conclude that the decision not to offer her the AFM post was because of age or disability. We have considered the following arguments.
- 139.1. We have not accepted her argument that the internal emails suggest a foregone conclusion. The emails were about process not outcome. They refer to 'any appeal' not 'the appeal'. Mrs Kelly had been vocal in her objections and the Respondent was reasonable to assume that, if she did not succeed, she might complain. All that is shown by the internal emails is that manages

wanted to make sure the procedure they adopted was correct, nothing more.

- 139.2. Of 6 people who assessed her, 5 people decided she had clearly not passed and 1 decided she was close to the passmark. This suggests to us that the decision was made genuinely on merit, given how many people reached the same conclusion.
- 139.3. There is nothing in Mr Ward or Ms O'Brien's interview notes that suggest stereotyping because of age or disability.
- 139.4. Mr O'Leary is not a statutory comparator because he was not in same or not materially different circumstances. This is because he was in a team which was in scope and therefore slotted-in. His was a different role. Further, he was not the only person lacking full qualifications to be slotted-in. We do not know the ages or protected characteristics of these others. Thus, he has little weight as an evidential comparator and does not assist Mrs Kelly to draw any inference.

140. Further in relation to disability:

- 140.1. the background facts show that Mrs Kelly had been happily employed for 20 years, with adjustments. This was not obviously an employer who had had difficulty with her disability. The failure to make reasonable adjustments about the chat box, in our judgment, was thoughtless not deliberate.
- 140.2. While the placing of the questions on the screen likely unsettled Mrs Kelly in the first interview and put her off her stride, this was not noticed by Ms O'Brien. Furthermore, Mrs Kelly failed to reach the pass mark at a second interview when there had been no failure to make reasonable adjustments.

141. Further, in relation to age, the statistics do not assist us because of the obvious pension advantage for the over 55s in leaving early.

142. In any event, we would have found that the reason for not appointing to AFM was not related to age or disability whatsoever. We have set out our findings of fact on this above. We have accepted Ms O'Brien's and Mr Ward's explanations and find their decisions were based on the merits after interview.

***Failure to offer Mrs Kelly the Finance Manager role (from July 2020 and 5 February 2021).***

143. Mrs Kelly has not proved facts from which we can properly conclude that the decision not to offer her the FM post was because of age or disability. We have considered the following arguments.

- 143.1. Plainly, Mr Storry made number of errors including the correct interview sequence. The FM interview should have come first. But this does not relate to age or disability
  - 143.2. Mr Storry's query about whether Mrs Kelly wished to go ahead was logical, given she had failed to secure the role 2 grades below. But it was clumsy. The reason for his query in our judgment was obviously because she had failed the first interview, not any other factor.
  - 143.3. Mrs Kelly's failure at interviews is not surprising as the role was two grades above her current role, with an 80% pass mark.
  - 143.4. That the Respondent employed a younger person, Ms Aly, at a higher grade is not of itself enough. We do not know not enough about Ms Aly to draw any inferences from that appointment. Mrs Kelly herself identified Ms Aly as very talented and, on its face, therefore suggests an appointment on merit untainted by considerations of age or disability.
  - 143.5. We repeat our conclusions on the statistics set out above.
  - 143.6. Mr McNamara's approach to the process was poor but we have found this does not raise any inference but it was because of his likely view that the FM interview was a non-starter, given the failure at AFM level and because he had set a very high benchmark.
144. In any event, we would have found that the reason for not appointing to AFM was not related to age or disability whatsoever. We have set out our findings of fact on this above. We have accepted Mr McNamara's and Mr Ward's explanations and find their decisions were based on the merits of after interview.
145. In summary all the direct discrimination claims fail.

### **Claim of Harassment Relating to Disability**

#### ***Did the Respondent engage in unwanted conduct as follows:***

***At the interview on 1 September 2020, Ms O'Brien said in a disparaging and/or hostile tone: "This isn't a good start to an interview"***

146. We found Ms O'Brien probably did not state a fully-formed sentence but words to the effect '*This isn't a good start*'. This comment was unwanted by Mrs Kelly. Our findings are that Ms O'Brien's comment could not, however, be reasonably heard as hostile or disparaging.

#### ***If so, did it relate to the protected characteristic of disability?***

147. The comment was a response to the difficulty that Mrs Kelly was muted. Broadly it probably did relate to disability in the sense that the unmute

problem was probably because Mrs Kelly could not as easily see the microphone button on the Zoom controls.

***In an email dated 3 November 2020, Mr C Hall told Mrs Kelly: “providing you with questions in advance would instead have conferred an extra advantage to you”.***

148. Mr Hall did make this comment but as part of the longer paragraph quoted in our findings above. It was an unwanted comment:

***If so, did it relate to the protected characteristic of disability?***

149. Plainly Mr Hall’s comment was related to disability as it was a response to a disability-related complaint.

***Did the conduct have the purpose or (taking into account the claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?***

150. First whether the comment had the purpose or effect of violating Mrs Kelly’s dignity. We are very clear that neither comment meets this test. And, even taken together, they do not do so. We set out our reasons in relation to each comment and each part of the test below.

151. First Ms O’Brien’s comment and its purpose. It was an off-the-cuff comment, said in the moment, in response to the brief difficulty at start of the interview. Such unmuting difficulties are common and phrases like Ms O’Brien’s have been said many times as individuals have attempted to engage with each other at the beginning of video conferencing. It was not hostile or disparaging. In our judgment the comment was not said with the purpose of creating the proscribed environment or violating Mrs Kelly’s dignity.

152. Second, whether Ms O’Brien’s remark had the effect of violating dignity. Mrs Kelly may well have heard Ms O’Brien’s as a negative. We have accepted she found it embarrassing and unsettling. But none of these effects reach the threshold of a violation of dignity. Violation is a strong word. Even if Mrs Kelly thought that her dignity was violated by the remark, we find it was not reasonable for the comments to have had that effect. We take into account Underhill P’s guidance in Dhaliwal: legal liability should not bite on every unfortunate phrase. We consider this was exactly the kind of phrase he had in mind: an unfortunate comment said in the moment and not hostile.

153. Further, we find that it was not reasonable for Mrs Kelly to perceive the comment it as creating the proscribed environment. It was only in cross-examination that her evidence ‘evolved’, as Mr Moher put it in his submissions, to describing the comment as humiliating and intimidating.

We do not find this is what she in fact felt. Nor could it reasonably have had this effect.

154. Next, we do not consider that Mr Hall made his email comment with the purpose of violating dignity or creating the proscribed environment. Nor can his remark reasonably be read as violating dignity or having the effect of creating the proscribed environment. This is because, reasonably interpreted, there is no suggestion in the comment that Mrs Kelly was trying to cheat or gain an unfair advantage. In the full sentence of the email Mr Hall is positing the hypothetical case of the face-to-face interview. His comment that being offered the questions beforehand in that situation would have given an unfair advantage was no more than a clear statement of fact because Mrs Kelly would not have been disadvantaged in a face-to-face interview. While Mrs Kelly might object to his logic, given she was not in that situation, she cannot object to his conclusion. Nor can the remark be interpreted that she was *in fact* trying to obtain an unfair advantage or cheat.
155. Our view does not change in relation to harassment if we look at the comments taken together. They could not reasonably be perceived as creating the proscribed environment or violating dignity.
156. In summary all harassment claims fail.

***Time Limits for any claims that have been successful?***

157. Mr Moher conceded that it would be just and equitable for time to be extended for any successful claim.
158. Time limits are a matter of jurisdiction and therefore for judicial determination, despite such a concession. We have considered the relevant factors: we agree with Mr Moher that the main factor here, weighing heavily in the balance in Mrs Kelly's favour, is that her first claim of a failure to make adjustments at the first AFM interview on 1 September 2020 is successful. Second the delay in bringing the claim is a matter of days, and while on its own that would not count in her favour, taken together with the time taken for the internal complaint we think it does weigh in the balance in her favour. A good proportion of the time from the date of the failure was taken up with Mrs Kelly's internal complaint. And, while Mrs Kelly was aware of the legal time limits, it was appropriate for her not to bring a claim before her internal complaint was decided. Factors weighing on the other side of the balance are limited in that the Respondent suffered no prejudice by the short delay. We note that Mrs Kelly was aware of her rights, but this on its own need not be determinative. We thus find that it is just and equitable to extend time to allow the claim of a failure to make a reasonable adjustment on 1 September 2020 to be heard.

*Preliminary Observations on Remedy*

159. We were confined in this judgment to a decision on liability. We make these remarks to assist the parties in considering remedy.
160. We are clear that compensation will be confined to an award of injury to feelings. This is because Mrs Kelly did not succeed at the reinterview, which we have found was a genuine one after which the decision-makers reached a decision on merit. This supports a conclusion that the failures to make adjustments for the questions being placed in the chat box at the first interview, did not mean Mrs Kelly lost any chance to be appointed at that interview. In a genuine reinterview with no comparative disadvantage she was still not appointed.
161. On injury to feelings awards, we explained briefly at the end of our oral liability judgment about the choice of 'Vento Bands' as the starting point of our assessment. We have heard, already, evidence from Mrs Kelly about how she felt when the questions were on the screen and she was not able to read them. And how she felt about this breach of duty. We have read her response to it in her letters of complaint. While she has further opportunity to give evidence about injured feelings, in the light of what we have heard, we felt confident enough to give our provisional view that our starting point would be the lower Vento band (£900-£9000).
162. In a short case management order sent to the parties, we gave them time to try to reach a settlement of the matter and Mrs Kelly time to consider whether she wanted to provide any more evidence about her injured feelings.

**Employment Judge Moor**

**3 March 2023**

## Issues

The issues between the parties which fall to be determined by the Tribunal are as follows:

### Time limits / limitation issues

1. Were all of Mrs Kelly's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")?

- 1.1 The Claimant contacted ACAS on 2 December 2020, received an EC Certificate on 11 January 2021 and subsequently presented her claim on 10 February 2021.
- 1.2 The Respondent contends that all acts occurring before 3 September 2021 are therefore out of time. This may involve consideration of whether there was conduct extending over a period, and/or a series of similar acts or failures.

2. If presented out of time, is it just and equitable to extend time?

### EQA, section 19: indirect age discrimination

3. The Claimant has withdrawn this claim which is dismissed.

### EQA, section 13: Direct age discrimination (Amendment allowed)

4. The claimant's age group is over 55 and she compares herself with people under 55

- 4.1 Did the respondent do the following things:
  - 4.1.1 Refuse to slot Mrs Kelly into a finance role in May to July 2020 when considering the restructure;
  - 4.1.2 Fail to offer Mrs Kelly the Assistant Finance Manager role (from July 2020 and 5 February 2021);
  - 4.1.3 Fail to offer Mrs Kelly the Finance Manager role (from July 2020 and 5 February 2021).
- 4.2 Was that less favourable treatment?
  - 4.2.1 The Tribunal will decide whether Mrs Kelly was treated worse than someone else was treated. There must be no material difference between their circumstances and Mrs Kelly's.
  - 4.2.2 If there was nobody in the same circumstances as Mrs Kelly, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.
  - 4.2.3 The Claimant has not named anyone in particular who she says was treated better than she was but asserts that the

Respondent retains and recruits younger workers and will point to the Respondent's survey that show a disproportionate impact on older workers.

- 4.3 If so, was it because of age?
- 4.4 The Respondent does not assert that any treatment was a proportionate means of achieving a legitimate aim.

EQA, section 13: Direct disability discrimination (Amendment allowed)

- 5. The claimant is disabled by reason of visual impairment
  - 5.1 Did the respondent do the following things:
    - 5.1.1 Refuse to slot Mrs Kelly into a finance role in May to July 2020 when considering the restructure;
    - 5.1.2 Fail to offer Mrs Kelly the Assistant Finance Manager role (from July 2020 and 5 February 2021);
    - 5.1.3 Fail to offer Mrs Kelly the Finance Manager role (from July 2020 and 5 February 2021).
  - 5.2 Was that less favourable treatment?
    - 5.2.1 The Tribunal will decide whether Mrs Kelly was treated worse than someone else was treated. There must be no material difference between their circumstances and Mrs Kelly's.
    - 5.2.2 If there was nobody in the same circumstances as Mrs Kelly, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.
    - 5.2.3 The Claimant has not named anyone in particular who she says was treated better than she was but asserts that the Respondent did not want to retain someone with identifiable visual impairment.
  - 5.3 If so, was it because of Mrs Kelly's disability?

Disability

6. The Respondent accepts that Mrs Kelly a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of a visual impairment.

Reasonable adjustments: EQA, sections 20 & 21

- 7. The Respondent accepts that it knew that Mrs Kelly was a disabled person.
- 8. The Respondent accepts that it applied a provision, criterion or practice ("PCP") of requiring interviews for redeployment positions to take place on Zoom.
- 9. Did any such PCP put Mrs Kelly at a substantial disadvantage in relation to



a relevant matter in comparison with persons who are not disabled at any relevant time?

9.1 The Claimant relies upon the difficult reading documents on screen ~~and in hearing what is being said in an on-line meeting.~~

9.2 The Claimant relies upon the difficulty of manipulating the Zoom controls and the mute function.

10. If so, did the Respondent know or could it reasonably have been expected to know Mrs Kelly was likely to be placed at any such disadvantage?

11. If so, were there reasonable steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage?

11.1 The Claimant says that the following steps would have been reasonable to take for each of the interviews on 1 September 2020, 4 September 2020 and 5 February 2021:

11.1.1 Providing questions in advance;

11.1.2 Not displaying material relevant to the interview on the screen;

11.1.3 Conducting the interview by telephone;

11.1.4 Giving her more time to respond to questions in the interview.

EQA, section 26: harassment related to disability

12. Did the Respondent engage in unwanted conduct as follows:

12.1 At the interview on 1 September 2020, Ms O'Brien said in a disparaging and/or hostile tone: "*This isn't a good start to an interview*"

12.2 In an email dated 3 November 2020, Mr Claimant Hall told Mrs Kelly: "providing you with questions in advance would instead have conferred an extra advantage to you".

13. If so, did it relate to the protected characteristic of disability?

14. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?