



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

Mr Jonathan Rackham

v

Judicial Appointments Commission

**Heard at:** Norwich

**On:** 19, 20, 21, 22 July 2022  
(Independent Intermediary present: Ms J Booth)  
20, 21, 22, 23, 24 February 2023  
(Court Intermediary present: Mrs Paula Backen)

**In Chambers Discussion:** 27 February 2023  
27, 28 March 2023

**Before:** Employment Judge Postle

**Members:** Mrs L Gaywood and Mrs J Costley

**Appearances**

**For the Claimants:** Miss Casserly, Counsel

**For the Respondent:** Mr Gray, Counsel

## RESERVED JUDGMENT

1. The Claimant's claims under s.19 of the Equality Act 2010 are not well founded.
2. The Claimant's claims under s.20 of the Equality Act 2010 are not well founded.

## REASONS

**Background**

1. In order to set the context, this case was originally heard in July 2022, with the then Intermediary of Ms Jane Booth. It was not possible to complete in the time, but there was also a factor that the Intermediary Ms Booth was not performing the function of an Intermediary as per the Guidelines contained in the Equal Treatment Bench Book.

2. It was therefore agreed, and an Order was made at the Hearing in July 2022 following previous reasonable adjustments for the Claimant at the Hearing in July on which many days, through no fault of the Claimant, the matter had to be adjourned as the Claimant was finding it difficult to concentrate during the periods of cross examination; notwithstanding he had an Intermediary, Ms Booth, at the time.
3. Following the part heard Hearing in July 2022, at the end of those proceedings, it was agreed the Claimant required an HMCTS approved Registered Intermediary to facilitate the Claimant giving his evidence. The Claimant's Representatives were Ordered to make the arrangements and instruct the appropriate Intermediary, following which that Intermediary would prepare an Assessment Report following which there would then be a Grounds Rules Hearing to determine the adjustments required for the re-listed Full Merits Hearing.
4. The Ground Rules Hearing duly took place on 23 November 2022. A new Intermediary had been appointed: Mrs Paula Backen. In summary, she was to attend each day of the resumed Hearing, in particular would attend on Monday 20 February 2023 at 10am with the Claimant (no other parties including Counsel were required to attend on that day) for the purposes of the Claimant and Mrs Backen familiarising themselves with the Internal Video Link Room and also at the same time, to meet Court Clerk Chris Shaw for the purposes of a test run of the Video Link.
5. On that day, the Tribunal was to refresh themselves with the evidence, witness statements and other relevant documents in the Bundle.
6. It was agreed at the Grounds Rules Hearing that the Claimant's evidence would commence each day at mid-day and would be given appropriate breaks as and when indicated by the Claimant, or the Intermediary, at appropriate stages of a topic / issues.
7. It was also agreed that the Witness for the Respondent, Mr Thomson, depending on the time of day will continue his evidence throughout the day commencing at 10am also with appropriate breaks.
8. The Claimant was to give his evidence through the Internal Video Link Room, accompanied by Mrs Backen.
9. Counsel for the Respondent, Mr Gray, would discuss / disclose to the Intermediary in advance of the re-listed Hearing, the questions he intended to ask by way of cross examination. It was also agreed that the Intermediary would not show those questions to the Claimant or his legal team. The Respondent and the Intermediary were to liaise directly to ensure the questions are formulated in a manner most likely to be suitable for the Claimant taking into account the recommendation in the Intermediary's Report. This did not preclude Counsel from asking spontaneous additional questions at the Hearing.

10. It was agreed that the Intermediary was entitled to intervene during cross examination at any stage to ensure the Claimant understood the question put to him and where necessary, ask the Respondent's Counsel whether the question should be re-formulated and indeed, whether Counsel could put the question in another format.
11. So far as re-examination was concerned, a short break will be given to allow the examination questions to be reviewed between Counsel and the Claimant and the Intermediary.
12. In this Tribunal, we heard evidence from the Claimant through a prepared witness statement. The Claimant also had an Expert's Report, an Occupational Psychologist Ms Osmond-Smith giving her evidence through a detailed Report.
13. For the Respondents, Mr Thomson Head of HR Finance Business Services and Complaints, also giving his evidence through a prepared witness statement. The Tribunal also had the benefit of a Bundle of documents consisting of 901 pages.
14. The Respondents accepted that the Claimant had a disability, namely Autism Spectrum Disorder and Asperger's Syndrome. The Respondents also accepted they had knowledge of those disabilities and the disadvantage to which the Claimant would have been put by way of the first PCP and the second PCP advanced, compared to non-disabled persons.
15. The first PCP relied upon was using on-line Application Forms for recruitment to the role which takes the form of asking questions and requiring answers involving behaviour and conduct which require particular processing skills. As indicated above, the Respondent accepted that, that put the Claimant at a substantial disadvantage compared to non-disabled persons.
16. The Respondents accept the second PCP, namely using multiple choice situational Qualifying Tests for its recruitment to both roles applied for, did put the Claimant at substantial disadvantage compared to non-disabled people.
17. There were two roles applied for: namely, the Office of Fee Paid Specialist Member of the Upper Tribunal assigned to the Administrative Appeals Tribunal (Disclosure and Barring Jurisdiction) and First Tier Health, Education and Social Care Chambers (Care Standards Jurisdiction). The second role applied for was the Fee Paid Disability Qualified Tribunal Member of the First Tier Tribunal Social Entitlement Chamber (Social Security and Child Support Appeal Tribunals) (2020 Disability Members Role).
18. The specific issues are set out at pages 73, 74, 75, 76, 77 and 78 of the Agreed List of Issues contained in the Bundle.

19. During the course of these proceedings, the following claims were withdrawn; a visit to the Respondent's premises to engage in a tailored assessment suitable for his disability, time to process the Qualifying Test questions and access to the questions in advance, are withdrawn.
20. The Respondents are of course relying on the justification defence that the measures they took were a proportionate means of achieving a legitimate aim.

### **The Facts**

21. The Commission was formally established on 3 April 2006 under the 2005 Constitutional Reform Act and its function is to recommend candidates for Judicial Office in England and Wales and to some Tribunals with UK wide powers. It fulfils this function by running selection exercises that allow the JAC Commissioners, sitting as the Selection Character Committee, to make merit based recommendations for judicial posts, up to and including the High Court. When running selection exercises for judicial roles, the Commission is responsible for the receipt of Applications, managing short listing processes and arranging for selection days.
22. The Commission is bound by a statutory duty to ensure that the selection of candidates for Judicial Office is based solely on merit and good character.
23. At the conclusion of each selection exercise, the Commission recommends those candidates who are considered suitable for appointment, to the appropriate Authority. The Commission's statutory duty to appoint on merit is at the heart of its recruitment activity. Judicial roles are subject to specific eligibility criteria laid out in the legislation.
24. Selection on merit also requires a fair selection process to be applied. The Respondent achieves this by way of ensuring that candidates are assessed by reference to competencies that are relevant to each judicial role. When the number of candidates far exceeds the number of vacancies, a short listing exercise is undertaken. Shortlisting may be a paper sift against the completed competencies in the Application Form, but where there is a large number of candidates it would typically involve the use of a Qualifying Test. The potential need for a Qualifying Test is set out in the Information Pack inviting applications for the role in question and is made known to the potential Applicants at the very start of the recruitment process.
25. The Claimant was diagnosed with ASD when he was 20 years old and with Asperger's Syndrome when he was 33 years old. These are apparently high functioning Asperger's Syndrome, the Claimant was educated in the main stream and lives independent. The Claimant finds social situations difficult, including communicating on a one to one basis

and his ability to imagine and deal with theoretical and hypothetical situations as opposed to real situations.

26. The Claimant has apparently held a variety of jobs, particularly a long term position as a Support Worker for those with mental health issues and personality disorders; including those with ASD both high and low functioning. His particular experience and expertise is in ASD.
27. The Claimant has applied for a number of roles through the Respondent, including both Judicial Fee Paid Members and non-Judicial Lay Panellist Members of Tribunals.
28. In November 2017, the Claimant applied for the role of Disability Members Role of the First Tier Tribunal. On 14 January 2018 (page 111), the Claimant wrote to the JAC suggesting a number of adjustments he would require to assist with the application process and test process. The Respondent replied by letter of 18 January 2018 (page 173) offering reasonable adjustments of extra time to take any tests and further discussion would take place around other reasonable adjustments if the Claimant was successful with the Qualifying Test. The Claimant took the test on 18 January 2018 and was successful. He attended a selection day in April 2018, but was then unsuccessful and notified in July 2018.
29. On 8 June 2018, the Claimant applied for a role as a Lay Panel Member. He completed a written test on 18 June 2018 and was advised he had been unsuccessful on 22 June 2018. The Claimant raised various concerns with Mr Thomson about the process involved with the Application, following which a conversation took place between the Claimant and Mr Thomson on 25 June 2018. The Claimant, on 27 June 2018, submitted a revised Application with further reasonable adjustments and subsequently withdrew that Application on 7 November 2018 as the Claimant had become concerned about the process. In particular that it would not enable him to demonstrate his skills because of his disabilities. However, ultimately he did decide to participate following a call from the Respondents and assurances that adjustments would be made. These being:
  - Interview by telephone rather than face to face;
  - Facilitator would observe the meeting and write up brief notes which they would discuss with the Claimant after the interview;
  - The Facilitator would send the notes in Word form; and
  - The Claimant would then turn the notes into an Interview Report in five working days.
30. The Claimant's interview took place on 14 December 2018. The Claimant was not successful and advised of this on 2 January 2019.
31. The specific subject matter of this claim is two fold. On 14 February 2020, the Claimant advised the Respondents (Kate Malone) that he intended to apply for the role of the Fee Paid Specialist Member of the Upper Tribunal

assigned to the Administrative Appeal Chamber (Disclosure and Debarring Jurisdiction) and First Tier Health Education and Social Care Chamber. The Application for those roles opening on 18 February 2020 and with a closing date of 3 March 2020. On-line Qualifying Tests were scheduled for 3 April 2020. The position had 10 posts and there were 76 candidates. Ultimately, the deadline (page 536) was extended for this role to allow the Claimant to submit his Application by email on 17 March 2020.

32. The second role also running at this time, was the Fee Paid Disability Qualified Tribunal Member of the First Tier Tribunal Social Entitlement Chamber (Social Security and Child Support Appeals Tribunal). This opened for applications from 11 March 2020 with a closing date of 25 March 2020 and there was to be an on-line Qualifying Test on 30 April 2020. This position had 18 posts and there were 456 candidates.

33. The Claimant had contacted the Respondents on 14 February 2020 expressing his interest in applying for the Specialist Member post and asking for a conference call to discuss reasonable adjustments (page 456). The Claimant had made it clear,

*"I am not prepared to go through any of the recruitment and selection process as it currently stands on the grounds of my disabilities".*

34. After the Claimant's initial contact, members of the Respondent's Selection Exercise Team, Susan Aylward and Kate Malone, contacted the Claimant to arrange a call that he had requested, (page 455). A note of that conversation with the Claimant can be found at page 465. It was explained to Mr Rackham that the main purpose of the call was to discuss what adjustments he may need and in that call the Claimant said he would not take part in the recruitment exercise unless there was significant changes and he expressed his view that the recruitment process should be overhauled to allow him to take part. The Claimant expressed the view that on-line applications did not work for him and that he wished to come to London for a reasonable procedure to be put in place that would help him answer questions and that those questions would have to be simplified (page 466). At this stage the Claimant had not yet submitted an Application Form. The Claimant was informed he would need to provide an eligibility statement to satisfy the Respondents he met the statutory eligibility criteria for the role (page 465).

35. The Claimant followed up this call to Ms Malone by email stating that reasonable adjustments are always subject to change at short and long term notice (page 467). Attached to this email was a document entitled *"Work Place Adjustments for People with a Learning Disability"* and that document appeared to be prepared by the Charity 'Mencap' (pages 475 – 478). The suggestions contained in the document were to allow additional time for taking aptitude tests, allowing candidates to have help from a supporter in completing the Application form. The document also suggested that candidates could be allowed to submit an Application Form in a different format, e.g. by telephone or email.

36. On 4 March 2020, Kate Malone emailed the Claimant to inform him that the National Autistic Society had been contacted and that they had recommended that he could have support from someone known to him in completing the Application Form. The advice the Respondents had received was that it was preferable for the person assisting the Claimant to be known to him as they would have a better understanding of that person's needs (page 479). Ms Malone offered to send the Application Form questions to the Claimant in a Word document to avoid the Claimant having to use the on-line form. The Claimant was also offered the opportunity to have a member of staff from the Commission call him so that he could provide the answers to the Application Form and the member of staff would explain the questions to the Claimant if he was unclear as to what was being asked.
37. The Claimant responded to that email almost by return (page 487) and expressed his appreciation of Ms Malone and thanked her for contacting the National Autistic Society. What the Claimant did not do was respond to Ms Malone's proposal in this email, rather expressing a preference to discuss another proposal which the Claimant described as an entirely different way of proceeding.
38. Ms Malone and the Claimant agreed to speak on 6 March 2020 (page 508), (the notes of that call can be found at page 534). Mr Rackham now said that he did not have faith in the National Autistic Society because their advice in the past had not been good. In relation to support in completing the Application Form, the Claimant said that his family could help, but described them as "*being personally involved*". What the Claimant wanted was a member of staff from the Respondent to act as a scribe and explain questions in a simplified form. The notes of the conversation, (page 534 – 535) indicate that Ms Malone explained that the Application Form itself was straight forward, she offered to send it direct to him avoiding the need for him to complete and submit the form on-line. It was also explained to the Claimant that he needed to submit an eligibility statement showing his experience of working within the particular area / subject matter of the application. She also explained to the Claimant that the statutory requirements of the role could not be simplified or watered down. Ms Malone explained that after filling in the Application Form the Claimant could then sit down with someone known to him to complete the questions, in the alternative a member of staff from the Respondent could call him to go through the questions and no doubt explain if there were any difficulties. The Claimant confirmed he was happy to proceed with the process, once again advising that reasonable adjustments could change at any stage.
39. The Claimant was sent a Word version of the Application Form and confirmation of the available options (reasonable adjustments) for completing it on 10 March 2020 (page 522).

40. Notwithstanding the above, the Claimant initially tried to submit the Application Form on-line (pages 536 – 537). In that email the Claimant said he would not be pursuing the adjustments that had been discussed because he did not believe that they would be enough and expressed the view that they would stretch the Respondent's resources (pages 536 – 537). It is note worthy that on 13 March 2020 the Claimant successfully submitted an on-line Application Form for the Disability Qualified Member role (pages 588 – 601). The Claimant subsequently submitting an application for a Specialist Member for Upper Tribunal, by email, having been given an extension of time, it was received by 17 March 2020.
41. Again, although the Claimant had been given the option to record his responses to the Application Form by telephone, the Claimant was to submit his form by email.
42. Subsequently, the Application Form for the Specialist Member role being received, the Claimant and Ms Malone had another telephone call on 17 March 2020 (notes can be found at pages 651 – 653). In that call, Ms Malone explained that a number of applicants for the role meant that a Qualifying Test was required and that she now wanted to discuss reasonable adjustments. The Claimant would have been aware of the need for a Qualifying Test from the information given in writing with the applications for the roles he had applied for. Ms Malone explained that the Qualifying Test was on-line, that it tested skills required for the role and that the questions required candidates to select the most and least appropriate answer. An example of these are to be found at page 725.
43. The Claimant was now expressing the view that the application process was becoming too complicated (page 651). Ms Malone tried to explain that submitting the Qualifying Test was similar to the method used for the Application Form. In view of this, it was suggested the Claimant could seek help from a friend, a family member or a key worker in completing the Qualifying Test. The Claimant objected to this, but unfortunately gave no reason why this was not possible.
44. In the above telephone call, instead of seeking support from someone already known to the Claimant or a family member, Mr Rackham wanted to attend the Commission's premises in order to complete the Qualifying Test.
45. Attending the Commission's office would not have been possible at the time. The world had been effectively locked down by the pandemic (Covid-19) which started on 23 March 2020. Indeed, on 16 March 2020, the Prime Minister had announced that people would work from home where possible. Given this advice, the Respondent's staff based in the office who might have facilitated this request from the Claimant in normal circumstances, were now working from home.
46. Ms Malone did offer to send the Qualifying Test questions to the Claimant with a view to him taking his time when completing the test and of course

additional time for completion of the test was also discussed, with the Claimant making the suggestion as to how much time he would require. It was explained to the Claimant that if the Qualifying Test questions were sent to him, he had to commit to completing the test. The reason for this was having sight of the Qualifying Test questions and then deciding not to take the test, he would clearly have an unfair advantage over other candidates in the future; the Claimant being more familiar with the requirements of the Qualifying Test. It was felt that such an advantage would undermine the important purpose of the Qualifying Test which is to assess the ability of candidates competencies required by the role. Competencies required for the Specialist Member role included exercising judgement which requires an ability to make decisions with confidence in a timely and appropriate manner and assimilating and clarifying information which requires candidates to show speed and flexibility in assimilating and processing large amounts of complex information. Clearly overall fairness is best achieved by ensuring that all candidates are assessed on their response to the same assessment material within the limited time frame available. It was accepted that access to the Qualifying Test could be flexed by way of reasonable adjustments, but the use of consistent assessment methods applied to all candidates to help ensure that all candidates are treated fairly and selected solely on merit.

47. It seemed that the Claimant's objection to the Qualifying Test was that it related to the fact that the test was on-line, together with his need to relate to the material. It was for this reason, he wanted to attend the Respondent's premises to take the Qualifying Test (page 651). It was again repeated that a visit to the Respondent's premises was not possible because of the Covid-19 announcement, namely people working from home and, there were therefore, no members of staff at the Respondent's offices. The Claimant indicated he wanted to wait until the pandemic had cleared up. That was clearly not possible because nobody at that date knew when the pandemic would be over. At that stage, the Claimant wanted to know who was responsible for making decisions and indicated to Ms Malone that he would now be declining the adjustments that had been offered and wished to write to the Commission's Chief Executive and Chair (pages 652 – 653).
48. It was around the end of March 2020 that Mr Thomson became engaged in correspondence with the Claimant, his role was responding to formal complaints. Mr Thomson wrote to the Claimant on 27 March 2020 (page 703) explaining the selection process had to be robust given that Panel Members were important decision makers that could impact on people's lives.
49. The Claimant replied to Mr Thomson's letter on 29 March 2020 (pages 708 – 710) in which the Claimant sets out 11 adjustments he described he needed. Mr Thomson replied to the Claimant on 1 April 2020 (page 722) providing the Claimant with an explanation in relation to the format of the Qualifying Test, hoping this would help the Claimant understand what was required. At that stage the Claimant was sent sample questions as an

example (page 725). Mr Thomson also attempted to engage with the Claimant's suggestion where he proposed adjustments specifically for taking the Qualifying Test, in which Mr Thomson proposed two options:

- a. completion of the test on-line with additional time allowed for completion, the standard time for completion was 40 minutes and the Claimant was to be offered 100 minutes; and
  - b. instead of completing the test on-line, he could have the test questions sent to him by email and be allowed 200 minutes to submit his answers.
50. The Claimant replied on 2 April 2020 (pages 726 – 730) and rejected Mr Thomson's proposals. In doing so he did not explain why those proposals were unsuitable.

## The Law

### INDIRECT DISCRIMINATION

51. Section 19 of the Equality Act 2010, states
- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
  - (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's 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.
52. For the avoidance of doubt, in this case the Respondents accept both the first and second PCPs advanced by the Claimant put him at a disadvantage.
53. Therefore the Respondents have to justify the PCPs by showing they are proportionate means of achieving a legitimate aim; in particular,
- a. can the Respondent show that it was a proportionate means of achieving a legitimate aim to use the first PCP regardless of any disability to ensure that candidates for Judicial roles are selected

- solely on merit as per s.63 of the Constitutional Reform Act 2005;  
and / or
- b. assess fairly by reference to competencies that reflect the role to be performed.
54. Likewise for the second PCP, it is accepted it put the Claimant at a disadvantage. Therefore, again, the Respondents have to show that it was a proportionate means of achieving a legitimate aim; in particular,
- a. can the Respondent show that it was a proportionate means of achieving a legitimate aim to use the same Qualifying Test for all candidates regardless of any disability:
- (i) in order to select candidates solely on merit; and / or  
(ii) in accordance with general fairness of the candidate selection process.

#### FAILURE TO MAKE REASONABLE ADJUSTMENTS

55. Under s.20 of the Equality Act 2010,
- (1) ...  
(2) ...  
(3) An employer (A) owes a duty to make reasonable adjustments for a disabled employee, or applicant, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
56. In considering what is reasonable, it is necessary to have regard to:
- (i) the extent to which taking the step would remove the disadvantage;  
(ii) whether it would be practical;  
(iii) the financial costs incurred and the extent to which the employer's activities would be disrupted;  
(iv) the employer's financial and other resources;  
(v) the availability of assistance; and  
(vi) the nature of the Respondent's activities and size of undertaking.
57. The test of reasonableness imports an objective standard, the question must not be looked at only from the perspective of the Claimant. The Tribunal must also take into account wider implications including operational objectives and the reality of the position applied for and the requirements of that post.
58. In the Respondent's closing, the Tribunal were directed to two particular cases:
- Tarback v Sainsbury's Supermarkets Limited [2006] IRLR664; and
  - Mr Burke v (1) College of Law, (2) Solicitors Regulatory Authority UKEAT2011/0854.

59. The Respondents also referred us to the Safeguarding Vulnerable Groups Act 2006, particularly s.4. The relevance of which being the importance of a Debarring Appeal Tribunal.
60. For the Claimant, we were referred to the cases of:
- The Government Legal Services v Miss T Brookes UKEAT/0302/16/RN; and
  - Miss V Cosgrove v Messrs Caesar and Howie UKEAT2001/1432

## **Conclusions**

### SECTION 19 CLAIM

#### The Application for the Office of Fee Paid Specialist Member of the Upper Tribunal Assigned to the Administrative Appeal (Disclosure and Barring Jurisdiction)

61. It is accepted that the Respondent applied a PCP of asking questions and requiring answers involving behaviour and conduct which require particular processing skills. The Respondent justifies the first PCP as being a proportionate means of achieving a legitimate aim. In particular, the Respondents argue that regardless of any of the Claimant's disabilities, to ensure that candidates for judicial roles are (a) selected solely on merit as per Section 63; and (b) assessed fairly by reference to competencies that reflect the role to be performed.
62. Clearly, Courts and Tribunals deal with complex and abstract cases with time constraints. The whole purpose of the selection process is to test candidates' ability and it clearly would not be appropriate to adjust the process to such an extent that it undermines the process itself to select those who can perform in the role. The Upper Tribunal role involves safeguarding and potential debarring which will inevitably involve complex and difficult questions and the outcome of the decision of that Tribunal can have life changing consequences for the individual concerned. It is therefore reasonably proportionate to test a candidate's ability to perform that role.
63. Indeed, paragraphs 3, 6, 7, 8 and 9 set out the role (page 840) which amongst other things requires preparation, reading case papers and engaging with unrepresented parties. The Situational Judgment Test is a realistic scenario situation that candidates will face in Courts and Tribunals and the hypothetical complex questions reflect the reality of the judicial role. The test involved is there to assess the reading of the situation and the effectiveness of an applicant's response.

64. Indeed, the Court of Appeal has said it is proportionate and not reasonable to make adjustments that undermines the test and demonstrates the merits and assessment of them.
65. Therefore, the Tribunal are unanimous in their view that the Respondents in applying the PCP clearly was a proportionate means in achieving a legitimate aim.

*Reasonable Adjustments for the Tribunal Role*

66. The question here is, did the Respondents fail to take reasonable adjustments to avoid the substantial disadvantage to the Claimant as a result of the first PCP? In this respect the Claimant argues that the following steps should have been taken:
  - 66.1. Simplified questions on the Application Form;
  - 66.2. To be assigned assistance from an individual from or representing the Respondent who was ASD trained and aware, (i.e. an Autism facilitator), for the Application process; and
  - 66.3. Completing a practical task relating to the role instead of the Application Form.
67. The Respondents provided reasonable adjustments, namely:
  - 67.1. Submitting Application Form off line, (i.e. having the questions sent to his home address and then providing answers orally on the telephone to the Respondent);
  - 67.2. Submitting the Application Form by email;
  - 67.3. Additional time to submit the Application Form; and
  - 67.4. Permitting the Claimant to have the assistance of someone he knew to complete the Application Form.
68. The Tribunal again took the view that having simplified questions simply undermines the assessment of merit and is no more complex than the legal questions the Tribunal would have to answer at a Hearing.
69. Although this appears to have been withdrawn, extra time was given by the Respondent. Furthermore, having the questions in advance of taking the test, the major concerns of the Respondents was that those questions if the Claimant did not undertake the test, would get into the public domain. It was therefore a legitimate concern to require the Claimant to commit to taking the test as that would give him an advantage in future applications.
70. Insofar as the use of an Autistic Facilitator at the test, the test is requiring candidates' ability to deal with situations in Tribunals. The adjustment the

Claimant wanted was some mock scenario which was not feasible realistically. It is clearly legitimate to test a written method with the scenarios the Claimant would face in Tribunal.

71. Insofar as being assigned assistance from an individual who was ASD trained, the advice of the National Autistic Society was that it was better to have someone known to the Claimant to assist him and it was clearly reasonable for the Respondents to act on the advice of the NAS, despite the Claimant's view that he was not happy with their advice.
72. The development of the Test was reviewed by the Diversity and Engagement Team to ensure it was an effective test in any event and to make sure it did not disadvantage the individuals in society, looking at the material to see if it does have an adverse effect.
73. Furthermore, the advice received from the NAS is consistent with the advice the Respondents had received from MENCAP.
74. In those circumstances such reasonable adjustments as were reasonable were afforded to the Claimant and the proposed adjustments that the Claimant was asking for were clearly going beyond what was necessary or reasonable, notwithstanding the Claimant's disability.

The role of Fee Paid Disability Qualified Tribunal Member of the First Tier Tribunal Social Entitlement Chamber (Social Security and Child Support Appeals Tribunal)

75. Here we are looking at, did the Respondent applying the second PCP, namely using multiple choice situational qualifying test which aids recruitment to both roles applied for. Once again, the Respondents accept it would have put the Claimant as a disabled person at a disadvantage and they rely on the defence of a proportionate means of achieving a legitimate aim.
76. In this respect the Tribunal repeat their findings as above in that it is a realistic scenario situation that Applicants will face in a Court or Tribunal, hypothetical complex questions reflect the reality of the judicial role. It is therefore reasonable and proportionate to test the ability of candidates in order to test their ability to choose between two competing arguments. In effect, reading the situation and effectiveness of response.
77. Once again, the Tribunal confirm that it is not reasonable to make adjustments to the test which undermines the test. It is there to demonstrate the Applicant's merits for the role and an assessment of them. Therefore, having a Situational Judgement Test is clearly a proportionate means of achieving a legitimate aim to select candidates on merit in accordance with the general fairness of the candidate selection process.

REASONABLE ADJUSTMENT CLAIM

78. Here it said that the Respondents failed to take reasonable adjustments to avoid a substantial disadvantage to the Claimant as a result of the second PCP. The Claimant contends that the following steps could and should have been taken:
- 78.1. Simplified direct questions that the Claimant can answer in a non-multiple choice format;
  - 78.2. Time to process the qualifying test questions;
  - 78.3. Access to the questions in advance;
  - 78.4. To be assigned assistance from an individual, or someone representing the Respondent who was ASD trained and aware (an Autism Facilitator); and
  - 78.5. Setting up a mock scenario to assess how the Claimant reacted and responded using scenarios set out in the qualifying tests.
79. The Respondents will say that they did make reasonable adjustments in providing extra time to complete the qualifying test, providing the Claimant with sample questions ahead of the actual qualifying test and permitting the Claimant to have the assistance of someone he knew whilst completing the qualifying test.
80. Once again, the Tribunal repeat their findings in respect of the first role applied for.
81. As far as simplified questions, again the Tribunal repeats, this undermines the effect of the exam and they are no more complex than the legal questions the Tribunal have to answer at a Hearing. The whole point of the test is to consider competing arguments and make a decision on those conflicting points of view. Something that a Member will frequently have to do during the course of a Hearing.
82. As for time to process the qualifying test question, clearly the Respondents did provide and offer extra time.
83. In respect of having the questions in advance, that was offered but the main concern of the Respondents was if the Claimant had those questions in advance and did not commit to taking the test, they would (a) end up in the public domain; and (b) the Claimant would have future knowledge of the type of questions to be asked in future applications which would give him an unfair advantage.

84. Insofar as being assigned assistance from an individual who was ASD trained, once again the Tribunal repeat its findings as above in respect of the first role applied for.
85. Finally, setting up a mock scenario to assess how the Claimant reacted and responded; that is a legitimate aid to test various scenarios that an Applicant would be faced in Court of Tribunal. The proposed adjustments setting up live ones was far too onerous on the Respondents. The qualifying test that simply involves 20 questions would have to be scripted, the form loaded and have to be done in a time frame which would be a significant burden on the Respondents. It was simply not reasonable or realistic to turn it into a live video.
86. The Tribunal, therefore, were of the unanimous view that such adjustments as were reasonable were afforded by the Respondents and that the adjustments that the Claimant was advancing was simply not realistic for the reasons set out above.

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Employment Judge Postle

Date: 28 June 2023

Sent to the parties on: 4 July 2023

GDJ  
For the Tribunal Office