



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr M Irish

v Network Rail Infrastructure Limited

Heard at: Central London Employment Tribunal

On: 15-17 May 2023
18 - 19 May 2023 (In Chambers)

Before: Employment Judge Woodhead

Members: Mr de Chaumont-Rambert
Mr Madelin

Appearances:

For the Claimant: Miss Twine (Counsel)

For the Respondent: Ms Hicks (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant's claim of discrimination arising from disability is not well founded and is dismissed.
2. The Claimant's claim of failure to make reasonable adjustments not well founded and is dismissed.
3. The Claimant's claims of unlawful harassment are not well founded and are dismissed.

REASONS

Preliminary

1. The Claimant started employment with the Respondent on 19 February 2020 as an Information Coordinator. He remains employed by the Respondent but at the time of the hearing he is a Signaler (a role he took up on 18 June 2021 after an assessment involving a virtual interview). He has a voluntary role as a D&I Champion at the Respondent. He has been diagnosed with autism spectrum

disorder and the Respondent does not dispute that this amounts to a disability under s.6 of the Equality Act 2010.

2. In January 2021 he applied for the role of Incident Support Controller (ISC). His claims relate to adjustments he says should have been made in respect of his interview for that new role and harassment he says he has suffered in relation to incidents alleged to have taken place on 22 March 2021, 19 or 20 April 2021 and 25 April 2021.
3. He submitted his claim in the Tribunal (through Morrish Solicitors LLP) on 29 July 2021. The Respondent submitted a response on or about 27 August 2021 (through solicitors Dentons UK and Middle East LLP). The Claimant submitted further particulars on 3 December 2021 following a private preliminary hearing on 16 November 2021 with Employment Judge Deol at which the Claimant was represented by Ms H Chambers (solicitor) and the Respondent was represented by Ms K Farrell (solicitor). The case was listed for a full merits hearing of five days between 5 and 11 July 2022 at the Central London Employment tribunal. Unfortunately that hearing had to be postponed by the Tribunal.
4. At the case management hearing on 16 November 2021 a draft set of claims/issues was agreed and the Claimant was required to provide clarification on parts of those claims/issues. The Respondent was granted leave to amend its grounds of resistance by 7 January 2022, which it did.
5. The claim was re-listed for a hearing of five days between 15 May 2023 and 19 May 2023. The hearing was held in person.

The hearing

6. We were provided with the following documents and written witness statements:

Documents:

- a. An agreed hearing bundle running to 327 pages which in broad terms included:
 - i. the pleadings;
 - ii. an agreed list of issues
 - iii. Employment Tribunal correspondence
 - iv. Respondent Policies/Procedures and related documents in respect of grievance raising, the conduct of interviews, reasonable adjustments, equality, diversity and inclusion, recruitment;
 - v. An occupational health report
 - vi. Other documents relating to the Claimants employment and the issues in question.
 - vii. A schedule of loss and counter schedule of loss.
- b. Separately we were provided with:

- i. Documents relating to Mr Dovener's ill health
- ii. An agreed chronology and cast list
- iii. Better copies of pages 177 (produced as 177a and b) and 136 of the main bundle
- iv. A recruitment timeline agreement designed to support and guide managers in a recruitment process

Witness statements:

- c. **Claimant**
 - d. **Mr Rutland** - The recruiting manager for the role that the Claimant applied for and the person who gave the Claimant feedback on his performance, he is a Senior Network Delivery Manager.
 - e. **Mr Bengé** – Who interviewed the Claimant for the role with Mr Rutland and who, with Mr Rutland, had meetings with the Claimant on Monday 22 March 2021 to discuss arrangements for the interview two days later on 24 March 2021. Mr Bengé is Network Delivery Manager.
 - f. **Mr Chiariello** – Mr Chiariello line manages Mr Rutland as Head of Control (Kent Route) and carried out an assessment of the Claimant's informal grievance about his interview for the ISC role. He was also alleged to have commented to the Claimant that the Claimant 'over think things' which is an allegation of harassment in the claim.
 - g. **Mr Shepherd** - Mr Shepherd was at the time in question a manager in the control room where the Claimant worked and their desks were very close to each other. He gave evidence in relation to a panic attack which the Claimant suffered on the afternoon of 22 March 2021.
 - h. **Mrs Styles** - Mrs Styles is Special Project Manager Operational Resilience (Wessex) and carried out a formal investigation of the Claimant's grievance after he was not satisfied by the decision of Mr Chiariello at the informal stage. She is independent of the team in which the other witnesses worked at the relevant time.
7. The parties' representatives, agreed a timetable for the hearing while we were reading documents on Monday 15 May 2023 but in the event we heard the evidence more quickly than had been provided for in that timetable. The witnesses gave evidence in the order above. The Claimant gave evidence during the course of Monday morning and Monday afternoon (15 May 2023) and the Respondent's witnesses all gave evidence on Tuesday 16 May 2023. In consultation with Counsel for both parties we took breaks as necessary for the witnesses and taking into account the Claimant's needs as explained to us.
8. We were provided with written submissions by Counsel for both parties by 11:30 on the morning of Wednesday 17 May 2023 and Counsel were given the opportunity to talk to their submissions and comment on the others at 13:30 that afternoon. The Tribunal hoped to be able to deliver a verbal judgement on Friday 19 May 2023 but when it became apparent that time would be short to do so and that in any event

written reasons would be preferable, the parties were told via Counsel in the early afternoon of 18 May 2023 about the Tribunal's intention to issue a reserved judgment.

9. We were provided with a witness statement for Mr Dovener which focused on an allegation of harassment that was made in respect of an alleged comment relating to Greta Thunberg. Mr Dovener has been suffering from serious ill health and was unable to attend the hearing to give evidence or to be cross examined on his witness statement. His manager, Mr Shepherd, gave sworn evidence at the end of the hearing as to Mr Dovener's ill health which was not contested by the Claimant. The Respondent also sent in medical evidence associated with Mr Dovener's ill health. A further potential witness in respect of this allegation of harassment, who is referred to in the List of Issues below as "Colleague 2", was not called and Ms Hicks confirmed on behalf of the Respondent that he is employed by a third party. The parties confirmed on 16 May 2023 that no claim was brought in respect of any comments that Colleague 2 was alleged to have made. We were directed by the parties to focus, in respect of this element of the harassment claim, on a comment allegedly made by Mr Dovener.

The issues to be determined

10. A list of issues had been prepared in draft at the case management preliminary hearing in November 2021 which was subsequently agreed between the parties and which was included in the employment tribunal bundle [60-62] was as follows subject to the further comments highlighted in bold:

Discrimination arising from disability (section 15 Equality Act 2010) (EqA)

1. *Contrary to section 15 of the EqA did the Respondent treat the Claimant unfavourably because of something arising in consequence of the Claimant's disability?*

The Claimant relies on "social etiquette", namely small talk about trivial unrelated matters prior to discussing key issues as being something arising in consequence of his disability.

Counsel for the parties agreed that the Claimant's difficulties in making small talk were the something which he alleged arose in consequence of his disability.

The unfavourable treatment relied on by the Claimant is:

Refusal to allow a virtual interview by the recruitment managers, Greg Rutland and Ian Bengo on 22 March 2021 despite this being an option for other candidates who requested it due to Covid-19.

2. *If so, was the Respondent's treatment of the Claimant a proportionate means of achieving a legitimate aim?*

This was not set out in the list of issues and Ms Hicks explained in submissions that it was not central to the Respondent's defense but if so required it relied upon a desire to get the best out of candidates in interview.

3. *Has the Claimant proved facts from which the tribunal could conclude that the Respondent treated the Claimant in this way because of something arising in consequence of his disability (s.136(2) EqA 2010)?*
4. *Has the Respondent shown that the treatment was not because of something arising in consequence of his disability in any way, consistent with s.136(3) EqA 2010?*

Failure to make reasonable adjustments (section 20 Equality Act 2010)

5. *Did the Respondent operate a provision, criterion or practice (PCP), which put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?*

The Claimant relies on the alleged PCP of:

Requiring candidates to attend a face to face interview.

6. *Is this a PCP?*
7. *If so, did this place the Claimant at a substantial disadvantage because of his disability within the meaning of s.20(3) of the EqA, namely:*

The Claimant contends that he was placed at a substantial disadvantage because it affected his performance in the interview, resulting in him not getting the job.

8. *If so, did the Respondent take such steps as it was reasonable to have taken to avoid the disadvantage, in accordance with section 20 of the EqA?*

The Claimant alleges that the Respondent failed to:

- a. *Adjust the interview process by allowing him to attend a virtual interview.*
- b. *Allow him additional time to answer questions during the interview.*
- c. *Allow him to use cue cards during the interview.*

Counsel for the Claimant agreed in her submissions that only a failure to make adjustment a) was asserted by the Claimant and that it was accepted that the Respondent had in fact allowed him additional time to answer questions during the interview and to use cue cards during the interview.

Harassment related to disability (section 26 EqA)

9. *Contrary to section 26(1) of the EqA, did the Respondent engage in unwanted conduct?*

The unwanted conduct relied on by the Claimant is:

- a. *The way the Claimant was allegedly questioned by Greg Rutland and Ian Bengé on 22 March 2021 regarding the adjustments required (i.e. to*

attend the virtual interview), resulting in the Claimant having a panic attack and having to leave the workplace.

- b. The following comment allegedly made to the Claimant by Gerardo Chiariello during a telephone conversation, on 19 or 20 April 2021 in response to the Claimant stating that he didn't have the capacity to "read between the lines":

"You overthink things".

- c. **Counsel for both parties agreed at the hearing that the third allegation of harassment was, contrary to how it was presented in the list of issue in the bundle, in fact most accurately captured in an email sent by the Claimant on 26 April 2021 (175) which included the following:**

Senior colleague 1: That Greta Thunberg is a strange one isn't she?

Claimant: She's autistic [insert name of senior colleague].

Senior colleague 1: Oh er, yeah, well, it's not because of that she's strange.

Colleague 2: Yes it is.

At the hearing it became apparent that the Senior Colleague was alleged to be Mr Dovener and Colleague 2 was in fact the employee of a third party. The parties agreed that the question for the Tribunal was the comment alleged to have been made by Mr Dovener as highlighted above by us in italics.

The Claimant disclosed the alleged unwanted conduct to Mr Chiariello and Ms Hutchinson by email on 26 April 2021.

10. If so, was the alleged unwanted conduct related to the Claimant's disability?
11. If so, did the conduct have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant taking into account;
- a. the Claimant's perception; and
- b. the other circumstances of the case.
12. If so, was it reasonable for the conduct to have that effect on the Claimant?

Remedy

13. If the Claimant's claim succeeds, what remedy is the Claimant entitled to?
14. What financial loss, if any, has the Claimant suffered as a result of unlawful discrimination?

15. *What award, if any, should be made for injury to feelings?*
16. *Should the Tribunal make any declaration or recommendation?*
11. In an earlier version of the list of issues the Claimant sought a recommendation that the Respondent implement neurodiversity training, training for recruitment managers in relation to the recruitment policy, best practice for keeping a written note of scores and for the Claimant to be given a job trial instead of interview for any future vacancies. The Respondent disputed that the Tribunal has power to award the remedies sought, save for compensation.

Relevant Facts

12. Each day the Claimant travels by train, mostly from Wivelsfield station but sometimes from Burgess Hill, to London Blackfriars to attend work at the Respondent's Puddle Dock Office. At the relevant time he worked shifts starting at 6:30am finishing at 14:30 or starting at 14:30 and finishing at 10:30pm during the week and Sat 8:00 – 18:00 and Sun 9:00- 17:00.
13. Mr Rutland, prior to being involved in the interview process for the ISC role, had first met the Claimant in 2019, when he interviewed him for the Information Coordinator position. The Claimant was successful in obtaining that role. Mr Rutland had regular interaction with all staff in the team, including the Claimant and would regularly approach the Claimant, unannounced, to discuss things.
14. We accepted the evidence, which was not challenged, of Mr Bengé (Network Delivery Manager) that Mr Bengé has responsibility for managing the day-to-day running of the railway and associated duties including managing disruptions, incidents, management of staff and liaising with colleagues in control and that the control room where the Claimant worked at the material time is an intense environment with lots going on.
15. On 12 March 2020 the Claimant, initiated a process for the preparation of an OH report [124-127] which made clear his diagnosis of Autism and, amongst other things, set out:

He is diagnosed with Autism and feels that people generally misunderstand the condition, and he is concerned about miscommunicating. He acknowledges that it takes time for him to process social norms and dynamics within new environments and with new people but does not wish to be misperceived or stigmatised.

Mr Irish started with NWR in Feb 2020 and is finding his way around the various teams and processes. He has identified and discussed the following requirements to help him manage his condition at work and it will be useful if management could explore these directly with him:

- *He requires structure and routine to function effectively.*
- *Needs a mentor for regular feedback.*
- *Needs training guides to know exactly what to do.*

- *Orientation*
- *Clear instructions.*
- *Sensory issues - he is sensitive to background noise and will benefit from noise-cancelling headphones.*
- *Unplanned disruptions and changes can result in a heightened sense of anxiety and stress.*
- *He believes having an Autism awareness training for colleagues will help others understand the condition better. I have informed him that NWR may already have this in place, and he may discuss with management. I have informed him that NWR may already have this in place, and he may discuss with management.*

16. This report was provided to Mr Rutland and to the Claimant's line manager, Thomas Giddings. Mr Bengé had not seen the report but knew of the Claimant's diagnosis at the relevant time as did Mr Chiariello.

17. In January 2021 the Claimant applied for the role of Incident Support Controller (ISC) that would be line managed by Mr Bengé who reports to Mr Rutland.

18. We find as per Mr Rutland's evidence (w/s para 13) that:

In terms of the essential criteria noted in the job description, this is something which is always the same for any Incident Support Controller role advertised anywhere in the company and the same principle applies to all Controller graded roles. It has been agreed with unions and we aren't therefore able to change this.

19. On 8 March 2021 the Claimant received an email invitation for interview for the ISC [135-136]. This was a standard form invitation which included the following paragraph:

If for personal reasons you do not feel comfortable with travelling and attending a face to face interview, we will be able to accommodate a virtual interview. Please make it clear this is your choice when responding. All of our Network Rail offices have been risk assessed and social distancing measures are followed at all times.

20. The Claimant sent an email to Mr Rutland and Mr Bengé on 15 March 2021 to say that he was having a meeting with another employee, TJ Vile, who had recently written about the challenges he (Mr Vile) faced in the selection process for his role with the Respondent. The Claimant had attached a copy of the article alongside a PowerPoint presentation. The Claimant specifically said that he didn't think he was asking for any adjustments, but rather just an understanding of some of the challenges he faced (pages 134 – 149). He referred to the fact he felt he had to "up the ante" in order to act more "neurotypical" in the process.

21. We accept that Mr Rutland and Mr Bengé read this information and found it useful for their understanding of the challenges that neurodiverse candidates face at

interview. Mr Bengé explained in cross examination that he had also seen Mr Vile's article in a newsletter circulated at the Respondent.

22. On Friday 19 March 2021 the Claimant sent an email to Mr Rutland and Mr Bengé asking for adjustments to be put in place for his interview [150] and which included the following:

What I took from the webinar— and TJ is that it's OK to ask for adjustments at times. Whilst I would always advocate others doing this, I am not good at asking for them personally. As you know, I am on the autism spectrum— which gives me strengths, but also challenges. Being 'slick and seamless' in job interviews is one of my challenges.

For my interview next week, please could I request (if needed):

- *A little extra time to think about and answer the questions you ask;*
- *To be allowed to look at 'cue cards' with my personal notes on In bullet point form (I will use these to try and give you the most comprehensive answers about my work-related experiences);*
- *To conduct the interview via Teams or phone, I think I would perform better from home given the 'goldfish bowl' nature of our office. If you were to agree to this adjustment, after my Interview I would then get on a train to London to cover the desk for both my colleagues being interviewed (as I think is planned on the roster). I could be at KICC by 12:00 at the latest.*

I don't know what your background knowledge as experience interviewers on interviewing neurodiverse candidates. TJ has kindly offered to provide support / advice for you via a Teams chat in terms of what can be offered to neurodiverse job applicants (which might be any candidate of course). He would be happy to set up a Teams meeting with himself and / or Loraine Martins if you feel that it would help – not only myself, but other candidates too.

I hope the above makes sense - but please let me know if I can add clarification to my request.

All the best,

Matt

Matt Irish

23. Mr Rutland and Mr Bengé were on leave on the day of this email. Over the weekend Mr Bengé did some catching up on emails and suggested that they meet to discuss the request on Monday 22 March 2021. They did meet on the morning of 22 March 2021. They did not take the opportunity to speak to Mr Vile. Mr Rutland explained that he could not infer from the article what specific challenges the Claimant would himself face and he thought it best to discuss it with the Claimant. We thought this was reasonable and in cross examination the Claimant

agreed that, although he asserted that he had felt pressured and that he had been 'pulled aside', it was reasonable for them to discuss it with him.

24. Mr Rutland and Mr Bengé agreed that it was easier to discuss the request for a remote interview in person with the Claimant. Mr Rutland therefore approached the Claimant at his desk, as he often did, to ask him for a discussion about the arrangements for the interview due to take place two days later on Wednesday 24 March 2021. They went through to the command suite which we were told is a large glass fronted office in front of the main desk area used by the team and in which senior management locate themselves when they need to manage an incident.
25. Mr Rutland told that Claimant that he would be allowed to use cue cards and be given extra time in the interview to answer questions. Mr Rutland, took the lead in this discussion but they both agreed that they wanted to understand more about the reasons for the Claimant's request to do the interview via Teams or the phone which in his email he indicated was because of the goldfish bowl nature of the office.
26. Following COVID the Respondent's rules had just been relaxed to allow in person interviews and there had been negative feedback from recruiting managers as to the effectiveness of interviews conducted remotely and Mr Rutland said that face to face interviews avoided potential tech issues associated with virtual meetings. Mr Rutland and Mr Bengé had a preference for carrying out interviews face to face because they thought it would be more effective in assessing candidates but they were not closed to the idea of the Claimant's or other interviews being carried out remotely. In fact a shortlisted candidate (referred to in the proceedings as MOM) did have his interview remotely because he had fallen with a sickness bug on the morning of his interview.
27. Mr Rutland explained to the Claimant that he could have additional time and that he could use cue cards in the interview. Mr Rutland conceded that he did say to the Claimant that he would prefer that he did not use the cue cards lots and that he could perhaps have explained that better and that his intention was that the Claimant did not read out scripted responses to questions.
28. The Claimant was showing visible signs of anxiety in this in person meeting and was speaking quickly. It became apparent that the Claimant was under the misapprehension that his interview would be conducted in the command suite and he understandably was anxious about that thought because he would be in full sight of others in the office during the interview.
29. Mr Rutland and Mr Bengé made clear that having the interview by Teams was an option but that there was no intention of carrying out the interviews in the command suite and that they had booked meeting rooms in another part of the office. Mr Rutland in his witness statement said that he apologised to the Claimant that this had not been made clear to the Claimant in the invitation to the interview. The Claimant on hearing that became more himself. Mr Rutland and Mr Bengé offered to take the Claimant up to show him the room on the mezzanine level and he agreed that would be helpful as he likes to be able to visualise in advance where he will be and his surroundings.
30. They went up to the area where the interview was planned to take place and which is in a part of the office which is not used except as a breakout area for reception

staff. They immediately discounted one of the meeting rooms because it was too open and but showed the Claimant another room on the North side of the building and asked him what he thought of it and how the layout of the room would be for him.

31. The Claimant in that discussion explained that he was not a good advocate for himself and his needs and Mr Rutland responded by reassuring him that he had had done a good job in explaining why he needed adjustments. At this time individuals were still social distancing at the Respondent and so Mr Rutland, Mr Bengé and the Claimant were standing apart. Mr Rutland asked about other impacts of the Claimant's autism and the Claimant explained that seeing people before the interview drained his cognitive capacities, that he would like to have a quiet space before the interview and that he would prefer it if, during the interview, Mr Bengé and Mr Rutland avoided eye contact with the Claimant. They agreed this and they explained that they would put in place arrangements so that, on the morning of the interview, the Claimant could come straight into that part of the office (which was not used) to avoid the command centre where his colleagues were and collect himself before the interview started at 9:30am.
32. Mr Rutland confirmed that he told the Claimant that, at that point, the plan was for everyone to have a face to face interview (the MOM's interview was conducted remotely because of his sudden illness). It was put to Mr Rutland in cross examination that, by saying that, he was giving the Claimant the impression that the Claimant was being difficult in asking for a remote interview. Mr Rutland said that it was an off the cuff comment and the reason he had made it was to reassure the Claimant that everyone was being treated the same. However, he conceded that in hindsight the comment did not demonstrate to the Claimant that they were catering for his individual needs and that sometimes people have to be treated differently.
33. Mr Rutland asked the Claimant if the arrangements discussed had solved the issue he had raised and the Claimant said it was fine. Mr Rutland took this response at face value.
34. The Claimant did not ask again, either verbally to or by email, for the interview be carried out remotely in the time period between that meeting on 22 March 2021 and the interview on the morning of 24 March 2021.
35. After this meeting with Mr Rutland and Mr Bengé, the Claimant sent an email to Mr Vile at 12:56 which included the following:

My manager took me aside today and asked me to explain why I had asked for adjustments to my interview. Felt a little on the spot as he and his colleague will be doing the interview.

On the plus side they showed me the meeting room on another floor and away from the 'goldfish bowl' of the regular office. Offered me somewhere quiet to wait. They asked why I felt it would be better on Teams - and I said I would have to place far less focus on 'being human' and more on delivering the answers that best demonstrate the competencies. Even the 'small-talk' before and after face to face meetings takes time and energy I would rather devote to what's important.

I asked if I could refer to notes - and they said yes - but they'd prefer I avoided it.

I explained that I am not great at self-advocating and asked them if maybe they could refer to someone with the right experience of best-practice for interviewing neurodiverse people. It's a bit like asking someone with cancer to be an Oncologist - you know you have a lump and what makes you feel physically comfortable and uncomfortable – but you aren't an expert on Cancer and treatment for it just because you have it.

In the end, I felt they don't want to seek advice from elsewhere. I just felt browbeaten into accepting the standard set-up.

That said, I appreciated seeing the interview room, knowing for sure who would be there (I had to sort of guess as my letter didn't make it clear whether it would be 1 or 10 people on the panel).

I sort of feel crushed for reaching out - but it is what it is - and I'll try and make the best of it on Weds

36. The Claimant explained that the process of writing this email brought to the fore his emotions and he became tearful. Mr Shepherd who sits at a desk close to the Claimant and who had not noticed anything out of the ordinary about the Claimant until then, noticed at about 1pm that the Claimant looked upset and Mr Shepherd suggested that they go and speak somewhere private, which they did. As they spoke the Claimant became more upset as he explained some challenges he was facing. He explained to Mr Shepherd which were:

- a. He had run out of his anxiety medication but that he was trying to get more (he had missed two days of medication);
- b. He felt he was being ignored by Paul Clark who he said had not said hello to him that day (the Claimant was particularly aware of this because he explained that he felt he had been ostracised by other members of the team as a result of having raised previous complaints about behaviour or comments he had witnessed which are beyond the scope of the matters in this claim and on which we do not reach findings). Mr Clark was someone the Claimant said he had had previous issues with.
- c. That Mr Shepherd had not asked him how he was that morning;
- d. Most worryingly to Mr Shepherd, that he had had a suicidal thought that morning about jumping in front of a train.
- e. The earlier conversation with Mr Rutland and Mr Bengie in relation to his interview.

37. The Claimant did not tell Mr Shepherd in this discussion that he was still not happy with arrangements for the interview.

38. By the end of the conversation, which lasted about 10 minutes, the Claimant had calmed down. Mr Shepherd told the Claimant he could go home and need not stay on shift to 14:30 and asked him to let him know that he had got home safely. Mr Shepherd in cross examination said that he would like to think that he had offered

the Claimant a taxi home but he could not remember. Mr Shepherd told the Claimant that he would explain the situation to the late shift duty manager.

39. The Claimant texted Mr Shepherd at 2pm that day to thank him for his help and to let him know that he had got home safely. He said he was going to arrange a doctor's appointment for another prescription in relation to his anxiety medication. Mr Shepherd said in his witness statement that later that day the Claimant sent him a joke via Facebook, so Mr Shepherd was confident that he was feeling better. This was not challenged in cross examination.

40. At 14:23 [151] Mr Vile replied to the Claimant's email of 12:56 saying "*Glad to hear that you have been able to start the conversation with your manager, at least it wasn't a no. Don't feel defeated, the hardest part was initiating the conversation.*"

41. The Claimant sent Mr Vile a further email at 16:42 saying, amongst other things:

I feel the equivalent would be asking a wheel-chair using candidate to justify why they feel a ramp is necessary to get into the building.

Or when in the building holding it up in a meeting room up a flight of stairs and then saying you are being fair to all colleagues by having the interview in the same room with the same questions. The wheelchair using colleague is then physically carried up the stairs, feeling hot, embarrassed and humiliated and then gets told that at least it's "a level playing field".

That said, I have had the conversation which was hard for me to do in the first place.

42. On the day of the interview, 24 March 2021, the Respondent's reception team were overzealous and did not initially allow the Claimant through to the private area of the office where it was agreed he could wait to avoid social interaction before the interview. This was quickly resolved.

43. In the interview it was not disputed that the Claimant was allowed to and did use his cue cards, that eye contact and small talk were minimized, that he was allowed more time to think about his answers (but in fact did not need it), that his interview lasted no longer than others' and that he performed well. The Claimant did not dispute that he is experienced in competency based questions having applied for other roles within the Respondent in which the same questions were used. While he answered the questions and was one of the three best performing candidates Mr Rutland said in his witness statement that he had been disappointed by some of the examples and answers given (Rutland WS25).

44. Immediately after the interview Mr Rutland (WS 26) asked Mr Bengel to leave the room so that he could have a welfare meeting with the Claimant. Mr Rutland was particularly concerned about the suicidal thoughts which Mr Shepherd had told him the Claimant had mentioned on 22 March 2021 when he had his anxiety/panic attack. He wanted to offer the Claimant additional support. The Claimant explained that he had run out of his anxiety medication at the weekend but now had more. Mr Rutland explained in his witness statement that he was satisfied that the Claimant was now ok, described that the Claimant shrugged off the incident, referred to Mr Clark not having said hello as a trigger and the fact that he had not

taken his medication but did not refer to the meeting that Mr Rutland and Mr Bengé had had with him that morning. The Claimant told Mr Rutland that he was worried the conversation they were having about his panic attack might influence him and Mr Bengé in their decision on appointment to the ISC role and Mr Rutland reassured him that it would have no impact.

45. On 1 April 2021 Mr Rutland verbally told the Claimant that he had not been successful in his application for the ISC role (CWS 15). Mr Rutland explained that the main reason that he had not been successful was that another candidate had shown greater propensity to become a “future leader”. We find that this had been assessed in the interview because the candidates had been asked to prepare, two weeks in advance of their interviews, a 10 minute presentation which was required to cover their the skills and behaviours they had built in their working life, why they had applied for the role and what they know about it, what they would bring to the role and where they saw themselves in the future (otherwise known in the Respondent’s recruitment parlance as ‘motivational fit for the role’) [271/272].
46. Mr Rutland and Mr Bengé destroyed their notes relating to the performance of the candidates assessed at interview, with the exception of the successful candidate, because of a misunderstanding about this being required for data privacy compliance (whereas the Respondent normally keeps such records for 6 – 12 months after interview).
47. On 7 April 2021 the Claimant received a standard letter from the Respondent’s Recruitment team confirming that he had not been successful at interview [157].
48. On 15 April 21 (Rutland WS28) the Claimant approached Mr Rutland and requested feedback from the interview. He arranged a meeting with the Claimant the same day in the office which lasted for around an hour and a half. The meeting was difficult Mr Rutland felt that the Claimant was trying to get him to incriminate himself or catch him out with respect to potential age discrimination in the selection process for the ISC role. Mr Rutland told the Claimant again he had not shown the required ambition for leadership. Mr Rutland asked the Claimant if he wanted to be a leader in the business and the Claimant did not answer but said ‘*It doesn’t matter, it matters what you say*’ and that other candidates may have lied about their ambitions. Mr Rutland allowed the Claimant to ask questions and there was discussion of other job applications the Claimant had made as well as a concern he had due to his line manager changing. Mr Rutland emphasized support for the Claimant to get where he wanted to go. They discussed the Claimant’s panic attack on 22 March 2021 and in that respect the Claimant put more emphasis on the trigger for the attack being Mr Clark having ignored him than on his lack of medication. In the meeting the Claimant did not attribute his anxiety attack to the meeting that Mr Rutland and Mr Bengé had had with him that morning nor did he mention his adjustment requests in respect of a virtual interview.
49. On 16 April 2021 the Claimant raised an informal grievance with Mr Chiariello about the ISC role interview and there was an email exchange between them that day [158]. Claimant to Mr Chiariello at 16:26:

[...] I had an formal feedback meeting with Greg Rutland yesterday (April 15th) - based on my unsuccessful application for the ISC role. I have summarised the meeting from my own perspective. I originally intended to send the summary to Greg [Mr Rutland] as a record of the meeting - and agreed outputs etc etc.

However, having reviewed the summary notes I have written, I am now of the belief that these meeting notes may form the basis of a grievance - the precise nature of which may become clear when you receive the notes. At this stage, I am content to request a review of my concerns under the informal part of our company grievance policy. You are therefore the designated manager to whom I should address an informal grievance. Please can you let me know if you are agreeable for me to supply my meeting notes in order for you to conduct an informal review.

50. Mr Chiariello replied to the email at 16:58 to say that he was more than happy to review the Claimant's concerns and provide his thoughts and he should send them through. He asked if he could also explain what resolution he would want if he were to go formal with a grievance.
51. The Claimant replied at 17:28 to Mr Chiariello with a summary he had prepared – addressed to Mr Rutland – of the feedback meeting he and Mr Rutland had had on 15 April. The Claimant in his email to Mr Chiariello said that whilst the meeting summary notes had been written as an email to Mr Rutland he had reflected and sent them to Mr Chiariello instead and that the solutions to the problems he highlighted were perhaps bigger than his own experience and may require a wider review of the Respondent's recruitment and selection processes to help create a level diversity and inclusion (D&I) playing field.
52. The summary attached to that email to Mr Chiariello [160 - 164] spanned four and a half pages of text. We find some of the key points to be:
- a. He thanked Mr Rutland for the time taken at the meeting the previous day to discuss feedback from the interview and his career pathway in the organisation;
 - b. Concern he had expressed at his initial lack of success in securing an interview for a Grade 4 Signaller vacancy' and that he might subsequently have been given an interview to placate him.
 - c. His assertion that he had been asked to justify his request for the ISC interview to be conducted remotely and which he said he had agreed to, feeling the pressure of refusing to comply with what the recruiting manager was asking him to do.
 - d. His comment that, whilst it may not have been apparent, he found having to verbally justify his request for adjustments 'on the spot' to Mr Rutland and Mr Bengé very humiliating but he had tried to self-advocate.
 - e. He had had an anxiety/panic attack shortly after that meeting on 22 March 2021 and went home from his shift an hour early.
 - f. His concern over the transparency of the selection criteria and the weight placed on leadership ambitions of the candidates including whether Mr Rutland would expect different answers from a 47-year-old candidate than those given by a 30-year-old candidate and potential age discrimination.
 - g. Concerns he had about his scoring in the interview.

h. The fact that in the meeting Mr Rutland had asked the Claimant if he had any feedback for him and the Claimant had offered two points relating to feedback to candidates and how appointments to roles were announced internally.

53. The Claimant closed the document by saying “*I am approaching my career ladder with determination – and where I have concerns, I will raise them through appropriate channels. Without further information to the contrary, it is my firm belief that I have been disadvantaged in this (and in elements of other processes) by my disability and age.*”

54. Mr Chiariello replied at 18:12 to acknowledge the informal grievance and tell the Claimant that he would reflect on it over the weekend. He asked the Claimant, as per his earlier email, to provide an idea of how the Claimant would like the issues resolved.

55. The Claimant replied at 18:58 to say [165]:

I think there are multiple 'limbs' to a reasonable resolution. The first limb would be an acceptance or acknowledgment that some elements of the selection process(es) I have been involved with (notably the ISC position - which sits within your own remit) are flawed and (in the case of the ISC selection process specifically) are potentially discriminatory (to more than one protected characteristic). If we can't get beyond that, there's probably not a lot of mileage in outlining either personal or wider changes that could help others that could be made within this part of the process. To be fair to you, I also need to know the scope to which you are able to investigate. For example, getting what may or may not be a 'token' interview for Signaller: Grade 4 at Robertsbridge following an 'admin error' may be outside the scope of what you are able to investigate. If that's the case then it would be helpful for me to know how to split my concerns to different managers / HR BPs etc. If you need anything else from me, please let me know.

56. On 19 April 2021 and 20 April 2021 Mr Chiariello and the Claimant had two conversations lasting a total of around 3 hours. [Chiariello WS14 and 15]. We accept that Mr Chiariello was trying to fulfil his duty of care by understanding exactly what the issues were that the Claimant wanted to be resolved, bearing in mind that he was being asked to apply the informal grievance processes, reassure the Claimant that he was taking his concerns seriously, establish what the Claimant wanted to happen and support the Claimant.

57. After their call, at 11:12 on 20 April 2021, the Claimant sent Mr Chiariello an email attaching a three page response to their previous discussion [167-170]. That document started:

Thanks for the chance to talk to you yesterday. I really appreciate your prompt response – and what appears to be a genuine desire to try to understand the concerns that I have expressed to you informally. Firstly, I hope I don't come across as a 'key-board warrior' in this or any other area of my communications with you. Having the face-to-face conversations that I had with you and Greg are just as important to me as our written communications, as we can often be more authentic when we have a verbal discussion. I have also been very happy to have 'face-time' with my (former) manager Tom about my career pathway

and our processes within NR. [...] As such I need you to deliver an informal outcome as the responsible representative of our organisation. [168].

58. The Claimant mentioned difficulties he had in 'reading between the lines' and the main focus of the document was to set out his thoughts on a potential resolution.
59. On the second call [Chiariello WS15] on 20 April 2021 Mr Chiariello shared some very personal experiences with the Claimant that he thought would reassure the Claimant that he was taking his concerns seriously.
60. Mr Chiariello delivered his outcome on the informal grievance by email on 22 April 2022 [171-173]. Some of the most relevant content from that email is:

I note from your original written submission that you requested to be interviewed 'over 'MS Teams' and although you didn't at the time, in correspondence, you referred to this as being a reasonable adjustment, which it certainly could have been. You correctly alluded to the fact that this had been offered to all candidates in the invite letter. The guidance issued by HR is as follows:

[...] interviewing in the current climate - virtual interviews have been a mandatory requirement throughout COVID-19. Considering the current government guidelines, a decision has been made that face to face interviews are now able to go ahead in the appropriate circumstances. If you and your team are not working remotely, interview location is fully risk assessed and social distancing measures can be applied then you are able to invite external candidates to site. Please be aware that the invite to interview e-mail will offer a virtual interview should the candidates not feel comfortable with attending face to face. This MUST be honoured and the candidate progressed.

In deciding if this is a breach of policy or disadvantaged you in anyway, I have considered the fact you are not working remotely and chose not to challenge the hiring managers request for you to attend a face to face interview. If you had done so, I am certain that your request would have been honoured in line with the above guidance. Consequently, I feel the request for you to attend a face to face interview was reasonable in the circumstances. [...]

61. C replied at 14:17 to the outcome

Dear Gez,

I have received your communication and have fully reviewed the content.

One area we didn't cover was the criteria for invite to second interview - because I have only been made aware that a second interview took place following our conversation. Given that some of my concerns were expressed surrounding transparency of process, I am really surprised that neither you or Greg made mention of this in any of our conversations.

Now that I am aware of it, could I ask how many candidates were invited for and participated in the second interview stage. You suggest two below - but if you

could be clear that would be helpful. With regard to the two long telephone conversations, a significant percentage of those conversations was occupied by references to your previous career within Thames Valley Police. Nevertheless, I appreciate the candid and frank examples you gave me from this period in your career as a way to assuage me that you have my best interests at heart and consider yourself to be very 'by the book'.

I apologise for the time you have spent on this - particularly at relative short notice. You mentioned that you have spent considerable time on this and other processes that I have instigated. I can only apologise for this - but ask you to consider that in the case of the sexist / racist workplace remarks, it would be the person responsible for making them that should hold the sole responsibility for the process within which you became involved - not the person who was essentially the victim / person reporting the concern. I do however thank you for your support throughout.

I remain apologetic if you were saying anything to me that required me to 'read between the lines'. I simply do not have that capability.

Regretfully - the final paragraph of your response (covering hidden selection criteria and 'alignment with [your] people strategy') leaves me with more questions than answers.

I shall, of course reflect, on your responses and consider what actions (if any) are necessary beyond this - as well as any learning opportunities for myself.

62. The next day, 23 April 2021 [176-177] Mr Chiariello responded to the Claimant's comments by adding text to the Claimant's earlier email and amongst other things made clear that the Claimant had not needed to apologise. It is clear from email correspondence that, that day, Ms Hutchinson (Senior Human Resources Business Partner) for the Respondent had a conversation with the Claimant and that the same evening at 22:36 she sent him an email saying:

Evening Matt

Thanks for talking with me today on the phone, it was good to catch up. We discussed your concerns regarding the selection process for the Incident Support Controller vacancy that you applied for and we spoke about the next steps, I suggested that neurodiversity awareness training may be beneficial to our colleagues at the KICC and have contacted the D&I team to arrange this. You said you are going to take the weekend to reflect on our discussion and we can speak again on Monday as to how to you would like to proceed with this.

Let me know when you would like me to call.

Have a nice weekend.

63. On 25 April 2021 the Claimant contacted Ms Hutchinson by email [180-181]:

Thank you for your time on Friday - particularly after a busy day.

I hope I articulated that I was trying to find a '3rd way' through my concerns over the ISC selection process, that was less combative and stressful than a formal process - but I was (and still am) seeking to understand the rationale that

underpinned the process. I explained to you that I have been part of two other recent selection processes (for Grade 6 Signaller and Incident Controller - both at TBROC) and had been unsuccessful. Nevertheless, I had been through the feedback process and did not feel disadvantaged - or perceived anything untoward. It was clear as far as that the process was purely score based - from standard interview questions (selected by managers from a pool of technical and non-technical questions) and the successful candidate had scored more than me. My own score was given to me to give me confidence that I hadn't been too far off the mark and the managers gave me feedback as to what would make 'good' answers into 'excellent answers' (using the scenarios I had provided). In both cases, I felt satisfied that neither age nor disability had hindered me from being successful. The managers did not make reference to any desire for me to demonstrate competencies that were not described in the job advertisement (as either essential or desirable). They made no references to their decisions being part of an overall 'departmental people strategy'. I accepted the outcomes in full.

I appreciated you telling me that you have some personal experience of people close to you with ASD/ASC. It gave me confidence you made no assumptions about my capabilities. It's been hard since I came 'out' about being autistic since my diagnosis. I've grown very good at 'masking' to get on in life. I had to choose between continuing to try and mask who I was (which I did for the first 41 years of my life) or try and relax a little and be me- and emphasise the positives to my condition (attention to detail, being very thorough etc) and be kinder to myself for being less good at other aspects of life (workplace 'banter' for example). To be authentic.

I think that what you propose about training would be very useful. I have been asked to do an interview (for my D&I newsletter - attached) with a colleague who really struggles but who wants to share his own experience. He is employed by Southeastern but at times faces an uphill struggle to being understood.

It's things like being told "you overthink things" that I find really backward (said in a conversation I had last week). That's like saying to a colleague who uses a wheelchair that they "don't walk much I". It's simply a trait of autism.

My problem in KICC moving forwards is that if there is a 'departmental people strategy' in place which involves 'leaders of the future', I may score well (again) on the standard questions used for interview, but fall down (again) in my honesty that I don't want to progress beyond the role I am applying for - plus the role above it at this stage in my life (which realistically would occupy about 5 years of my career). I may feel different 5 years down the line having built my confidence in those two roles. I don't know how to break out from that.

Nevertheless, I feel assured that I did well enough to score very similar in the ISC process to the candidates who were selected for 2nd interview. I'll reflect on everything we talked about as well as everything Gez and Greg has said.

64. The Claimant did not make specific reference to concern about the interview having been carried out in person.

65. On 26 April 2021 [175] the Claimant emailed Mr Gerardo Chiariello, copying HR as follows:

I'm letting you know this for information only. I don't need any time spent on it - or anyone being spoken to. It's just an example of how we need to do more to educate our colleagues. This is a workplace conversation from yesterday:

Senior colleague 1: That Greta Thunberg is a strange one isn't she?

Me: She's autistic [insert name of senior colleague].

Senior colleague 1: Oh er, yeah, well, it's not because of that she's strange.

Colleague 2: Yes it is.

Sometimes saying less is more. I left the conversation there.

66. We heard undisputed evidence that there were t.v. or other screens around the office on which Greta Thunberg might have appeared.

67. The next day, 27 April 2021 Mr Chiariello replied [174] saying:

You cannot send the below and expect me to do nothing - the fact you have raised it requires me to look into it. I note that you do not want anyone spoken to, but clearly there is an issue that needs addressing and if you wish to elaborate then please do, so I can get the matter investigated.

I spoke to Lucy last week and have asked her to arrange some training to be delivered in the KICC by the D+I team. This will be done as soon as is practicable and I am hopeful that this will raise awareness and educate colleagues.

68. The Claimant replied within the hour to say:

Hi Gez,

There's a brilliant Autism Awareness session that was delivered by a couple of NR colleagues that I would recommend to anyone wishing to know more. Link here:

<https://web.microsoftstream.com/video/3201bf09-55d5-4aa2-a331-8a3dc2e882ea>

I have no desire to 'rock the boat' as far as the comments were concerned - and I don't want to become known as someone with a tendency to report minor comments like this. It was just an example to (hopefully) underpin your decision to raise awareness around the issue. I will obviously continue to chip away with other education pieces via our joint SE / NR D&I newsletter.

I'm popping into the office tomorrow afternoon for the D&I photo-shoot on my day off, so if you want to touch base for a coffee / chat let me know.

All the best,

69. Ms Hutchinson on 27 April 2021 also sent an email to the Claimant asking how he would like to proceed with this complaint.

70. On 6 May 2021 the Claimant had a conversation with Mr Chiariello and we were provided with an undisputed file note prepared by Mr Chiariello of his impressions of the discussion:

- *At around 13:55 MI came into the KICC management office asking the whereabouts of Georgina Barry.*
- *There were several NR and Se people in the office at the time and as he was leaving he asked me if I had a few minutes as to discuss something in person rather than it come to me as a surprise.*
- ** We went into the strategic command suite and following a couple of minutes of him telling me about his day in Court yesterday, I asked him what he wanted to tell me.*
- ** He informed me that he was putting in a subject access request following speaking to someone else.*
- ** He wanted to see my people strategy, which I said was in development – something he knows from our previous conversation. His response was “Well that’s an easy one for you to reply to – just say that then”!*
- ** He wanted his notes from interview.*
- ** I didn’t appreciate his tone or the way he was speaking to me. It was rude and I felt he was disrespectful, almost like he was trying to provoke a reaction from me.*
- ** In my email to him dated the 23/4/2, I made it clear if he wasn’t happy with my response he needed to escalate the matter to Lucy Hutchinson. Consequently, I told him that I wasn’t prepared to discuss the matter further and for him to formally raise his concerns in writing.*
- ** I told him that I didn’t appreciate how he was operating and in my view there were much better ways to go about business to get what he wants.*
- ** Conversation ended.*

71. That day the Claimant did submit a data subject access request [183-184].

72. On 10 May 2021 the Claimant reported to Mr Chiariello a conversation which included a homophobic comment [201-203]. Mr Chiariello replied to the Claimant that his first port of call for escalating issues of this nature should be to his line manager or the SNDM but went on to add

I note from your email on 6th May that you are now the KICC TSSA rep for equalities – what do you recommend is needed to address this unacceptable behaviour over and above briefings from me and the Neurodiversity Awareness Training we are working to introduce?

As I've previously stated, sending me emails like this are no use – I need to know who is responsible so I can arrange for it to be dealt with at an appropriate level.

73. The Claimant replied within the hour to say:

Thanks Gez. All noted.

In terms of my TSSA role until my credentials are formally notified to NR, I don't believe I have any official rep standing.

I don't think casual homophobia would be covered by the neurodiversity awareness training – unless I have missed something. The colleague this time works for Southeastern and made the comment as he was leaving. I asked his relief if this was a new expression – and he shrugged.

I've copied Tom in (as you have suggested I refer this to SNDM). I don't want to put myself through any investigation again as I just want to be accepted by my peers – I just thought you would like to be aware when one of your team who happens to be a gay person, experienced this language. In terms of training, do people really need teaching that homophobia is not acceptable in a modern 2021 workplace?

74. At 21:38 in the evening Mr Chiariello replied:

Are you making a complaint? If not how do you expect me to be able to stop this type of unacceptable behaviour?

This is the second example of inappropriate behaviour that you have flagged to me in two weeks, but in both cases you have chosen not to disclose the person responsible. How do you realistically expect me to tackle the problem without knowing who is responsible?

In relation to your comment about training, it is abundantly clear that there is a need for this to educate staff and I will make sure it happens.

Moving forwards, please raise any issues you have with Carol as your direct line manager. If she feels the need to escalate to Tom she will and if Tom feels the need to escalate to me I am sure he will.

75. The Claimant replied at 22:41 to say:

All noted. Tony and I had a pastoral conversation this evening about this issue and he offered me appropriate support as the duty manager.

My difficulty in raising it with Carol is that she was there when it was said. She was even closer to the comment than me. She may have not heard it, or it may just be normal to her. I could have asked her though.

There's no complaint - I don't want to make myself unpopular as a consequence, I just want to come to work and do my job without this. I don't want to have to 'confront' people. I just want it not to happen, I don't think this is an unreasonable expectation. It's your call as the head of the department whether you think there is a wider education piece to deliver.

76. The Claimant was unhappy about the fact that Mr Chiariello then on 11 May 2021 sent the email exchange on to a wider group of managers to let them know that the person who had made the comment had spoken to him and had undertaken to publicly apologise to the Claimant and said “*as far as I am concerned no management action other than reminding staff about displaying the correct behaviours in the KICC*”. The Respondent’s Head of Service Delivery contacted the Claimant to reassure him and the Claimant confirmed back to him that he had received an apology and thanked him and Mr Chiariello for their supportive words.
77. This was escalated and an apology was given, which the Claimant accepted [208].
78. On 19 May 2021 the Claimant lodged a formal grievance [210-213]. That grievance challenged the leadership aspects of the ISC role selection decision making and included the following paragraph [212]:

That Network Rail failed to make available to me ‘reasonable adjustments’ for the interview / presentation when specifically requested to do so. I made a request to refer to ‘cue-cards / notes’ during the interview and to conduct the interview over MS Teams. The latter had been offered to all candidates as a ‘COVID secure’ method of conducting the process. I had made the request to reduce social anxiety in getting to the location in good time, making small-talk and all the usual non-verbal signals we try to get right in face to face interviews. In short, I wanted to focus on the quality of my answers. On March 22nd, I was taken to the room in which the candidates would be interviewed by Ian Bengé and Greg (the interviewing managers).

I was asked to provide justification for the ‘reasonable adjustment’ to be interviewed via MS Teams as “all the other candidates were attending in person”. I tried to explain how autism works – and how specifically it would aid my performance on providing the best responses possible with less brain power devoted unnecessary considerations. I do not self-advocate well – and I found it a humiliating experience to give this explanation to the two recruiting managers. It was clear to me that they wanted me there in person so (mindful I would be challenging the very decision-makers for the interview itself), I acquiesced to their requirement to appear ‘in person’.

It is no coincidence I experience a panic / anxiety attack around 30 minutes later and had to be sent home from work by the Network Delivery Manager one hour before my shift end. I believe this is an example of direct discrimination. To use an analogy, would we ask a candidate who is a wheel-chair user to explain why they need the aid of a lift to get past a flight of steps? I can’t imagine our organisation asking someone to justify a need to utilise a ramp or lift if they requested special assistance to get to a meeting room.

[...] To conclude, it is my belief that the processes that have been applied, significantly discriminated against me both directly and indirectly on grounds of disability and age. If you are in agreement that my protections in law for the aforementioned characteristics have been breached (wholly or in part) and / or company policies not followed to the letter, then we would need to mutually agree the appropriate remedy.

79. On 18 June 2021, the Claimant attended a virtual interview for the role of a Signaller. His application and the interview were successful and he started his new role in October 2021.

80. On 7 July 2021 the Claimant reported a conversation to Mr Withers (Network Delivery Manager) as follows:

I wanted to mention that a colleague took me aside in recent days and said that they admired my challenging the status quo - but that I "needed to watch my back". This of course is concerning - and the person would not elaborate.

There is absolutely nothing I can do with this comment - other than record it was said, as it was very unspecific as to who or what I should watch out for.

If this is something just to record with Carol as my manager, then of course let me know.

81. Mr Withers replied on 9 July 2021

Thank you for the e-mail below.

Firstly I can assure you that KICC management – both Southeastern & Network Rail, as well as each respective company - treat any form of bullying or threats very seriously. I've cc'd both Gez & Ben Rudkin in, as you have not specified who the colleague was, and I've also cc'd Carol your line manager.

Obviously this is about the message itself, rather than the person who made these comments, but for me context is always very important in terms how it was delivered and the over-riding theme of the conversation. Because of the vagueness of the statement made to you – and as you've eluded to -at this stage there is only a limited amount that can be done. If you wish to raise this matter further, than in the first instance you should approach Carol as your line manager.

82. The Claimant replied "agreed – there is little that can be done" and thanked Mr Withers for his support. Mr Chiariello then sent an email that evening saying:

** How do people know what you are challenging? To my knowledge it is not widely known or discussed in the KICC, and only a small number of managers are aware of ongoing matters.*

** As eluded to by Mark, context is everything, but I will not tolerate any form of bullying, provocation, threats or intimidation in the KICC and I know Ben shares my view on this. As such, the person who approached you needs to be spoken to, as they can provide essential evidence to identify those who at the very least are potentially committing gross misconduct, but more concerning to me is the possibility that if these allegations are true, they could amount to criminal conduct.*

Please disclose to Carol in the first instance who approached you, so that we can launch a formal investigation into these serious allegations.

83. The Claimant did not ask for this to be further investigated.

84. On 7 July 2021 Mrs Styles invited the Claimant, by letter, to a grievance investigation hearing [248] to be conducted virtually by Teams on 14 July 2021 and the hearing took place on that date [253].
85. On 29 July 21 the Claimant through solicitors filed his claim.
86. On 17 August 21 Mrs Styles conducted a grievance interview with Mr Rutland [268].
87. The Respondent filed its response to the Claimant's claim on 27 August 21.
88. As referenced above, in October 2021 the Claimant started his new role as a Signaller.
89. On 11 October 2021 Mrs Styles held a grievance outcome meeting with the Claimant to explain her decision [278-281] and we were provided with a grievance investigation report dated 24 October 21 [282-285] and outcome letter dated 25 October 2021[288-287]. The Outcome Letter, amongst other things found that:

Part 1 – based on the evidence of this grievance, you should have been afforded the opportunity to go through to the second interview based on the competency scores achieved at the initial interview stage.

Part 2 – with regards to the request for reasonable adjustments I agree that this was request was listened to, considered and efforts were made to allay concerns, therefore I do not uphold this allegation

90. The investigation report commented:

Reflect key decision:

Matthew Irish advises that three requests were made in terms of location, having notes available and more time to answer questions. Greg Rutland confirms that he had received these requests via email and that he approached Matthew, as they were both in the office, to talk through Matthew's concerns. As Matthew was provided with confirmation that notes could be available, more time to answer questions and the location and room were shown to Matthew and that and that subsequently Matthew confirmed to the hiring manager that he can attend the interview face to face, I conclude reasonable adjustments were provided and additional efforts were made to allay concerns in terms of the location of the interview.

Conclusion

Based on the evidence of this grievance, Matthew should have been afforded the opportunity to go through to the second interview based on his competency score.

With regards to the request for reasonable adjustments I agree that this request was listened to, considered and efforts were made to allay Matthew's concerns, therefore I do not uphold this allegation.

My conclusion is that based on all of the evidence obtained I uphold only one part of the grievance and that is with regards to the selection process. I also recommend that in line with our guidelines managers within the Kent Route Control involved in the recruitment process must make themselves aware of the NR recruitment policies and ensure they undertake the relevant online training. I do also note that Greg Rutland has taken steps to refresh his understanding of the current recruitment guidelines and has attempted to undertake the online training.

91. On 29 October 2021 the Claimant appealed the grievance decision and we understand that an appeal process was undertaken but the grievance appeal hearing manager did not provide evidence and we were not referred to the appeal documents by the parties' representatives and so have not taken them into consideration in the case.

Relevant law

Equality Act 2010 (EqA), Part 5 Chapter 1, Employment, Etc Employees

92. Section 39 EqA provides:

[...]

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

[...]

(d) by subjecting B to any other detriment.

[...]

(5) A duty to make reasonable adjustments applies to an employer.

93. Section 40 EqA provides:

(1) An employer (A) must not, in relation to employment by A, harass a person (B)—

(a) who is an employee of A's;

(b) who has applied to A for employment.

EqA, s136– burden of proof

93. The shifting burden of proof applies to claims under the EqA 2010.

94. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgment.

95. In *Madarassy v Nomura International plc*. Court of Appeal, 2007 EWCA Civ 33, [2007] ICR 867, Mummery LJ approved the approach of Elias J in *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865 and confirmed that the burden of proof does not simply shift where M proves a difference in sex/disability and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient, para 56 – 58 Mummery LJ.

Liability of employers and principals

96. Section 109(1) provides that ‘anything done by a person (A) in the course of A’s employment must be treated as also done by the employer’. It matters not whether that thing is done with the employer’s knowledge or approval — S.109(3). However, the employer has a defence under S.109(4) where it can show that it took all reasonable steps to prevent A from doing that thing or from doing anything of that description. The section replaces similar provisions in the previous equality legislation, with the result that the substantial body of case law generated under the antecedent provisions continues to be relevant. Quite properly in our view, the Respondent did not rely on S.109(4).

Discrimination Arising from Disability

97. s 15 EqA provides:

“(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B’s disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability”.

98. Simler P in *Pnaiser v NHS England* [2016] IRLR 170, EAT, at [31], gave the following guidance as to the correct approach to a claim under [EqA 2010 s 15](#):

(a) ‘A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The “something” that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A’s motive in acting as he or she did is

simply irrelevant: see *Nagarajan v London Regional Transport* [\[1999\] IRLR 572](#). A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises..

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely, to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* [UKEAT/0149/14](#), [\[2015\] All ER \(D\) 284 \(Feb\)](#) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) There is a difference between the two stages – the “because of” stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the “something arising in consequence” stage involving consideration of whether (as a matter of fact rather than belief) the “something” was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the “something” leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of “something arising in consequence of the claimant's disability”. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to “something” that caused the unfavourable treatment."

99. When assessing whether the treatment in question was a proportionate means of achieving a legitimate aim, the principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs

of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax* [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60]. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own objective assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: *Hardys & Hansons plc v Lax* [2005] IRLR 726, CA.

100. A PCP will not be proportionate unless it is necessary for the achievement of the objective and this will not usually be the case if there are less disadvantageous means available, *Homer* [2012] ICR 704.

Reasonable Adjustments

101. By s39(5) *EqA* a duty to make adjustments applies to an employer. By s21 *EqA* a person who fails to comply with a duty on him to make adjustments in respect of a disabled person discriminates against the disabled person.

102. s20(3) *EqA* provides that there is a requirement on an employer, where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter, in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

103. The EHRC Code of Practice on Employment (2011) (“**the Code**”) provides:

At Paragraph 6.24, that there is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask);

At paragraph 6.37, that Access to Work does not diminish or reduce any of the employer’s responsibilities under the 2010 Act.

At paragraph 6.28 the factors which might be taken into account when deciding if a step is a reasonable one to take:

Whether taking any particular steps would be effective in preventing the substantial disadvantage;

The practicability of the step;

The financial and other costs of making the adjustment and the extent of any disruption caused;

The extent of the employer's financial or other resources;

The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

the type and size of the employer.

104. It is not necessary to prove that the potential adjustment will remove the disadvantage; if there is a “real prospect” that it will, the adjustment may be reasonable. In *Romec v Rudham* [2007] All ER (D) 206 (Jul), EAT: HHJ Peter Clark

said that it was unnecessary to be able to give a definitive answer to the question of the extent to which the adjustment would remove the disadvantage. If there was a 'real prospect' of removing the disadvantage it 'may be reasonable'. In *Cumbria Probation Board v Collingwood* [2008] All ER (D) 04 (Sep), EAT: HHJ McMullen said that 'it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage'. In *Leeds Teaching Hospital NHS Trust v Foster* [UKEAT/0552/10](#), [2011] EqLR 1075, the EAT said that, when considering whether an adjustment is reasonable, it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage.

105. Schedule 8 EqA (Work: Reasonable Adjustments) - Part 3 limitations on the duty provides:

S. 20. Lack of knowledge of disability, etc

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

Under Part 2 and an interested disabled person includes in relation to Employment by A, an employee of A's.

106. If relied upon, the burden is on the Respondent to prove it did not have the necessary knowledge. The Respondent must show that it did not have actual knowledge of both the disability and the substantial disadvantage and also that it could not be reasonably have been expected to know of both the disability and the substantial disadvantage.

Harassment

107. Section 26 EqA 2010 provides:

(1) A person (A) harasses another (B) if-

(a) A engages in unwanted conduct related to a relevant protected characteristic, 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.

108. *Richmond Pharmacology Ltd v. Dhaliwal* [2009] IRLR 336 makes clear that 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:

Discussion and Decision

109. The Tribunal took into account all its findings of fact and the relevant law (including that referred to by the parties in submissions) when reaching its decision. For clarity, it has stated its conclusion on individual allegations separately.

Duty to make reasonable adjustments s.39 EqA 2010

110. The Claimant's claim that the respondent failed in a duty to make reasonable adjustments by not holding his job interview remotely via Teams is, for reasons we will explain, more persuasive than his claim under s.15 EqA 2010 (discrimination arising from disability). Findings in respect of the reasonable adjustments claims are also relevant to the arising from disability claim. For these reasons we address the reasonable adjustments claim first.

Was there a pcp of requiring candidates to attend a face to face interviews?

111. The Respondent asserts that this claim fails because there was no provision, criterion or practice ("**pcp**") of requiring candidates to attend face to face interviews. It says this is plain from the face of the invitation which we accept says that remote interviews could be accommodated [132]. However, we have not placed much emphasis the invitation because the paragraph referred to by the Respondent is directed at those who might not want to attend an in person interview due to anxiety about COVID. It does nonetheless evidence flexibility on the part of the Respondent and one candidate (the MOM), having fallen ill on the day of the interview, did in fact have their interview remotely. The Respondent says that the most that could be said is that there was a preference for face-to-face interviews.

112. We noted the HR guidance quoted by Mr Chiariello in his email of 22 April 2021 "*[...] interviewing in the current climate - virtual interviews have been a mandatory requirement throughout COVID-19. Considering the current government guidelines, a decision has been made that face to face interviews are now able to go ahead in the appropriate circumstances. If you and your team are not working remotely, interview location is fully risk assessed and social distancing measures can be applied then you are able to invite external candidates to site. Please be aware that the invite to interview e-mail will offer a virtual interview should the candidates not feel comfortable with attending face to face. This MUST be honoured and the candidate progressed.*"

113. The Claimant says at the time of his interview there was a practice, endorsed by HR post lifting of covid restrictions, to return to the position pre covid of offering candidates for interview face-to-face interviews and that this was the default position

114. The Respondents arguments are persuasive but we find that there was the necessary pcp. In particular we note the guidance of the EAT in *Carreras v United First Partners Research UKEAT/0266/15/RN* that the concept is not to be interpreted in too restrictive a way and includes one off decisions. We also note the guidance in the Code:

6.10: “[It] should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions.”

4.5: The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase ‘provision, criterion or practice’ is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions.

A provision, criterion or practice may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a ‘one-off’ or discretionary decision.

115. We consider that there was a practice of holding interviews face to face unless an exception was made.

If there was a pcp, did this place the Claimant at a substantial disadvantage because of his disability within the meaning of s.20(3) of the EqA, namely: because it affected his performance in the interview, resulting in him not getting the job?

116. We have concluded that the Claimant did find social interaction draining and that having a face to face interview involving travelling in, albeit to his normal place of work, would have left him more drained and less fresh for the interview than if he had not had to leave home and had been able to carry out the interview virtually. We also consider that being interviewed in an office that he was not familiar with would also have been an added challenge to him because of his disability.

117. We do not consider that having a face to face interview resulted in him not getting the ISC role. There are a number of reasons for us reaching that finding but central to them is the fact that a key reason for the Claimant not being given a second interview is that he did not show the desired thirst for progressing to future leadership roles which was an element of the interview for which the Claimant had two weeks to prepare.

118. This of course reflects on the question of whether any disadvantage was substantial but is not determinative of it. Also reflective of whether the Claimant was put at a substantial disadvantage is that he performed well at the interview. The Claimant asserted that he would have performed better had he conducted the interview virtually.

119. We have taken into account that steps were taken to reduce the Claimant's need for social interaction being:
- a. the Claimant being shown the interview room and offering him any adjustments to the layout – this mitigated the challenge he faces with being in unfamiliar surroundings;
 - b. the Claimant being allowed early and private access to a quiet space (albeit reception did not grant him immediate access to it);
 - c. his interviewers seeking to avoid eye contact with the Claimant in the interview;
 - d. the interview being held early in the day.
120. Notwithstanding that we do not find that having a face to face interview led to the Claimant not getting the job, and taking these factors into account, we find that the Claimant was put at a substantial disadvantage.

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

121. It is clear and undisputed that the Respondent knew that the Claimant had the relevant disability so the focus is of course on whether the Respondent knew or could reasonably be expected to know that the Claimant was put at a disadvantage. If not then the duty to make reasonable adjustments is not triggered.
122. The Claimant maintained that he felt a little on the spot and felt brow beaten into accepting a face to face interview at the meeting on Monday 22 March 2021. We accept that the Claimant's disability made it more difficult for him to self-advocate (i.e. ask for the adjustments that he felt he needed to help him with his disability) and that this might have been more challenging when making that request of two managers who were going to be conducting an interview with him for a job that he wanted. Mr Rutland conceded that he told the Claimant all the candidates were going to be interviewed face to face (as was the plan on 22 March 2021) and we find that, whilst Mr Rutland meant this as offering reassurance to the Claimant that everyone was being treated equally, it would have in fact made it harder for him to ask for a remote interview. It was also clear from the evidence that the Claimant was having more difficulty that day with his mental health because he had run out of his anxiety medication. Later that day he suffered a panic/anxiety attack and Mr Shepherd suggested that he go home an hour or so early.
123. However, we do not uphold the Claimant's claim because we do not consider that the Respondent knew or could reasonably have been expected to know that the Claimant was likely to be placed at a substantial disadvantage. We consider that the Respondent reached a reasonable conclusion that it had made the adjustments that the Claimant felt necessary. We reach this conclusion in particular because:

- a. The Claimant's request for a remote interview was framed as follows – "I think I would perform better from home given the 'goldfish bowl' nature of our office".
- b. The Respondent reasonably thought that they had addressed this issue by explaining that there was no intention to hold the interview in the command centre and the Claimant then visibly became more himself when they told him where the interview would actually take place. The Respondent reasonably thought that they had addressed the disadvantages faced by the Claimant and we find that the Claimant gave the Respondent no reasons to suspect otherwise.
- c. Mr Bengé and Mr Rutland would have agreed to the Claimant having a remote interview had the Claimant repeated his request on knowing the actual arrangements for the interview day – the Claimant would have been pushing at an open door;
- d. While the Claimant found it difficult to ask for adjustments, he could and did still do so.
- e. Whilst the Mr Bengé and Mr Rutland did not talk to TJ Vile for another source of advice, it was reasonable for them to have focused on the Claimant and his specific needs.
- f. It was reasonable for Mr Rutland to have approached the Claimant at his desk, as he did, and to ask for a discussion with the Claimant about his requests, as he did. In the past, the Claimant had been receptive to this type of approach and the Claimant did not raise any concerns. The Claimant also ended his email making his request for adjustments by inviting the Respondent to let him know if he could add any clarification. The meeting with Mr Bengé and Mr Rutland was not in any way hostile or pressurised and they took the Claimant up to show him the room and arrangements they had considered for the interview to get his input. We do not consider that it was this that caused the Claimant's later panic attack.
- g. We do not consider that it would be reasonable to expect the Respondent, after the Claimant leaving work slightly early that day following his panic attack, to have asked the Claimant again whether he was content with an in person interview and the Claimant did not email the Respondent to say that on reflection he thought he would still benefit from a remote interview.

Discrimination arising from disability

124. Firstly we address, as per the list of issues, whether the Claimant was refused a virtual interview by the recruitment managers, Mr Rutland and Mr Bengé on 22 March 2021 despite this being an option for other candidates who requested it due to Covid-19 and if so did that amount to unfavourable treatment?
125. The Respondent submitted that, as a matter of fact, the Respondent did not refuse to allow a virtual meeting on 22 March 2021. The Respondent said that Mr Rutland merely wanted to understand why the Claimant had requested a virtual interview as he was concerned that the Claimant's premise for so doing was based on a misconception about the meeting room (based on the Claimant's comment about the goldfish bowl nature of the office). However, we conclude that the

Claimant was in substance refused a virtual interview and that it amounted to unfavourable treatment.

What was the something?

126. Counsel for the parties agreed that the Claimant's difficulties in making small talk were the something which he alleged arose in consequence of his disability.

Do we agree that this something arose in consequence of disability?

127. Objectively we agree with the Claimant that the Claimant's difficulties in making small talk did arise in consequence of his disability.

Was the unfavourable treatment because of the something?

128. We find that the Claimant's difficulties in making small talk/social interaction were not the reason why the interview did not take place virtually and the Claimant's claim for discrimination arising from disability fails on this ground. We are clear that the Respondent did not carry out the interview virtually because it reasonably concluded that, through the other measures it had taken, it had made the adjustments that the Claimant needed for the interview and that the Claimant was content to have the interview in person. Having made the adjustments that they had agreed to make and the Claimant appearing to be content with them, they reasonably concluded that a face to face interview would be more effective than a remote interview.

Was the unfavourable treatment a proportionate means of achieving a legitimate aim?

129. This was not part of the Respondent's positive case but the Respondent said that conducting the interview face to face nonetheless had the legitimate aim of getting the best out of candidates. We agree that this could be a legitimate aim. It does not fall to us to decide here whether conducting the interview face to face was a proportionate means in the circumstances of achieving that aim because we have found that the Claimant's difficulties in making small talk/social interaction were not the reason why the interview did not take place virtually. However, given the other adjustments made and the fact that the Claimant performed well in interview we consider that this was a proportionate means of achieving a legitimate aim.

Unlawful harassment

The way the Claimant was allegedly questioned by Greg Rutland and Ian Bengel on 22 March 2021 regarding the adjustments required (i.e. to attend the virtual interview), resulting in the Claimant having a panic attack and having to leave the workplace.

Did it happen?

130. The Claimant's case was in essence that he was put under pressure in the meeting on 22 March 2021 to justify the adjustments he wanted to be made to the process. We conclude that the Claimant was asked about the reasons for the adjustments he requested. We consider that this was the most practical and reasonable way to address his request and to understand his comment about the

goldfish bowl nature of the office. It might have been preferable for HR to have held the meeting with the Claimant but we do not consider that this was necessary.

Unwanted conduct?

131. We consider that this conduct was unwanted and that the Claimant would have preferred for his requested adjustments just to have been agreed and not to have to talk about them.

Related to protected characteristic?

132. We find that the unwanted conduct did relate to the Claimant's protected characteristic because it was a discussion about adjustments he wanted to be made on account of his disability.

Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

133. We are clear that the purpose of the Respondent's questioning of the Claimant was simply to understand his request for adjustments to the interview process more fully (and in particular his comment about the goldfish bowl nature of the office). The purpose of the Respondent was not to violate the Claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for him.

134. Two of our number concluded that the Respondent's conduct did not violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant and if it did in fact subjectively make the Claimant feel like he was in such an environment then objectively it was not reasonable for him to feel that way. If he did feel that way then on the balance of probabilities we conclude that it was not because of any inappropriate conduct on the part of the Respondent but because of the Claimant's state of mind that day and the fact that he had not had the benefit of his medication for two days. One of our number did consider that the Claimant felt intimidated but that in light of the other issues that took place that day, in particular because of the fact that he had not had benefit of medication and other factors mentioned, it was not reasonable for him to have felt intimidated.

During a telephone conversation, on 19 or 20 April 2021 in response to the Claimant stating that he didn't have the capacity to "read between the lines": "You overthink things".

Did it happen?

135. Mr Chiariello denied saying to the Claimant 'you over think things' either on 9 or 20 April 2021 [Chiariello 17] and that it was the Claimant himself who professed to overthinking things. As the Claimant said in his email dated 25 April 2021, it is (in his view) "simply a trait of autism" [181]. On the balance of probabilities and given that the Claimant did not mention it in his email of 20 April 2021 [171] or the document it attached, we do not consider that it was said.

Unwanted conduct?

136. If we are wrong and the conduct did happen we consider that it would have been unwanted because we consider that the Claimant would not have wanted it to have drawn to attention.

Related to protected characteristic?

137. Again, if we are wrong and the conduct did happen we consider that it would not have been intended to be a slight against him as an autistic person and no medical evidence was presented that this is a trait that the Claimant has from his autism. Nonetheless we go on to consider whether it had the necessary purpose or effect.

Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

138. If the comment was made we find that it was not said for the purpose of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

139. We also find that if the comment was made that it did not have the effect of creating such an environment for the Claimant and that, even if subjectively it did have that effect, it would not have been objectively reasonable for it to have had that effect. The Claimant himself said that he had a tendency to overthink things and the subsequent correspondence to Mr Chiariello does not suggest that he was affected in that way [171]:

I apologise for the time you have spent on this - particularly at relative short notice. You mentioned that you have spent considerable time on this and other processes that I have instigated. I can only apologise for this - but ask you to consider that in the case of the sexist / racist workplace remarks, it would be the person responsible for making them that should hold the sole responsibility for the process within which you became involved - not the person who was essentially the victim / person reporting the concern. I do however thank you for your support throughout.

I remain apologetic if you were saying anything to me that required me to 'read between the lines'. I simply do not have that capability.

Harassment involving the following alleged conversation:

Senior colleague 1: That Greta Thunberg is a strange one isn't she?

Claimant: She's autistic [insert name of senior colleague].

Senior colleague 1: Oh er, yeah, well, it's not because of that she's strange.

Colleague 2: Yes it is.

140. Counsel for the Respondent pointed out that in the Claimant's contemporaneous report of this alleged incident made on 26 April 2021 he made no mention of laughter [175]. Mr Dovener in his witness statement said that he has "absolutely no recollection of this conversation taking place" [Dovener 13] and "cannot envisage a

scenario when or where [he] would have spoken to the Claimant and/or Colleague 2 about Greta Thunberg” [Dovener 13]. Whilst he was available and ready to give evidence at the initial hearing in July 2022, Mr Dovener was not able to attend to give evidence at this reconvened hearing on health grounds. As evidenced by his medical records and oral testimony of Mr Shepherd, Mr Dovener was diagnosed with pancreatic cancer in November 2022, had a series of medical appointments over the days of this hearing in preparation for a major operation on 19 May 2023. The Respondent therefore invited us not to draw any inferences from his non-attendance. The Respondent also invited us to find that any such conversation did not create the prohibited environment for the Claimant for the following main reasons.

- a. The comment was about the famous activist and was not directed at the Claimant. Therefore the requisite purpose is missing.
- b. The Claimant did not make any complaint at the time; he merely brought it to the attention of Mr Chiariello but refused, despite prompting, to name those involved or lodge a complaint [174-175].
- c. At the time, he referred to comment as “minor” [178] and as such, the conduct did not have the effect of violating the Claimant’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. He had made it plain that the comment did not cause him great upset and that he did not want to take the incident any further.
- d. It would not have been reasonable for this conduct to have had the effect of violating the Claimant’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him given (a) it was not aimed at him but a comment in the course of a conversation about a third party [175] and (b) he considered it “minor” at the time and not worthy of investigation [178].

141. Counsel for the Claimant submitted that:

- a. Mr Dovener was aware that the Claimant is autistic (Dovener 9);
- b. that the Claimant had a fairly cordial relationship with him;
- c. that the comment was prompted by Greta Thunberg appearing on a news report;
- d. that the Claimant felt the comment was directed at him and in his direction, Mr Dovener knowing of the Claimant’s autism.
- e. The Claimant was upset by Mr Dovener’s comment and emailed Mr Chiariello about it [179].
- f. By this point, the Claimant was ‘tired of backlash’.
- g. The comment was described by the Claimant as minor [178] not because it did not cause upset but because it affected, and offended, only him.
- h. The Claimant accepted that Mr Dovener did not himself say that Greta Thunberg is autistic and strange.

- i. We should accept that Mr Dovener said she was strange directing his comment at the Claimant and knowing that both Greta Thunberg and the Claimant have autism, thereby making a veiled offensive remark to C.
- j. The Claimant challenged Mr Dovener at the time and thereafter reported the conversation to Mr Chiariello who accepted that, if occurred as alleged, it would be inappropriate.
- k. The conduct had the proscribed effect and it was reasonable for it to have that effect on C.

Did it happen?

142. We accept that Mr Dovener was not deliberately avoiding the Tribunal hearing. However, we could attribute less weight to his witness statement than we could have done had he attended the hearing and given consistent evidence under cross examination. We found Mr Dovener's witness statement to be somewhat short of categorical on this point in that at paragraph 13 he says (our emphasis added):

I have absolutely no recollection of this conversation taking place on or around 25 April 2021, with the Claimant and/or James Hitchin or with any other person, or at any other time. Whilst I cannot categorically say that the conversation did not take place, I would be inclined to say that it did not occur at all. I cannot envisage a scenario when or where I would have spoken to the Claimant and/or James about Greta Thunberg. Further, I would not have said or indicated or referred in any way that she was 'strange'. I would not describe her in this way at all, and it is not my view of her. As I have already stated I am very open minded and not judgemental about other people, their views or preferences. The Claimant has not put forward any proof that this conversation took place, as he alleges or otherwise. That is because I am very certain it never took place.

143. We have taken these factors into account and find on the balance of probabilities that Mr Dovener did say: "That Greta Thunberg is a strange one isn't she?"

Unwanted conduct?

144. We find that the comment was unwanted because the Claimant reported it as unwanted the next day.

Related to protected characteristic?

145. We do not consider that Mr Dovener's comment was related to the Claimant's disability albeit the Claimant and a third party did then link it to his disability but that it not the subject of the claim. The Claimant's claim fails on this basis and on the further grounds we set out below.

Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

146. We do not find that the purpose of Mr Dovener's comment was to violate the Claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

147. We can understand that the Claimant would be sensitive to comments of this nature about people who also have autism. However, we do not accept the submission made on behalf of the Claimant that the Claimant described the exchange as minor [178] not because it did not caused upset but because it affected, and offended, only him. We find that his description of the conversation as minor (bearing in mind that this was a comment on the entire conversation and not just the comment made by Mr Dovener which we are asked to focus on) is reflective of the effect on the Claimant of the comment of Mr Dovener. We do not find that the comment had the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant and if we are wrong on that we do not consider that objectively it would have been reasonable for it to have had that effect.

Employment Judge **Woodhead**

Date: 19 May 2023

SENT to the PARTIES ON

31/07/2023

FOR THE TRIBUNAL OFFICE