EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss Caprice Wilton	AND	Job Solutions Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY BY VIDEO (CVP) AND PUBLIC TELEPHONE CONFERENCE **ON** 24 and 25 July 2023

EMPLOYMENT JUDGE N J Roper **MEMBERS** Ms V Blake
Ms E Smillie

Representation

For the Claimant: In person (Assisted by Relay UK)
For the Respondent: Mrs G Cross, Director

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims are dismissed.

REASONS

1. In this case the claimant Miss Caprice Wilton claims that she has been discriminated against because of a protected characteristic, namely disability. The claim is for direct discrimination; a failure to make reasonable adjustments; and harassment. The respondent concedes that the claimant is disabled, but it contends that there was no discrimination, and it denies the claims.
2. This has been a remote hearing on the papers. The form of remote hearing was by Cloud Video Platform, and also by telephone conference. An in-person hearing was not held because it was not practicable, and all issues could be determined in a remote hearing, and the parties consented to a remote hearing of this nature.

3. <u>Adjustments for the Claimant at this Hearing:</u>
4. The claimant suffers from mutism and is non-verbal. She has requested three adjustments be made to accommodate her disability for the purposes of this hearing.
5. The first is non-controversial and is a request to be assisted by the good offices of Relay UK who act as an intermediary and are able verbally to articulate typed messages from the claimant, who can hear the proceedings, but who cannot respond verbally. We have no difficulty in accommodating this request, which is agreed by the respondent, and we make the point of thanking Relay UK for their assistance.
6. The second requested adjustment is also non-controversial, namely that the hearing should be conducted remotely by video, because the claimant says that she would suffer from anxiety if required to attend in person. The Tribunal service is now well used to conducting hearings remotely by video. The respondent does not object to this adjustment, and we have all agreed to proceed remotely by CVP video platform.
7. The third requested adjustment is more controversial and is opposed by the respondent. The claimant has requested that she conducts the hearing with her video camera turned off, so that no one can see her, especially when she is giving her evidence. The respondent argues that it is against the interests of justice for the claimant to give evidence and to answer questions in cross examination without being seen, and without being heard, not least because no one could be sure who was giving her evidence.
8. These issues had previously been raised and discussed at a case management preliminary hearing on 23 March 2023. As confirmed in my case management order of that date ("the Order"), the claimant's request for that adjustment was to be discussed at the commencement of this hearing. I made it clear then that if the claimant wished to pursue an application not to appear on video when giving her evidence then that application would need to be supported by medical evidence which needed to address: (i) the exact nature of the disability in question; (ii) why this caused a substantial disadvantage to the claimant in connection with the giving of her evidence; and (iii) what adjustments it would be reasonable to make in order to ameliorate that disadvantage.
9. The claimant has adduced a letter from her GP Dr Hicyilmaz who declined to provide the evidence requested. Indeed, that letter raises concerns that she had not been able to see the claimant in person to discuss her needs, including those relating to video consultations, and stated "it is a difficult situation as we can neither prove nor disprove that it is her when communicating …" That is exactly the point raised by the respondent when objecting to the suggestion that the claimant need not appear in person (with the video turned off) when giving her evidence through Relay UK.
10. We agreed with the respondent's objections, and we declined to allow this adjustment which the claimant had requested (namely that she should be allowed to give evidence through Relay UK with her camera turned off) and we agreed with the respondent that it was not in the interests of justice to allow the claim to proceed on that basis when the respondent wished to see the claimant give her evidence and to raise questions on it.
11. We suggested that the claimant appeared to have the following three options in these circumstances. The first was to apply for a postponement pending confirmation from her new GP as to the position, bearing in mind the information requested above. The second option was for the claimant to proceed with the claim by way of a telephone conference hearing assisted by Relay UK, save that when it came to her own evidence she would have to give this evidence and answer questions by video, but with the camera turned on. The third option was to decline to give evidence in person, other than to rely on her originating application and her written witness statement as exchanged but without being questioned on it by the respondent or the tribunal. We explained that in those circumstances her evidence would be accepted but that we would only be able to attach less weight to it than if the evidence was given in person such that the claimant can answer questions on it.

12. The claimant requested that we proceeded by way of the third option, and all of her remaining requested adjustments were accommodated. In the event it proved more convenient for everyone for the hearing to proceed by way of public telephone conference, at which the claimant was able to communicate through the good offices of Relay UK.
13. Against this background, and with these adjustments in place as requested by the claimant, we accepted the claimant's originating application and her written witness statement as exchanged as her evidence. However, we can only attach limited weight to this for the reasons explained above. For the respondent we have heard from Mrs Geraldine Cross and Mrs Georgia Pym, who gave evidence personally.
14. There was a degree of conflict on the evidence. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
15. <u>The Facts</u>
16. The respondent Job Solutions Ltd is an employment agency and in the summer of 2022 it was engaged by a client (namely Toolstation) to assist in filling two vacancies for the role of warehouse operative. The claimant Miss Caprice Wilton suffers from mutism and is non-verbal. She also suffers from other medical conditions, and at the relevant time she was being assessed with regard to a possible diagnosis of autism. On about 17 May 2022 the claimant applied for one of the positions of warehouse operative. The claimant had previously registered with the respondent in about 2018.
17. The respondent is an experienced recruitment agency which also holds a Gangmaster's Licence. It has a set four stage procedure which it follows whenever a candidate applies to the respondent for employment with one of its clients. The procedure is as follows: (a) application process; (b) checking the right to work documentation in compliance with the Gangmaster's Licence and immigration regulations; (all being well) then (c) an interview (with (b) and (c) being referred to as the "onboarding process"); and potentially the final stage of (d) an offer of assignment.
18. We accept the respondent's evidence, which was not challenged by the claimant, to the effect that the respondent was experienced in dealing with disabled applicants and that they had previously accommodated requests for adjustments during this application procedure, to include typing information and answers when requested by non-verbal applicants.
19. On about 17 May 2022 the claimant applied for the position using the Indeed website which included her uploaded CV. Via the agency of the respondent Toolstation has in place a rolling monthly advertisement and whenever Toolstation request the respondent to recruit staff on their behalf, the respondent considers the Indeed website to identify potential candidates who have applied within the last month. The respondent then sends those candidates a standardised response which invites them to call the respondent further to discuss the position, together with a potential start date.
20. We accept the respondent's evidence that the CV which the claimant had submitted, and on which she relies, was a very simplistic CV with bullet points only setting out her previous experience such as: "Photography, Sales Assistant, Time Management, Organisation and Retail Sales." There was no suggestion of any experience as a warehouse operative. The respondent has described this CV as not "fit for purpose". We also accept the respondent's evidence that there were over 50 applicants for the two positions, and the two successful applicants had substantial warehouse experience. We also accept the respondent's evidence that the claimant was never going to be successful in this round of applications simply because of her lack of warehouse experience when compared with others, and in particular the two successful candidates.
21. In reply to the claimant's application, the respondent accepted it along with many others as a "maybe" and it then sent its standardised response to the claimant which commenced the Indeed messaging exchange which is now set out below. Against this

background it is worth noting that Thursday, 2 June 2022 and Friday, 3 June 2022 were public bank holidays to celebrate the Queen's Jubilee.

22. The standardised response to the claimant was sent at 11:11 am on 31 May 2022 which read: "Thank you for your application for our picker/packer 10:00 to 14:00 vacancy. We are looking for staff to start this shift ASAP. Are you able to call us today to discuss a potential start date? Our contact number is (01278) 434749. Our opening times are Monday to Friday 09:00 to 1700 no appointment necessary. We are closed for the bank holiday.
23. We accept the respondent's evidence that this was not confirmation of a successful application and an invitation for the claimant to start employment on a specific date. It was a standardised response to assess when an applicant might be available to start, subject to the remaining formalities.
24. The claimant replied at 7:56 pm that evening as follows: "Hello, I am non-verbal so it would be easier for me to message on here rather than call. Could you let me know where the location is please? If it is suitable, I can start ASAP after some reasonable adjustments have been made. I look forward to hearing from you soon."
25. The respondent replied immediately the following morning at 09:14 on Wednesday 1 June 2022: "Following on from your email can you please explain the following for health and safety reasons: 1 – Non-verbal; 2 - reasonable adjustments? I don't understand what you mean so do require more information."
26. The above messaging chain continued with the claimant's reply at 9:53 am to this effect: "I am non-verbal so I can't talk which was why I wanted to type on here instead. I need some reasonable adjustments before I can start work but I would like to know where the location of this job is before we talk about that, so we don't waste each other's time. I don't drive so if the walk is too far, I won't be able to do the job."
27. The respondent replied immediately at 9:58 am on 1 June 2022: "We are trying to gage (sic) a bit more info so we can see what procedure can be put in place. When you say you are non-verbal, is this a medical condition? The position is with Toolstation. Kind regards".
28. At 1.17pm on 1 June 2022 the claimant replied: "The location is good with me. It's an undiagnosed medical condition, I have my autism assessment in a few weeks' time so will be diagnosed soon. Some reasonable adjustments I would like is to be able to wear my noise reduction headphones while at work. They have a focus on voice mode so I can still hear people's voices. (Sony xm4 if you need to look them up). I'd like to be able to work on my own as much as possible and be placed in an area with less foot traffic. The last adjustment I would like is for you to be able to purchase an AAC app for me. The one I have been looking at is £99 and it is called Prologue4Text. This means if I need to talk to someone, I can use my phone instead and I can type what I'd like to say. The phone will read it out to me."
29. Although the claimant asserts that there was insufficient time for the respondent to have done so, we accept Mrs Cross's evidence that she checked the position with her client namely the Operations Manager at Toolstation. He determined that the adjustments requested by the claimant could not be accommodated and therefore she was not suitable for the position.
30. The respondent therefore replied at 1:23 pm on 1 June 2022: "Unfortunately this job is not good for you as we cannot guarantee an area with minimal foot traffic in any of our client sites and also the client does not allow mobile phones on the warehouse floor. We wish you good luck in your employment search."
31. We find that it was at this stage that the respondent declined to process any further the claimant's application to be a warehouse operative with Toolstation.
32. The claimant then sent three successive short emails: at 1:25 pm "I understand that you cannot guarantee it but that isn't a reason to not give me a job."; At 1:26 pm "In my message above, I just said I'd like to work on my own "as much as possible" and to be put in an area with "less" foot traffic. I didn't say no foot traffic". At 1:27 pm: "and about the mobile phones, the PCP can be changed for a disabled employee."

33. The respondent replied at 1:33 pm: “We have to be aware of all employees being safe on any site, especially where there are forklifts there. As you stated earlier you have not been officially diagnosed yet so I believe our client would not change their policies until they are required to. As you are not actually an employee of ours, we are not at liberty to purchase equipment for you. We will email you if any assignment suitable does become available.”
34. The claimant replied at 1:38 pm: “Under the Equality Act 2010 you have a duty to make reasonable adjustments for disabled people. No risk assessment has been done to assess the potential risks.” She also emailed immediately thereafter at 1:47 pm to say: “A diagnosis isn’t required. The definition of disability under the Equality Act 2010 is: a long-term negative effect on your ability to carry out normal day-to-day activities that will or has lasted 12 months or more. It’s still affecting me if I am diagnosed or not. For example, say you’re off with stress you don’t get diagnosed with stress. Citizens’ advice website also mentioned that a diagnosis is not needed.”
35. The respondent replied at 1:53 pm on 1 June 2022: “Yes, we know this, and risk assessments have been done at all our clients’ premises for all our employees. However, you are not an employee and we have not offered you any assignments. We are not legally bound to employ every candidate that registers with us. As stated in our last email, we will make you aware of any suitable assignments in the future. Regards”
36. The claimant replied at 1:56 pm: “The very first message here on Indeed, you asked me to call you for a start date. But now I have mentioned my disability, I’m no longer allowed to start. I’m unable to have this job, not because you aren’t hiring, it’s because this job in your words “isn’t suitable” for me.”
37. The respondent replied at 2:09pm: “This message is a generic message sent to everyone who applies through Indeed. We always ask people to phone us to discuss any potential assignment. As said, we will offer suitable assignments if available. We are now closing for the Jubilee weekend.”
38. The claimant replied at 2:14 pm: “But if I wasn’t disabled, I would have been given a start date. I would like to raise a grievance. I know I’m not an employee so you can reject that but I will start ACAS early conciliation if we can’t sort this out. At the end of the day, you said no to me having a job because of a protected characteristic under the Equality Act 2010. It is discrimination.”
39. The respondent replied at 2:28 pm: “No we won’t give anyone a start date over the phone or by email, we would ask them to come into our office to discuss the assignment further, we would then check all right to work in the UK documents and take copies before then deciding if the assignment was right for them as we do with everyone and then we give everyone the assignment details in writing. As you are already registered with us, we would have also checked that none of your details had changed from when you first came in and if they had we would update. We have noted your grievance and tried to explain the situation. We are closing at 14:30 hours for the Jubilee weekend.”
40. The claimant continued with the following two emails that afternoon, the first at 2:29 pm: “you have decided on my behalf that this isn’t suitable for me. I find that wrong. Have you even called up the operations manager from to discuss any risk assessment?” And secondly at 2:34 pm: “ “Unfortunately this job is not good for you” - you don’t get to decide what I can and can’t do because of my disability. No risk assessment has been done. I understand once a risk assessment has been done and it says not safe but that’s not what has happened here.”
41. On either 2 or 3 June 2022 Mrs Pym of the respondent then selected the two successful candidates who were able to commence as warehouse operatives with Toolstation at the commencement of the following week.
42. There was then no further communication between the parties until after the Jubilee weekend. At 9:42 am on Monday, 6 June 2022 the claimant stated: “Good morning. Please can you confirm if you have been in contact with Toolstation about this matter and if you have, please provide me with the name of the person you have spoken to so I can take this further.”

43. The respondent replied at 10:14 am: "I have spoken to them and the reason for not allowing mobile phones on the warehouse floor is to do with GDPR regulations. We were given two instructions for that shift, we then went through everyone's applications including yours and have now hired the most experienced candidates for the positions - Candidate A - 5 years warehouse experience, Candidate B - 12 years warehouse experience. As you can imagine this shift is very popular and we were inundated with applicants. Obviously, we would like to help everyone but that is impossible. We now consider this matter closed. Regards."
44. The claimant however did not consider the matter closed and she sent three more emails on 6 June 2022. The third of them at 3:28 pm stated: "I have now notified ACAS. You don't have to comply with them, but this will go to employment tribunal if you do not." The next email from the claimant was on 5 July 2022 at 3:03 pm which stated: "Hello I have been notified by ACAS that you do not want to settle out of court. I would just like to say that I will be submitting a claim to the employment tribunal as I have proof that Toolstation are willing to hire me through Quinn Recruitment …"
45. The claimant had already commenced the early conciliation procedure with ACAS on 6 June 2022, and the certificate was issued on 5 July 2022. The claimant presented these proceedings on 7 July 2022.
46. Having established the above facts, we now apply the law.
47. <u>The Law</u>
48. This is a claim alleging discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct disability discrimination, failure by the respondent to comply with its duty to make adjustments, and harassment.
49. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if she has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or it is likely to last the rest of the life of the person.
50. As for the claim for direct disability discrimination, under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
51. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first and third are relevant in this case.
52. The first requirement (s20(3) EqA) is that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage.
53. The third requirement (s20(5) EqA) is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
54. A failure to comply with either requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person. However, under paragraph 20(1)(b) of Schedule 8 of the EqA 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) … 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.
55. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected

characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.

56. Under section 39(1) EqA an employer (A) must not discriminate against a person (B) – (a) in the arrangements A makes for deciding to whom to offer employment; (b) as to the term on which A offers B employment; (c) by not offering B employment.
57. Under section 60(1) EqA a person (A) to whom an application to work is made must not ask about the health of the applicant (B) – (a) before offering work to B … This is not enforceable by a claimant under section 60(2), and under Section 60(3) A does not contravene a relevant disability provision merely by asking about B's health; but A's conduct in reliance on information given in response may be a contravention of a relevant disability provision. Under section 60(4) subsection 60(5) applies if B brings proceedings before an employment tribunal on a complaint that A's conduct in reliance on information given in response to a question about B's health is a contravention of a relevant disability provision. Under section 60(5) EqA in the application of section 136 to the proceedings, the particulars of the complaint are to be treated for the purposes of subsection (2) of that section as facts from which the tribunal could decide that A contravened the provision.
58. However, there is an exception in that section 60(6) EqA provides that this section does not apply to any question that A asks insofar as asking the question is necessary for the purpose of (a) establishing whether B will be able to comply with a requirement to undergo an assessment or establishing whether a duty to make reasonable adjustments is or will be imposed on A in relation to B in connection with the requirement to undergo an assessment; and (b) establishing whether will be able to carry out a function that is intrinsic to the work concerned.
59. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
60. We have considered the cases of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL; Igen v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Nagarajan v London Regional Transport [2000] 1 AC 501; Environment Agency v Rowan [2008] IRLR 20 EAT; Nottinghamshire City Transport Ltd v Harvey [2013] EqLR 4 EAT Newham Sixth Form College v Sanders EWCA Civ 7 May 2014; Archibald v Fife Council [2004] IRLR 651 HL; General Dynamics Information Technology Ltd v Carranza [2015] ICR 169 EAT; Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham [2018] EWCA Civ 564 Betsi Cadwaladr University Health Board v Hughes and Ors EAT 0179/13; Ahmed v The Cardinal Hume Academies EAT 0196/18; Grant v HM Land Registry [2011] EWCA Civ 769; and Richmond Pharmacology v Dhaliwal [2009] ICR 724 We take these cases as guidance, and not in substitution for the provisions of the relevant statutes.
61. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures (2015) ("the ACAS Code").
62. Decision
63. The claimant's claims to be determined by this Tribunal were agreed at a case management preliminary hearing and set out in my Case Management Order dated 23 March 2023 ("the Order"). The claimant's claims are for direct disability discrimination, for an alleged failure to make adjustments, and for harassment. It is important to note that the claimant's complaints which are dealt with by this Tribunal are those presented against this respondent, which were clarified, agreed and set out in the Order. It has not fallen to this Tribunal to determine whether the claimant has any claims, successful

or otherwise, against Toolstation. It was also brought to our attention in the evidence before us that the claimant entered a COT3 Agreement with ACAS in connection with unspecified claims against Toolstation. It is important to note that we have only considered and decided the claims presented against this respondent, as set out in the Order. We now deal with each of these claims in turn.

64. The Claimant's Status:
65. The parties agree that the claimant was not an employee of the respondent within the meaning of section 83 EqA. However, the respondent accepts that the claimant was an applicant for employment within the meaning of section 39 EqA for the warehouse operative position.
66. The Claimant's Disability:
67. The disability relied upon by the claimant is mutism. We find that at all material times the claimant suffered from this physical impairment which had a substantial and long-term adverse effect on the claimant's ability to carry out normal day to day activities, in particular speech and communication. There was a substantial adverse effect because it was more than minor or trivial, and there was a long-term effect because it lasted for at least 12 months.
68. The respondent has conceded that the claimant was a disabled person by reason of the impairment relied upon at all material times. We agree with that concession, and we so find.
69. Harassment:
70. Turning first to the claim for harassment, A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B. The assessment of the purpose of the conduct at issue involves looking at the alleged discriminator's intentions. In deciding whether the conduct in question has the effect referred to, the tribunal must take into account the perception of B; the other circumstances of the case, and whether it is reasonable for the conduct have that effect (s26(4) EqA).
71. The Court of Appeal gave guidance on determining whether the statutory test has been met in Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham: "In order to decide whether any conduct falling within subparagraph (1)(a) has either of the proscribed effects under subparagraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all other circumstances - subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.
72. Whether unwanted conduct has the proscribed effect is matter-of-fact to be judged objectively by the Tribunal. Although the claimant's subjective perception is relevant, as are the other circumstances of the case, it must be reasonable that the conduct had the proscribed effect upon the claimant Betsi Cadwaladr University Health Board v Hughes and Ors. If it is not reasonable for the impugned conduct to have the proscribed effect, that will effectively determine the matter Ahmed v The Cardinal Hume Academies. It is well established that not all unwanted conduct is capable of amounting to a violation of dignity, or being described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Per Elias LJ in Grant v HM Land Registry at para 47 "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment." Similarly, Langstaff P emphasised in Betsi at para 12: "The word "violating" is a strong word. Offending against dignity, hurting it, is

insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc ..."

73. The intent behind unwanted conduct will not be determinative. However, it will often be relevant, per Underhill P in Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT at para 17: "one question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt."
74. There are three allegations of harassment related to disability, and we deal with each of these in turn:
75. The first allegation of harassment is that: "At 9:14 am on 1 June 2022 by way of email asking the claimant to explain her disability and to go into detail which made the claimant feel uncomfortable, such that the claimant did not wish to discuss her disability".
76. We find that the respondent's email was a sensible and reasonable request to seek more information from the claimant, to assist the respondent in knowing whether, and if so how, it might comply with any duty to make adjustments. It follows the claimant's email at 7:56 pm the previous evening in which she states: "Hello, I am non-verbal so it would be easier for me to message on here rather than call. Could you let me know where the location is please? If it is suitable, I can start ASAP after some reasonable adjustments have been made. I look forward to hearing from you soon."
77. The respondent replied immediately the following morning: "Following on from your email can you please explain the following for health and safety reasons: 1 – Non-verbal; 2 - reasonable adjustments? I don't understand what you mean so do require more information.
78. We find that this was a sensible and reasonable request from the respondent, and, for the record, exactly the sort of question that is envisaged by section 60(6) EqA which otherwise precludes a potential employer from asking questions about health or disability. We do not accept that in the circumstances the respondent was guilty of conduct which had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It clearly was not conduct which was intended to have this effect. If the claimant's subjective perception was that it had that effect, we find that it was not reasonable to suggest that the impugned conduct had that effect.
79. This first allegation of harassment is therefore dismissed.
80. The second allegation of harassment is that: "At 9.58 am on 1 June 2022 by way of further email the respondent asked the claimant to explain her medical condition."
81. The above email chain continued with the claimant's reply at 9:53 am to this effect: I am non-verbal so I can't talk which was why I wanted to type on here instead. I need some reasonable adjustments before I can start work but I would like to know where the location of this job is before we talk about that so we don't waste each other's time. I don't drive so if the walk is too far I won't be able to do the job."
82. This allegation relates to the immediate reply from the respondent at 9:58 am on 1 June 2022: "We are trying to gage (sic) a bit more info so we can see what procedure can be put in place. When you say you are non-verbal, is this a medical condition? The position is with Toolstation. Kind regards".
83. We find that this was also a sensible and reasonable request from the respondent, and again, exactly the sort of question that is envisaged by section 60(6) EqA which otherwise precludes a potential employer from asking questions about health or disability. We do not accept that in the circumstances the respondent was guilty of conduct which had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It clearly was not conduct which was intended to have this effect. If the claimant's subjective perception was that it had that effect, we find that it was not reasonable to suggest that the impugned conduct had that effect.

84. This second allegation of harassment is therefore dismissed.
85. The third allegation of harassment is that: "At 1.17 pm on 1 June 2022 the claimant explained that she had an undiagnosed medical condition (relating to her mutism) but that she was also due an imminent assessment for autism the respondent told the claimant: "this job is no good for you" and "good luck with your search for employment"."
86. As noted above, the respondent's actual message in full reads as follows: "Unfortunately this job is not good for you as we cannot guarantee an area with minimal foot traffic in any of our client sites and also the client does not allow mobile phones on the warehouse floor. We wish you good luck in your employment search."
87. We accept that the claimant might have been disappointed to be told that her application was not proceeding. However, the message was not rude or insulting, and it explained in simple terms the reason for the respondent's decision. It was not a message which was intended to demean or hurt the claimant. Not all unwanted conduct is capable of amounting to a violation of dignity, or being described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Per Elias LJ in Grant v HM Land Registry at para 47 "Tribunals must not cheapen the significance of these words".
88. We do not accept that in the circumstances the respondent was guilty of conduct which had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It clearly was not conduct which was intended to have this effect. If the claimant's subjective perception was that it had that effect, we find that it was not reasonable to suggest that the impugned conduct had that effect.
89. The claimant's claim for harassment related to disability is therefore dismissed.
90. Direct Discrimination:
91. Secondly, with regard to the claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably because of her disability than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the claimant.
92. As for the correct comparator, paragraph 3.29 of the EHRC Code of Practice on Employment (2011) provides: The Comparator for direct disability discrimination is the same for other types of direct discrimination. However, for disability, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself).
93. In Madarassy v Nomura International Plc Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in both Ayodele v Citylink Ltd [2018] ICR 748 and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.
94. There is one allegation of direct discrimination under section 13 EqA, namely that the respondent declined to process the claimant's application to be a warehouse operative. The respondent accepts that this is factually correct, and also accepts that this was potentially less favourable treatment.

95. The claimant relies on an hypothetical comparator. For a case of direct disability discrimination, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself).
96. The respondent has asserted that the claimant's application was not processed, along with about 50 other applications for the position, simply because she (and they) were less qualified than the two successful applicants who had extensive relevant experience for the position, which the claimant lacked. We have accepted the respondent's evidence that the two successful candidates were far more qualified than the claimant, and she would never have been appointed ahead of them in that process. However, it seems clear to us that the decision to stop the recruitment process for the claimant had already taken place before the two successful candidates were appointed. The respondent's message telling the claimant that "this job is not good for you" was sent out 1:23 pm on 1 June 2022. Mrs Pym did not select the eventual candidates until at least the following day.
97. It became clear during this hearing that Mrs Cross informed the claimant that it would not be proceeding with her application after Mrs Cross had spoken with her client who had made it clear that they would not accommodate the claimant. The respondent's decision therefore followed this instruction from their client that they would not be supporting an application from the claimant. We find that that was the reason why the respondent informed the claimant that her application would not proceed, and in that email at 1:23 pm on 1 June 2022 Mrs Cross confirmed that they "could not guarantee an area with minimal foot traffic in any of our client sites and also the client does not allow mobile phones on the warehouse floor".
98. This potentially less favourable treatment of the claimant must be compared with her chosen hypothetical comparator, that is to say a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself). This would include for example someone who had lost the ability to communicate verbally, but not for a sufficiently long period to amount to a disability. We find that Toolstation would have declined an application from such a person and informed the respondent of their decision in the same way. In other words, the claimant was treated no differently because of her disability than her chosen hypothetical comparator would have been treated.
99. Put another way, the respondent's decision to discontinue the claimant's application was because of the instruction from its client. We do not have sufficient information, and it was not for us to decide, whether or not that requirement on the part of Toolstation was discriminatory. Even if the statutory duty to make adjustments had arisen, that duty is to make such adjustments as are reasonable. The circumstances may be that Toolstation's refusal to accept any such adjustments was reasonable and lawful. We simply do not know that.
100. We find that the respondent decided to discontinue the claimant's application for the position with Toolstation because it was instructed to do so, and it was therefore for a non-discriminatory reason.
101. In this case, we find that no facts have been established upon which the tribunal could conclude (in the absence of an adequate explanation from the respondent), that an act of discrimination has occurred. In these circumstances the claimant's claim of direct discrimination fails, and it is hereby dismissed.
102. <u>Reasonable Adjustments</u>
103. The constituent elements of claims in respect of an alleged failure to make reasonable adjustments are set out in <u>Environment Agency v Rowan</u>. Before considering whether any proposed adjustment is reasonable, the Tribunal must identify: (i) the provision, criterion or practice applied by or on behalf of the employer;

(ii) the identity of the non-disabled comparators (where appropriate); and (iii) the nature and extent of the substantial disadvantage suffered by the claimant.

104. Environment Agency v Rowan has been specifically approved by the Court of Appeal in Newham Sixth Form College v Sanders - the authorities make it clear that to find a breach of the duty to make reasonable adjustments, an employment tribunal had first to be satisfied that there was a PCP which placed the disabled person at a substantial disadvantage in comparison with persons who were not disabled. The tribunal had then to consider the nature and extent of the disadvantage which the PCP created by comparison with those who were not disabled, the employer's knowledge of the disadvantage, and the reasonableness of proposed adjustments.

105. As per HHJ Richardson at para 37 of General Dynamics Information Technology Ltd v Carranza UKEAT/0107/14 KN: “The general approach to the duty to make adjustments under section 20(3) is now very well-known. The Employment Tribunal should identify (1) the employer's PCP at issue; (2) the identity of the persons who are not disabled with whom comparison is made; and (3) the nature and extent of suffered by the employee. Without these findings the Employment Tribunal is in no position to find what, if any, step it is reasonable for the employer to have to take to avoid the disadvantage. It is then important to identify the "step". Without identifying the step it is impossible to assess whether it is one which it is reasonable for the employer to have to take”.

106. The claimant’s claim for failure to make reasonable adjustments consists of two elements as confirmed and set out in the Order. It is as follows.

107. First, the claimant asserts that the respondent has in place a PCP which requires job applicants in the claimant’s position to communicate with the respondent vocally. Secondly, the claimant asserts that there was the lack of an auxiliary aid (namely equipment to assist her to communicate in a typed fashion through Indeed). In either event the claimant asserts that she was put to a substantial disadvantage because she is non-verbal, and she was only able to communicate in a written and/or typed fashion.

108. First, we find that there was no such PCP in place. It is clear in the first place that the parties communicated in a non-verbal fashion by typing messages to each other. There was no requirement for the claimant to communicate orally or verbally. We also accept the respondent’s evidence that where candidates progress to the formality stage of getting “on board” the respondent is able to accommodate requests for candidates to communicate in a typed non-verbal fashion, including at their premises.

109. In circumstances where the PCP relied upon by the claimant is not in place, from which it follows that there is no substantial disadvantage caused to the claimant by any PCP, we have no hesitation in dismissing the claimant’s claim to the effect that this statutory duty was engaged, and that respondent failed to make reasonable adjustments.

110. The second aspect of this claim is very similar. In the alternative the claimant asserts that the lack of an auxiliary aid (namely equipment to assist her to communicate in a typed fashion through Indeed) put her at a substantial disadvantage compared to someone without the claimant’s disability because she is non-verbal and she needs to communicate in a written/typed fashion.

111. The same point applies. It is clear that the parties communicated in a non-verbal fashion by typing messages to each other. There was no requirement for the claimant to communicate orally or verbally. We find that the lack of the auxiliary aid referred to by the claimant did not affect her ability to communicate with the respondent in any way, and she was not put to any substantial disadvantage (as compared to someone without her disability) in her communications with the respondent. We also therefore dismiss this second aspect of the claimant’s claim.

112. The claimant’s claim that the respondent failed in its statutory duty to make adjustments is also therefore dismissed.

113. Conclusion:

114. In conclusion therefore the claimant’s claims are all dismissed. We also repeat our comment that the claimant’s complaints which have been dealt with by this Tribunal

are only those claims presented against this respondent, which were clarified, agreed and set out in the Order. It has not fallen to this Tribunal to determine any other claims against the respondent, nor whether the claimant has any claims, successful or otherwise, against Toolstation.

115. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 15 to 45; a concise identification of the relevant law is at paragraphs 47 to 61; and how that law has been applied to those findings in order to decide the issues is at paragraphs 62 to 114.

Employment Judge N J Roper
Dated: 25 July 2023

Judgment sent to Parties on 10 August 2023

For the Tribunal Office