EMPLOYMENT TRIBUNALS

Claimant: Mr R Bryce

Respondent: Coventry City Council

Heard at: West Midlands (Birmingham) Employment Tribunal

On: 10, 11, 12 and 13 October 2023

Before: Employment Judge Childe
Ms S Fritz
Mr J Reeves

REPRESENTATION:

Claimant: In person

Respondent: Ms Carter (solicitor)

JUDGMENT

1. The claimant's complaint that the respondent failed to make reasonable adjustments, and therefore discriminated against the claimant, in breach of section 21 Equality Act 2010 is not well-founded and fails.
2. The claimant's complaint that the respondent subjected him to discrimination on the grounds of disability, in breach of s.15 Equality Act 2010, is not well-founded and fails.

Summary of the case

1. The claimant applied for the position of team manager, revenue services with the respondent and was interviewed for the role. He was informed that he had not been successful for it.

2. The claimant brings a complaint of disability discrimination, alleging that the respondent failed to make reasonable adjustments and also discriminated against him on the grounds of his disability.

Introduction

3. We heard evidence from the claimant.

4. From the respondent we heard evidence from Paula Stafford, council tax and business rates manager in the revenue and benefits service of the respondent and Andrew Stinton, revenues recovery manager, both of who interviewed the claimant. We will refer to them as Mrs Stafford and Mr Stinton.

5. We were referred to relevant documents in a bundle of documents which ran to 425 pages.

6. On the morning of day two the claimant made an application to include a document entitled "*employing autistic people- a guide for employers".* We agreed that this document could be included, and it was inserted into the back of the bundle.

Reasonable adjustments

7. The tribunal began the hearing on the first day by discussing with the claimant the adjustments that he required to enable him to participate effectively in the hearing.

8. We reviewed the reasonable adjustments that the claimant had previously indicated he required, as set out in Employment Judge Kelly's case management order dated 17 October 2022.

9. The claimant said he had only been sent the first set of cross examination questions from the respondent's representative at 5 PM the day before day one's hearing. Ms Carter accepted that this was correct and apologised for her oversight. The respondent had been required to provide this information two weeks before the final hearing, as set out in Employment Judge Kelly's case management order.

10. The tribunal explored with the claimant how long he would require to consider the list of questions and be ready for cross examination. There were 15 questions to consider. The claimant said he would be ready to give evidence on the morning of day two of the hearing. The tribunal agreed to adjourn the hearing on the first day and made this adjustment to the timetable to enable the claimant to participate effectively in the hearing.

11. The claimant explained that he understood he could bring a companion with him to take notes and had chosen not to do so. On the second and third day of the hearing a trainee solicitor attended with the respondent's representative, to take a note of the hearing. The respondent helpfully agreed to provide their note of the respective days' proceedings to the claimant to assist him.

12. The claimant requested a break after each hour, of 5 to 10 minutes. This was accommodated.

13. The tribunal then had a discussion with the claimant about what other adjustments the tribunal could make. The tribunal made reference to the relevant guidance set out in the equal treatment bench book. The tribunal reassured the claimant that:

    a. He may seek clarification at any stage by asking for a question to be repeated or re-phrasing it to check understanding.

    b. He can take his time when considering responses and can inform the judge when he is no longer able to maintain concentration.

    c. Misunderstandings on his part will not be treated as evasiveness and inconsistencies will not be regarded as indications of untruthfulness.

    d. He is not expected to rely on his memory alone for details of dates, times locations and sequences of events.

    e. He would not be expected to skim through and absorb new documentation or locate specific pieces of information in the court bundle.

14. The tribunal also guided Ms Carter to adjust her cross-examination style as follows;

    a. Questions to be asked singly.

    b. Thinking time allowed to assimilate information and produce a considered response.

    c. Not asking the claimant to read through large parts of a document and comment on it.

15. Ms Carter was happy to do so. On the occasions where Ms Carter strayed from the guidance given, the tribunal intervened to ensure that the claimant understood the questions put.

16. The claimant indicated that he was happy to participate in the hearing with these reasonable adjustments put in place. The claimant confirmed no further reasonable adjustments were required.

17. On day one, the claimant made an application under rule 43 to exclude the respondent's witnesses from the hearing until they were required to give evidence. For the reasons the tribunal gave at the time, this application was refused.

18. On day one the tribunal timetabled, with the claimant's agreement, two hours (inclusive of breaks) for the claimant to cross examine each of the respondent's witnesses. The claimant was provided with guidance on how to approach cross examination. The claimant's cross examination did not always focus on the issues to be determined. The tribunal took a more inquisitorial approach and provided assistance, in a neutral way, to further the overriding objective and enable the claimant to put his case effectively within the time set down for the hearing. The claimant had sufficient time to cross examine each witness and did not request additional time.

19. As the claimant was not represented, the tribunal gave the claimant the opportunity at the end of his evidence to clarify any matters that he had given in evidence. The claimant began to take this as an opportunity to introduce new evidence which did not have the purpose of clarifying evidence he had given in cross examination. The tribunal intervened and explained to the claimant that he was only been given an opportunity to clarify any parts of the evidence he had given in cross examination.

20. The claimant said that he would prefer to put his submissions in writing and did not wish to provide oral submissions. The tribunal explained that there was no expectation on the claimant to provide oral submissions and that written submissions would be accepted. It was agreed on day one of the hearing that respective written submissions would be provided by both parties at 2 PM on day three of the hearing. The parties were invited to update their written submissions as the hearing progressed. Both parties were able to provide written submissions within the deadline set by the tribunal. The claimant also provided what he described as a bundle of authorities. The claimant said he had not had enough time to identify the relevant parts of the authorities he had provided in his written submission. The tribunal invited the claimant to send an email with this information, should he wish, to enable the tribunal to consider this during deliberations. The claimant did so and this information was considered by the tribunal.

21. The claimant requested this judgment be produced in 14pt Arial font, with at least 1.5 line spacing and with text fully justified. We have done so.

Issues to be determined

22. The agreed issues to be determined by the tribunal are as follows:

Disability Discrimination

23. The respondent accepts that the claimant is a disabled person, as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about, with the disabilities Asperger syndrome and dyslexia.

Failure to make reasonable adjustments

24. The respondent accepts it knew about the dyslexia and Asperger syndrome condition from 24 January 2022.

25. Did the respondent have the following provisions, criterion or practice ("**PCP**"): Providing candidates with a certain amount of time to provide examples of how they met the job criteria?

26. Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, as he was not offered the job of team manager because he was not given sufficient opportunity to provide examples of how he met the job criteria.

27. The respondent does not accept that they knew the claimant was likely to be placed at such a disadvantage from 24 January 2022.

28. What steps could have been taken to remove the disadvantage?

a. the claimant says the respondent could have asked the claimant further questions and explored with him how he met the criteria for the team manager job; and/or

b. the respondent should have asked closed questions rather than open questions regarding experience for the job.

29. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Discrimination arising from disability

30. Did the following thing arise in consequence of the claimant's disability:

    a. The claimant had difficulties communicating effectively. In particular, he misinterpreted questions put to him and so he gave the wrong answer.

    b. The claimant had difficulties remembering, so he struggled to recount examples on the spot or example in an interview.

    c. The claimant suffered stress in new situations such as meeting new people in job interviews.

31. Did the respondent treat the claimant unfavourably by not offering the claimant the job of team manager, revenue services?

32. Did the respondent not offer the claimant the role of team manager, revenue services because of any of the reasons set out in paragraph 30 above?

33. If so, has the respondent shown that not appointing the claimant to this role was a proportionate means of achieving a legitimate aim. The respondent relies on the following as its legitimate aim:

    a. The need to select the most suitable person to successfully carry out the team manager role taking into account their knowledge, skills and experience as demonstrated during the recruitment process.

34. The respondent accepts that it knew of the claimant's respective disabilities on the date set out in paragraph 24 above.

35. If it is possible that the claimant would still not have got the job even if there had been no discrimination, and so what reduction, if any, should be made to any award as a result?

Findings of fact

36. The relevant facts are as follows.

37. In February 2021 the claimant was interviewed for a senior revenue officers' role by Mrs Stafford and Mr Stinton. The claimant did not secure this role.

38. In January 2022 the claimant applied for one of two team manager positions advertised by the respondent. We will describe the role the claimant applied for as the team manager, revenue services role.

39. The claimant has a varied employment history and describes himself as having been in some form of employment since the age of 16. He is now aged 38. The only experience the claimant has of being a manager during his employment was for a period of one year, from 1 August 2017 to 1 August

2018, when he was employed on a fixed term contract as a professional enforcement manager for the London Borough of Croydon.

40. On 24 January 2022, after he had submitted his job application, the claimant telephoned the respondent's recruitment department. He declared he had Asperger syndrome and dyslexia. He was told he had been shortlisted for the interview for the role.

41. On 25 January 2022 Trisha Prajapati discussed reasonable adjustment with the claimant in connection with the interview.

42. The format of the interview for the team manager, revenue services role, was as follows:

    a. Candidates were required to submit a written presentation prior to the interview, to deliver at the interview. The claimant was given eight days' notice to produce this presentation. The presentation was intended to last for up to 10 minutes. We will refer to this as the first part of the interview.

    b. Candidates were then to be asked seven questions, which were based on the person specification for the team manager, revenue services role. Candidates had up to 45 minutes to provide his answers. We will refer to this as the second part of the interview.

43. The claimant was given an interview slot on Friday, 4 February 2022 between 4 and 5 PM for the interview for the role of team manager, revenue services role. The interview took place remotely via Microsoft teams.

44. The claimant was informed beforehand that the respondent would make a reasonable adjustment to the job interview by sending the claimant the interview questions for the second part of the interview, 20 minutes before his interview slot.

45. On the 4 February 2022 at 1536, 24 minutes before the interview, Trisha Prajapati sent the claimant the interview questions.

46. The claimant attended the interview as planned. The interviewing managers were Mrs Stafford and Mr Stinton. The claimant completed his interview within the allotted time.

47. The claimant was unsuccessful at interview and was not offered the role. There was a total of eight candidates for the two roles. The claimant scored the lowest of all eight candidates, with a score of 24. The successful candidates scored 51 and 61 respectively.

48. Mrs Stafford contacted the claimant after the interview to provide feedback and to explain that he was not successful in his application for the role.

49. The claimant raised a grievance with the respondent on 14 February 2022. This was not upheld.

50. The above facts are uncontroversial. We have set out below in the relevant law, analysis and conclusion section of our judgement those facts that are disputed and how we have resolved that dispute.

Relevant law, analysis and conclusion

51. The parties discussed and agreed the issues to be determined at the start of the hearing and we have recorded these at paragraphs 22 to 35 above. We will refer to those issues in our analysis and conclusion.

52. We apply the relevant law to our findings of fact (as set out above and within the body of this section of our judgment), to reach a conclusion on each of the relevant issues identified.

Burden of proof

53. Section 136 of the Equality Act 2010 sets out the burden of proof. The burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another. (*Hewage v Grampian Health Board* [2012] IRLR 870, SC.)

54. In this case we are able to positive findings of fact on the evidence, as set out below, to determine both disability discrimination claims brought by the claimant.

Failure to make reasonable adjustments

55. We begin with the claimant's claim that the respondent failed to make reasonable adjustments to his role.

56. The duty to make reasonable adjustments is found in sections 20 and 21 Equality Act 2010.

57. It is unique as it requires *positive action* by employers to avoid substantial disadvantage caused to disabled people by aspects of the workplace. To that extent it can require an employer to treat a disabled person more favourably than others are treated.

58. We take a methodical approach to this task. We first identify the provision criterion or practice ('**PCP**') upon which the claimant relies. We were careful to discuss and agree with the claimant and establish the PCP in the issues, at the start of the hearing. This is because the PCP as appeared in the original list of issues in the tribunal's order dated 17 October 2022 was not a PCP, but rather an example of less favourable treatment.

59. We find that the respondent did have the PCP of providing candidates with a certain amount of time to provide examples of how they met the job criteria**.** This was accepted by Mrs Stafford in evidence. Mrs Stafford explained that the respondent did provide candidates interviewing for the role with a certain amount of time for their interview.

60. Turning now to substantial disadvantage. Our task is to set out the nature, effects and extent of the alleged substantial disadvantage and assess it objectively. In other words, we must consider why the PCP puts the claimant at the alleged disadvantage and ask ourselves what specific thing it is about the PCP that puts the claimant at the alleged disadvantage.

61. Considering the PCP, we have interpreted the "providing candidates with a certain amount of time to provide examples of how they met the job criteria"

broadly to include both the preparation time for the two components of the interview and the interview itself. We describe this PCP as "the **Time PCP**" in this judgement. Ms Carter accepted that the PCP could be given this wider meaning, in her oral submissions.

First part of the interview- substantial disadvantage

62. We find that claimant was not placed at a substantial disadvantage in connection with the first part of the interview, for the following reasons.

63. The focus of the claimant's complaint regarding the presentation was the lack of instructions from the respondent about how the claimant should deliver the presentation, rather than the amount of time he had to prepare. We pause to observe that this is not a disadvantage connected to the Time PCP. In fact, the claimant did not say in evidence that he should have been given more time to prepare his presentation.

64. The presentation was relatively short (10 minutes). The claimant was required to look at the job description, look at the personal specification and think of examples which would enable him to demonstrate he had the skills for the role. The claimant was given 8 days to prepare his presentation for the interview and this was sufficient time in our view to enable the claimant to do so.

65. Mr Stinton's evidence was that the presentation the claimant produced was not as comprehensive and did not demonstrate sufficient depth of experience, as the other candidates. Mr Stinton said he expected the candidate to be able to clearly articulate a range of skills a manager would need. He said these included the ability to communicate effectively, effective time management, empathy and also strategic thought. Mr Stinton expected candidates to provide specific examples and not just buzz words. Mr Stinton formed the view that the likely reason for this was that the claimant had very limited experience as a manager.

66. We accept this evidence in its entirety. Mr Stinton's evidence on this point was straightforward, clear and genuine. It aligned with the documentary evidence in this case. The claimant only had one year's prior management experience. We find the claimant's presentation consisted of him reading from a two-page pre-prepared script. The successful candidate delivered their presentation using a more engaging powerpoint presentation. We accepted evidence from Mr Stinton that the format of the presentation itself (i.e the claimant using word and not powerpoint) was not regarded by the respondent as inferior. The reason the claimant presentation was inferior to the successful candidate was not connected to the time the claimant had to prepare, but rather because of both the content and the delivery of his presentation.

Second part of the interview- substantial disadvantage

67. We find that the claimant was put at a significant disadvantage by the second part of the interview: the respondent's requirement that he provide examples of how he met the job criteria in response to the seven questions asked by the respondent, in real-time, in the interview itself.

68. This is because we accept the claimant's evidence, set out in his disability impact statement, that he struggled to recount situations and sometimes had

difficulty providing an account of an incident due to his disability. We find that this would include in practice the claimant having difficulty being able to provide examples of his skills on the spot, immediately and in the moment, when required to do so in an interview process, due to his conditions of Asperger syndrome and dyslexia.

Knowledge of disadvantage

69. We turn now to the respondent's knowledge that the claimant was likely to be placed at such a disadvantage.

70. This issue was considered in the recent Employment Appeal Tribunal decision of *AECOM Ltd v Mr C Mallon*: [2023] EAT 104.

71. At paragraph 25 of this judgement, the EAT said:

> *An employer is not therefore subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know, both that the complainant has a disability and that he or she is likely to be placed at the substantial disadvantage. We observe that what is necessary is not that the employer know that the complainant is generally disadvantaged by their disability, but that it knows that they are "likely" to be placed at "the disadvantage referred to in the first … requirement", which is as specified in s 20(3) "a substantial disadvantage in relation to a relevant matter".*

72. In this judgment the EAT approved the following summary of the legal position at paragraphs 27 to 32:

> [27] In Ridout v T C Group [1998] IRLR 628, the claimant had applied for a job and was short-listed for interview. The respondent had been informed that she had photosensitive epilepsy controlled by Epilim. The claimant brought sunglasses to the interview which she wore on a cord round her neck and made comments at the start about the fluorescent lighting in the room that might disadvantage her. Those comments were understood by the respondent to be an explanation for the sunglasses. In the event, Ms Ridout never used the sunglasses or told the employer that she was unwell or felt disadvantaged. Her complaint of failure to make reasonable adjustments was dismissed on the basis that the respondent could not reasonably be expected to know about the requirements of epileptics for particular lighting arrangements, and it was not reasonable for the employers to make any further enquiry on receipt of her application form or in the light of her comments on entering the room. Ms Ridout appealed, and the EAT dismissed her appeal. At [24]-[27] the EAT (Morison P, sitting with Mr J R Crosby and Lord Davies of Coity CBE) held:
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> *24. It seems to us that they were entitled on the material before them to conclude that no reasonable employer would be expected to know* ***without being told in terms by the applicant****, that the arrangements which he in fact made in this case for the interview procedure might substantial disadvantage was one which had no factual basis and was effectively a perverse conclusion on the facts as found by the Industrial Tribunal.*
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> *25. Furthermore, it seems to us that the Industrial Tribunal was best placed to judge whether the disabled person had been placed at a substantial disadvantage in comparison with persons who are not disabled. That is a*

judgment which has to be made by the fact finding tribunal. We accept what Counsel for the appellant was saying, that Industrial Tribunals should be careful not to impose on disabled people who are seeking employment a duty to "harp on" about their disability so as; so to speak, to excuse themselves at the interview process before the selection is made. One of the purposes of the legislation is to ensure that disabled people have the same opportunities for employment, and in their employment, as others not suffering from such disability. It would be unsatisfactory to expect a disabled person to have to go into a great long detailed explanation as to the effects that their disablement had on them merely to cause the employer to make adjustments which he probably should have made in the first place.

26. On the other hand, a balance must be struck. It is equally undesirable that an employer should be required to ask a number of questions about a person suffering from a disability as to whether he or she feels disadvantaged. There may well be circumstances in which that question would not arise. It would be wrong if, merely to protect themselves from liability, the employers or prospective employers were to ask a number of questions which they would not have asked of somebody who was able-bodied. People must be taken very much on the basis of how they present themselves.

27. It seems to us, in these circumstances, that the question as to whether the prospective employers should have taken any other steps as a result of what was said at the interview depended almost entirely on the perception of both parties as to what was happening at the interview process. If the appellant was simply nervous and explaining that she might have to put on her glasses because the room was likely to cause a problem but that she was quite happy to go on with the interview, that would be one thing. If, on the other, she was saying that the room was causing her a problem and she might have to put on dark glasses, but that she felt disadvantaged as a result of being in that room, that would be another. This was therefore a matter of fact and evidence for the Industrial Tribunal and a judgment for them to make on the basis of the evidence as to precisely what occurred.

[28]. *Secretary of State for Work and Pensions v Alam* [2010] ICR 665 concerned a claimant with depression who had been given a disciplinary warning when, as a result of his depression, he lost concentration, lost his temper and left work early when he had been refused permission to do so. The tribunal found that the employer had applied a PCP of requiring employees to get permission before leaving the workplace or be disciplined and that the employer had failed to make reasonable adjustments to help the employee cope with stress and avoid being given a disciplinary penalty. On appeal, the EAT held that the tribunal had wrongly concluded that the employer knew or ought to have known that difficulty in asking for permission was a feature of the claimant's disability and allowed the appeal and dismissed the claim. The EAT (Lady Smith, sitting with Ms K Bilgan and Mr S Yeboah) cited Ridout with approval, and emphasised at [17]-[18] the importance of considering both the questions of what the employer actually knew and what they reasonably ought to have known. At [21], the EAT held as follows, making clear the importance of the employer being aware (actually or constructively) of the particular disadvantage, not just of the disability generally:-

In this case, question 1 of the two questions set out in our "Relevant law" section falls to be answered in the negative. The employer did not know of the claimant's disability and did not know that it was liable to have any effect on him. The second question then arises. As regards that second question, whilst the employer ought to have known that the claimant was disabled to the extent that he had symptoms of depression comprising difficulty at times in concentrating and with keeping his temper and severe headaches at times, it cannot be said that he ought also to have known that that put him at a substantial disadvantage as compared to a non disabled person in relation to any provision, criterion or practice that was applied by the employer. That is because, even assuming that a provision, criterion or practice as identified by the tribunal at para 23 was applied to the claimant, there was no finding of fact that difficulty in asking for permission was a feature of the claimant's disability. Putting matters at their highest, the employer ought to have known that there could be times when, because of his disability, the claimant might have difficulty in concentrating, difficulty in controlling his temper and severe headaches, none of those features amount to or imply difficulty in asking for permission when it was required. So, the second question also falls to be answered in the negative because, although the employer ought to have known that the claimant had a disability, the nature and extent of which was as set out in the GP letter of 12 September 2008, it could not be concluded that it ought to have known that the disability had the effect to which the tribunal refers. We thus accept Mr Branchflower's submission that the tribunal erred in law in failing to apply the provisions of section 4A(3) of the Disability Discrimination Act 1995 correctly.

[29]. That point was also emphasised by the Court of Appeal in *Newham Sixth Form College v Saunders* [2014] EWCA Civ 734 at [12]-[14] per Laws LJ: Page 13 [2023] EAT 104 12.

The stepped approach commended in Rowan and endorsed in Ashton requires, among other things, that the ET identify the nature and extent of the substantial disadvantage to which the disabled person is placed by reason of the PCP in question. Unless that is done, the ET cannot make proper findings as to whether there has been a failure to make reasonable adjustments.

13. Here the respondents say that the ET failed to undertake any proper analysis of the nature and extent, in particular the extent, of the substantial disadvantage in question; and they made no finding as to the state of the respondent employer's knowledge specifically concerning the nature and extent of the substantial disadvantage. They failed also, it is said, in any event to make a proper assessment of the reasonableness of the proposed adjustment.

14. In my judgment these three aspects of the case -- nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustments -- necessarily run together. An employer cannot, as it seems to me, make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and the extent of the substantial disadvantage imposed upon the employee by the PCP. Thus an adjustment to a working practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage. Implicit in this is the proposition, perhaps obvious, that an

adjustment will only be reasonable if it is, so to speak, tailored to the disadvantage in question; and the extent of the disadvantage is important since an adjustment which is either excessive or inadequate will not be reasonable.

[30]. An important theme in the case law on this issue is that consideration of whether an employer reasonably ought to have known whether the claimant was disabled and at the relevant substantial disadvantage requires the employer to make reasonable enquiries of the employee. An employer cannot 'turn a blind eye'. This is a point made clear in the EHRC Employment Statutory Code of Practice 2011 ("the Code of Practice") which states at paragraph 6.19 that an employer must "*do all they can reasonably be expected to do to find out whether*" an applicant/employee has a disability and is, or is likely to be, placed at a substantial disadvantage. In Ridout (quoted above at [26]) the EAT recognised that this is not, of course, an unlimited duty – the duty is only to make such enquiries as are reasonable and what is reasonable will depend on all the circumstances.

[32]. Ms Barsam has also referred us to the more recent authority of A Ltd v Z [2020] ICR 199, where the EAT (HHJ Eady QC, as she then was) summarised at [23] the principles applicable to consideration of knowledge for the purposes of a s 15 claim. From those principles, we take the following additional points that are not already covered by the authorities to which we have referred: "(6) It is not incumbent upon an employer to make every inquiry where there is little or no basis for doing so … (7) Reasonableness … must entail a balance between the strictures of making inquiries, the likelihood of such inquiries yielding results and the dignity and privacy of the employee, as recognised by the code".

73. We turn now to look at the specific knowledge the respondent had about the claimant's disability and the substantial disadvantage caused by the Time PCP. We consider what the claimant told the respondent about how the arrangements for the interview procedure might substantially disadvantage him. We take into account the perception of both parties as to what was happening at the interview process. We go on to consider what the respondent reasonably ought to have known and what, if any, reasonable enquiries the respondent should have made.

74. We begin by observing that the claimant was not an employee of the respondent; he was a job applicant. We accept the respondent's submission that the respondent therefore did not have access to the claimant's detailed medical history as this was not provided. We turn now to the information the claimant did provide to the respondent.

75. On 24 January 2022 Trisha Prajapati spoke to the claimant, who at that point had already been shortlisted for interview. The claimant told Trisha Prajapati he has Asperger syndrome and dyslexia. We also accept the claimant's submission that Mrs Stafford was aware of the claimant's Asperger syndrome and dyslexia. The respondent therefore had knowledge of the claimant's disabilities from 24 January 2022.

76. However, an employer's knowledge of the claimant's disabilities in a general sense is not enough to trigger the duty to make reasonable adjustments, as set out in the authorities above. What is required is knowledge of how the

claimant is likely to be placed at the substantial disadvantage by the Time PCP. We find the claimant provided the following information to the respondent in this regard:

a. On 25 January 2022 Trisha Prajapati spoke to the claimant again. The claimant asked if the respondent could accommodate an interview at the end of the day on Friday 4 February 2022. This was to ensure the claimant did not feel time pressured as he knew he would be the final candidate of the day and the interview could run over the time allocated, if he required more time. The respondent did not originally offer this appointment to the claimant but made an adjustment and agreed to give the claimant this timeslot.

b. During that same conversation, Trisha Prajapati agreed that the interviewing manager would be able to prompt the claimant during the interview. We find that what was meant by that was if the claimant appeared to not understand the question put, the interviewing manager would ask the question in another way to give the claimant the opportunity to provide examples of how he met the relevant job specification criteria for the role.

c. During that same conversation the claimant and Trisha Prajapati discussed the amount of time before the interview itself that the claimant should be provided with the seven interview questions for the second part of the interview. What was said during this discussion is controversial. We find the following was said by the claimant during this discussion: the claimant said he required the interview questions to be sent to him 20 minutes before the interview and Trisha Prajapati agreed to this.

Reason for finding claimant did not request he be provided with the interview questions two days in advance, prior to interview

77. During the tribunal hearing, claimant said in evidence, for the first time, that he had a disagreement with Trisha Prajapti about the amount of time in advance he required the interview questions for the second part of the interview. The claimant's evidence was unclear, but he appeared to suggest he had initially asked for the information two days in advance, rather than twenty minutes. The claimant said Trisha Prajapati had refused this request. The claimant said he decided to take this request no further at the time, because he "*wanted the job*". The claimant said that he required the interview questions two days in advance as a reasonable adjustment and the respondent should have known this, based on what he told Trisha Prajapti on 25 January 2022. We find the claimant's evidence on this point to be unreliable and we do not accept that this was said, for the reasons that follow.

78. This information was not contained in the claimant's grievance raised with the respondent on 14 February 2022, his pleaded case, or his witness statement.

79. By comparison, Trisha Prajapti sent an email on 17 February 2022 at 11:03, shortly after the alleged conversation took place, in which she said "*we agreed to send him the questions 20 minutes before his interview*." We consider this to be an accurate record of what was discussed. Had the claimant said he

needed the questions two days in advance and had Trisha Prajapti disagreed, we find this would have been recorded in the contemporaneous email.

80. Trisha Prajapti sent the claimant an invite to the interview. This interview invite said the claimant would be provided with the interview questions twenty minutes beforehand. If the claimant had said he required two days, he could and in our view would have challenged this at the time.

81. In addition, the claimant said in paragraph 3.2 of his witness statement, that "*Trisha Prajapati gives an accurate summary account in this email of the phone calls that I had with her*". Had the claimant said he needed the questions two days in advance and had Trisha Prajapti disagreed, the claimant would have said so in his witness statement.

82. The claimant says in submissions that we should find the claimant did request two days to prepare for the second part of the interview for the following reason: '*The Respondent did not also challenge the Claimant that the fact that the Claimant had stated under oath that he spoke to Trisha and was forced to only accept 20 minutes. It was not put to him that he was not telling the truth*.'

83. We reject the submission. The first time the claimant provided this evidence was after the respondent's cross examination had concluded and was in response to a clarification question asked by the tribunal. The respondent therefore did not have the opportunity to cross examine on this issue. In addition, because the respondent was unaware that this was an allegation the claimant intended to pursue, they had not called Trisha Prajapati to give evidence. We therefore do not except that a failure on the respondent's part to cross examine on this point means that we should find the claimant did in fact request two days preparation time in connection with the second part of the interview, as now alleged.

Information given by the claimant to Ms Stafford or Mr Stinton about reasonable adjustments required

84. In conclusion, we find that the claimant's evidence about what he said to Trisha Prajapati about the amount of time he needed to prepare for the second part of the interview therefore changed fundamentally, from 20 minutes to two days, during questioning from the tribunal. For the reasons we have set out, we do not accept this part of the claimant's evidence was reliable.

85. The claimant did not tell the interviewing officers, Ms Stafford or Mr Stinton, at any time during the interview that he had been substantially disadvantaged by the time he had to prepare for the second part of the interview process. This is accepted evidence.

86. We accept Mr Stinton's evidence that if the claimant had asked for more time to prepare for the interview (specifically longer than the 24 minutes the claimant had been provided with) he would have consulted with HR and got some guidance, before making a decision. The claimant did not make such a request. We find that had a reasonable request been made for extra time in the interview, this would have been granted by Mr Stinton.

87. The claimant made a request for the following adjustments at the start of the interview. The claimant said he sometimes forgets the question asked. The claimant explained that if a question is in two parts, the claimant might need reminding of the different parts. Also, sometimes the claimant might appear forgetful or might misunderstand the question and if so, they should refocus him and ask the question in a different way. We find these adjustments were carried out by Mr Stinton and Mrs Stafford.

88. We accept Mr Stinton's evidence that broadly the claimant was able to provide examples of how he met the job criteria in the second part of the interview. The only example where the claimant appeared to misunderstand the question was in response to question 2, which was about any barriers that exist when managing a team that may partly work at home and partly in the office. The claimant said no barriers existed but didn't explain why. Mr Stinton and Mrs Stafford thought he had misunderstood the point of the question and intervened and rephrased the question, to give the claimant the opportunity to provide further explanation. We accept Mrs Stinton's evidence that the claimant complemented him on how well he had broken down this particular question, during the interview.

89. Mrs Stafford provided the claimant with feedback after his unsuccessful interview and the claimant raised no concerns about the interview process itself.

90. We conclude that the knowledge Mrs Stafford, Mr Stinton and Trisha Prajapati had about the reasonable adjustment required, to remove any disadvantage the claimant might suffer due the Time PCP, was:

    a. he could not recall the specific examples on the spot, during the interview process: and

    b. to remove this substantial disadvantage, he needed to be provided with the interview questions twenty minutes before interview (and no more than twenty minutes) and should he misunderstand a question or forget a question, they should either prompt him or re-phrase the question.

91. There was no need for Mrs Stafford or Mr Stinton to make further enquiries about the claimant's disability or the substantial disadvantage he might have as a result of the Time PCP, as the claimant had provided this information to them, respectively prior to the interview and during it. There was nothing to indicate to them prior to, during or after the interview that the claimant had been placed at a disadvantage by the Time PCP or indeed any other part of the interview process.

92. We reject the claimant's submission that the respondent should have taken further steps, of their own accord, to consider further reasonable adjustments. The respondent was entitled to take the information provided by the claimant about the reasonable adjustments he would require at face value.

93. The next question is, based on that knowledge, whether there were any reasonable steps which the respondent could have taken to avoid the disadvantage which were not taken. We focus on the practical steps to remove or lessen any disadvantage.

94. Paragraph 6.28 of the equality and human rights commission code of practice on employment (2011) ("the **ECHR Code**") identifies the factors relevant to whether an adjustment is reasonable or not. These include:

    a. the extent to which it is likely to be effective;

    b. the financial and other costs of making the adjustment;

    c. the extent of any disruption caused;

    d. the extent of the employer's financial resources and the availability of financial or other assistance, and the type and size of the employer.

95. The question is how might the adjustment have had the effect of preventing the Time PCP putting the Claimant at a substantial disadvantage compared with others. This is an objective test, and the Tribunal can substitute its own view for that of the respondent.

96. We turn to look at what steps could have been taken to remove the disadvantage?

97. In short, there were no further steps that could have been taken in addition to those adjustments which had already been made. The claimant accepted in evidence that he completed his interview within the allocated time and did not request further time to provide examples of how he met the job criteria.

98. The claimant said under questioning that had he been given more time to prepare for the second part of the interview, he would have given better answers. He would have "*soaked it in and digested it*". The claimant said he felt he was rushing.

99. This, in our view, was a request for an adjustment which went above and beyond what was required to remove the substantial disadvantage caused by the Time PCP. The adjustments put in place gave the claimant enough time to match the examples of his prior job experience as a manager to the questions that were asked in interview, which were designed to enable the claimant to demonstrate how he could meet the person specification competencies. As we have said, the claimant had primarily one year's worth of experience as a manager from which he could draw on examples of management experience. The claimant knew what questions the respondent was asking and therefore which examples to use, twenty-four minutes beforehand. We accept Mr Stinton's evidence that the claimant was able to do this in interview, with some additional prompting and re-phrasing of questions from him. If the claimant felt he was rushing he could have asked for extra time. He did not do so.

100. Providing the claimant with additional time to consider the examples he might have would not, in our view, have been a reasonable adjustment because the claimant had not requested it and the respondent therefore didn't know it was required. In addition, in our view, it would not have changed the examples of the claimant's management experience the claimant was able to give in the interview or his ability to explain those examples.

101. The claimant said in evidence that his view was even if the interviewers had felt he had understood and answered the questions put, they still should have asked additional questions of him. We reject this submission. The

interviewers did not know what the claimant's examples would be. Only the claimant knew this. If the interviewers considered the claimant had understood an answer the questions put, there would have been nothing to suggest to them that further questions were required to elicit further information from the respondent. This was not in our view a reasonable adjustment the respondent was required to make.

102. The claimant also suggests the respondent should have asked closed questions rather than open questions regarding his experience for the job. This is not in our view a reasonable adjustment connected to a substantial disadvantage suffered by the claimant in respect of the Time PCP. Instead, this relates to the way questions were put to the claimant, which is not part of his claim for a reasonable adjustment.

103. If we are wrong on that point, we go on to consider whether it would have been a reasonable adjustment to ask closed rather than open questions. We find as a matter of fact that the seven questions asked by the respondent were all closed questions. They required the claimant to provide examples to demonstrate specific competencies required by the respondent. They fell within the definition of closed questions set out in the '*tips for interviewing people with Asperger syndrome*' as provided by the autistic Society. An example of the questions asked was '*what is your approach to dealing with conflicting priorities? Can you give an example*? Here the interviewee was being asked to provide a specific example of how they had approached a scenario where they had to deal with conflicting priorities. This was not vague and it enabled the candidate to understand exactly what the interviewers wanted to know.

104. The claimant said in evidence that what he meant by a closed question was one that could only be answered yes or no. An open question, the claimant said, was any other question which had multiple responses. We do not accept that the respondent should be required to make an adjustment to designed interview questions that could only be answered yes or no. This would not give the candidates an opportunity to demonstrate examples of how they were able to meet the person specification competencies and it is hard to see how the respondent would be able to properly assess candidates if it took this approach.

105. We conclude therefore that the respondent has not failed in its legal duty to make reasonable adjustments under sections 20 and 21 Equality Act 2010.

Discrimination arising from disability

106. This claim is brought under section 15 of the Equality Act 2010.

107. In order for the claimant to succeed in his claims under section 15, the following must be made out:

    a. there must be unfavourable treatment;

    b. there must be something that arises in consequence of the claimant's disability;

    c. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability;

d. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim

108. Paragraph 5.20 of the ECHR Code says that employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments.

109. Turning to the agreed issues, the first issue is whether the following arose in consequence of the claimant's disability:

    a. The claimant had difficulties communicating effectively. In particular, he misinterpreted questions put to him and so he gave the wrong answer.

    b. The claimant had difficulties remembering, so he struggled to recount examples on the spot or example in an interview.

    c. The claimant suffered stress in new situations such as meeting new people in job interviews.

110. We find that each of the matters set out in paragraph 109 above arose in consequence of the claimant's disability. The claimant has articulated this in his disability impact statement. This was not challenged by the respondent. We accept the claimant's evidence on this point.

111. The second issue is whether the respondent treated the claimant unfavourably by not offering him the team manager role. We find the respondent did. Not offering the claimant a role was clearly capable of being unfavourable treatment.

112. The third issue is whether the respondent did not offer the claimant the team manager role because of any one of the matters set out in paragraph 109 above. We take each matter in turn and find as follows.

The claimant had difficulties communicating effectively. In particular, he misinterpreted questions put to him and so he gave the wrong answer.

113. We accept the evidence of Mr Stafford that the claimant did not misunderstand the questions put to him during interview, with the exception of the second question which was about what barriers there might be for someone working at home. We accept Mr Stinton's evidence that he thought the claimant had missed the point in this question, as the claimant answered by saying there were no barriers but did not give an explanation to say why. Mr Stinton rephrased the question to give the claimant the opportunity to understand and give the best answer he could.

114. We found Mr Stafford evidence to be clearer than the claimant's' on this point. The claimant was not able to provide an example of a question he had misunderstood (other than question two referred to in paragraph 113 above).

115. We accept Mr Stafford's evidence that the reason the claimant was not offered the team manager, revenue services role was not because he misinterpreted questions put to him or gave the wrong answer.

116. Mr Stafford gave clear and straightforward evidence on this point. Mr Stafford was an experienced interviewer who had undergone recruitment and

selection training and recently diversity and inclusion training. We formed the view, based on the evidence of Mr Stafford gave, that he had proactively taken the time to clarify the only question that he thought the claimant misinterpreted. Otherwise, he had been satisfied that the claimant had understood the questions asked.

The claimant had difficulties remembering, so he struggled to recount examples on the spot or examples in an interview.

117. We have found that the respondent made the reasonable adjustments necessary to enable the claimant to recount examples of his experience, in the interview, to demonstrate he had the competencies for the team manager, revenue services, role.

118. We accept the evidence of Mr Stafford that the claimant was able to recount examples of his experience during the interview and that his answers were not inappropriate or irrelevant.

119. The issue for Mr Stafford was that the answers the claimant gave lacked the detail, breadth and depth of the answers supplied by the other candidates. Again, the evidence Mr Stafford gave on this point was clear and straightforward. This answer was consistent with the notes Mr Stafford took at the time about the answers the claimant gave in response to the questions asked.

120. It was also consistent with the claimant's management experience. The claimant had only 12 month's experience as a manager. The majority of the seven questions he was asked at interview required him to demonstrate skills and experience as a manager. It is therefore not surprising that the claimant was not able to provide examples in great depth to demonstrate his suitability to be a manager, because of the limited management experience he had.

The claimant suffered stress in new situations such as meeting new people in job interviews.

121. We have accepted the evidence of Mr Stinton that the claimant appeared not to be more nervous about being interviewed and that he did not seem particularly stressed or anxious.

122. We accept Mr Stinton had extensive experience of interviewing candidates and was able to detect signs of stress or anxiousness. Mr Stinton fairly accepted that an interview process was stressful for candidates.

123. We accept Mr Stinton's evidence that in fact the claimant seemed quite confident in the interview. Mr Stinton said he formed this view because the claimant was able to articulate the adjustments he required for the interview at the start. Mr Stinton also pointed to the claimant's decision not to share his screen to deliver his presentation when asked to do so by the interviewers. Mr Stinton gave the opinion, based on his experience, that people who are stressed might do things that they did not want to do. In this case, if the claimant was stressed, he might have shared his screen when asked rather than choosing not to do so.

124. We also observe that Mr Stinton and Mrs Stafford were not new to the claimant and indeed it was not the first time he had been interviewed for a job by them. The claimant had been interviewed by them the year before for an alternative role.

125. We conclude that the reason the claimant was not offered the team manager, revenue services role was not because he was suffering from stress because he was placed in a new situation by meeting new people in a job interview.

The reason the claimant was unsuccessful at interview

126. We accept Mr Stinton and Mrs Stafford's evidence that the reason the claimant did not get the role of team manager, revenue services was because he did not score as highly as the other candidates in the competency-based interview. There were eight candidates. The claimant scored the lowest of all eight candidates, with a score of 24. The successful candidates scored 51 and 61 respectively.

127. Having reached the finding that the reason the respondent did not offer the claimant the team manager role ***was not*** because of any one of the matters set out in paragraph 109 above, we not need to consider whether the respondent can show that this treatment is a proportionate means of achieving a legitimate aim.

128. In conclusion, the claimant fails in his claim for disability arising from disability.

If it is possible that the claimant would still not have got the job even if there had been no discrimination, and so what reduction, if any, should be made to any award as a result?

129. If we are wrong on our findings that the respondent failed to make reasonable adjustments and/or discriminated against the claimant due to something arising from disability, we would nonetheless conclude that the claimant would still not have got the job even if there had been no discrimination.

130. We reach this view because we find that had the claimant been given more time to prepare for the interview it would have made no difference to the examples he was able to give to demonstrate competencies for the role.

131. The claimant only had 12 months' experience as a manager with a different company. He therefore had a limited range of examples that he was able to give to demonstrate the skills required to be a manager. Those skills were articulated by Mr Stinton as being an ability to communicate, time management, empathy, and strategic thought.

132. The claimant simply did not have the experience required to demonstrate those skills. This is why he scored the lowest out of eight candidates for the role.

Employment Judge Childe

16 October 2023

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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