EMPLOYMENT TRIBUNALS

Claimant: **Mr S Mahmood**

Respondent: **The Commissioner of Police of the Metropolis**

Heard at: **London South Employment Tribunal (by CVP)**

On: **26, 27, 28, 29 September 2023**

Before: **Employment Judge Curtis**
Mr R Singh
Ms. B Leverton

Representation
Claimant: In person
Respondent: Miss Crew (Counsel)

JUDGMENT

The judgment of a majority of the ET is that:

1. The Claimant's claims of direct discrimination on the grounds of race are not well founded and are dismissed

The unanimous judgment of the ET is that:

2. The Claimant's claims of direct discrimination on the grounds of disability, of a failure to make reasonable adjustments, of discrimination arising from disability and of direct age discrimination are not well founded and are dismissed.

REASONS

Claims and issues

1. The Claimant brings claims of direct disability discrimination, direct race discrimination and direct age discrimination. He also brings claims of discrimination arising from disability and a failure to make reasonable adjustments.

2. The claims were set out in very limited detail in the ET1. They were subsequently clarified at two preliminary hearings on 25 April 2023 and 12 June 2023 and confirmed in a list of issues contained in the bundle presented for this hearing.

3. The issues for the tribunal to consider were discussed and agreed at the start of the hearing. These are as follows:

Time limits

3..1. Were the Claimant's claims presented in time, such that the tribunal has jurisdiction to consider them?

Disability

3..2. Was the Claimant disabled for the purposes of the Equality Act 2010 at the material times? The Respondent conceded that the physical impairments of diabetes and ulcerative colitis amount to a disability at all material times. The Respondent conceded that the physical impairment of osteoarthritis amounted to a disability from 1 January 2022 onwards, but asserts that the condition was not long term and/or did not have a substantial impact on day to day activities prior to that date.

Direct disability discrimination

3..3. Did the Respondent do the following:

- 3..3.1. Keep the Claimant on a waiting list after passing the board in 2021 and never posting him into the Band I Technical Officer position?
- 3..3.2. Fail to appoint the Claimant to the Band I Technical Officer position pursuant to his interview in January 2022?
- 3..3.3. Allow the Claimant to be removed from the waiting list on 12 June 2021, which he says was extended due to a recruitment freeze until January 2022, just as 20 vacancies were coming available?
- 3..3.4. The Director of Professional Standards failed to investigate the Claimant's subsequent complaint and downgrade it to a grievance?
- 3..3.5. The Claimant's complaint was not accepted as a grievance either and therefore has not been addressed?

3..4. Was that less favourable treatment? The Claimant relies on the comparator of the other candidate for the Band I Technical Officer position

3..5. If so, was it because of disability?

Discrimination arising from disability

3..6. The Claimant relies on the same unfavourable treatment as for the direct disability discrimination claim.

3..7. Did the following things arise in consequence of the Claimant's disability:

- 3..7.1. At the relevant time the Claimant had limited mobility and needed a walking aid. For example he could not move around to kiosks and to get cables/get access under desks
- 3..7.2. At the time of the interview the Claimant was shielding during the pandemic and confined to home

3..8. Was the unfavourable treatment because of those things? The Claimant shielding is said to relate to the interview outcome in January 2022 only; the limited mobility relates to all of the unfavourable treatment.

3..9. If so, was the treatment a proportionate means of achieving the legitimate aim of ensuring that appropriately skilled individuals are appointed to vacant positions?

Reasonable adjustments

3..10. Did the Respondent know or could it have been expected to know that the Claimant had a disability/disabilities? From what date?

3..11. Did the Respondent apply the PCP of the physical mobile element of the Band I Technical Officer role, which involved attending premises to seize computers?

3..12. Did that PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disabilities, in that the Claimant had mobility issues?

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

3..14. Were there reasonable steps the Respondent could have taken to avoid the disadvantage, which were not taken? The Claimant suggests adjusting the role for the Claimant so that he concentrated on the technical side of the role which could be done at a computer remotely.

Direct Race Discrimination

3..15. The Claimant is British Asian of Pakistani origin

3..16. Did the Respondent do the following things:

- 3..16.1. Ask the Claimant "Where do you come from" in the interview in January 2022?
- 3..16.2. One of the interview panellists made the comment as the interview was ending, overheard by the Claimant, "Shall we take Golly 1?"
- 3..16.3. The panellists appeared disinterested in the interview
- 3..16.4. Fail to appoint the Claimant after the interview

3..17. Was that less favourable treatment? The Claimant relies on the comparator of the other candidate for the Band I Technical Officer position.

3..18. If so, was it because of race?

Direct Age Discrimination

3..19. The Claimant was 52 years old at the time of the act complained of. The comparator age group is persons in their 20s, 30s and early 40s.

3..20. Was the Respondent's failure to appoint the Claimant after the interview in January 2022 less favourable treatment?

3..21. Was it because of age?

3..22. If so, was the treatment a proportionate means of achieving the legitimate aim of ensuring that appropriately skilled individuals are appointed to vacant positions?

3..23. The Claimant relies on a hypothetical comparator.

Documents and evidence heard

4. We had witness statements from the Claimant, Annette Cabot, Allan Bowers, Russell Nash, Leighann Robson and Joanne Lloyd and heard oral evidence from them.

5. We were provided with a bundle containing 341 pages

Fact findings

6. The Claimant commenced employment on 30 March 2005. At the time of the matters complained of he was employed as a Band E Digital Forensic Assistant.

Select List

7. In around June 2020 the Claimant applied for a role as a Digital Forensic Technician, which was graded as a Band I (Level 1 Service) role. After an assessment process for the role the Claimant was deemed as meeting the required standard for the role, but he was not offered the role as there were not enough vacancies.

8. The Respondent operates Select Lists for some roles. Where an individual has been assessed as meeting the required standard for a role, but they have not been appointed into the role due to insufficient vacancies they may be put on a Select List. If vacancies arise for the role in the future, then individuals from the Select List may be appointed into the role without a further recruitment exercise taking place.

9. Following the June 2020 application, the Claimant was placed onto a Select List for the role of "Digital Forensic Technician – Band I (Level 1 Service)".

10. From the Claimant's witness statement and his pleaded case it appeared that he believed that this meant that he was on a select list for all Digital Forensic Technician roles. However it became clear in his oral evidence the Select List operated for the role applied for only (i.e. Band I Level 1) and not for all Digital Forensic Technicians. We find that the Select List operated in that way.

11. When the Claimant was placed on the Select List he was told that the arrangement would last for a maximum of 12 months. The Claimant's evidence was that this was extended to 18 months due to a recruitment freeze caused, in part, by the COVID pandemic. He relies in part on an email dated 23 November 2020 to support his contention. We accept the Claimant's evidence on this point, not least because no evidence was called to contradict the Claimant's assertion. We find that the Select List was extended to a period of 18 months, so that it would expire on or around 11 December 2021.

12. During the period that the Claimant was on the Select List, the Respondent recruited a number of individuals into the role of Digital Forensic Technician. We are satisfied that none of these roles were the same as the role the Claimant was on the Select List for, i.e. none of the roles were Band I Level 1 service. We make that finding as it is consistent with the evidence of Annette Cabot, and the Claimant also accepted in oral evidence that there were no Level 1 roles available during the period that he was on the Select List.

Vacancy 8901

13. In November 2021 the Claimant applied for a Digital Forensic Technician role in MO4 Forensic Services; the recruitment process was numbered

8901 by the Respondent. Part of the recruitment process for vacancy 8901 included a timed assessment.

14. The Claimant requested an adjustment to the timed assessment to take account of his disabilities. This aspect of the Respondent's recruitment process is managed through an online system called "OLEEO". When applying for a role, a candidate is required to upload a completed application form through OLEEO; the form includes questions about potential disabilities and adjustments which may need to be made to the recruitment process. If adjustments may be required then input is sought from Occupational Health. The entries on the application form which relate to potential disabilities and adjustments are routinely removed before the form is sent to the recruiting manager and interviewers. Those parts of the form were removed in the Claimant's case for this vacancy and for the later vacancy 10033.

15. For vacancy 8901 it was agreed that the Claimant would have a 'stop the clock' adjustment and access to toilets for his timed assessment, so that if he needed to use the toilet or needed to administer medication then the clock would be stopped for as long as necessary. This agreement was recorded in a document signed by the Claimant.

16. The Respondent's practice is to require a fresh application for reasonable adjustments for each vacancy. This is reflected in the reasonable adjustment agreement signed by the Claimant for vacancy 8901, as above the Claimant's signature it states: *"it is my responsibility to re-submit my request for consideration for reasonable adjustment prior to re-application for future assessments"*

17. Whilst the tribunal found it surprising that an individual with a long-term disability is required to re-apply for reasonable adjustments each time they apply for a role, we accepted the evidence of Miss Cabot that this is how it worked in practice. Miss Cabot explained that this meant the adjustments are tailored to the recruitment process being undertaken, and explained that she had had individuals in the past who had required adjustments for one round of recruitment but not another, due to the differing nature of the assessments. The tribunal accepts that an explanation for this could be to avoid hiring managers knowing of any disability where that knowledge is not necessary for the recruitment process.

18. The Claimant ultimately withdrew his application for vacancy 8901 and no claim is made in relation to that recruitment.

<u>Vacancy 10033 – the January 2022 interview</u>

19. In late 2021 or early 2022 the Claimant applied for the role of Band I Technician in Central Specialist Crime. This was a role within the High Tech Crime Unit of the Online Child Sexual Abuse and Exploitation team. The vacancy number was 10033. As with the earlier role, the entries on the Claimant's application form which related to potential disabilities or adjustments were removed before the application form was received by the recruiting managers. The recruiting managers were not told of the Claimant's potential disabilities, nor of the adjustment which had been granted for vacancy 8901.

20. There were only three applicants for the role and the Respondent chose to interview all three of them. One withdrew their application before the interview, leaving the Claimant and Nathan Dinham to be interviewed for the role.

21. On 7 January 2022, DS Bowers sent all three applicants an email suggesting that whilst a CV was not a requirement for the role, it might be useful if they were each to bring a copy of their CV to the interview. The Tribunal accepts the evidence of DS Bowers and Mr Nash that they did not have the Claimant's CV as part of the application process; that is consistent with the email requesting a copy of the Claimant's CV. We also find that that Claimant did not send his CV in response to the suggestion in this email.

22. On 10 January 2022 the Claimant informed DS Bowers that he was self-isolating due to being a close contact of someone who had tested positive for COVID-19 and asked for the interview to take place via MS Teams or to be moved to another date. The Claimant said that he was asymptomatic. The Claimant did not, at any time, mention that he was shielding, nor that he was clinically vulnerable or had a physical impairment. DS Bowers agreed for the interview to take place via Teams, and it was scheduled to take place on 13 January 2022.

23. The Claimant subsequently tested positive for COVID-19, but did not inform the Respondent.

24. The tribunal find that the Claimant did not inform the interviewers of his disability. Nor were the interviewers aware of his disability from the Claimant's application form, as all parts relating to disability had been removed. We also find that there was nothing in the way the Claimant presented at interview which could have put the interviewers on notice that the Claimant had one or more disabilities.

25. The interview was undertaken by a panel of two, who were both part of the team that the successful candidate would be working in: DS Bowers was the line manager and Mr Nash was a long serving technical expert.

26. The Respondent's "Assessment Process SOP" states at paragraph 5.1 that an interview panel should normally have a minimum of two assessors, comprised of the line manager and another appropriate individual, possibly someone independent of the team. The SOP goes on to say that it is recommended that one panel member is independent of the team, particularly if a candidate is currently undertaking the job in question on a temporary basis, although it recognises that it may not always be practical.

27. The Claimant attended the virtual interview on 13 January 2022. At the interview he was asked a set of questions which were scored, along with some icebreaker questions at the start of the interview.

28. As part of the icebreaker questions the Claimant was asked about where he was from. The tribunal accept the evidence of DS Bowers and Mr Nash that this was to understand where the Claimant would travel in from, as the role would require attendance at early morning warrants (executed at

around 6am) across the London area. It was therefore important for the interviewers to understand where the candidates lived, and what arrangements they would make to be able to attend the execution of warrants.

29. Nathan Dinham was not asked the same question of where he was from. We find that this was because the panel had a copy of his CV at the time of the interview, which contained his address. The handwritten notes of the interview record that there was discussion with Mr Dinham about the fact he was happy to go on early morning searches and was able to stay late or do overtime; these points were important as he lived outside of the M25. We find that there were discussions with Mr Dinham around what arrangements he would make to attend the execution of warrants.

30. When undertaking the interviews, the panel were in a building where building work was taking place. This meant that there was occasionally background noise during both the interview of the Claimant and of Mr Dinham. As the Claimant's interview was taking place over MS Teams it was more difficult to read body language. The interviewers made handwritten notes during the interview which meant that they were not always looking at the camera. The tribunal find that these factors resulted in the interviewing panel appearing distracted during the Claimant's interview.

31. Following the interviews the role was offered to Mr Dinham rather than the Claimant. It is agreed that Mr Dinham's race is different to the Claimant's race.

32. In an email on 15 January 2022 DS Bowers provided the Claimant with some feedback on the interview, including areas in which the Claimant could have given better answers.

33. The tribunal have been provided with a copy of the scores provided by DS Bowers and Mr Nash for both the Claimant and Mr Dinham, along with their handwritten notes of both interviews.

34. From the documents provided and the evidence of DS Bowers, Mr Nash and the Claimant we find that the Claimant's scores were a fair representation of the answers he gave at interview. We reach this conclusion for the following reasons:

    35.1 The Claimant said that he had not really heard of SQL, whereas Mr Dinham was able to describe SQLite databases and explain how he had shadowed people using them

    35.2 The Claimant mis-described The Onion Router ('TOR') as an operating system.

    35.2 The Claimant's oral evidence to this tribunal was that he had been put off by the perceived disinterested approach of the interview panel, as well as feeling rushed or being asked for more detail in his answers. His evidence to the tribunal was that his answers were poor. That is consistent with the Claimant receiving lower scores than he might have otherwise expected.

35. The Claimant asserts that at the end of the interview as he was exiting MS Teams and the screen was going black he heard one of the interview panel say “Shall we take Golly 1?”. DS Bowers and Mr Nash deny that this comment was made.

36. On the balance of probabilities we find that the comment was not made. Whilst it would be unusual for the Claimant to have made this up, we rely on the following in reaching our conclusion:

    37.1 The Claimant made no reference to the comment in his original appeal against the decision not to recruit him, nor in the original complaint to the Directorate of Professional Standards on 14 February 2022, nor in his grievance to the grievance management team on 28 March 2022. We reject the Claimant’s suggestion that this comment was referred to in the complaint forms but was removed by an unknown person; such events are unlikely. We also reject the Claimant’s contention that the document at **[302]** of the hearing bundle is the document he submitted with his appeal/grievance, as it contains reference to matters which occurred after his grievance/appeal were lodged.

    37.2 The Claimant’s oral evidence was that the audio was cutting out, there was a lot of noise as the computer was closing down and he could barely hear. We find that it is more likely that he misheard something else which was said.

Appeal of interview outcome

37. The Claimant appealed the outcome of his interview. The appeal was assigned to DCI Jo Lloyd, who rejected the Claimant’s appeal by way of letter dated 14 February 2022. We find that the appeal form submitted is the one produced in the bundle by the Respondents at pages 194-197 and that it did not contain a reference to the “Golly 1” comment.

Complaint to Directorate of Professional Standards and grievance

38. The Claimant sent an email the same day to the Directorate of Professional Standards via their “reporting wrongdoing” email address, in which he stated that the interview process fell short of the Respondent’s policy and procedure and that he believed he had been discriminated against on the grounds of race and disability.

39. The Claimant attached a document titled “Interview held at 11.doc”. There is a dispute as to which version of this document was attached; the Claimant asserts it was the version which appears at page **[302]** of the bundle, which contains a reference to the “Golly 1” comment; the Respondent asserts that it was the version attached at **[222]** of the bundle which contains no such reference. On the balance of probabilities we prefer the Respondent’s account and find that the document at **[222]** was attached to the complaint. We do not accept the Claimant’s account as the document at **[302]** contains references to matters which occurred after the complaint was lodged, and we consider it improbable that the reference to

the ”Golly 1” comment would have been removed by the Respondent (or its employees); in our judgment there was no good reason for it to be removed.

40. The Directorate of Professional Standards took the view that what was being raised was a grievance rather than a matter of professional misconduct, and forwarded the complaint to the grievance team’s email address on 16 February 2022. As we have found above, the complaint form did not contain any reference to the “Golly 1” comment.

41. On 24 and 25 March 2022 individuals from the Grievance Management Team told the Claimant that the matter had been referred to them from the Directorate of Professional Standards and asked the Claimant to complete and submit a grievance form. The Claimant submitted the grievance form on 28 March 2022. As we have found above, the grievance form did not include any reference to the “Golly 1” comment.

42. The grievance document was reviewed by Leighann Robson on 19 April 2022. The same day Ms. Robson emailed Reeta Chhiba, a Grievance Administrator, to ask her to contact the Claimant and let him know that the grievance process was not suitable to review allegations of misconduct, and that if the Claimant wanted the matter to be reviewed under the grievance process then he would need to send more information outlining his concerns so that the team could undertake the initial triage assessment.

43. On 27 April 2022 Ms. Chhiba sent an email to the Claimant stating that the grievance process was not suitable to review allegations of misconduct. It also said that if the Claimant wanted the matter to be reviewed under the grievance process then he would need to send in more information, and asked him to confirm whether he wanted the matter dealt with under the grievance process or as a misconduct allegation.

44. In addition to the matters Ms. Robson had asked Ms. Chhiba to say, Ms. Chhiba’s email added sentences which said that the Claimant’s desired outcomes were not within the remit of the grievance team and that Ms Chhiba was unable to progress the matter further and the grievance would be closed. These points went beyond what Ms. Robson had asked Ms. Chhiba to communicate.

45. It appears that the grievance was then closed, although we have not heard any evidence from the two individuals who would have been responsible for closing grievances or following up on outstanding grievances (that is: Ms. Chhiba and her line manager). Ms Robson told us that Ms. Chhiba no longer works for the Respondent.

Other vacancies in February 2022

46. In February 2022 the Respondent advertised vacancies for 20 Band I Digital Forensic Technicians. The unchallenged evidence of Miss Cabot was that these were for Digital Hub Technicians. The Claimant accepted in his evidence that the Digital Hub Technician role was different to the Band I Level 1 role that he was on the Select List for. We find that these roles

were not roles which would have been covered by the Claimant's Select List. The Claimant did not apply for one of these vacancies.

Minority decision

47. The findings of the minority differed from the majority in the following ways.

48. The minority found as a fact that the Claimant had provided his CV to the interview panel. The minority accepted the Claimant's evidence that the CV was attached to the original application form and noted that DS Bowers and Mr Nash were both experienced interviewers who were unlikely to have failed to follow up on the CV request unless they in fact already had the CV.

49. As to the interview on 13 January 2022, the minority found that the Claimant was asked "where do you come from" at the start of the interview and found that, on the balance of probabilities, this was not related to the geographical nature of the work. The minority rejected the Respondent's explanation, noting that the successful candidate lived outside of the M25, which was inconsistent with the Respondents' explanation that home address was an important factor for the role.

50. The minority found, on the balance of probabilities, that at the end of the interview one of the interviewers said "Shall we take golly 1?". The minority found the Claimant's evidence as to what was said persuasive and rejected the evidence of DS Bowers and Mr Nash, relying in particular on the detail of the Claimant's account (the reference to "Golly 1" rather than simply "Golly").

51. The minority found that the Claimant's appeal regarding the interview outcome, his emailed complaint to the Directorate of Professional Standards on 14 February 2022 and his grievance to the Grievance Management Team on 28 March 2022 had all contained a paragraph stating "*The interview concluded at 1235Hrs. As the interview was held over MS teams, as the interview screen was going blank, I heard part of the conversation between DS Bowers, and his colleague, where DS Bowers was heard to say "Shall we take Golly 1". After this I could not hear the conversation further".* The minority found, on the balance of probabilities, that this paragraph had been removed by a person or persons unknown within the Respondent prior to the documents being given to the appeal/grievance officer. The minority therefore did not find that the absence of this complaint in contemporaneous documents undermined the Claimant's assertion that the comment was made.

52. The minority also relied upon a finding that the manner in which the grievance was concluded was inexplicable, and indicative of the Respondent seeking to conceal matters. The minority found that whilst Ms. Roberts' evidence was that discrimination allegations were treated as a high priority, that was inconsistent with the fact that the Claimant's grievance was closed and it was also inconsistent with the assertion that the Claimant's grievance was closed in error. The minority concluded that the closure of the Claimant's grievance was not accidental, as that outcome was improbable in an organisation which asserts that it affords a high priority to discrimination complaints. This finding caused the minority

to disbelieve the Respondent when it said that the original appeal, the complaint to the Directorate of Professional Standards and the grievance did not contain reference to the "Golly 1" comment.

The Law

53. The relevant part of section 13 of the Equality Act 2010 provides:
(1) 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.
(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

54. The relevant part of section 20 provides:
(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, 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, to take such steps as it is reasonable to have to take to avoid the disadvantage.

55. Section 136 of the Equality Act deals with the burden of proof. The relevant parts provide:
(1) This section applies to any proceedings relating to a contravention of this Act
(2) 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.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision

56. Section 39 of the Equality Act provides that an employer must not discriminate against an employee in the way it affords the employee access to opportunities for promotion, or by subjecting the employee to any other detriment.

57. When considering whether a matter amounts to a detriment, the tribunal must take all the circumstances into account and consider whether the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment. An unjustified sense of grievance cannot amount to a detriment: *Shamoom v Royal Ulster Constabulary* [2003] UKHL 11.

58. When considering whether treatment was "because of" the protected characteristic under section 13 of the Equality Act, the tribunal will have to look to the mental processes of the alleged discriminator: *Nagarajan v London Regional Transport* [1999] IRLR 572

59. When applying the burden of proof provisions at s.136 of the Equality Act, guidance is provided in *Igen v Wong* [2005] EWCA Civ 142. The first stage is to consider whether the Claimant has proved on the balance of probabilities facts from which the tribunal could decide, in the absence of any other explanation, that discrimination took place. If the Claimant does not do so then the claim fails. All that is needed at this stage is facts from which an inference of discrimination is possible; it is important to bear in mind that it is unusual to find direct evidence of discrimination and that the outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found. Primary facts are sufficient to shift the burden if a reasonable tribunal could properly conclude on the balance of probabilities that there was discrimination: *Madarassy v Nomura International Plc* [2007] EWCA Civ 33. It is not sufficient for the employee merely to prove a difference in protected characteristic and a difference in treatment; something more is required (*Madarassy)*.

60. Once the burden of proof shifts to the employer under s.136 Equality Act, it is then for the employer to prove that the less favourable treatment was in no sense whatsoever because of the protected characteristic. As the facts necessary to provide an explanation will usually be in the hands of the employer, a tribunal will normally expect cogent evidence to discharge that burden of proof. Tribunals should take care before accepting an explanation that the less favourable treatment lies merely in general poor administration: *Komeng v Sandwell MBC* UKEAT/0592/10.

Analysis and Conclusion

61. Applying the law to the facts set out above, we reach the following conclusions in relation to each of the Claimant's claims. In the underlined headings below we have used the numbering from the list of issues, which appear at pages **[104-109]** of the bundle.

Direct disability discrimination

3.1.1 – keeping the Claimant on a waiting list after passing the board in 2021, and not posting him to the Band I Technical Officer role

62. As set out above, we have found that the Select List operated only for the role which the Claimant had applied for, that is a Band I Level 1 role. The Claimant accepted this in his evidence. The Claimant also accepted that there were no Band I Level 1 roles which arose during the period he was on the Select List.

63. The Claimant has not proven facts from which we could conclude that discrimination had taken place. The facts proved by the Claimant give rise to no inference of discrimination. On his own evidence there is no basis on which we could conclude or infer that the reason for not posting him to a Band I role during the period of the select list was in any way related to his disability. This claim fails as the Claimant has not discharged his initial burden of proof under s.136 Equality Act.

3.1.2 – Failing to appoint the Claimant to the Band I Technical Officer position

64. We have found in our findings of fact that the Claimant's scores were a fair reflection of his performance at interview. The comparator, Mr Dinham, scored higher than the Claimant and was appointed to the role.

65. Based on our findings we are also satisfied that the decision makers (DS Bowers and Mr Nash) did not know that the Claimant was, or might be, disabled. There is nothing within the evidence to suggest that the Claimant was treated differently by reason of disability. The interview took place over MS Teams at the Claimant's request due to his self-isolation after having a close contact with someone who had tested positive for COVID-19. The adjustment made was a benefit to the Claimant. Whilst the conditions for the interview were not ideal (the background noise due to building work), that was something which applied to both interviewees and it was clear that it would have applied to a non-disabled person.

66. As a result we find that the Claimant has failed to prove facts from which we could conclude or infer that the non-appointment was because of his disability. This claim fails.

3.1.3 – Allowing the Claimant to be removed from the waiting list on 12 June 2021, which he says was extended due to a recruitment freeze until January 2022, just as 20 vacancies were coming available

67. We accepted the Claimant's evidence that the time on the Select List was extended to a period of 18 months, which would take it to December 2021. We also found that the Select List would not have applied to the vacancies which became available in February 2022, even if the Claimant had remained on the select list until that time.

68. We are not satisfied that this allegation amounts to a detriment for the purposes of s.39 Equality Act. The extension of his Select List was treatment which was favourable to the Claimant. Advertising vacancies after the Claimant's Select List cannot reasonable be considered to be a disadvantage in circumstances where the Select List would not have applied to the roles advertised.

69. We have also considered whether the treatment amounts to discrimination in the provision of opportunities for promotion. We reach the conclusion that the Claimant has not proved facts from which we could conclude or infer that that this treatment was in any way because of his disability. This claim fails.

3.1.4 Failing to investigate the Claimant's complaint to the Directorate of Professional Standards/downgrading it to a grievance

70. The tribunal took into account the fact that the Claimant's complaint to the Directorate of Professional Standards referred to his disability. When looking at the totality of the complaint we considered that it contained a mix of matters relating to conduct (such as allegations of discrimination) and matters which would normally be dealt with as a grievance or an appeal against the decision (such as the request for independent verification of the Claimant's scores).

71. The failure to treat the Claimant's complaint as a conduct issue is something which a reasonable employee could consider to be a detriment.

72. As to whether the Claimant has proved facts from which we could find discrimination, whilst we note that a failure to act on complaints of discrimination could shift the burden of proof we consider that in this case the Respondent did not, at this stage, fail to consider the complaint but

instead said it should be considered by a different department. The Claimant did not provide evidence to show that the person responsible for moving the complaint to the grievance team was aware of his disabilities; whilst there was a reference to disability in the complaint there was no detail provided of what the Claimant's disability was, or how it impacted on his complaint.

73. We find that the Claimant has not proved facts from which we could conclude or infer that the treatment was because of disability.

74. If we are wrong on that, then we would have concluded that the Respondent's conduct was in no sense whatsoever because of the protected characteristic. The contemporaneous internal emails lead us to the conclusion that the matter was moved to the grievance team as the Directorate of Professional Standards considered that the points being raised were more akin to a grievance than a professional misconduct issue. That is particularly so in light of the absence of the "Golly 1" allegation, and the reference at the end of the Claimant's complaint where he requested an independent verification of his interview responses.

3.1.5 Not accepting the Claimant's complaint as a grievance, and not addressing the Claimant's complaint

75. We are concerned with the manner in which the Claimant's complaint has been handled. The Claimant made a complaint first to the Directorate of Professional Standards, who referred it to the Grievance Management Team. The Grievance Management Team then appear to have taken the view that it should be dealt with as a misconduct issue by the Directorate of Professional Standards. The Claimant was left with both departments passing the complaint to the other.

76. The Claimant's grievance should never have been closed without it being investigated and resolved. The fact that this happened meant that the complaints raised by the Claimant were never considered by either the Grievance nor the misconduct teams.

77. We are satisfied that the closure of the Claimant's grievance in circumstances where it had already been moved to the grievance team by the Directorate of Professional Standards are facts from which we could, in the absence of an explanation, conclude that it was because of a protected characteristic. The Claimant has satisfied his burden of proof under s.136 Equality Act for this claim.

78. We turn to consider the Respondent's explanation and whether it has proved that the treatment was in no sense whatsoever because of the Claimant's disabilities.

79. Whilst we have real concerns about the manner in which the process was handled, we are satisfied that this was a case of error rather than something influenced in any way by a protected characteristic. We have given careful scrutiny to the explanation put forward by the Respondent. We have borne in mind that it can be an easy defence for an employer to hold up its hands and say that it is disorganised or inefficient, and that it is important for the tribunal to carefully test such explanations.

80. In finding that the explanation was error rather than something which was in any way influenced by the Claimant's disability or race, we have given particular weight to the internal email from Ms. Robson to Ms. Chhiba. We find that Ms. Chhiba wrongly misinterpreted the instructions given by Ms. Robson and closed the grievance when that was not what should have happened. We believe that this was a case of clear incompetence on Ms. Chhiba's part, and that it was in no sense whatsoever because of the Claimant's disability. This claim fails.

Discrimination arising from disability

81. As set out in our findings and conclusions above, the matters complained of as unfavourable treatment did occur.

82. We have considered what caused the treatment, or what the reason was for the treatment. In our judgment, there is no basis on which we could find that the treatment was because of anything arising in consequence of the Claimant's disability and for that reason the claims fail.

83. The Claimant first relies on the fact that he had limited mobility and needed a walking aid, meaning he could not move around to kiosks and to get cables/access under desks. That is in no way related to the fact that he was kept on the Select List, or failed to be appointed following his January 2022 interview, or was removed from the Select List in December 2021, or failed to have his grievance/complaint properly considered. There was nothing within the evidence we heard which could lead to the conclusion that any of that treatment was, in any way, because of the Claimant's limited mobility or need for a walking aid.

84. The Claimant also relies on the fact that he was shielding and confined to home as something which caused him not to be appointed following the January 2022 interview. We heard no evidence from the Claimant to the effect that he was not appointed because he was at home, or that being at home affected whether or not he was appointed. In our judgment the reason that the Claimant was not appointed was solely because he performed more poorly at interview than his comparator, which was unrelated to the fact that he was shielding. The Claimant's answers were not, in our judgment, in any way related to the fact he was shielding.

Reasonable adjustments

85. We find that the Respondent applied a PCP of *"the physical mobile element of the Band I Technical Officer Role involving attending premises to seize computers".*

86. We find that the application of this PCP did not put the Claimant at any disadvantage. The PCP was not applied to the Claimant (in that he was not required to carry out the role of a Band I Technical Officer). Further, the Claimant was not put at a substantial disadvantage by the application of that PCP to others employed by the Respondent. Put bluntly: there was no way in which this PCP affected the Claimant, directly or indirectly.

87. Had the Claimant been successful in his application to the role then the PCP may have put him at a disadvantage. Equally, if the Claimant had been unsuccessful due to difficulties complying with the PCP then he would have been put at a disadvantage. However neither of those

circumstances applied here. The Claimant was unsuccessful for reasons which did not relate in any way to his disability; he was completely unaffected by the PCP.

Direct Race Discrimination

6.2.1 – asking the Claimant "Where do you come from"

88. We are satisfied that a reasonable employee from a minority ethnic background could reasonably consider being asked this sort of question to be unfavourable treatment.

89. We found that a question along these lines was asked of the Claimant. In our judgment the mere asking of a question such as this amounts to facts from which we could conclude that the Respondent has acted because of race. The Claimant has satisfied his initial burden of proof under s.136 Equality Act.

90. We have considered the Respondent's explanation for the question which was asked. As set out in our factual findings we accepted the evidence of DS Bowers and Mr Nash that this was to understand where the Claimant would travel in from, as the role would require attendance at early morning warrants (executed at around 6am) across the London area. It was therefore important for the interviewers to understand where the candidates lived, and what arrangements they would make to be able to attend the execution of warrants.

91. We considered whether the question was in any sense whatsoever because of the Claimant's race. We note that Mr Dinham was not asked the same question, although we consider that his circumstances were materially different as he had provided a copy of his CV prior to the interview, which showed his home address. We also take into account that Mr Dinham was asked questions relating to his ability to attend the execution of warrants and overtime, which both related to where he lived.

92. We are satisfied that a person of any race in the same circumstances as the Claimant would have been asked the same question. We accept the Respondent's evidence that the question was asked for the purposes of understanding the Claimant's location and ability to perform the role, and that it was in no way influenced by the Claimant's race. This claim fails.

6.2.2 – an interview panellist making the comment "Shall we take Golly 1"

93. As set out in our factual findings, we concluded on the balance of probabilities that this comment was not made. This claim therefore fails.

6.2.3 – panellists acting disinterested in the interview

94. We find that the panel appeared distracted, in part due to the noisy building work which was taking place and in part due to the need to make notes whilst the interview was taking place, which would have resulted in less eye contact and looking away from the camera on a video call.

95. In our judgment the Claimant has not proved facts from which we could conclude that the panel appearing distracted was because of the Claimant's race. We have found that there was not a racial slur made at the end of the meeting, and that the question about location during the icebreaker was wholly unrelated to the Claimant's race. In our judgment

there is nothing which results in the burden being shifted to the Respondent.

96. If we are wrong on that then we would have gone on to conclude that the conduct of the panel members was in no sense whatsoever because of the Claimant's race. The panel members appearing distracted was wholly due to the noise, the need to take notes, and the fact that the interview was conducted over video.

6.2.4 – Failure to appoint the Claimant after the interview

97. We have set out above our findings and conclusions on why the Claimant was not selected, both in the findings of fact and in the conclusions for the disability claim.

98. The Claimant has not proved any facts which could lead us to conclude that his failure to be appointed was due to his race. As we say above, we have found that there were no racially tainted comments made in the interview. In any event, we were satisfied that the reason the Claimant was not appointed was wholly due to his scores following the interview, which we have found to have been a fair reflection of his performance.

Direct Age Discrimination

99. In our judgment the Claimant's case on age discrimination is a classic case of the Claimant proving a difference in protected characteristic and a difference in treatment and no more.

100. Mr Dinham was younger than the Claimant and was offered the role. Aside from those facts, there is nothing the Claimant can point to, and no facts which he has proved, which suggests that age was in any way a factor in the selection process.

101. As we have said above, in our judgment the scoring was a fair reflection of the Claimant's performance at interview. There was nothing to suggest that the scoring of Mr Dinham was anything other than fair. The Claimant's age had nothing to do with it.

Disability and time limits

102. It was agreed that all claims which related to matters occurring after 5 January 2022 were presented within the statutory time limit.

103. In light of our findings above it was not necessary for us to consider whether it would be just and equitable to extend the time limit for claims which related wholly to events occurring before 5 January 2022.

104. As set out above, the only dispute in relation to disability was whether the Claimant's osteoarthritis was a disability before 1 January 2022. In light of our findings above we have not considered it necessary to resolve this issue; for the purposes of reaching our conclusions on the disability discrimination claims we have assumed that the osteoarthritis amounted to a disability at the material time.

Minority decision

105. The minority disagreed with the majority decision in the following respects.

6.2.1 – Race discrimination based on "Where do you come from" question during January 2022 interview

106. When assessing whether the Respondent had discharged its burden of proof under s.136 of the Equality Act, the minority rejected the Respondent's contention that the question was asked to determine the Claimant's location for work related reasons. The minority relied on the fact that the comparator lived outside of the M25, which was inconsistent with the Respondent's assertion that location was important. The minority also relied on its finding of fact that the interviewers had a copy of the Claimant's CV, and as such would not have needed to ask the Claimant his address.

107. The minority concluded that a comparator of a different race would have been treated differently, and relied on the actual comparator of Mr Dinham, having found that the circumstances were not materially different as both candidates had provided their CV.

108. The minority would have upheld this allegation of direct race discrimination.

6.2.2 - Race discrimination by making the comment "Shall we take Golly 1" at the end of the interview in January 2022

109. As set out in the findings of fact, the minority found that this comment was made.

110. The minority concluded that this amounted to unfavourable treatment and would, in the absence of an explanation, be related to race.

111. The minority found that the Respondent did not put forward an explanation for the conduct, other than saying that the comment was not made. Having found that the comment was made, there was no ground on which the Respondent asserted that the comment was wholly unrelated to race.

112. The minority would have upheld this allegation of direct race discrimination.

6.2.3 – Panellists appearing disinterested in the interview

113. The minority found that the Claimant had proved facts which shifted the burden of proof under s.136 Equality Act, in light of the minority's findings about the "where do you come from" comment and the "Golly 1" comment.

114. When considering the Respondent's explanation for the conduct, the minority found that the conduct was at least in part because of the Claimant's race. The minority found that the noises would not have had a significant affect on the interviewers, and that the interviewers appeared disinterested because they were disinterested in the Claimant. As there was no credible explanation of why the interview panel would have been disinterested in the Claimant, the minority found that the conduct was because of the Claimant's race.

115. The minority would have upheld this allegation of direct race discrimination.

Employment Judge **Curtis**

____09 October 2023_____
Date