Neutral Citation Number: [2024] EAT 5

Case No: EA-2022-000566-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 January 2024

Before :

HIS HONOUR JUDGE AUERBACH
MRS GEMMA TODD
MR MARTIN PILKINGTON

- -

Between :

MR S GLASSON	**Appellant**
- and -	
THE INSOLVENCY SERVICE	**Respondent**

- -
- -

Gus Baker (instructed by Cole Khan Solicitors LLP) for the **Appellant**
Nicholas Flanagan (instructed by TLT LLP) for the **Respondent**

Hearing date: 7 December 2023

- -

JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION

The claimant has worked for the respondent since 2005. He has a stammer, which the respondent knows. In 2020 he applied for a promotion to a position for which there were two vacancies. Prior to oral interview, in answer to questions on a form about adjustments for the interview, he indicated that, because of his stammer, he might need to be allowed more time to complete his answers. Oral interviews were conducted by videoconferencing because of the pandemic. The claimant was judged to have performed well overall, and passed the interview, but he scored one point behind the second most successful candidate. The jobs were given to that candidate and the highest scorer.

The claimant brought complaints of failure to comply with the duty of reasonable adjustment (section 20 **Equality Act 2010**) and discrimination arising from disability (section 15). He did not rely upon the fact that he needed more time for his answers, but on the fact that his stammer meant that he went into what he called "restrictive mode", giving shorter answers to some questions than he otherwise might, as a way of avoiding stammering. He did not raise this effect of his stammer in the interview form, nor did the respondent otherwise have actual notice of it (as opposed to being on notice of the fact that he might need more time to complete his answers). However, in light of the evidence presented to it, the tribunal accepted that this effect of "restrictive mode" was something arising from the claimant's stammer, which had in fact had an impact on his performance at interview.

The reasonable adjustments complaints failed, because the tribunal found that the respondent, as well as not having actual knowledge of the disadvantage relied upon, did not have "constructive knowledge" of it, being a reference to the test in schedule 8 paragraph 20 of the **2010 Act**. The tribunal did not err in so concluding. It did not fail to identify the PCPs relied upon, nor the substantial disadvantage relied upon, which was the same in relation to all the PCPs. Nor did it err by failing to consider whether the fact that the claimant gave less detailed answers to some questions than expected should reasonably have put the interviewers on enquiry as to whether this might be an effect of his disability. In reaching its conclusion on constructive knowledge, the tribunal properly had regard to

the factual background and context of the claimant's general high performance at work, a previous similar interview process in relation to which he had raised no similar concerns, and his overall good performance at this particular interview, in which he was only one point behind the second-highest candidate.

Nor did the tribunal err in dismissing the section 15 complaint on the basis that the justification defence was made out. It did not err by failing to consider what it was that needed to be justified, nor did it err by taking account of irrelevant considerations.

HIS HONOUR JUDGE AUERBACH:

Introduction, the Facts, the Tribunal's Decision

1. The claimant in the employment tribunal began working for the respondent in 2005. In August 2020, when he was an Insolvency Examiner, he applied for a promotion to the role of Deputy Official Receiver. There were two vacancies. He was interviewed by video conferencing. He was deemed to have passed the interview, but, by one point, came third. He was placed on a reserve list.

2. The claimant presented a claim complaining of failure to comply with the duty of reasonable adjustment and discrimination arising from disability. The disability relied upon was that he has a stammer. The matter was heard before EJ Mark Butler, and lay members Egerton and Worthington, sitting at Manchester. The claimant represented himself. Mr Flanagan of counsel appeared for the respondent. The claims were dismissed. The claimant appeals from that decision.

3. In its decision at [10] the tribunal set out the issues as follows:

> "**Discrimination arising from disability**
>
> > **1 Has the Claimant been treated unfavourably contrary s.15(1)(a) EqA 2010 by not being offered a position following a job interview on 18 August 2020?**
> >
> > **2 Was that unfavourable treatment because his assessed score in the interview was lower than two other candidates?**
> >
> > **3 Was that lower score something arising from his disability?**
> >
> > **4 Can the Respondent show that the alleged treatment described at paragraph 2 was a proportionate means of achieving a legitimate aim under s. 15(1)(b) EqA 2010? The respondent says that the legitimate aim is having a fair and proportionate recruitment process for filling any vacancies**
> >
> > **Reasonable Adjustments**
> >
> > **5. A PCP is a provision, criterion or practice. Did the respondent have the following PCPs in relation to the recruitment process for the Assistant Official Receiver vacancies:**
> >
> > > **a. PCP 1: Holding interviews by video conferencing**
> > >
> > > **b. PCP 2: Emphasising oral answers and performance in interview over written answers and an assessment of technical skills when scoring candidates or selecting them for appointment;**

> **c. PCP 3: Having warm-up questions as part of the interview.**
>
> **6 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability?**
>
> **7 In relation to each PCP, did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?**
>
> **8 Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCPs would have been reasonable:**
>
> **a. In relation to PCP1: not requiring the claimant to attend the interview by videoconferencing**
>
> **b. In relation to PCP2: increasing the weight given to written answers and an assessment of technical skills when scoring candidates or selecting them for appointment**
>
> **c. In relation to PCP3: not asking the claimant warm up questions or giving him the option whether to be asked such questions."**

4. The tribunal gave itself a direction as to the law which is not criticised, as such.

5. In its findings of fact (from which point the paragraph numbering begins again at 1) the tribunal found that the respondent was aware of the claimant's stammer. He had performed to a high level throughout his employment. Prior to the application with which this claim was concerned, he had been interviewed on 7 July 2020 for another role by video conference. On that occasion he did not request any adjustments to the selection process other than additional time, nor did he raise any issues following the selection process, as to any difficulties in connection with his disability.

6. In relation to his application for the Deputy Official Receiver role the claimant had indicated that he would require an adjustment at interview. He wrote: "I have a stammer and may require longer to answer questions in the interview." No further adjustment was requested by him.

7. The tribunal went on to make the following findings:

> **"9. At the interview, the claimant struggled to give full answers to the questions being asked, and entered what he referred to as 'restrictive mode', which is where the claimant limits what he is saying. We have no reason to doubt the claimant's evidence on this, and the claimant's evidence on the fullness of the answers he was giving in**

> **interview is consistent with the feedback given by the panel at the time, in that some of the claimant's answers were not fully expressed.**
>
> **10. The claimant did not explain to the interviewers of the difficulties he was experiencing in expressing himself at the interview. Although the claimant had thoughts of terminating the interview at the time, he continued to provide answers to the questions he was asked as he considered this to be least worse option. When the claimant was asked questions he continued to provide answers, and when he was prompted for further information, he provided responses.**
>
> **11. The claimant did not tell anybody of the respondent, either before or during the interview process, nor anybody on the panel, about this impact of his stammer, or why he was not able to provide fuller answers. He simply assumed that the interviewers knew. This finding is consistent with the notes of interviews that were prepared as part of grievance process, and the evidence of Ms Hudson, which we accepted as accurate."**

8. The tribunal went on to find that the claimant "scored reasonably well" and was "deemed to have passed the interview." But, having scored one point less than the second highest candidate, he did not get one of the two positions. He was placed on a reserve list.

9. The tribunal's conclusion in relation to the reasonable adjustments claims was as follows:

> **"13. Consequent to the findings above, in these circumstances, the tribunal concludes that the respondent did not have knowledge, either actual or constructive, of the disadvantage that the selection/interview process was putting the claimant at due to his disability. The claimant was working to a high standard in his role, he had been interviewed through a video conferencing format previously and raised no concerns, he raised no concerns in advance of his interview for Deputy Official Receiver either on his application form or elsewhere, he provided answers in the interview which were reasonably competent, albeit not as detailed as the panel expected. It is in these circumstances that that the tribunal concludes that knowledge on the part of the respondent of the substantial disadvantage has not been established in this case."**

10. In relation to discrimination arising from disability the tribunal noted that it was conceded that the claimant's stammer is a disability and that the respondent knew about it, and that he was subjected to unfavourable treatment. We will set out the remainder of the tribunal's reasoning in full.

> **"17. The claimant employs various mechanisms to help him manage his impairment. This includes avoiding particular words or phrases, trying to avoid blocks and increasing concentration on the words that he is using. These coping strategies make it difficult for the claimant to provide a full and focused answer to any questions being asked of him in his interview for the role of Deputy Official Receiver. The answers he provided led to lower scores being awarded to him during the video interview for the role.**
>
> **18. The claimant gave clear and consistent evidence of the impact that his stammer**

has on him, this was both compelling and persuasive evidence. And this evidence is consistent with some of the views given to him following interview, at least in so far as the panel expected the claimant to have been able to provide fuller answers. And this evidence from the claimant is substantially consistent with the Speech and Language Therapy Report (at p.392), the STAMMA Report (at p.394, although we note that this document is not relating specifically to the claimant but his a general report), and the stammering assessment report (starting at p.396, but in particular the comments under the heading of 'Interview and Issues at work' at p.398). Although this supporting evidence is somewhat limited, and the tribunal would have benefitted from more directed evidence on the impact that the claimant's stammer has on him and the effects of it, we conclude that this, on balance, satisfies the burden of proof required to establish a causal connection between the disability and the something arising in consequence of it.

19. The tribunal was satisfied that the claimant had been subject to unfavourable treatment for something arising out of his disability. The tribunal therefore needed to assess whether the approach adopted was objectively justified.

20. The numbers affected by the decision to hold interviews by video from a disability discrimination perspective were small. There were no other complaints, other than from the claimant. And there were no complaints, including by the claimant, in relation to an earlier round of video conference interviewing.

21. The impact on the claimant of holding interviews by video conferencing is quite low, when qualitatively assessed. The claimant was able to engage with the process for the most part, and answered questions asked of him. He scored relatively high in the process. He passed the interview, and only missed out on one of the two available roles by one point. He scored joint highest in at least one category. With all this in mind, the measure adopted had a low discriminatory affect. The tribunal reminded itself that the respondent's justification is to be assessed with proportionality to the seriousness of the discriminatory treatment in mind.

22. This process was held during a pandemic, during which the respondent had put in place a hold on recruitment, and its offices were closed. Face to face interviews were not able to be conducted. However, there were business critical roles that it needed to fill, with the role of Deputy Official Receiver being one such role. It is in this context that the measure adopted must be considered.

23. The respondent put in place a recruitment process to fill the role. The measure adopted was to assess the candidates, including the claimant for the role in question, using a standard interview process but over video conferencing.

24. The tribunal concludes that this measure adopted, that being using video conferencing to conduct interviews for the role of Deputy Official Receiver, was with a view toward achieving the legitimate aim of having a fair and proportionate recruitment process for filling any vacancies. And that it was appropriate to achieve that aim. In effect, it enabled assessment of candidates against the required competencies for the role. Each candidate, including the claimant, was able to provide answers to questions posed and were assessed against these competencies.

25. No reasonable alternative approach that was capable of achieving the legitimate aim but with a less discriminatory impact has been presented before the tribunal. Nor, could the tribunal identify one. The role itself included oral communication. This was one of the skills needed, and was one of the skills being tested during the process. The approach adopted was appropriate to test the required skills, including oral communication. Any alternative approach would have had to include some oral

communication aspect to it, which would inevitably include the claimant having to consider situations and provide some explanation and expansion to the situation presented. And therefore it is difficult to envisage how an alternative approach could have been adopted, given the circumstances of the pandemic and the inability to hold face to face interviews, that would have remained appropriate to achieve the legitimate aim whilst having less of a discriminatory impact. Removing the oral aspect would be one way of reducing the discriminatory impact, however, this would not be deemed appropriate to achieve the legitimate aim, given the need to test oral communication skills.

26. Balancing all of the factors in this case, although we conclude that there has been discrimination arising in consequence of the claimant's disability, we find that the measure adopted was a proportionate means of achieving a legitimate aim."

The Statutory Framework

11. The following are the relevant provisions of the **Equality Act 2010** (omitting irrelevant parts):

"15 Discrimination arising from disability

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

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

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

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

20 Duty to make adjustments

(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.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

39 Employees and applicants

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

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

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

(c) by dismissing B;

(d) by subjecting B to any other detriment.

136 Burden of proof

(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.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

Schedule 8 [the effect of other provisions is that the following provisions applied in the present case on the basis that A was the present respondent]

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

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

The Grounds of Appeal

12. There are seven numbered grounds of appeal.

13. Grounds 1 to 5 relate to the complaints of failure to comply with the duty of reasonable adjustment. Ground 1 contends that the tribunal erred by failing to make a finding as to the substantial disadvantage at which the claimant was put, so that there was no proper foundation for its conclusion that the respondent had no knowledge of such disadvantage. The tribunal should have identified that the claimant was put at a substantial disadvantage in answering oral questions in interview.

14. Ground 2 asserts that, given that the claimant had stated: "I have a stammer and may require longer to answer questions in interview", it was perverse to conclude that the respondent did not have

actual or constructive knowledge that the PCPs put the claimant at a substantial disadvantage. This should have been obvious, or the respondent should otherwise have known it. It was also perverse to conclude at [19] that the claimant had raised no concerns in advance.

15. Ground 3 contends that the tribunal erred by failing to consider, in addition to actual knowledge, constructive knowledge, that is, whether the respondent could not reasonably be expected to know that the claimant was likely to be placed at the substantial disadvantage. In particular, the tribunal failed to consider whether the fact that some of the claimant's answers were "not fully expressed", as found at [9], or "not as detailed as the panel expected", as found at [13], should have led them to make reasonable enquiries as to whether his stammer might be having that effect.

16. Ground 4 contends that, in considering whether the respondent had actual knowledge of the substantial disadvantage, the tribunal erred by taking into account considerations that were irrelevant, including that the claimant "scored reasonably well in the interview process" and "was deemed to have passed the interview" [12], that "he was working to a high standard in his role" [13], that he had "been [successfully] interviewed through a video conferencing format previously" [13], and he "provided answers in interview that were reasonably competent, albeit not as detailed as the panel expected" [13]. The ground asserts that none of these things could indicate one way or another whether the claimant was put at a substantial disadvantage by the PCPs. They could not deprive the respondent of knowledge that he was held back by his stammer.

17. Ground 5 contends that the tribunal erred by failing to make any findings about whether each of the PCPs was applied, and then going on to consider whether each of those PCPs put the claimant at a substantial disadvantage, as the necessary underpinning for then considering the knowledge issues. It also suggests that the emphasis on videoconferencing gives the impression that the tribunal only considered whether that particular PCP put the claimant at a disadvantage.

18. Grounds 6 and 7 relate to the complaint of discrimination arising from disability. Ground 6

asserts that the tribunal erred by considering whether the use of videoconferencing was justified, whereas it should have considered whether the unfavourable treatment, which was receiving lower scores in the interview process, was justified. Ground 7 asserts that the tribunal, by wrongly considering whether the decision to use videoconferencing was justified, took into account a number of irrelevant factors, including the numbers of people affected by the decision to hold interviews in that way [20], the impact on the claimant of holding interviews in that way [21] and the fact that the pandemic and closure of the office meant that face to face interviews were not possible [22].

Arguments

19. We will summarise what seem to us to have been the main points emerging from the skeletons and oral argument.

20. Generally in relation to grounds 1 to 5, Mr Baker contended that the tribunal had erred by failing to take a structured approach, as outlined in **Environment Agency v Rowan** [2008] ICR 218. It needed, first, to consider whether a given PCP was in fact applied; then, if it was, whether it in fact put the claimant at the substantial disadvantage relied upon; and, then, if it did, whether the respondent had actual or constructive knowledge of that disadvantage. Finally, if so, the tribunal needed to consider whether the respondent ought reasonably to have taken some step to avoid that disadvantage.

21. In support of ground 1, Mr Baker submitted that, accordingly, the tribunal needed to make a finding about the nature of the substantial disadvantage before deciding the knowledge questions which related to it. The present tribunal had erred by purporting to dispose of the knowledge questions without first identifying the substantial disadvantage. In his claim form the claimant had written that he claimed that his score "was adversely affected by him not communicating his answers fully" and that his stammer was also "adversely affected by video conferencing". But the tribunal did not make clear what it was that it considered the respondent did not have knowledge of.

22. In relation to ground 2, Mr Baker's skeleton acknowledged that perversity is a high hurdle,

but relied on the proposition that it may be established by contradictory findings or conclusions. In this case the tribunal made findings of fact that, in the interview form, the claimant referred to his stammer and said that he may require longer to answer questions in interview. It also found that he did not communicate his answers fully, and that the panel considered that some of his answers were not as fully expressed or detailed as they would have expected. It was, in light of those findings, perverse to conclude that the respondent had no actual or constructive knowledge of the disadvantage, as well as perverse to conclude that the claimant had raised no concerns in advance of the interview. In oral argument Mr Baker clarified that this ground maintained perversity in relation to the particular disadvantage relied upon before the tribunal, arising from the claimant going into "restrictive mode".

23. In support of ground 3, Mr Baker referred us to the guidance in the authorities on the question of constructive knowledge (in that case of disability) summarised by HHJ Eady QC (as she then was) in **A Ltd v Z** [2020] ICR 199 at [23], from which he highlighted the following sub-paragraphs:

> "**(3) The question of reasonableness is one of fact and evaluation, see Donelien v Liberata UK Ltd [2018] IRLR 535 CA at paragraph 27; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.**
>
> **(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (Ridout v TC Group [1998] IRLR 628; SoS for Work and Pensions v Alam [2010] ICR 665).**
>
> **(7) Reasonableness, for the purposes of section 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code."**

24. Mr Baker also referred us to **AECOM Ltd v Mallon** [2023] EAT 104 in which a job applicant informed the employer that he had a difficulty with online communication because of disability, but did not explain why. The EAT held in that case that the employer had failed to take the reasonable step of telephoning the claimant to find out more about the nature of the problem.

25. In the present case, submitted Mr Baker, the tribunal stated its conclusion that the respondent did not have knowledge, actual or constructive, without asking itself whether the respondent should

have made further enquiries about how his stammer affected him in interviews, or whether the fact that his answers were not all as fully expressed, or as detailed as the panel expected, should have prompted them to consider whether that might be linked to his stammer, and make further enquiries.

26. In oral argument Mr Baker submitted that the tribunal's reference, at [13], to knowledge, actual or "constructive" was not sufficient to show that it had applied its mind to the full wording of the test of so-called constructive knowledge in the statute, nor had it considered the authorities.

27. In support of ground 4, Mr Baker cited the following paragraph in the *EHRC Code of Practice on Employment (2011)* concerning the circumstances of a section 20 comparator:

> "**6.16 The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly – and unlike direct or indirect discrimination – under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's."**

28. Mr Baker's skeleton also referred to **Smith v Churchills Stairlifts plc** [2005] EWCA Civ 2020; [2006] ICR 524, another case concerning an unsuccessful job application. In that case the tribunal concluded that a job-related requirement to be able to carry out a certain particular physical task did not place the claimant at a substantial disadvantage by comparison with the general non-disabled population, who would also generally not be able to carry out that task. The Court of Appeal held that this was an error of approach, as the proper comparators were the successful (non-disabled) candidates for the job, who plainly, as they were successful, had been able to carry out the task.

29. Mr Baker submitted in his skeleton that, in taking into account various good and positive aspects of the claimant's performance and successes with the respondent, the tribunal was effectively making the same error as did the tribunal in the **Smith** case. The tribunal should have considered the claimant's success, or not, relative to the candidates against whom he was competing for this position. Further, it was, in principle, wrong to consider that the respondent could not have known of the

disadvantage because of the claimant's past good performance, and generally good performance at interview. The tribunal seemed to imply that disability equates to poor performance, thereby wrongly making a stereotypical assumption that stammerers could not be high performers. Rather, the claimant performed as well as he did in interview, *in spite* of the disadvantages caused by the PCPs.

30. In oral submissions Mr Baker acknowledged that the contention that the present tribunal had factually made the same type of error as the **Smith** tribunal was perhaps a stretch; but he maintained that the tribunal had still erred, by not focusing on the question of actual or constructive knowledge of the comparative disadvantage experienced by the claimant, relative to his fellow interviewees.

31. In support of ground 5, Mr Baker submitted that the tribunal had failed to start, as it should have in line with the **Rowan** guidance, by identifying which PCPs were applied, then considering whether each of them put the claimant at a particular substantial disadvantage, before turning to the knowledge questions in relation to such disadvantage. In its conclusions at [13] it put emphasis on videoconferencing. It did not deal directly with whether the other PCPs put the claimant at a substantial disadvantage, and then the knowledge questions in relation to each of those.

32. In oral submissions, Mr Baker acknowledged that it might be said that PCP 2 was "in the mix" of the tribunal's discussion at [13] but he submitted that it should have been specifically referred to. The claimant had also given evidence in his witness statement that the effort of answering warm-up questions had an adverse effect on him. Whatever the claimant may have said in cross-examination about that, it was not suggested that he had formally withdrawn reliance on PCP3; so the tribunal should have addressed it discretely, however briefly.

33. In support of ground 6, Mr Baker submitted that the treatment complained of was giving the claimant lower scores in the interview process. The tribunal should have considered whether *that* treatment was justified. Instead it erred by considering whether the policy of using videoconferencing (and, further, only that policy) was justified. This error was apparent from the conclusions at [23]

and [26]. In support of ground 7, he submitted that none of the factors highlighted in this ground were relevant to the justification issue. Only the claimant was subject to the treatment in question. In oral arguments Mr Baker accepted that ground 7 did not add anything of substance to ground 6.

34. For the respondent, Mr Flanagan submitted that the essence of the claimant's case, as explained to the tribunal, was that his stammer meant that he did not provide full answers to all questions at interview, because he entered what he called "restrictive mode". He had not referred to this phenomenon in his interview form or otherwise prior to, or during, the interview. Nor was this claimed disadvantage in the list of issues that had been prepared at a preliminary hearing. The tribunal had accepted that the claimant *did* do this in consequence of his stammer, but in part in reliance on the evidence of the reports produced to it, which were not available to the respondent at the time.

35. In response to ground 1, the tribunal identified the PCPs relied upon, and it had identified, and indeed accepted, at paragraphs [9] and following, that the substantial disadvantage that the claimant relied upon was that he did not give full answers to some questions at interview, because he restricted what he was saying by way of a coping strategy on account of his stammer. It was therefore not correct that it had failed to identify the substantial disadvantage on which he relied.

36. The tribunal then properly found that the respondent did not have actual or constructive knowledge of that disadvantage, because the claimant had never raised it, by contrast with having raised, when asked, the distinct disadvantage that he might need more time to give his answers, for which allowance was duly made. The claimant had never at the time raised an issue about being interviewed as such, other than asking to be allowed more time for answers, nor about the interview being conducted by video conferencing, nor about there being warm-up questions. His own case was that keeping answers short, or framing them differently, was a way of *avoiding* stammering. So it would not have been obvious that his stammer was the explanation for this.

37. Contrary to ground 2, submitted Mr Flanagan, it was not perverse to fail to find that the

respondent had actual or constructive knowledge of this particular disadvantage, given the fact that, on the relevant form, the claimant had identified one particular disadvantage when asked, but not this one, and that the nature of this disadvantage was that it related to a strategy to *avoid* stammering. The tribunal was entitled to conclude that the fact that the claimant did not give as full answers as the panel had hoped on some questions was not enough to put them on enquiry. There could be any number of explanations for that. The tribunal was entitled to consider the wider context of the claimant's general performance at work and the previous job application, in relation to which he had raised no such issue, when considering whether there was actual or constructive knowledge of the substantial disadvantage relied upon. In that regard it was common ground that all of the interviewers had worked with the claimant. The high threshold for a perversity challenge could not be surmounted.

38. Contrary to ground 3, it was not an error not to conclude that the claimant not giving as full answers to some questions as the panel expected should have put them on enquiry. As the discussion in **A Ltd v Z** explains, an employer is only under a duty to make such enquiries as are reasonable. A balance has to be struck between an employer not unreasonably ignoring a red flag, but conversely not placing a burden on it to make proactive enquiries that could not reasonably be expected and might risk being regarded as intrusive or presumptuous. How that balance was struck in the given case is fact sensitive and a matter for the appreciation of the tribunal.

39. In this case, given that the claimant was open about his stammer, and had freely made a statement about its impact on the interview form, the tribunal was entitled to conclude that the respondent could not reasonably be expected to enquire further. Interrupting the interview to ask why the claimant was not giving fuller answers would have risked disrupting it and subjecting the claimant to indignity. Use of the term "constructive" knowledge is a well-established and unobjectionable legal shorthand for the test the tribunal was required to apply. The discussion in paragraph [13] showed the tribunal considering facts and circumstances that could be considered relevant to both actual and constructive knowledge. This case was not like **Mallon**, where the applicant expressly

asserted a particular problem with the requirement to complete an online form, on account of disability, but the employer failed to take the reasonable step of telephoning him to find out more.

40. Contrary to ground 4, submitted Mr Flanagan, the other matters relating to the claimant's performance at work generally and at interview were properly relevant to a consideration of whether there was anything else that might give rise to the respondent having actual or constructive knowledge of this particular disadvantage, particularly bearing in mind that the interviewers all knew, and had worked with, the claimant. Evidence was also given about how the other candidates had performed at interview. The tribunal did not need specifically to refer to it at [13].

41. In response to ground 5, Mr Flanagan submitted that the PCPs were correctly identified and set out by the tribunal at [10/5] of its decision. PCPs 1 and 2, relating to the use of videoconferencing and the assessment of oral answers within that format, were inter-related. The claimant had conceded in evidence that he was not put to a disadvantage by the use of warm-up questions, as such. Given that, the tribunal could and should be forgiven for not addressing it separately in its conclusions.

42. As to grounds 6 and 7, Mr Flanagan submitted that the challenge mounted by ground 6 was an example of the sort of over-exacting critique of a tribunal's decision that was warned against in **Fuller v London Borough of Brent** [2011] ICR 806. The underlying complaint was that the claimant scored worse because of the weight attached to answers to questions given in a live oral interview. The facts that the live oral interview was also conducted by video conference and included some warm-up questions were ancillary to the fact that the format was that of an oral interview.

43. It was clear that the tribunal had accepted that, because of that way of assessing candidates, the claimant was subjected to unfavourable treatment – getting a lower score, and so not being appointed – because of something arising from his disability. The tribunal then plainly considered that this treatment, in terms of the particular mode and format, was justified. Reading [25] and [26] as a whole, the tribunal did not confine itself to considering the interview being by video conference,

as opposed to in person. It gave full and detailed reasons at [20] – [26] which covered all the specific elements of the justification test summarised in **Secretary of State for Defence v Elias** [2006] EWCA Civ 1293; [2006] 1 WLR 3213. It reached a permissible decision on the evidence available, particularly given the context and circumstances of the pandemic in which the interview occurred.

Discussion and Conclusions

44. The wider context for the claim to the tribunal, and now this appeal, is that the claimant says, and the tribunal accepted, that his stammer has two distinct effects on how he communicates orally, and in particular how he communicated in the live oral interview for this particular job. The first is that in oral questions and answers he may need more time to complete giving his answers. The second is what he called "restrictive mode", such that he may limit some answers, in order to avoid stammering. The complaints before the tribunal, as heard, related entirely to the second effect.

45. It appears to us clear that the tribunal understood what were the PCPs relied upon in this case. It set them out correctly in its summary of the issues at [10/5]. In some cases there may be a dispute about whether a claimed PCP was, in fact, applied; and/or about whether, even if the conduct said to be a PCP did occur, it amounted in law to a PCP. In the present case there were, plainly, no such issues. There was no dispute that the respondent had conducted live oral interviews of all the candidates, and the final scoring was determined, either wholly or mainly (it was agreed before us that nothing turned on which), by the assessment of their performances at interview. There was no dispute that the interviews were held by video conference, and no dispute that they started with some warm-up questions. Nor was there any dispute in this case that, in law, these things all amounted to PCPs. Given all of that, we do not think the tribunal erred by not stating expressly that it found that all the claimed PCPs were applied. It is plain and obvious from the decision that it did.

46. It appears to us that the tribunal also did identify the particular disadvantage to which the claimant claimed all of these PCPs put him, which it set out at [9] of its findings of fact, and went on

to discuss in the following paragraphs, being the impact on his answers of going into restrictive mode. It is true that the tribunal reached one overall conclusion in relation to the overall reasonable adjustments complaint, at [13], without there distinguishing between the three PCPs. But in this case they were all related; and, importantly, it was the same disadvantage that the claimant relied upon in relation to all three PCPs. The tribunal also plainly accepted that the claimant was in fact put to this disadvantage by comparison with the other candidates who were interviewed in the same way, who did not have his disability, because it accepted that, because he went into restrictive mode because of his disability, he gave less full answers to some questions, and this affected his score.

47. When it came to the question of constructive knowledge, what the tribunal then had to consider, for the purposes of the whole reasonable adjustment claim, and in respect of all three PCPs relied upon, was whether the respondent had actual or constructive knowledge of the common substantial disadvantage to which they were said to give rise, and, the tribunal found, did give rise.

48. We therefore conclude that the tribunal did identify the three PCPs relied upon, and plainly accepted that they factually applied and were, in law, PCPs. It also understood what was the substantial disadvantage relied upon, which was the same for all three PCPs, and which it found did arise, and it duly considered whether the respondent had actual or constructive knowledge of that disadvantage. Grounds 1 and 5 therefore fail.

49. We take next grounds 3 and 4.

50. We reject the contention that the tribunal failed properly to consider the appropriate legal test, and the particular wording of schedule 8 paragraph 20 of the **2010 Act**. The tribunal set out, precisely, the material words of the statute at paragraph 7 of the list of issues at [10]. The use of the term "constructive knowledge" as a shorthand for this sort of legal test is very familiar to lawyers. Though lawyers should always be alive to when they are using jargon which may need explaining to non-lawyers, it is a convenient way of capturing the test in two words. We are using it in this decision.

51. Nor did the tribunal err by not citing from one of the many authorities that have discussed the test. It might have been better had it, at least briefly, set out the main points emerging from those authorities. But the essential points, while conveniently summarised and restated in **A Ltd v Z**, are well-established and familiar, going back to authorities from the early days of domestic disability discrimination legislation, such as **Ridout v TC Group** [1998] IRLR 628. Further, what matters, ultimately, is whether the tribunal erred in substance in reaching its conclusions.

52. It was plainly an undisputed fact that the claimant did not at the time specifically refer to, or explain, the possibility that he might go into restrictive mode (whether or not using that term) or seek any adjustment in that regard, in the form relating to this job application. The focus of the claim, and of the tribunal's consideration, was on the issue of constructive knowledge. While the tribunal properly addressed the issue of actual knowledge as well, and found that this was absent, we agree with Mr Flanagan that paragraph [13], and the other earlier findings to which it refers, shows the tribunal engaging also with the substance of whether there was constructive knowledge in this case.

53. Contrary to ground 4, we do not agree that the tribunal improperly took account of irrelevant considerations in the course of paragraphs [12] and [13]. The evidence the tribunal had, and findings it made, about the claimant's general work performance and previous application and interview, were properly regarded as relevant. The tribunal was, entirely properly, considering whether there was anything in the wider background or context to show that the respondent had previously been made aware of the phenomenon of the claimant going into "restrictive mode" so as to give it actual knowledge of it, and/or whether there was something in this wider context or background that might have contributed to the argument that the interviewers should have had reason to suspect that this might be going on in the interview, and/or to make proactive enquiries about whether it may be.

54. Further, reading these passages as a whole, it seems to us clear that the tribunal's view, and conclusion, was that, while it accepted that going into restrictive mode was something that the

claimant did sometimes do on account of his disability, and did do during the course of this interview, he did not do so to such a severe extent, or so pervasively, that this should reasonably have alerted the interviewers to the fact that his disability might be affecting his answers in this particular way.

55. Thus the tribunal noted that the feedback from the panel was that "some of" his answers were "not fully expressed" [9], that he "continued to provide answers" and "when he was prompted for further information, he provided responses" [10]. He was not able to provide "fuller" answers [11]. The tribunal found that he "scored reasonably well", was "deemed to have passed" and was only one point behind the candidate above him [12]; and (though this is part of the later discussion of the section 15 complaint, at [21]), he "was able to engage with the process for the most part, and answered questions asked of him", he "only missed out … by one point" and "scored joint highest in at least one category". These findings are all of a piece. They paint a picture that, while the tribunal accepted that going into restrictive mode had *some* impact, its effect in the interview was not so dramatically obvious as to put the interviewers on enquiry.

56. The evidence as to the claimant's general performance at work was also properly relied upon by the tribunal as consistent with, and supporting, that picture. The tribunal was simply making the wider point that, while it accepted that the claimant had entered restrictive mode during the interview, there was no suggestion that his doing so in general had had such an impact on his performance at work, that the respondent should have, for that reason, appreciated that there might be a particular problem of this sort relating to his stammer, which was affecting his interview answers.

57. We do not agree that the tribunal engaged in any form of stereotyping. To the contrary, it did not assume that all persons who have a stammer will be affected by it in the same way, or to the same degree. It wholly accepted that the claimant's stammer did have the effect upon him at interview that he claimed. But it properly concluded, on the facts of this case, that he was not affected by it at interview to such a degree or extent that it put his interviewers on constructive notice of that effect.

58. We do not accept that the tribunal erred by failing to address whether the claimant's truncated answers should have reasonably put the panel on enquiry. The final matter in the list of features to which the tribunal referred in the course of [13] was that the claimant gave answers in interview which were "reasonably competent, albeit not as detailed as the panel expected". Perhaps it would have been better if the tribunal had spelled it out, but in the context of this section, and the wider findings, the clear and obvious sense to the reader is that the tribunal did not consider that the claimant's answers were so dramatically affected as to put his interviewers on enquiry that this might be because of another effect of his disability, distinct from the one that he had drawn to their attention.

59. Grounds 3 and 4 therefore also fail.

60. Turning to ground 2, it was not perverse, in light of the fact that the respondent knew that the claimant had a stammer, or what he put on his interview form, to nevertheless conclude that the respondent did not have actual or constructive knowledge of the substantial disadvantage on which he relied in his reasonable adjustment claims. The effect which he declared on the form was the fact that his stammer meant that he may require longer to answer questions in interview. He did not declare or describe the distinct effect that he might go into restrictive mode. Having regard to all the factual features on which it properly drew, the tribunal's findings and conclusions were not contradictory, were conclusions that it was entitled to reach, and were not perverse. Ground 2 fails.

61. We turn to ground 6. The factual premise of the section 15 complaint was straightforward. The claimant did not get the job. He did not get the job because of his scoring, as he scored third. His score was (at least mainly, if not entirely) a reflection of how he performed at interview. His case, which the tribunal accepted, was that this was something that arose in consequence of his disability, because he went into restrictive mode because of his disability, and his doing so led to him giving lower-scoring answers. There was, thus, the requisite chain of causation between his not getting the job, and his disability. All of this was accepted by the tribunal. The matter therefore

turned on whether the respondent could meet the justification test in section 15(1)(b) of the **2010 Act**.

62. For the purposes of the section 15 complaint the unfavourable treatment was, as correctly identified in the list of issues, put shortly, not giving the claimant the job. But what the tribunal had to consider was whether that was a proportionate means of fulfilling the respondent's legitimate aim, having regard to the process by which the respondent reached that decision, and its impact. The claimant was not complaining, as such, that the respondent's approach was to give the two jobs to the two people who scored highest. What was at issue was the underlying method of assessment which resulted in the scores, and whether *that* was a proportionate means of deciding who to appoint, taking account of the discriminatory impact of that particular method of assessment on the claimant.

63. What the tribunal needed to consider in this case, therefore, was whether an assessment exercise centred on performance in oral questions and answers at a live interview, as opposed to other modes of testing, such as written examination, or online testing, was justified. It was also part of the claimant's case that, for him, his tendency to adopt restrictive mode in some answers was exacerbated by that live oral interview being conducted by video conference rather than in person, and by there being some warm-up questions before the questions proper began. But, as we have already noted, these features were ancillary to the underlying mode of testing being live oral interview.

64. It appears to us that the tribunal plainly understood all of this, and reading its decision fairly and as a whole, did engage with it when considering the justification defence, over the course of paragraphs [20] to [25]. We do not read paragraphs [20] and [21] as being focussed purely on the fact the interviews were held by video conference, without giving consideration to the use of a live oral interview, as such. The discussion there is about how, overall, the claimant performed at interview, but with the tribunal also taking on board that it was held by video conference. The tribunal refers also at [23] to the use of "a standard interview process but over videoconferencing". In the course of this passage, in particular at [25], it plainly considers the justification of using a live oral

interview, as such, having regard to its finding that oral communication was one of the skills needed for the job, and which was being tested, as well as considering the justification for conducting the live oral interviews by the method of video conferencing, in the context of the pandemic.

65. While the tribunal did not specifically, anywhere in this discussion, refer to the fact that there were warm-up questions, we do not consider that this bespeaks an error on its part. That is for the following reasons. First, being asked warm-up questions was simply relied upon as something exacerbating the impact on the claimant of the oral question and answer format, on account of his disability, and the potential impact of his going into restrictive mode. Secondly, the tribunal plainly considered the overall interview process and methodology, which was what the single section 15 complaint required it to do. The tribunal was also plainly aware that there were warm up questions, and it referred at [23] to what it called a "standard interview process but over video conferencing." It was, on a fair reading, looking at the process as a whole.

66. Finally, in relation to ground 7, the tribunal, as part of its application of the justification test, properly considered, in context, the degree of discriminatory impact which the method of assessment had on the claimant, and how far it could be said to have been reasonably necessary to adopt the particular methodology. Specifically, in relation to the decision to hold the interviews by video conferencing, the context of the pandemic, closure of the respondent's offices, and face to face interviews not being possible, were plainly relevant considerations; and the tribunal also properly took into account, its finding at [22] that these were business-critical roles that needed to be filled.

67. Grounds 6 and 7 therefore also fail.

Outcome

68. The claimant, who has had a successful career with the respondent, came very close to getting this particular promotion. The tribunal found that his performance at interview was, to some extent, adversely affected by his disability. However, the requirement for what the tribunal, and we, have

called constructive knowledge of the substantial disadvantage, is an essential element of a complaint of failure to comply with the duty of reasonable adjustment, which the tribunal properly found was not met on the facts of this case. Section 15 allows for a defence of justification, which the tribunal properly found was satisfied on the facts of this case.

69. The appeal is therefore dismissed.