Case No: 1403005/2020

EMPLOYMENT TRIBUNALS

Claimant: F

Respondent: Met Office for and on behalf of the Secretary of State for Business, Energy and Industrial Strategy of the United Kingdom of Great Britain and Northern Ireland.

Heard at: Exeter **On:** 13-16 September 2021

Before: Employment Judge P S L Housego
Tribunal Member R A Clarke
Tribunal Member K J Sleeth

Representation

Claimant: In person
Respondent: Robin Moira White, of Counsel, instructed Laura Coombs, solicitor, of Foot Anstey LLP

JUDGMENT

The unanimous decision of the Tribunal is that Respondent discriminated against the Claimant by reason of disability.

REASONS

Summary

1. F has complex PTSD. It can be triggered by exams, which F finds very hard to sit. The Met Office (as the Respondent is referred to in this judgment) has always known this, and has made adjustments. F narrowly failed to pass the final assessment (AMF). F wanted just to re-do the few points where F had not been passed as competent. The Met Office did not agree. They called a meeting at which F was dismissed. They say that while there were some procedural failings in the process those were unconnected with disability, and there was no other possible outcome to the impasse they say they faced. The Claimant says that their approach and decision was all connected with, and because of, F's disability and was discriminatory. The Tribunal found that the chain of events was such that F had shown facts from which disability discrimination could be inferred, and that the Met Office had not shown that it

was otherwise.

Law

2. F was employed for less than 2 years and so cannot claim unfair dismissal.

3. The claim of disability discrimination relies on S15 of the Equality Act 2010, for which no comparator is needed:

> *"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."*

4. F also says that the Respondent did not make reasonable adjustments:

> *"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.*
>
> *(4) The second requirement is a requirement, where a physical feature 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.*
>
> *(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial*

disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(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.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

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.

…"

5. F also claims indirect disability discrimination:

"19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

6. The particulars of all these claims were set out in a Case Management Order of 21 January 2021. They are:

"1. (a time point not pursued)

2. Discrimination Arising from Disability (s15 Equality Act 2010)

2.1 Did the respondent treat the claimant unfavourably by:
2.1.1 failing to allow F to re-sit the AMF assessment; and
2.1.2 failing to adhere to the correct procedures in the Probation Policy, in particular not adhering to Stage 2 and not implementing Stage 3; and
2.1.3 dismissing F.

2.2 Did the following things arise in consequence of the claimant's disability? The claimant's case is that they failed the relevant examinations because of F's disability, in particular the requirement to answer with confidence.

2.3 Was the unfavourable treatment because of any of these things which

are said to have arisen from the claimant's disability?

2.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were to ensure that its staff are fully competent to meet their required standards, because the services provided by the respondent can be used in critical situations and impact on the health and safety of others.

2.5 The Tribunal will decide in particular:

2.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;
2.5.2 Could something less discriminatory have been done instead;
2.5.3 How should the needs of the claimant and the respondent be balanced?

2.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? If so, from what date?

3. Indirect Disability Discrimination (s 19 Equality Act 2010)

3.1 A "PCP" is a provision, criterion or practice. Did the Respondent have or apply the following PCP, namely requiring candidates to answer examination questions with confidence?

3.2 Did the Respondent apply the PCP to the claimant?

3.3 Did the Respondent apply the PCP to persons with whom the claimant did not share the same protected characteristic, or would it have done so?

3.4 Did the PCP put persons with whom the claimant shared the characteristic, at a particular disadvantage when compared with persons with whom the claimant did not share the characteristic?

3.5 Did the PCP put the claimant personally at that disadvantage in that F failed a relevant examination because F was unable to answer with confidence?

3.6 Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were to ensure that its staff are fully competent to meet their required standards, because the services provided by the respondent can be used in critical situations and impact on the health and safety of others.

3.7 The Tribunal will decide in particular:

3.7.1 Was the PCP an appropriate and reasonably necessary way to achieve those aims;
3.7.2 Could something less discriminatory have been done instead;
3.7.3 How should the needs of the claimant and the respondent be balanced?

4. Reasonable Adjustments (ss 20 and 21 Equality Act 2010)

4.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? If so from what date?

4.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

4.2.1 PCP 1: refusing to allow candidates to re-sit the AMF examination; and
4.2.2 PCP 2: not allowing candidates to refer to their notes; and
4.2.3 PCP 3: dismissing candidates who fail the AMF examination?

4.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that PCP 1 the claimant was not afforded the opportunity to re-sit the AMF examination; PCP 2 the claimant was not allowed to refer to notes during the examination; and PCP 3 the claimant was dismissed?

4.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

4.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The claimant suggests:

4.5.1 PCP 1 allowing F to re-sit the AMF examination; and
4.5.2 PCP 2 allowing F to refer to notes; and
4.5.3 PCP 3 allowing the claimant to be redeployed rather than dismissed.

4.6 Was it reasonable for the respondent to have to take those steps and when?

4.7 Did the respondent fail to take those steps?"

7. The Claimant must provide evidence from which this Tribunal might find disability discrimination. If F does so, it is for the Respondent to show that the reason was not, even in part, to do with disability[1]. The question of whether an adjustment is or is not reasonable is a value judgment for which there is no burden or standard of proof. The same applies when deciding whether a particular matter is a substantial disadvantage to a disabled person by reason of a provision criterion or practice, and whether it is a proportionate means of achieving a legitimate aim.

Evidence

8. The Tribunal heard oral evidence from F, from a colleague, Benjamin Brooks, and from a trade union official Debbie O'Sullivan. Another colleague provided a witness statement but did not appear, and so the Tribunal accorded it little weight. For the Met Office the Tribunal heard oral evidence from Andrew Bowden (F's line manager, who presented the management case at the hearing at which F was dismissed), Craig Langley (who chaired the hearing at which F was dismissed), Graham Leitch (Andrew Bowden's line

[1] The law about burden of proof is comprehensively set out in Royal Mail Group Ltd v Efobi [2021] UKSC 33 and the Tribunal applied the approach there prescribed.

manager), Joanna Harris (of human resources) and from Graham Mallin (who took the appeal against dismissal). There was an agreed bundle of documents of over 500 pages and an agreed chronology.

The hearing

9. The hearing was in person, not by cvp. F was accompanied on two days by Benjamin Brooks. F found the hearing very difficult to cope with, and the Tribunal had to make substantial adjustments. In doing so, the Tribunal had the full cooperation of Counsel and of those instructing her, and the Tribunal records its gratitude for, and appreciation of, the approach taken to those adjustments, which was to the highest professional standard. There were breaks more often than usual. Counsel set out the areas about which there were intended to be questions, and F was given time to prepare what F wanted to say about those areas, with only limited follow up questions. The Tribunal had to establish the areas of concern of F, and then formulate and ask open questions of several of the Met Office's witnesses. Counsel was content that the way this was done was impartial. One of the Met Office witnesses was unable to attend the Tribunal for health reasons, but able to give evidence remotely. The Met Office's solicitor provided the facility to do so in their office (next door to the Tribunal building), to which the Tribunal removed for the taking of that evidence. F consented, commenting that given the adjustments made for F it was only right that consent was given. The Tribunal made it clear that it would not consider there to be technical objections to submissions on the basis that the case was not put to F: in practice all relevant questions were put. With the Tribunal's full approval and encouragement, submissions were presented in written form, and briefly supplemented orally. Judgment was reserved.

Submissions

10. Counsel focussed on the need to concentrate on the clear list of issues, and the need not to allow the case to be broadened by reason of evidence about other matters to be considered: the Respondent had to be able to prepare for the case it was to meet. Plainly there had been some failings – it was candidly acknowledged - and they would be addressed. But an unfair dismissal (if it was such) was not disability discrimination because it was unfair. There had been a genuine belief that F was refusing to resit the AMF and that meant the Met Office reason for dismissal was nothing to do with disability. It was accepted by F that the AMF had to be passed, and it had not been. This was an oral appraisal. As it had been a reasonable adjustment to move to an oral assessment from a written test, how could a reasonable adjustment be a detriment? The AMF was entirely oral. There could be no *"stop the clock"* adjustment (as had been done in written papers) in what had to be a real time assessment (for obvious reasons). No occupational health report or medical letter had raised any issue about the AMF, and nor had F done so, prior to taking it. The AMF was externally validated, so it was not that the Met Office could depart from standards for F.

11. F set out the Met Office case, and then set out F's own case, referring to the evidence and time line. The Tribunal found that F was, in substance, right, and so the import of F's submissions appears in the following findings of fact and conclusions.

Background – uncontentious facts

12. The Met Office needs no introduction. F was employed at its head office in Exeter, which is large. F had come from Australia to work as a trainee meteorologist. F is a scientist and had previously been working towards a PhD. The Met Office has a training academy which is separate from its operations. There is a probation policy which applies throughout training, academic and practical. After the academic training ends there is practical training, which culminates in an assessment – the Aeronautical Meteorological Forecaster (AMF) test. The trainee doubles up with a forecaster for a month, and then undertakes two shifts observed by an assessor. There are so many capabilities to be assessed that it takes two shifts to assess them all. The assessment is on an electronic document, with a series of capabilities to be assessed, all pre populated with red crosses, which when clicked turn to green ticks. Some reference to notes is permissible, and as forecasters do not work alone, some help from the assessor is acceptable. Forecasters are expected to be confident in their work, and lack of confidence can be a concern if the test is not passed, but it is not an assessed competence, so that if all the crosses are turned to ticks the assessment is passed, even for those less confident. It costs over £20,000 to train a meteorologist, so the emphasis is on helping people to pass. A failure is more a case of not yet passing rather than a reason to dismiss, unless it is thought that the trainee will be unlikely ever to meet the grade. This happens seldom. Some people go through the AMF process in a few months, for others it may take up to a couple of years.

Policies

13. For trainee meteorologists, the probation lasts for the whole training period (56). There is a process set out if improvement is required (57). First there is 4.1.1 – Informal Improvement steps. This is usually an informal improvement plan.

14. If performance does not improve, 4.1.3 sets out that there may be a **Formal Improvement Notice** [emphasis in original].

15. If the trainee does not improve sufficiently during the period of that Improvement Notice than at its end, or during it, the manager may move to a Formal Written Notice (4.2.1). This states:

> *"Your 1RM will meet with you to advise you that insufficient notice has been made and they will issue you with a* ***Formal Written Notice*** [emphasis in original]*. A Formal Improvement Plan will be put in place to help you achieve the required standard, and a monitoring period set (usually for a maximum period of 1 month)".* (In this case David Snook, but the function was being exercised by Andy Bowden, 2RM, 1RM being line manager and 2RM being the manager above.)

16. At 4.2.3 is stated that if performance does not improve: *"Your 1RM will invite you to another formal meeting to discuss the situation. Your 1RM may then find it necessary to move to the next formal step in the procedure, which is a* ***hearing****."* [Emphasis in original.]

17. The probation procedure (62-64) states that it applies throughout training. It states, in relation to such a hearing, if the hearing decides on dismissal:

> *"The panel will consider whether to offer you redeployment. The option of redeployment requires there to be an existing vacancy for which you are a suitable candidate, based on the panel's assessment of your skills, experience and commitment."*

This was not followed in practice, and had not been for some years, according to Debbie O'Sullivan. Ms O'Sullivan said that human resources dealt with all issues of redeployment. Craig Langley and Graham Mallin said the same. The Tribunal so finds.

18. The AMF policy (103) stated:

> *"If there are areas where an individual cannot demonstrate the required competence, they will undergo further training and development."*

The Tribunal noted the mandatory nature of this – **"will"** undergo further training and development.

19. The probation policy states that any earlier warning may *"be taken into account"* in the practical stage even if that earlier warning was in the academic stage (62).

Facts found

20. At the very beginning F told the Met Office about F's difficulty with exams. That difficulty is surmountable for F, as F's academic achievements demonstrate. It was largely the result of an event in 2012, so was not affecting earlier academic achievements. F's performance in the Met Office academy was satisfactory, but F narrowly failed the test before the AMF process was to start. Adjustments were made. F was allowed a *"stop the clock"* adjustment, which enabled F to leave an exam situation to recover composure, and resume when F felt able, with the time in between not counted towards the time for the exam. For the last exam F was allowed part oral examination rather than written.

21. At one point (28 March 2019, page 186) F was given an informal warning, which it was stated could be escalated to the formal stage at any point in F's probation. This was during the academic stage, which was passed – F went on to the practical stage.

22. F's practical training passed without serious incident. On 05 February 2020 F's 1RM, David Snook, emailed the trained OpMets with whom F worked (154). The Tribunal was not shown any response indicating serious concern about F's performance.

23. F worked about 90 shifts with about 19 colleagues. There are daily logs and they do not reveal any great issue with F's work. On one occasion in 20 February 2020 F was left without a qualified colleague (although still supervised by an operational meteorologist) and performed well, such that F

(among others) were given an award.

24. For the AMF process at the end of the practical training F did not request any alteration or reasonable adjustments. There had been occupational health reports and reports from F's GP, which did not refer to any need to do so. F's first shift assessment (there are always two shifts assessed) was with a person with whom F felt comfortable, and there were no problems with it.

25. On the second assessment, (12 March 2020, 188 *et seq*) F was disconcerted by the assessor being a different person. The Tribunal finds that this was allowed within the process, but that F was uncomfortable about it, as F had got on well with the first assessor. Further, the other person in F's two person team that shift was someone who had been on the same academic training course as F, and who had gone through the AMF process swiftly. F found this uncomfortable, in principle, and because F had found reassuring the fact that on the first assessment F's colleague had been very experienced and supportive (Matt Field). The second assessor, Tony Wisson, had no knowledge that F had any issue with exams. After the second shift three competencies remained to be ticked off, of about 65 (166).

26. Tony Wisson unticked one of the competencies, which is not within policy, but understandable if he felt that competency was not demonstrated on the second shift he was assessing. This was about use of model data. F felt this was unfair, because F said this had been done, but he had not noticed.

27. One of the remaining issues was about fog. F pointed out that there was in the assessment a positive reference to the assessment of fog in another section, so this was not accurate. The third was about the *"Spanish plume"* which is a meteorological event which occurs now and then, but had not occurred in either assessment. F said this point was not about assessment of F's work in practice so there was no reason why F could not demonstrate knowledge of this orally, outside an assessed shift. F said that he (Tony Wisson) had stopped F referring to notes, when this was an open book assessment, so it was permitted. (Mr Wisson's view is that limited reference is acceptable, but excessive reference was a contra indicator to competence.)

28. Tony Wisson's assessment for the shift of 12 March 2020 (194) was:

> *"Although I'm satisfied you met most of the outstanding criteria today, I often had to coach you into giving the right answer, sometimes to a point when it fell outside of my role as an assessor. Going forward, in addition to addressing the outstanding criteria, I think that more time doubled up followed by a more holistic assessment would be beneficial to increase your confidence get you into a more comfortable position to go solo."*

29. (Tony Wisson's later assessment for the panel which dismissed F was *"I did not know anything about [F] or [F's] situation before the AMF on 12th March and was not informed that any adjustments were required in advance. From what I observed on the day [F] was able to execute a business-as-usual shift during quiet weather. I have not observed [F] in a severe weather event so cannot gauge how much support [F] needs. Regarding the knowledge requirement of the ACs I think the best thing is to refer to the observation reporting I also gave a suggestion of how to take things forward."*)

30. At about this point, F's line manager, David Snook, had some health issues, and while he remained F's line manager for meteorological matters, Andy Bowden (F's 2RM) took over the other management of F.

31. There were discussions about what to do next. F wanted simply to tick off what was left. Human resources was involved, in the person of Linda Caley. The witness statement of Andy Bowden states that there were meetings on 13 and 19 March 2020. F says this was not so, and that F was not at work on 19th. No evidence was produced about F's attendance at work on 19th. There are file notes (203/204 and 237) from Linda Caley: one refers to 13th the other to 19th, but it is apparent that they are the same meeting as the notes are in the same terms, and there is no progression from one to the other. The note of 19th does not refer to a meeting on 13th. There was but one meeting, on 13th. No decisions were taken at it. F asked to retake only the few sections remaining. This was not agreed.

32. On 17 March 2020 F sent a highly charged email about F's mental health (200). The recipient emailed someone else about it stating that s/he felt unqualified to deal with it, but that it felt like emotional blackmail.

33. Then there was Covid lockdown, from 23rd. F became unwell, and sent emails to colleagues about the situation. F's email access was disabled as they were emotive.

34. On 24 March 2020 F attempted suicide. It was in the local news. As this is a public document no more detail is given, but it is an important part of the narrative as matters moved swiftly afterwards.

35. It was then decided that there would be a hearing, and the formal stage omitted. It is clear to the Tribunal that this was a decision made by human resources. Andy Bowden, Craig Langley and Graham Mallin were all led by human resources rather than advised by them. The reasons for this conclusion are set out below. No rationale for so doing had been advanced, other than (retrospectively) that it was an impasse as F was said to be refusing to resit the assessment.

36. That human resources was driving the process is first apparent from an email of 03 April 2020 (227) from Joanna Harris of human resources (who had taken over from Linda Caley in late March 2020) to Cheryl Shearer, who was higher up the management chain in human resources. This stated:

> *"F is now in [F's] OJT and has failed the assessment to permit [F] to go solo and be signed off as having finished … probation and become a full Op Met. Hence, the next stage would be formal warning and formal improvement plan. However, I do want to consider [F] going back to the hearing panel to decide how best to proceed and would like your thoughts on this…. I am comfortable that there is sufficient reason to refer to the hearing they will have the formal warning and improvement plan as an option, so we are not removing that as an option but we are technically jumping a step. … There is serious concern about the likelihood of [F] being able to consistently perform at the required level and this is the aim of the probation policy."*

37. This has multiple inaccuracies:

37.1. F had not *"failed"*. That implies permanence. F had very nearly passed. Resits are routine for those who nearly pass. The policy *requires* more training and development in this circumstance. The next step would not be a formal warning but training. It would not usually be a formal warning. The AMF policy cited above specifically says otherwise – there would be encouragement and help.

37.2. Joanna Harris said in her oral evidence that the panel was briefed as to these options. Craig Langley in his oral evidence said that he had no such briefing. There is no reason to doubt his evidence. The panel was never told they might revert to a formal notice. Indeed, the policy is only to have a hearing once a trainee has failed to improve *after* getting a formal improvement notice.

37.3. Nowhere in the assessment of Tony Wisson is there any indication of *"serious concern"* that F might not make the grade. Nor is there any assessment during F's training of concern about F's work. F had worked over 90 shifts with some 19 people, and the daily shift log did not reveal any substantial inadequacy. No such evidence came from the email of 20 February 2020. No such evidence was put before the hearing panel, or to this Tribunal.

38. By letter of 08 April 2020 (239) F was called to a hearing, the reason given being *"Following your recent unsuccessful attempt to pass your AMF assessment".* This was only 3 weeks after the assessment of 12 March 2020. No one had been at the workplace since lockdown on 23 March 2020, so there was only about 10 days to discuss matters, and nothing happened in between, save F's breakdown. There was only one inconsequential meeting on 13 March 2020, at which F had expressed the preference to be assessed only on the 2, or 3, remaining competencies. The calling of the hearing was very hasty, and directly conflicts with the AMF policy of encouragement.

39. It must be, and the Tribunal so finds, that before the hearing was called Linda Caley had advised Andy Bowden that F should be dismissed (321(d), 30 April 2020), because Joanna Harris said that she had taken over from Linda Caley in late March 2020, and the hearing was called in April 2020.

40. Joanna Harris said that if the panel decided to dismiss F they would be able also to consider redeployment, and that a list of vacancies was attached to the briefing pack to assist them in so considering. Craig Langley, in his oral evidence said that he had no idea that he could consider redeployment – he said that the hearing was the first time he had heard that, and, he said, it would be a matter for human resources, not his panel. He said that the first time he had seen the list of vacancies was while giving his oral evidence to the Tribunal. There is no reason to doubt him in either regard, particularly given the oral evidence of Debbie O'Sullivan that the policy requiring panels to consider redeployment had not been followed for some years, and that it was human resources which dealt with redeployment.

41. The notes of the appeal hearing on 27 May 2020 (421) state at 5.4:

"GM asked whether the panel had discussed [F]'s opportunity to retake the AMF. CL said no, as neither side had raised it or presented evidence about it. The panel therefore had no view on it."

This is somewhat remarkable, since the whole point was that F was said to have failed and refused to resit. Not passing the first time was no reason for the hearing. It happens and people resit as a matter of routine. The dismissing panel had no view on the central issue before them.

42. The letter of dismissal (312-314) of 23 April 2020 stated (inter alia):

"You are required to pass your course and you have been unable to do this, even with reasonable adjustments to support you."

This is inaccurate: the Met Office's case to this Tribunal is that F had no adjustment and needed none, as the way the assessment was conducted (for everyone) accorded with the adjustment made for written examinations.

43. It also said:

"You questioned why expressing an interest in other roles was not seen positively. Your contract states that you cannot consider apply for other roles until 24 months after qualifying. Therefore your interest before qualifying therefore could be perceived as a lack of commitment to the role."

There was a contractual requirement not to leave the training programme, but the Met Office had (previously) concluded that it was not acceptable to preclude people from applying for other posts within the Met Office while training. It was not a reason to dismiss. F told the Tribunal F had hoped to have two roles within the Met Office, one scientific, one as a Op Met. Given that F had the ability to work towards a PhD there is no reason to doubt that F might be able to do so. F had so proposed - it is referred to in a later internal human resources email of 30 April 2020 (321(c)).

44. In the dismissal letter there were other criticisms of F: not completing a training log and leaving a workbench. It is not apparent why these were considered relevant to a decision to dismiss F.

45. The letter made no reference to redeployment. In controverting F's case that F was the not the only person dismissed as a trainee meteorologist in the recent past, the Met Office produced dismissal letters for 2 others (anonymised).

46. One is dated 25 August 2017 (91-93). It was chaired by Craig Langley, as was the panel for F. The person was not able to produce the work in the timescales required. That person was dismissed from her post. The letter went on:

"Your contractual notice is five weeks, but we would be very pleased to see you remain at the Met office so will we will extend that to 3 months'

notice, with dismissal effective from 22/11/17. We hope you will be able to successfully apply for a new role to make good use of your sound meteorological knowledge and skills within the three months."

47. The other is dated 17 February 2020 (160/161). This person was described as repeatedly failing to meet required assessment scores. Resits were not thought likely to lead to passing. That person's work in class was slow, and the person was adverse to team working. The person was not suitable to be an Op Met Technician [a lower role than an Op Met] because of these concerns. The next paragraph states:

"Nevertheless, we noted your dedication to the Met Office and your hard work whilst on the OMFC [the training course]*. We do believe that you have the knowledge and skills that are of use to the Met Office if a suitable vacancy is available. We therefore recommend that you meet with your line manager and an HR representative during your notice period to discuss the potential for you applying for an alternative vacancy."*

48. The contrast between these two letters and that sent to F is stark (and Craig Langley was the person who chaired one of those panels). It is especially stark as it was known that F was actively seeking other roles within the Met Office.

49. Asked about the letter of dismissal, Craig Langley's oral evidence was that it was prepared by human resources (Ellie Green), approved by the co signatory Tracey Marsh (described in the letter as *"Senior HR Business Partner"*) and then signed by him. That accords with the rest of the evidence. This all indicates that it was human resources directing the process.

50. There are then a series of internal emails (321(a) – (i)) in late April 2020, that is, within the notice period. They start on 27 April 2020 when a human resources associate, Sarah Martin, emailed the human resources team generically:

"One of the Science teams wanted to interview [F] for a Defence role which was put on hold, we are now in a position to move forwards and I am querying whether I/they can contact [F]?"

51. The reply, to which the Tribunal attaches importance, was on 27 April 2020 from Ellie Green (321(a)). Ellie Green was the human resources support to the dismissal hearing and to the appeal. It states:

"That is interesting, [F] is set to be a leaver with 5 weeks notice and ***we did not allow [F] to apply for other positions****. I believe that if [F] appealed and was reinstated [F] would not be able to move for 24 months so cant see how [F] can apply…"* [Emphasis added.]

The word *"we"* is significant, as if it were the panel's decision it would say *"they"* or *"the panel"*. The *"we"* is, and can only be, human resources. Further, Craig Langley and Andy Bowden were crystal clear that redeployment was a matter for human resources, not for them, as was Debbie O'Sullivan. There is no reason to doubt that evidence.

52. Ellie Green further responded on 29 April 2020 to say that she was not sure F could apply, as F's contract said F could not do so within 24 months of completing training (321(h)). This was incorrect. While the contracts said something of the sort, the Met Office had decided that this was not enforceable (Joanna Harris set this out for Ellie Green by email on 30 April 2020 (321(e)). Secondly, the point of the clause was to get their money's worth from the £20,000 or so cost of training an Op Met. It cannot be relevant to someone who is said to have failed the training. It was not the policy for the other two who failed their training, who were actively assisted in getting other employment with the Met Office.

53. On 30 April 2020 Linda Caley then emailed Joanna Harris, Ellie Green and the communal human resources email address:

> *"[F] was (before [F's] current problems blew up) was already saying [F] did not like being a trainee OpMet, and … was losing the qualification skills that [F] had from [F's] PhD. [F] was being so disruptive my advice to Andy Bowden was that if [F] is expressing an interest in applying for other jobs* ***I would let [F] go****.* [Emphasis added.] *[F] was holding a place as a trainee OpMet that could be given to someone else who is interested becoming a trainee OpMet and maybe they will pass in a reasonable time. [F] was not performing either."*

54. It was Ellie Green who was advising the appeal panel, having advised the dismissing panel. The steer they were to get is clear from this email. It is also clear from this email that in March, when Linda Caley was advising Andy Bowden, she advised him to secure the dismissal of F.

55. F appealed. F set out preferences for possible outcomes. Those did not include a full retake, but there is nothing in the appeal to suggest that this was a *"take or leave it"* approach to possible outcomes.

56. Before the appeal hearing there was a series of emails (407-410). It was at this point that Graeme Leitch became involved. The matter of a possible retake was raised. *"Was [F] permitted a retake?"* was answered by Andy Bowden (410) *"We offer them 2 assessments [meaning one assessment over two shifts], and if they haven't passed we have a discussion between managers, trainers and assessors and decide if another assessment is worth doing or not?"* Graeme Leitch (408, 22 May 2020) asked Andy Bowden to be more specific – to say *"We offer them…".* Later that day Andy Bowden gave an answer to the question *"Was a retake arranged for [F]?"* with *"[F] was offered but was not interested as [F] felt it wasn't relevant with [F's] technical knowledge as a Meteorologist"…* and copied it to Graeme Leitch. The email chain ends (at least as far as was produced to the Tribunal) with Graeme Leitch emailing Andy Bowden and Alison Black (who ran the AMF) *"I still think we need a direct answer to "Was [F] permitted a retake"?"* The Tribunal finds that F was not. The appeal panel was not shown this email exchange. What it was shown, after the hearing, is set out below.

57. Graeme Leitch was not involved in the decisions. It does not appear that there was ever an answer to this question, and Craig Langley's panel did not explore the matter, and nor did that of Graham Mallin. It is clear that there never was any requirement made of F to sit the AMF again, and while F

preferred not to do, F did not refuse to resit it. Indeed, F could not refuse as F was never asked to do so. F only ever expressed a preference not to do so.

58. Graham Mallin chaired the appeal. It was heard on 27 May 2020. F's employment ended the following day, 28 May 2020.

59. The notes of the hearing contain, at 3.8 (420) *"[F] said [F] thought it would be reasonable to have more than one opportunity to take the AMF…"* Debbie O'Sullivan was clear that F had said in that hearing that F was prepared to retake it. Graham Mallin said he could not recall it, and when pressed said it had not been said. Debbie O'Sullivan's evidence was given with great clarity, and with this contemporaneous support is found by this Tribunal to be accurate.

60. Subsequent to the hearing on 05 June 2020 at 10:18 Ellie Green emailed Graham Mallin, copied to Linda Caley:

> *"I have heard that from Andy [Bowden] and he said that Lin Caley, ERA, was a witness. I have spoken to Lin this morning and she confirmed that they met with [F] together and explained that [F] had failed the AMF and they offered [F] a resit which they could arrange for approx. one month later. Both said that [F] declined and asked to do questions failed and wanted it done much sooner than the months wait."*

61. Linda Caley emailed Ellie Green the same day (10:54) as Ellie Green had asked (424):

> *"Andy Bowden and I met with [F] informally when we heard that [F] had not successfully completed … AMF assessment.*
>
> *[F] was upset and said that [F] had only failed in 2 areas and wanted to retake those 2 areas. Both Andy and I explained that [F] couldn't just take the 2 areas, it had to be a full resit of the whole AMF assessment.*
>
> *We wanted to help [F] get through this and suggested an improvement plan for a month…*
>
> *[F] was not happy with this and demanded that [F] retake only the 2 areas of the AMF…*
>
> *Andy and I explained to [F] that was not possible, it would need to be the whole AMF assessment that [F] re-sat and it would take time to re-organise."*

62. It is apparent that Ellie Green's email says more than Linda Caley said to her, and that Andy Bowden was not asked at all.

63. F was not shown that correspondence. Plainly this was not right. The Tribunal noted that this was again Ellie Green corresponding, and what was reported was hearsay. The Tribunal finds that it was inaccurate: F had never refused to retake the AMF.

64. The appeal decision was dated 10 June 2020 (429-430). Graham Mallin telephoned F to read the panel decision. When he said that [F] had refused to retake the whole AMF, F became hysterical and screamed down the phone *"I never said that!"* (This was the evidence of Debbie O'Sullivan (who was with [F] at the time) and of Graham Mallin as well as of F.) The Tribunal finds that that was a truthful response by F.

Conclusions

65. At the beginning F told the Met Office that F had issues over exams. The Met Office agree that F had a disability and that they have always known this. This was addressed to everyone's satisfaction in the academic stage. During that stage there had been an informal stage to the competency process, but F had passed the exam in respect of which it was issued. Then there was the practical stage. As set out above F worked satisfactorily throughout that. F then did not pass the AMF. Tony Wisson's assessment does not give any hint that he thought F was incapable of doing so. One would expect that F would be helped to pass the AMF, as that was the Met Office ethos, F was not too far away, and the Met Office did not like wasting the £20,000 or so it cost to train a meteorologist.

66. F then had to be at home because of Covid. F was not allowed to work at home, as did others, and was placed on sick leave. F had a preference for just redoing the few areas it was said were not achieved. On the key finding of fact – had F refused to take the AMF – the Tribunal finds, with no difficulty in doing so, that F did not, for the following reasons:

66.1. F always said re-marking only those items was F's preference.

66.2. In the appeal [F] said there were 3 options, and retaking all was not one: but there was no reason why the appeal panel should not have come up with a fourth.

66.3. There is absolutely no contemporaneous evidence that F refused to retake the whole AMF. This is a quasi governmental body with thousands of employees, a clear management structure, with experienced managers and a substantial human resources department. It is simply not credible that they were all so lackadaisical that none of them prepared meeting notes and failed to follow up with emails pointing out that it was a requirement to resit the AMF. It is incomprehensible that Joanna Harris should continue with a process which led to F being dismissed, when there was no evidence on file of anything relevant, simply because on handing over to her Linda Caley had told her so, without seeking to remedy that evidential deficit. Human resources is about process above all.

66.4. The question was not put to F in either hearing.

66.5. The notes of the appeal meeting (420) clearly state that F had stated to Graham Mallin that it was reasonable to have more than one attempt to take the AMF.

66.6. F's reaction when told that F had refused to take it was immediate,

vehement and is not in doubt. F had never refused to do so.

66.7. They had never asked F to do so. All the Met Office witnesses say is that they offered a new AMF to F.

66.8. F had reason to think they might say yes to ticking off the remaining competencies – they had before in the academic stage and the person who wrote the AMF procedures had said that this was permissible. (When this was put to Mr Mallin, he said that would only be for someone who was engaging had nearly passed before. It is hard to see how this differs from F, save that F nearly passed first time.)

66.9. The basis of the belief was that Andy Bowden and Linda Caley said it was so. For Mr Mallin this was in emails before and after the hearing (407 *et seq*), which were not shown to F. These start off by saying that a new AMF was not arranged, then that it was offered but that F thought it was not necessary. They did not, in fact, say at the time that F had refused to retake the AMF. It was Ellie Green who relayed this hearsay, after an email exchange which clearly reads as a sequence to get to the desired answer, and (as set out above) report more than was written to her. The emails at 407-410 are equivocal and human resources tried to get them more definite. They do not state that F had refused, indeed it was unclear to Graeme Leitch that Andy Bowden and Linda Caley were saying so. Only later did Ellie Green email that she had spoken to both, and that both said it was so. The issues with this narrative do not need elucidation.

66.10. As set out above, in the appeal hearing (421) at point 5.4 *"GM [Graham Mallin] asked whether the panel had discussed [F]'s opportunity to retake the AMF. CL [Craig Langley] said no, as neither side had raised this or presented evidence about it. The panel therefore had no view on it."* Since this was the reason for the asserted impasse, it is a remarkable omission that the panel did not enquire itself.

66.11. The Tribunal noted that the correct course was suggested – an improvement plan – (although even that was probably excessive, as there was no evidence that others who narrowly failed had improvement plans) and that was later replaced by a hearing, for no good reason.

66.12. The Tribunal also noted that the emails contains no reference to F refusing to retake the AMF, just that F was upset that F was being asked to do so.

67. The Tribunal noted also that the AMF policy (103) supported F's position:

> *"An AMF Assessment can be completed whilst the person being assessed is on a shift, or can be done by means of simulation on a non-operational admin day. A simulation is where the meteorologist is given a real or hypothetical situation and asked to respond as if he or she were on an operational shift. Some competencies can be assessed by simulation but only during a re-assessment (ie must be observed on first assessment post-college)."*

This clause envisages re-assessment on a non-operational day of some competencies by simulation. This was not a topic explored in the hearing, but it is, at the least, not a positive point for the Met Office. What is clear from the evidence is that at no time has the Met Office said other than that a full reassessment was required on a shift that was being worked, but has given no reason other than that this was policy, and was needed by reason of the external verification of the qualification. There is no reason apparent to the Tribunal why F could not have been re-tested remotely on these few points. The Tribunal did not take this into account, as it was not tested in evidence, and occurred to the Tribunal in retirement. The claim succeeds without the point. If it could have been determinative, the parties would have been asked for submissions on it, and perhaps witnesses recalled.

68. The Tribunal found that Craig Langley and Graham Mallin were substantially directed by human resources, and in particular by Ellie Green and by Linda Caley, and by Joanna Harris. Ellie Green was human resources support for both meetings. Joanna Harris' evidence was that the panel knew all about the options they had as they were briefed, that they knew about the redeployment possibilities, and they were provided with the list of vacancies, which is in the bundle of documents next to the letter calling the meeting. None was the case. Craig Langley said he had no briefing, was not told what options there were and that he had not seen the list of vacancies before this hearing. He had not read the relevant policies either.

69. Sarah Martin of human resources asked the team (321(b)) by email at 14:30 on 27 April 2020 *"One of the Science teams wanted to interview [F] for a defence role which was put on hold, we are now in a position to move forward and I'm querying with the I/they can contact [F]?"*

70. The reply from Ellie Green was at 14:55 the same day (321(a) *"That is interesting, [F] is set to be a leaver with five weeks' notice and* ***we did not allow [F] to apply for other positions****."* [Emphasis added.] The Tribunals findings of fact are above. The question is why this was so. The Tribunal finds that it was because F was becoming increasingly disturbed as it appeared to F that there was management inaction about a matter which was of increasing worry to F. This deterioration in mental health was the result of the complex PTSD which affects F and which was triggered by the assessment outcome and the fear of having to retake it. There is no other reason that can be ascertained from the evidence.

71. The letter of dismissal was (Craig Langley's oral evidence) drafted by Ellie Green, and he signed it off. It says only that F was dismissed on grounds of capability. It says applying for other roles might indicate a lack of commitment. It states that F is unable to pass the course. There is no basis for that conclusion. It was, plainly, not the view of the assessor Tony Wisson. The letter contains no reference to the possibility of redeployment, although Craig Langley had previously written such a letter, encouraging redeployment for another person who had failed the AMF. The contrast between the letter sent to F (313) with the two comparators provided by the Met Office is stark (91 and 160/161). One extended notice from five weeks to three months to seek a new role with support from manager. The other was dated 17 February 2020 so is almost contemporaneous with this. That letter expresses pleasure at the obtaining of new employment within the Met Office.

72. Linda Caley emailed to Ellie Green 05 June 2020 (424) that they met and said it had to be full resit. But that was not said about the meetings said to have occurred on either 13th or 19th.

73. On 23 March 2020 F emailed Linda Caley (208):

> *"You said we could have a meeting and possibly get those 2 questions reasked. What is the update on this?"*

Plainly this was discussed. There was no answer to this as it was followed the same day by a series of emails showing increasing distress.

74. Tony Wisson's assessment (437/438) when asked later was *"I didn't know anything about [F] or [F's] situation before the AMF on 12th March and was not informed that any adjustments were required in advance. From what I observed on the day [F] was able to execute a business-as-usual shift during quiet weather. I have not observed it in a severe weather event so cannot gauge how much more support [F] needs."* This was not an assessor who thought that the person being assessed was not capable of passing the AMF.

75. The Tribunal is very well aware that unfairness is not enough. It is the reason for the unfairness that is critical. Here, after lockdown, the mental health of F took what came close to being a catastrophic downturn. F sent a series of emotional emails to colleagues, and F's email access was cut off. (Not unreasonable in the circumstances, although they should have explained.) After traumatic personal circumstances on 24 March 2020, on 08 April 2020 the meeting was called (238) and took place on 17 April 2020 and the dismissal letter was 23 April 2020, all without further contact with F, and at some speed.

76. Human resources decided to skip the step of formal process (227), and then did not advise Craig Langley about the process or his options (or other roles), instead telling him (with no sound evidential basis, and not showing F the emails) that F was refusing to resit the AMF. There has been no explanation as to why there was a decision to go straight to a hearing. The reason, of course, is that human resources (Linda Caley) had suggested to Andy Bowden that F be dismissed, and this was the way it could be accomplished.

77. Nowhere was it formally put to F that F must retake the AMF, nor were arrangements made for F to do so. Nowhere is there any suggestion of alternative employment. In fact, human resources actively blocked it, and rebuffed those interested in interviewing F from doing so (F was in fact interviewed for the Defence post, unsuccessfully, but how this came about was not apparent from the evidence: however F knew of no other available post, and was not helped by human resources.)

78. The only possible conclusion was that human resources and Andy Bowden wanted F dismissed (his management case to the panel and to the appeal so shows) and human resources had concluded that F was too complex and demanding to manage, and engineered F's dismissal from F's job, and blocked any route by which F might remain with the Met Office.

79. From all the evidence set out above the Tribunal finds that it was human resources that was driving the whole process. It was they who advised Andy Bowden to seek F's dismissal. They did not follow the correct process, skipping the improvement notice. They did not brief Craig Langley about the possibility of such a step. They gave no information about redeployment, and they actively blocked it for F, having actively assisted others.

80. The reason human resources found F was hard to manage was the manifestation of F's disability. The change of approach followed the events of 24 March 2020. The whole narrative clearly links the reason for F's reluctance to retake to F's disability. The response of the Met Office to that reluctance is because of the effect of that disability.

81. Accordingly, there is a strong causal link between F's dismissal and disability, and F's dismissal was disability discrimination.

82. That is the main element of the claim (2.1.3). Dealing shortly with the other matters:

83. The Respondent did fail to allow F to resit. They suggested F did, F asked otherwise, F never refused, and they dismissed F without rearranging it. Had they done so, while not wanting to do so, the Tribunal has no doubt but F would have done so. F raised it in the appeal. Management has to manage. The simple point is that narrowly F did not pass the assessment. F asked to retake just the parts that F did not meet. They said that was not possible. Then they dismissed F. They never required F to do so. That was because of F's disability and so was disability discrimination.

84. It was submitted that the two managers entirely believed that F had refused and that means their decisions were not infected with a discriminatory element. The reasoning in paragraph 60 of Royal Mail Group Ltd v Jhuti [2019] UKSC 55 applies as much to disability discrimination as to unfair dismissal.

85. The Met Office did not follow the policy correctly (2.1.2). They moved to a dismissal hearing without a formal improvement process. That was disability discrimination because they (the Met Office generically) wanted to short circuit the process to lead to dismissal.

86. F did not fail the AMF; F had just not passed it yet (2.1.1). F was denied the opportunity to do so. That is slightly different to the issue in the list of issues, but substantially the same.

87. Point 2.2 – an asserted requirement of confidence – it was unrealistic to expect F to be as confident as others in assessment or as F would be in normal work, but this is not the real issue in this case, which was that F's dismissal was not, in truth, by reason of failing the AMF.

88. Point 2.3: all is disability related and within S15.

89. As to justification, the aim was entirely legitimate – effective and competent meteorologists are needed to guide airports and pilots. The actions

of the Met Office were not a proportionate means of achieving it: F was removed as F's mental health was problematic for the Met Office. The Tribunal carefully considered whether the effect of the mental illness meant that F was not suitable to be an OpMet. This was not the case put forward by Met Office, and all the medical evidence was of the trigger being exams not pressure of work. There was no medical opinion that the role of OpMet was problematic for F.

90. The Tribunal considered carefully Counsel's two clear and cogent submissions: how can a reasonable adjustment be a detriment? The Respondent said that they made all the adjustments suggested to them, but none were suggested for this, as it was an oral assessment, and they had no way of knowing that any might be needed for it. Secondly, the AMF is an externally validated assessment (by the Civil Aviation Authority and by a University), and so cannot be altered in the way F asked.

91. As to the first, the adjustment of oral testing reduced the effect on F of F's exam sensitivity, but (it is plain from what happened) did not remove it.

92. For the second, the format is externally agreed, but the assessment is subjective. Benjamin Brooks had noted no lack of confidence. Alison Black had not indicated that it was impossible to resit parts. It had been done in the academic stage. It is the standard that is immutable. It must be the case that the way it is demonstrated that is down to the individual assessor. Tony Wisson might, for example, have noted that F was likely to be unusually sensitive and lacking in confidence while being assessed. If you tick the boxes, you pass. Confidence is then irrelevant (although perhaps the less confident will find it harder to pass). The assessment is about doing the job in real time. For one of the matters, the Spanish plume, it was entirely academic as it had not occurred on shift. No reason is apparent why this explanation had to be given during a shift and not otherwise. The assessment was only narrowly failed. There is nothing in the external validation argument that precludes some flexibility in establishing that the trainee is competent.

93. We make it absolutely clear that there can be no criticism of Tony Wisson. He did not know of F's difficulty. He reported fairly about what he saw, and gave balanced and helpful reports, plainly designed to assist F to succeed. (That F did not agree with everything he assessed does not affect that conclusion.)

94. It would also have been a reasonable adjustment to allow F to resit the assessment rather than dismiss F. It was not that F was thought incapable of passing, and that could not be thought given how nearly F was to passing it. It was in fact more than a reasonable adjustment to allow F to resit, but the obligation of the Met Office to arrange a resit.

95. In summary, the Tribunal's finding is that while dismissing those who cannot pass is fair (disabled or not) not being allowed to pass (which was what in effect happened) was disability discrimination.

96. The Tribunal considered Rule 50. The Tribunal had accepted documentary and oral evidence about F's mental health. There is a strong public interest in transparency in Employment Tribunal proceedings, and the Tribunal gave this

full weight. However, it acceded to F's request to anonymise the Claimant's name. The Tribunal decided that not to do so would, in the particular circumstances of the Claimant, be a disproportionate interference with the Claimant's Article 8 right to a private life[2].

Employment Judge Housego
Date 20 September 2021

Judgment & Reasons sent to the Parties: 23 December 2021

FOR THE TRIBUNAL OFFICE

[2] Privacy and restrictions on disclosure (set out so far as is relevant)
50. (1) A Tribunal may make an order with a view to preventing the public disclosure of any aspect of those proceedings so far as it considers necessary in order to protect the Convention rights of any person.
(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.
(3) Such orders may include an order that the identities of specified parties should not be disclosed to the public by the use of anonymisation in any documents entered on the Register