



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Turner

**Respondent:** Driver Vehicle Standards Agency (DVSA)

**Heard at:** Newcastle Employment Tribunal

**On:** 13, 14 and 15  
November 2023

**Before:** Employment Judge M Martin  
Mrs C Hunter  
Ms D Newey

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr A Tinnion (Counsel)

**JUDGMENT** having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## Introduction

1. The claimant gave evidence on his own behalf. Mr Stephen Moore, Head of Frontline Recruitment for the respondent, and Ms N Giles, Campaign Manager for Government Recruitment Service, gave evidence on behalf of the respondent.
2. At the preliminary hearing heard on 24 April 2023 before Employment Judge Pitt, at the request of the claimant, a number of adjustments were agreed for the claimant as follows:

- (1) All hearings were to be in person;

- (2) In advance of the final hearing, the respondent was to provide the claimant with a list of the broad areas of cross examination seven days before the hearing;
- (3) The claimant was permitted to have his PC with him at the witness table for the purposes of taking a note of questions only;
- (4) The claimant was to be permitted to take a note of questions asked of him;
- (5) The claimant was to be permitted extra time at the discretion of the Judge to answer questions;
- (6) At the conclusion of cross examination of any witness the claimant was to be permitted a short break to review the answers and ensure he has covered all issues;
- (7) At the conclusion of evidence the claimant was to be permitted a break to finalise his submissions (his argument as to why he should win) before presenting it to the Tribunal;
- (8) Additional breaks were to be incorporated into the hearing;
- (9) Insofar as possible, the final hearing is to conclude at 3.00pm each day at the discretion of the Judge, who hears the final hearing, such that the hearing day may be curtailed but frequent shorter breaks may best assist the claimant and be in accordance with the overriding objective.

3. It was stated that those adjustments were to be revisited at the commencement of the final hearing to ensure that they remained appropriate. Accordingly, at the outset of the final hearing, Employment Judge Martin reviewed each of those adjustments with the claimant and continued to do so throughout the course of the final hearing on a regular basis.

4. At the outset of the hearing and at various times during the final hearing Employment Judge Martin also asked the claimant if there were any other adjustments which he may require. The claimant did not indicate or request any other adjustments.

5. The Tribunal was provided with a bundle of documents marked Appendix 1.

### **The Law**

6. The Tribunal considered the following.

7. Section 6 of the Equality Act 2010 provides that a person has a disability if they have a physical or mental impairment, and that impairment has a substantial and long-term adverse effect of a person's ability to carry out normal day-to-day activities.

8. Sections 20 and 21 of the Equality Act 2010 states that where this Act imposes a duty to make reasonable adjustments on a person, the person on whom the duty is imposed is referred to as A for these purposes.

9. Section 20(2) EA 2010 states:

“The duty comprises the following three requirements.”

10. Section 20(3) EA 2010:

“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.”

11. Section 21(1) EA 2010 states:

“A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.”

12. Section 21(2) states:

“A discriminates against a disabled person if A fails to comply with that duty in relation to that person.”

13. Section 39(1) Equality Act 2010 states:

“An employer (A) must not discriminate against a person (B):

- (a) in the arrangements A makes for deciding to whom to offer employment ....
- (b) to the terms on which A offers B employment;
- (c) by not offering B employment.”

14. The Tribunal also took into account the Equality and Human Rights Commission Code of Practice on Employment 2011 and in particular took note of paragraph 6.28 which sets out some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take include:

- Whether taking any particular steps would be effective in preventing the substantial disadvantage;
- The practicality of the step;
- The financial and other costs of making the adjustment and the extent of any disruption caused;
- The extent of the employer’s financial or other resources;
- The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

- The type and size of the employer.

15. Paragraph 6.29 states that:

“Ultimately the test of the ‘reasonableness’ of any step an employer may have to take is an objective one and will depend on the circumstances of the case.”

### The Issues

16. The issues which the Tribunal had to consider were as follows:

#### Disability

- (1) Did the claimant have a disability as defined under section 6 of the Equality Act 2010? The disability the claimant relied upon is a mental impairment of an acquired brain injury which impacts the claimant's ability to retain and process information as a result and he also suffers from dyslexia and fatigue.

#### Failure to make reasonable adjustments

- (2) Did the respondent know, or could it reasonably have been expected to know, that the claimant had a disability, and if so from what date?
- (3) Did the respondent apply have a provision, criterion or practice (“PCP”)? The PCP relied upon was:
  - (a) The requirement that the claimant engage in an interview where the interviewer had pre-recorded the questions and the claimant was required to record his response.
- (4) Did that PCP put the claimant at a substantial disadvantage compared to someone without the claimant’s disability in that:
  - (a) Because of problems with his short-term memory the claimant was unable to remember the questions being asked;
  - (b) The claimant was unable to engage with the person to ensure he had answered the question asked or clarify a question being asked;
  - (c) The claimant was unable to answer complex question, such as a question within a question.
- (5) Did the respondent know, or could it reasonably have been expected to know, that the claimant was likely to be placed at the disadvantages set out above?
- (6) What steps could have been taken to avoid the disadvantages? The claimant suggests that the respondent should have allowed the claimant to have sight of the questions prior to the interview.

- (7) Was it reasonable for the respondent to have taken those steps, and if so, when?
- (8) Did the respondent fail to take those steps?

Remedy

- (9) The Tribunal had to consider whether a recommendation should be made.
- (10) The Tribunal also had to consider what financial losses had been incurred by the claimant and for period?
- (11) What award should be made for injury to feelings?
- (12) Should any interest be paid in relation to any compensation?

**Findings of Fact**

17. The respondent is an Executive Agency sponsored by the Department of Transport. It is responsible for driving tests, driving instructors and MOT testing.

18. The respondent commenced a recruitment campaign in early 2023 for driving examiners for both cars and motorcycles.

19. The respondent arranged for the Government Recruitment Service (GRS) to undertake this recruitment campaign on their behalf.

20. At this time there was a substantial backlog in driving tests and a shortage of examiners. This was largely due to issues that had resulted from delays being incurred because of the Covid-19 pandemic.

21. As a result, a significant number of people were required to fulfil those roles. The respondent therefore decided to set up a recruitment process which could address their requirements quickly and manage the backlog to address the shortage of qualified driving examiners.

22. There was a substantial backlog for driving tests and a shortage of examiners, so the respondent wanted to run a recruitment and selection process quickly and efficiently. To meet those needs the respondent decided to put in place an online process to run the assessment process. This was a substantial campaign. The respondent was aware of the significant resources and time involved so as a result, they decided to utilise the online system for the assessment process.

23. In evidence, the respondent said that they had done online tests and pre-recorded interviews a few times previously. During their evidence in Tribunal, the respondent did say that, due to the reduced success rate they had from their online campaign, they had gone back to face to face interviews, but recently they had now reverted to video interviews because of the speed and resources required which were substantially less for an online process.

24. The claimant suffers from acquired brain injury ABV which he sustained whilst working for the Household Cavalry many years earlier. During the course of these proceedings, the respondent accepted that that impairment amounted to a disability as defined under section of the Equality Act 2010.

25. The claimant is an advanced driver. He enrolled and has been an observer on an IAM advanced driver course. Since 2021 he has worked as an adviser for bank riders.

26. The Tribunal note at page 41 of the bundle that the claimant received a "First" for his advanced driving course with IAM.

27. The advert for the post for which the respondent was recruiting were for a fixed term of two years. There were 16 posts in different locations. The posts in the locations were in clusters, which meant that an applicant could be appointed to any location within that cluster. The two clusters which the claimant was interested in were Darlington (which covered Carlisle) and Gateshead (which covered Sunderland, Blyth and Gosforth (page 51).

28. The advert is at pages 50-56 of the bundle. At page 52 it sets out the essential criteria for the role. At page 53 it sets out the behaviours which will be assessed during the selection process. They are stated to be the following: communicating and influencing; managing a quality service; making effective decisions and working together (page 53).

29. The process for the recruitment is set out at page 54 of the bundle. It states that there are three stages to the application and assessment process. Stage one comprises completing the Civil Service Customer Service Test. It states that these are online tests. It then goes on to state that at Stage two an applicant will be invited to undertake an interview. It states that pre-recorded video interviewing has been chosen for this stage of the selection process. It states that the interview will give the applicant the opportunity to respond to questions which have been selected for the role. Stage 3 it states that successful interview applicants will be invited to a driving assessment. It also says that they will also be invited to a driving assessment undertaken on a motorbike (page 54 of the bundle).

30. At page 55 it states that the campaign is being run on merit order and that the pass mark may be raised at different stages to determine how many candidates progress to the next stage. It also says that meeting the minimum requirements for each stage is no guarantee of an invitation to continue to the next stage of the process.

31. The claimant applied for the position. His online application is at pages 57-60 of the bundle. He applied on 22 January 2023. He requested an interview under the Disability Confidence Scheme. He also requested reasonable adjustments.

32. The questions about reasonable adjustments are at pages 58-59 of the bundle. They first ask whether a reasonable adjustment is required during the interview or assessment stage, to which the claimant said "yes". The claimant also indicated (as requested) the reasonable adjustment sought. He states that he may need extra time and states that he has an acquired brain injury. The applicant is

also asked if they require reasonable adjustments during the online test. The claimant again confirms that he does. He states exactly the same adjustment is required, namely that he may need extra time because he has an acquired brain injury (pages 58-59 of the bundle).

33. The claimant's location preference was in Darlington with his alternative option being at Gateshead.

34. He does not provide any further details about his disability or any other reasonable adjustments he may require.

35. The respondent said in evidence that, because the claimant applied for a reasonable adjustment his application was put on hold to be considered.

36. In her evidence Ms Giles said that GRS automatically offered extra time as a reasonable adjustment and applied it without reverting to the respondent. She said that the agreement between them was that they could give extra time without having to agree it in advance with the respondent.

37. On 23 January 2023 GRS confirmed to the claimant that he would be provided with extra time. That is noted at page 61 of the bundle and related to the Customer Service Skills test.

38. The respondent says that the extra time given was 25% which they applied.

39. The claimant did the online skills test and passed. He received a score of 97 which was a high score. In his evidence to the Tribunal the claimant indicated that he was surprised that he had received such a high score due to his disability.

40. On 23 January 2023, the claimant was advised that he had passed the test. His application was put on hold again to deal with any reasonable adjustments requested.

41. On 24 January 2023, the claimant was notified that his request for a reasonable adjustment was being considered (page 64). He did not receive a link for the online interview at that stage.

42. On 25 January 2023, the claimant was informed that he had been selected for interview and he was informed that the interview would be by way of video interviewing. He was advised that he would then be sent the link (page 65).

43. On 25 January 2023, the claimant was then invited to interview by the respondent and GRS. In his response to his invite to attend the video interview he referred to him being part of the disability Confidence Scheme and that he may require extra time. He states that he was told that at the end of the initial application somebody would be in touch with him about his requirements. In his email, he states that he has an acquired brain injury from his time in the army which he says places him at a slight disadvantage. He then goes on to indicate that he completed the online Civil Service Customer Services Skills Test and noticed that extra time had not been allocated but that he completed it successfully. He then goes on to refer to noting that in the job details that there was to be a pre-recorded video interview and that he was concerned that his request for additional time would not be possible. He

refers to the “recruitment in detail” page and realises that he should have contacted the vacancy holder. He then states that he is doing that now as he feels that with the pre-recorded interview it may be more suitable due to his disability to have the interview questions before he is asked to complete the interview (pages 68-69 of the bundle).

44. GRS forwarded the email onto the respondent. It then appears that GRS having taken those steps closed the case because it automatically closes a case once those actions have been taken.

45. Mr Moore, who was responsible for heading up the recruitment campaign, said in evidence that he discussed that request with one of his colleagues in his team. He stated that he told his colleague that they were not able to provide the questions in advance as it was not standard practice to do so, nor possible or appropriate to do so with the system being used. In his evidence to the Tribunal, he said that the respondent had considered this matter previously and that they had decided previously that they would not do this. He said in his evidence that, prior to confirming the position to his colleague, he had contacted the Operations Team to check that that position (about not providing questions in advance) was still the position. He said he was advised that it was still the case. Mr Moore then asked his colleague to respond to GRS to inform them that it was not their practice to provide the questions in advance. A response was then sent to GRS indicating that it was not the practice to send interview questions in advance (page 67 of the bundle). That email was sent at 14:25. In the email it did, however, indicate that the respondent was happy for the claimant to have extra time.

46. The claimant then sent a further email to GRS on 26 January 2023 which effectively repeated the request he had made in his earlier email the previous day (page 71 of the bundle). His email was then passed on to the respondent for comment (page 70 of the bundle).

47. The respondent then replied to GRS in response to that email in which they indicated that they had responded to the request about extra time but if the claimant was asking for something else other than extra time, they were going to leave it with GRS to contact the claimant to find out if any reasonable adjustment could be offered.

48. GRS, having passed the enquiry back to the respondent, then closed their case and said the case was closed.

49. Neither the respondent nor GRS reverted to the claimant to tell him that his request for questions to be provided in advance had been referred on, nor that it had been refused nor asked if there are any other reasonable adjustments that the claimant required. Further, they do not tell him that extra time has been applied. However, the respondent does apply extra time to the claimant. They give him 25% extra time as is the norm.

50. GRS do respond to the claimant on 27 January 2023 indicating that they have been in contact with the respondent and forwarded the email to them for them to respond directly. The claimant responds to that email indicating that he awaits a

response soon, but also indicates that he is looking to do the interview the following day should the adjustment be in place (page 79 of the bundle).

51. The claimant is under some pressure (time limits) to undertake the interview and he has to do so by 30 January 2023.

52. Even though the claimant suggested on 27 January 2023 that he would await a response, he then proceeds to undertake the online interview on 28 January 2023.

53. The questions which were asked in the online interview are set out at page 74 of the bundle. This is consistent with the information that was provided on screen. There were four questions, all of them around the different behaviours which were identified in the advert.

54. The first question was about making effective decisions. The question was, "Can you provide an example about a decision you have made, the steps you took and what the impact of that decision was?". The candidate was told to think about "Who you spoke to, what options you considered, what challenges you might have encountered, how you overcame them and what was the result".

55. The next section was about communicating and influencing. The question was, "Give an example of when you have communicated a key message to a number of people". The candidate was told to think about "What methods did you use or consider, how did you respond to feedback or challenges, how did you ensure everyone understood the message?".

56. The next question was about managing a quality service. The question was, "What steps would you take to reassure a nervous candidate so that they can perform their best on the driving test?". The candidate was asked to think about, "How would you ensure you took steps to accommodate any individual needs or requirements, how you tailor your communication for the individual needs of the candidate?".

57. The last question was about working together. The question was, "Can you describe a time when you worked with a variety of people as a team/group to deliver an outcome?". The candidate was told to think about and explain "How you achieved the outcome by working closely together, how you shared your knowledge/experience with others, how you ensured everyone's views were considered/taken into account and how you offered help or support to ensure cooperation within the group to achieve the objective?".

58. In each case the question would appear on the screen together with what had to be thought about, which might be between 3-5 short (or very short, in some cases) bullet points.

59. In his evidence to the Tribunal, Mr Moore (who devised the online test) explained how it would work. He said that the question would appear on the screen and would remain on the screen throughout the whole period when the question was being asked. He also said that the bullet points about what to think about would also be on the screen. He said that the question would remain on the screen after it had been asked verbally in the pre-recorded interview.

60. Mr Moore said that each question was then asked in turn and that there was a clock at the bottom of the screen which would allow the candidate to see how long they had to answer each question. He said that, in the case of the claimant, an extra 25% of time was allocated to him. He acknowledged that the claimant may not have been aware of that, but it would have been indicated at the bottom of the screen.

61. The respondent marked the online interviews in accordance with the marking instructions at pages 75-76 of the bundle. They note the evidence that was being sought to achieve the higher scores in each case.

62. The claimant's scores are at pages 72-73 of the bundle. He did not score well. He achieved scores of 1 and 2, which were either the behaviours were not demonstrated or minimal demonstration of the behaviours, namely either no or minimal evidence of the competency being demonstrated. He was provided with some feedback of his answers and the reasons why he did not meet the criteria required, as is noted at pages 72-73 of the bundle. The claimant was unsuccessful. He was informed of this on 8 February 2023.

63. On the same date, the claimant raised a grievance (pages 77-78 of the bundle). He raised a grievance about a failure to make reasonable adjustments during the recruitment process. He states that he asked for extra time but had not been given it in relation to the online test which he nevertheless passed. He then refers to his various emails regarding his request for reasonable adjustments on 25-27 January 2023. The claimant indicated that he was awaiting a response, but due to the time restraints, he proceeded to take the test without any adjustments in place. He states that the adjustments that he was seeking were extra time for the service skills test and to be provided with the questions being asked prior to the interview being undertaken.

64. The claimant said in evidence that, because of his driving experience, he would have passed the stage 3 driving assessment and would have effectively been appointed. He says this is the case due to his qualifications and driving experience.

65. The respondent on the other hand says that the numbers who proceeded to stage 3 were very low and those who were appointed as examiners was very low indeed. Mr Moore said in evidence that there were almost 1,300 people who applied; approximately over 100 passed the interview, but only just over half of those passed the driving test. He also said that some of those who undertook the training course, which was required for all successful applicants, also did not proceed. He said that, as a result of the various stages of the process, only approximately 5% of those who applied actually progressed to being offered the position of a driving examiner.

66. The respondent says that no further action was taken regarding the grievance as a few days later the claimant brought these proceedings in the Employment Tribunal.

67. During the course of his evidence the claimant referred to an extract from the Department of Transport website of which he says he later became aware after viewing the Civil Service job site and Department of Transport website. That sets out details about criteria for applications and also includes information about reasonable adjustments. It refers to the respondent's Disability Confidence Scheme

(DCS). It also gives on to detail types of reasonable adjustments available. It refers to extra time being allowed during the interview and any assessment exercise. It also (at page 120) suggests that questions could be provided ahead of the interview and talks about interview assessments being scheduled at particular times of the day and additional breaks being provided.

68. Mr Moore in his evidence said that he was not aware that questions were provided ahead of interview other than in face-to-face interviews. He said they had not been provided (as far as he was aware) in any pre-recorded interviews online. He said that, where they were provided in advance for face-to-face interviews, there was the opportunity to further test the answers and ask questions around those questions, but that opportunity was not available where the interviews were pre-recorded. In his evidence, Mr Moore said that he did not consider providing the questions to the claimant in advance was a reasonable adjustment. He said that would provide an unfair advantage for applicants who got the questions in advance to those who did not. He said that providing the questions in advance for face-to-face interviews meant you could still probe the candidate on their responses thoroughly and clarify what was being tested, but where it was an online interview, the candidate was only going to be able to respond to what was on screen. He said that providing questions in advance meant there was an unfair advantage as the candidate could do research and prepare their answers in advance and that it was therefore not possible to test the candidate's ability to think on their feet by asking further (more probing) questions. He said that the nature of the role which was being recruited for meant that it was necessary for candidates to be able to think on their feet and react to situations as they occurred. He said that the questions were designed to try and test the candidate's ability to think on their feet and deal with situations as they occurred. He maintained that questions provided in advance of a face-to-face interview still gave the opportunity to follow up with more probing questions which it is not possible to do with a pre-recorded interview.

69. Mr Moore said in his evidence that the question about providing the questions in advance to the claimant was considered. He said in evidence it had already been considered by the Operations Team previously, and that position had not changed. He had clarified that before asking his colleague to revert to GRS to explain that adjustment was not considered to be a reasonable adjustment.

70. In this case, the Tribunal had, at a preliminary hearing made directions about reasonable adjustments which the claimant had requested and which the Tribunal stated would be provided to the claimant at the final hearing. The respondent's representative had sent to the claimant in advance a list of subjects about which the claimant would be cross examined. This document was copied to the Tribunal. At the outset of the hearing Employment Judge Martin clarified that the claimant had received that document and was content that he had been provided with that adjustment which he confirmed.

71. The Tribunal also noted that there was a requirement for regular breaks to be provided for the claimant. With that in mind, Employment Judge Martin at various regular intervals during the hearing asked the claimant whether he wished to take a break. The claimant rarely took advantage of the offer of a break and did not specifically request any breaks.

72. When the claimant went into the witness box, he was offered the opportunity to take his laptop with him, which he declined. Employment Judge Martin also asked the claimant if he wanted to have some paper made available to him if he wanted to make notes, which he also declined. The claimant was also asked to make it clear to the Tribunal if needed time at any stage during his cross examination for a break, or wanted a pause so that he could consider any question. He did not suggest any alternative adjustments other than at paragraph 73 below.

73. The claimant did, prior to going to the witness box, ask the respondent's representative to move seats so that he was better able to answer questions, which move was accommodated by the Tribunal. No other requests for adjustments were made by the claimant.

74. The Tribunal made its own observations of the claimant's presentation in Tribunal. The claimant largely answered questions on cross examination very clearly and in quite some detail. However, there was a period when he was asked some longer more difficult questions. Employment Judge Martin intervened at one stage and asked the respondent to rephrase the question. Employment Judge Martin also asked on one occasion when the question appeared to be more difficult whether it would be helpful if the question was written down, which the respondent's representative agreed to do, but the claimant then proceeded to answer the question.

75. There were times when the claimant (which is not inconsistent with the way other claimants respond when asked difficult questions) found it difficult to answer the question. The Tribunal noted that was something which did occur with this claimant on occasions when he was asked difficult questions on cross examination. Those questions were re-put to the claimant and indeed broken down at times by Employment Judge Martin to assist the claimant.

76. The claimant was given the opportunity during his cross examination of the respondent's witnesses to have breaks or to use his laptop to make notes, however he did not avail himself of those offers. He did use his laptop to ask questions which he would appear to have prepared in advance, as is often the norm. He did not however ask for any further time or breaks. The Tribunal noted that the claimant asked on occasions very long and quite difficult questions. In this case Employment Judge Martin and the members noted that Employment Judge Martin did not need to assist the claimant much at all in asking any questions on cross examination as he appeared to be able to ask quite long questions without difficulty. The Tribunal noted that it is likely he may have had some assistance in advance in preparing those questions as is quite proper, because EJ Martin rarely had to aid the claimant in asking any questions on cross examination.

77. Although, the claimant rarely took the opportunity to take any breaks offered. Employment Judge Martin however offered specific breaks to the claimant before he proceeded to deal with re-examination and on each occasion after he had completed his cross examination of the respondent's two witnesses so that he could consider whether there was anything else or any other questions he wished to ask.

78. When Employment Judge Martin gave the oral judgment, she also asked the claimant if he wished to make notes on his laptop or asked if he wished to make any notes on paper, both of which he declined to do so.

79. The only reasonable adjustment that was strictly adhered to and which the claimant did request at the end of each day was that the hearing be concluded at 3.00pm. The claimant indicated that he needed to finish at 3.00pm because he became tired. Accordingly, the Tribunal ensured that it did not sit beyond 3.00pm on any day.

80. The Tribunal was provided with a bundle of documents as indicated above, which included medical records for the claimant. However the Tribunal did not review those records to consider whether any adjustments needed to be made nor were they referred at any stage by the claimant to those records suggesting any other adjustments that should be made by the Tribunal other than those which were set out in the order made in April 2023.

81. There was some delay to the start of the hearing due to some travel difficulties one of the members had in attending at the Tribunal venue. Employment Judge Martin ensured that the parties were notified of the delay and reasons for that delay.

### **Submissions**

82. The respondent's representative submitted that, although the respondent had knowledge that the claimant suffered from an acquired brain injury from the application form, they did not know whether that was a disability, nor did they know the specific disadvantage that may cause the claimant. The respondent's representative submitted that the claimant never stated at any stage either in his application form or any of his emails what was the substantial disadvantage(s) to him because of his disability. The respondent's representative said that the disadvantages suggested in these proceedings were not raised with them in any correspondence with them as part of the claimant's application.

83. The respondent's representative submitted that it would not have been reasonable to allow the claimant to have sight of the questions prior to the interview as that would not be a reasonable adjustment. The respondent submitted that that would give the claimant an unfair advantage over other applicants.

84. The claimant submitted that the respondent had a duty to provide him with reasonable adjustments and failed to provide a reasonable adjustment to him.

### **Conclusions**

85. The claimant's condition of an acquired brain injury amounts to a disability as defined under section 6 of the Equality Act 2010.

86. The Tribunal note that the respondent did not make any enquiries with the claimant when the claimant notified them that he was asserting he had a disability and seeking adjustments. Equally, however, the claimant did not provide any information regarding the disadvantages to him of his disability or of the practice which he was now relying on, being the practice of the pre-recorded interview

process. He had ample opportunity to do so either on his application form or more particularly in the various emails which he then sent to the respondent, once he had passed the initial online service test, when he specifically requested the reasonable adjustment about having the questions provided to him in advance, but he did not do so. The claimant was aware when he applied for the position that there was a pre-recorded interview and at no stage did he specifically suggest why that type of interview may disadvantage him or why he may need the adjustments which he sought. He has given no explanation for his failure to do so.

87. The Tribunal reminded itself that the burden of proof to prove in a claim of disability discrimination is on the claimant.

88. On balance, the Tribunal find that the respondent did not know that the claimant was likely to be placed at the disadvantage relied upon by the claimant because they were not provided with any information about it by the claimant.

89. The Tribunal accept that the respondent did have a provision, criterion or practice of requiring interviewees in the interview process to engage in an interview where the interviewer had pre-recorded the questions and the interviewees were required to record their responses.

90. The Tribunal does not find that there was a substantial disadvantage to the claimant in respect of any of the three disadvantages upon which he relies in these proceedings. The Tribunal will deal with each of those in turn:

91. In relation to the first disadvantage, which the claimant says is problems with his short-term memory that meant he was unable to remember the questions being asked, the Tribunal does not consider this was a substantial disadvantage to him because in fact the questions were asked verbally and then remained on screen for the entire period during which the claimant had to answer the question. In addition, the Tribunal do not consider that the adjustment which the claimant suggested, namely of having the questions in advance would remove that disadvantage, because the questions were available throughout the period in which the claimant was being asked to answer the question, so if he had forgotten the question, it was on the screen in front of him.

92. In relation to the second disadvantage upon which the claimant relies, namely that he was unable to engage with the person asking the question to ensure that he had answered the question asked or clarify a question being asked, the Tribunal consider that this was no more of a disadvantage to the claimant than it was to all the other applicants for the post. It is clear to the Tribunal that most people benefit from visual clues and engaging on a face-to-face basis with an interviewer rather than having to respond to questions on a video screen. This has been borne out following a substantial move over the last two years during the Covid-19 pandemic when many meetings were held by video (Zoom and Teams) and it has been acknowledged that it is more difficult for individuals to be able to pick up visual clues when engaging with people on video rather than in person. When the questions are pre-recorded as opposed to in person, then it is a disadvantage to all applicants and the Tribunal does not consider it to be any more of a disadvantage to the claimant and certainly not a substantial disadvantage to the claimant. Furthermore, some

clarity was provided with the prompts for answering the questions being put on the screen., namely the “Think about”

93. In relation to the third disadvantage upon which the claimant relies, namely that he was unable to answer complex questions such as a question within a question, the Tribunal (having seen the questions which were asked) do not consider that they were questions within questions, nor does the Tribunal consider that they were complex questions either. Further, the questions remained on screen during the time when the claimant had the opportunity to answer those questions. In addition, prompts were also provided on screen for matters for candidates to think about when answering each question. Furthermore, this Tribunal had the opportunity to observe the claimant during these proceedings and note that the claimant has (during the course of these proceedings) been able to answer more complex questions than those questions he was asked during the interview process during the course of being cross examined, and indeed, more significantly he himself asked complex questions off witnesses on cross examination. Significantly, the claimant was given an indication of the behaviours which were to be assessed in advance as noted on the application form, in a similar way to which he was provided in advance with the broad areas of questions on cross examination in these proceedings.

94. Therefore, the Tribunal do not consider that allowing the questions to be provided in advance was a substantial disadvantage to the claimant.

95. The Tribunal note that in his application form the claimant simply asked initially for additional time. When he applied for the post initially although he was aware of the pre-recorded interview process, he did not request being provided with the questions in advance, which would suggest that he did not consider at the time that the pre-recorded interview did place him at a substantial disadvantage as otherwise he would have requested that specific reasonable adjustment in the first instance, but he did not do so until further into the process.

96. The respondent did not agree to the claimant's request to provide the questions in advance, but they did provide him with extra time as requested in his application form for both the online test and the video interview, albeit they failed to tell him that they had done so.

97. The Tribunal find that the respondent did consider the reasonable adjustment requested by the claimant to provide him with the questions in advance as well as the request for extra time. Unfortunately, due to some substantial failings on their part, the respondent failed to inform the claimant that they had agreed to his reasonable adjustment about additional time being provided to him, or in the case of the request for the questions to be provided in advance to tell him that adjustment would not be provided and the reasons why it would not be provided.

98. The Tribunal has reminded itself that the duty on the respondent is to consider reasonable adjustments. This Tribunal finds that the respondent did consider the reasonable adjustments requested by the claimant, including the request to have sight of the questions prior to the interview. In that regard we accept Mr Moore's evidence that the request was considered. That evidence is supported by the documentary evidence responding to the request, effectively denying that request, as noted at page 67 of the bundle.

99. The Tribunal note that the respondent did provide the claimant with some adjustments by way of extra time as requested by him; albeit that they did not specifically communicate that to the claimant.

100. Furthermore, this Tribunal find that Mr Moore clearly had cogent reasons for rejecting the request for the questions to be provided in advance. The Tribunal accept it was reasonable for the respondent to reject that request for an adjustment on the basis advanced by Mr Moore, namely that it would provide any applicant provided with the questions in advance with an unfair advantage over those who did not have the questions in advance because they could research the answer or prepare answers in advance.

101. The Tribunal would expect that, if a request was made for reasonable adjustments and a decision made about those adjustments, it ought to be communicated to the requester, which was not what happened in this case. This was a failing on the part of the respondent, but not a failure in their duty to consider reasonable adjustments.

102. The Tribunal consider that it was not reasonable to agree to that adjustment and nor does the Tribunal consider that the respondent failed to consider that request – what the respondent failed to do was communicate their response, which is not in itself a failure in their duty to consider reasonable adjustments.

103. The Tribunal consider that the refusal to provide the adjustment requested of having sight of the questions prior to the interview was reasonable. In that regard the Tribunal have taken account of Mr Moore's evidence and note the basis upon which that request was refused. The Tribunal do not consider that providing that adjustment would have prevented the disadvantage relied upon. In that regard the claimant led little evidence to show the substantial disadvantage to him. The Tribunal does not consider that there was a substantial disadvantage to the claimant nor that the adjustment would have been effective in stopping any disadvantage to the claimant. The claimant led no evidence to suggest that providing those questions in advance would have prevented any substantial disadvantage to him. The Tribunal do not consider that it would have prevented any substantial disadvantage to the claimant anyway.

104. The Tribunal accept that providing the questions in advance to the claimant in this case would have given the claimant an unfair advantage over other applicants and would in fact have been an unfair advantage to him because he would have the opportunity to prepare responses to the questions in advance or been able to research his answer in advance.

105. The Tribunal accept Mr Moore's evidence that the purpose of the interview in this case was that this was a role where it was essential for successful applicants to be able to respond to a situation. The questions being asked were designed to draw out whether a candidate could think on their feet and respond to a situation. Providing questions in advance would not be able to satisfy the respondent that the claimant was able to do so, and therefore deny the respondent the opportunity to fully test the claimant's competencies for the role.

106. Accordingly, for these reasons the claimant's claim for disability discrimination is not well-founded and is hereby dismissed.

---

Employment Judge M Martin

Date: 29 February 2024

**Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.