EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113650/2021 Hearing Held at Edinburgh on 26, 27, 28 and 29 February, and 4 and 5 March 2024; Members' Meeting on 28 March 2024

Employment Judge: M A Macleod
Tribunal Member: M Watt
Tribunal Member: T Lithgow

X	**Claimant** **In Person**
A	**1st Respondent** **Represented by** **Dr A Gibson** **Solicitor**
B	**2nd Respondent** **Represented by** **Dr A Gibson** **Solicitor**
C	**4th Respondent** **Represented by** **Dr A Gibson** **Solicitor**
D	**5th Respondent** **Represented by** **Dr A Gibson** **Solicitor**
E	**6th Respondent** **Represented by** **Dr A Gibson** **Solicitor**

F **7th Respondent Represented by Dr A Gibson Solicitor**

G **8th Respondent Represented by Dr A Gibson Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant's claims all fail and are dismissed.

REASONS

Introduction

1. The claimant, known here as X pursuant to an Order under Rule 50(3)(b) of the Employment Tribunals Rules of Procedure 2013 issued by the Tribunal on 13 February 2024, presented a claim to the Employment Tribunal on 7 December 2021, in which he complained that he had been discriminated against on the grounds of disability.

2. The claim was presented as against 8 respondents. Following a Preliminary Hearing in May 2022, the claimant withdrew his claim against the then 3rd respondent, and a Judgment was issued by the Tribunal dismissing the claim insofar as directed against that respondent dated 22 July 2022 (p57 of the Joint Bundle of Productions).

3. All of the respondents are the subject of the Rule 50(3)(b) Order as well as the claimant, and accordingly they have been identified as A to G, and will be so identified throughout this Judgment. The Tribunal continues to identify them according to the numbering in the original claim, and accordingly while no 3rd respondent appears in the instance or herein, it was thought to be more convenient and understandable to allow the other respondents to be associated with the original numbering.

4. The Tribunal also issued a Privacy Order under Rule 50(3)(a) in relation to the Hearing which took place.

5. The respondents resisted all claims made by the claimant.

6. A Hearing was listed, following a number of delays, partly related to the claimant's ill-health, to take place in the Employment Tribunal, Edinburgh, on 26, 27, 28 and 29 February and 3 and 4 March 2024. Owing to careful timetabling, the use of witness statements and the discipline of the representatives, it proved possible to conclude the Hearing within the allocated diet. However, it was directed by the Tribunal at the conclusion of the Hearing that submissions should be addressed to the Tribunal in writing, and directions were issued to that effect. Those submissions were received from the parties in time to allow the Tribunal to meet together on 28 March 2024 to carry out the task of deliberating upon its decision in this case.

7. A number of adjustments were put in place to take account of the claimant's disability, including taking breaks at appropriate times during the course of the Hearing.

8. The claimant appeared on his own behalf in this Hearing. The respondents were represented by Dr A Gibson, solicitor.

9. As indicated above, the evidence in chief of each witness, including the claimant, was taken by way of witness statement. Each witness was placed on oath or affirmation, and on occasion, Dr Gibson sought permission from the Tribunal to ask some supplementary questions arising from the terms of the claimant's witness statement. No objection being taken by the claimant, each such request was granted. Little additional time was taken up in this way.

10. The claimant gave evidence on his own account. He called no further witnesses.

11. The respondents called each of the individual respondents as witnesses, and in addition, called the Principal Crown Counsel, whose name is

omitted here in order to preserve confidentiality but who is referred to as 'AE', to give evidence.

12. A timetable of witnesses was laid out before the Tribunal. Owing to the particular responsibilities of the witnesses, parties were agreed that it would be appropriate to adopt this approach in order to avoid the need for witnesses to spend time in the Tribunal waiting room prior to their evidence. As a result, each witness was scheduled to be heard either starting at 10am or at 2pm each day, so as to avoid unnecessary delays. This appeared to work well, though the Tribunal regularly adjourned early as one witness's evidence was concluded and no other witness was available until the next day.

13. A Joint Bundle of Productions was provided to the Tribunal, to which reference was made by the parties.

14. In addition, the Tribunal was shown a video recording of the claimant's advocacy assessment, and two telephone conversations which had been privately recorded by the claimant were also played to the Tribunal, accompanied by transcripts accepted to be accurate.

Applications

15. The claimant did seek the permission of the Tribunal to call a witness, Dr Shah, who has been his treating clinician since 2013. He submitted that this was the kind of case in which the Tribunal would normally hear expert evidence. He was, he said, confused about the difference between the respondents' admission that he is a disabled person, and the need to prove substantial disadvantage. This related to his capability to do the job, highlighting the traits which people with his conditions often display.

16. Dr Gibson objected to this application. He pointed out that there had been a Preliminary Hearing specifically designed to allow parties to define their list of witnesses. None of the respondents' witnesses had had the opportunity to review the evidence of Dr Shah, since neither a report nor a witness statement was provided by the claimant. He also argued that

since the respondents concede that the claimant is and was at the material time a disabled person within the meaning of the 2010 Act, it is apparent that the respondents concede that the claimant experienced and experiences the symptoms he says he suffers as a consequence.

17. As to the section 15 claim, Dr Gibson submitted that it is not controversial that the claimant's mark in the advocacy assessment was unfavourable treatment, but whether he received that mark as a consequence of disability is a very specific question as to the way in which the assessment was carried out. The claimant can give evidence, he said, on the consequences of the assessment, but the claimant's treating clinician cannot.

18. He concluded by saying that the Tribunal would normally hear expert evidence in determining whether or not the claimant was at the material time a person disabled within the meaning of the Act. That is admitted in this case, and therefore there is no need to hear from Dr Shah.

19. We concluded that it would not be in the interests of justice, nor consistent with the overriding objective of the Employment Tribunals Rules of Procedure 2013, to allow the claimant to call this witness on the basis of such a late application. No notice of such an application was given to the Tribunal in advance of the Hearing, and Dr Gibson said that it was only on the previous Thursday that he had awareness of the application.

20. We refused the application, for the following reasons:

- This is a case in which the Tribunal has engaged in considerable case management, and a Preliminary Hearing was held on 16 December 2023 during which the claimant indicated that he was intending to call an expert on autism and ADHD to express an opinion on the marking and handling of the interviews. He did not identify the expert at that stage, but it was noted by the Tribunal that time would be required to allow the claimant to identify, instruct and "obtain a report" from such an expert (113). As a

result, the claimant clearly understood that the expert's evidence would require to be presented in written form in advance of the Hearing.

- Witness statements were also the subject of the Tribunal's case management order (113ff), with Order no 3 requiring parties to exchange witness statements no later than 28 days prior to the Hearing.

- No report or witness statement was made available by the claimant in advance of the Hearing, in relation to Dr Shah.

- To have allowed the claimant to lead a witness without forewarning the respondents of the evidence to be presented would have been contrary to the interests of justice and, insofar as preventing the parties being placed on an equal footing, contrary to the overriding objective.

- We considered that it would simply have been unfair to the respondents to allow the claimant to call Dr Shah, especially in circumstances where there appeared to be no reason why a written statement of evidence or report could not have been prepared and presented in advance of the Hearing.

- Finally, standing the admission that the claimant was and is a disabled person within the meaning of the 2010 Act, it was not clear to us why it was necessary for a fair trial to have Dr Shah's evidence presented in this way.

21. The second application made by the claimant was that he be allowed to record the Hearing on a personal device, either his laptop or his mobile phone, on the desk in front of him. This would, he said allow him to listen back to the evidence as heard. He undertook that he would delete this once the process had been completed.

22. Dr Gibson asked for an adjournment to take instructions on this application, as it came as a surprise to him. Once he had taken

instructions, he opposed the application, noting that the Tribunal had had considerable discussions with the parties about the adjustments which would be required, and that this was not mentioned by the claimant. There is no medical evidence available as to why not permitting the claimant to record the hearing would place him at a substantial disadvantage. Witness statements were available on which the substantial evidence of each witness would be presented. Dr Gibson also questioned how the Tribunal could be assured that the recordings would go no further. The respondent would be disadvantaged in that he had not had the opportunity to speak to his witnesses, who would be likely to be concerned that they were being recorded in the Hearing, particularly as the evidence would show that the claimant had already recorded them without permission or consent. That would "worry" them. Dr Gibson indicated that he was concerned about being recorded himself.

23. Having heard from both parties, the Tribunal sisted consideration of this application until the following morning. At that point, we advised that we were not prepared to grant the application, for the following reasons and taking into account the following matters:

- We had reference to the terms of the EAT's Judgment (The Honourable Mr Justice Choudhury (President)) in **Dr R Heal v The Chancellor, Master and Scholars of the University of Oxford and Others [2020] ICR 1294**.

- In that case, Mr Justice Choudhury gave guidance as to how Tribunals should approach an application for recording a Hearing by a party.

- At paragraph 34, the Judgment set out the considerations to which the Tribunal should have regard:

"*34. The adjustment sought in this case, namely the use of a recording device to record proceedings, gives rise to an additional reason why such an adjustment could not be made automatically or as a matter of routine. The express consent of the Tribunal is required for such an adjustment*

otherwise there could be a breach of s.9 of the 1981 Act. The Tribunal has a broad discretion to grant such consent, but in doing so it will generally be relevant to consider whether there is a reasonable need for proceedings to be recorded, or whether the claimed disadvantage would be alleviated by the use of a recording device. The difficulties involved in taking a contemporaneous note of proceedings are likely to be experienced by many self-represented litigants. The taking of such notes is not an everyday skill and even those who do not have any physical or cognitive disability may find it difficult to keep a meaningful or helpful contemporaneous note of proceedings. The Tribunal will therefore be unlikely to accept that a slight limitation on the ability to take notes would lead to the adjustment of permission being granted for a recording device; a cogent explanation of the precise nature of the difficulty and why other adjustments alone, such as additional breaks or time, would not suffice, could normally be expected before consent is given.

35. Furthermore, the position of the other parties may be relevant. A recording device would be likely to record everything that is said in the hearing room, including (depending on the sensitivity of the equipment) conversations between parties and their advisers. Whilst any consent to record proceedings would almost invariably be on terms that limited any other use being made of the recording, the Tribunal may wish to consider the other parties' positions on whether the Claimant can record proceedings using his own device.

36. All of these factors - and these are no more than a selection of those that may be relevant - would usually mean that any decision as to whether or not such an adjustment should be made would normally be taken at a hearing where all parties are present, or, at the very least, on the basis of a fully set out written application and response."

- Reference to s.9 of the 1981 Act is to the Contempt of Court Act 1981.

- Rule 41 of the Employment Tribunals Rules of Procedure 2013 gives the Tribunal power to regulate its own procedure, and to conduct hearings in the manner considered fair, having regard to the principles contained in the overriding objective (found at Rule 2).

- We considered whether there was a reasonable need for the proceedings to be recorded. In this case, the Hearing took place in a Tribunal room with CVP facilities, which allowed the entirety of the evidence to be recorded. There was, for that reason, no separate need to allow the claimant to carry out his own recording.

- However, we did consider whether the claimant should be allowed to record the Hearing in order to be able to listen back to the evidence following the close of the Tribunal day. Again, the fact that the Hearing was being recorded provided some reassurance in this regard, in that while the recording would not be available each day, the claimant would be able to apply to the Tribunal for a copy of the transcript of all or any of the days' proceedings, and could have them available prior to making submissions.

- In that regard, we agreed that the Hearing would be adjourned following evidence, so that the parties could prepare and present written submissions some weeks after the Hearing. That would allow the claimant to apply for a transcript. He did not, in the event, do so, but that opportunity was available to him.

- There was very little detail provided by the claimant as to why it would amount to a reasonable adjustment to allow him to carry out his own private recording of the Hearing. No medical evidence was provided in support of this application.

- We also had regard to the objections of Dr Gibson on behalf of the respondents, expressing considerable discomfort about the

prospect of being privately recorded during the Hearing. It would be very difficult to be sure that the recordings did not include matters not part of the formal Hearing, such as private or overheard discussions in the Tribunal room during adjournments, whether deliberate or inadvertent, and we accepted the respondents' submissions about this.

- The claimant did point out that he did not have the benefit of a noter with him, and that his conditions made it difficult for him to listen, note and formulate further questions all at the same time. We accepted that there may be some justification for this argument, though it was not supported by medical evidence, but as an experienced legal practitioner, we considered that the claimant would have a basic understanding of how to take notes while questioning a witness. Further, the fact that the witnesses' evidence in chief was taken by witness statement reassured us that the claimant would be unlikely to be disadvantaged were he not to be allowed to record the Hearing.

- Our conclusion, therefore, was that there was insufficiently good reason advanced by the claimant to depart from the normal process whereby a party is not permitted to record a Hearing. Accordingly, we refused the application.

List of Issues

24. The parties were unable to agree a Joint List of Issues in this case, due to a lack of consensus between the parties as to a number of significant matters in dispute between them.

25. The claims presented by the claimant were summarised in the paper apart to his ET1 (20/21), and included complaints of direct discrimination (section 13 of the Equality Act 2010), discrimination arising from disability (section 15), failure to make reasonable adjustments (section 20/21), indirect discrimination (section 19), harassment and victimisation

(sections 26 and 27). The claimant subsequently withdrew his claim of harassment.

26. We have concluded that the Issues to be determined by the Tribunal in this case, under each of the headings above, are as follows:

1. Discrimination arising from Disability (section 15)

a. Did the 1st, 2nd, 4th, 5th, 6th and/or 7th respondents discriminate against the claimant by subjecting him to unfavourable treatment because of something arising in consequence of his disability? The less favourable treatment alleged by the claimant was the rejection of his application to become Advocate-Depute, that is, the decision of the assessment panel that the claimant had not passed the advocacy assessment. The claimant alleges that his performance in the advocacy assessment arose in consequence of his disability.

b. If so, was that unfavourable treatment a proportionate means of achieving a legitimate aim on the part of the respondents? The respondents submit that the legitimate aim was to ensure that Advocate-Deputes who were appointed possessed a very high level of professional skill in prosecutorial advocacy, were able to exercise good judgement, often in situations of extreme high pressure, were able to interact successfully with others including COPFS staff, victims of crime and their families, witnesses and defence counsel and be able to engage with the judge and jury in a manner appropriate to a prosecutor representing the Crown in the most serious criminal cases

2. Direct Discrimination (section 13)

a. **Did the 1st, 2nd, 4th, 5th, 6th and/or 7th respondents discriminate against the claimant because of his disability by treating him less favourably than the respondents treat or would treat others not suffering from that disability? The less favourable treatment alleged by the claimant was the rejection of his application to become Advocate-Depute, that is, the decision of the assessment panel that the claimant had not passed the advocacy assessment.**

3. **Failure to make Reasonable Adjustments (section 20/21)**

a. **Were the 1st and/or 2nd respondents under a duty to make reasonable adjustments because a provision, criterion or practice (PCP) of the 1st or 2nd respondents put a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?**

b. **If so, did the 1st and/or 2nd respondents fail to take such steps as it was reasonable to have to take to avoid the disadvantage? The claimant contends that reasonable steps for them to have taken included disapplying any criteria that he could not meet due to his disabilities (including building rapport via video link, having good eye contact, not looking down during questioning, not losing his train of thought); or that appointing him to work exclusively in the Appeal Court, as an ad-hoc Advocate-Depute, providing him with extra training or a trial period.**

4. **Indirect Discrimination (section 19)**

a. **Did the 1st, 2nd, 4th, 5th, 6th and/or 7th respondents discriminate against the claimant by applying to him a PCP which was discriminatory in relation to his disability? The PCP alleged by the claimant to be discriminatory is that the respondents actively**

encouraged a system which is dependent upon close relationships with persons who are known to them, on good terms and with whom they have previously worked, who are then approached to come to work for the 2nd respondent?

b. If so, did the PCP put, or would it put, persons with whom the claimant shares a disability at a particular disadvantage when compared with persons with whom the claimant did no share it; and did it put, or would it put, the claimant at that disadvantage?

c. If it did, was the application of the PCP a proportionate means of achieving a legitimate aim?

5. Victimisation (section 27)

a. Did the 1st, 2nd, 4th, 5th, 6th and/or 7th respondents discriminate against the claimant victimise the claimant by subjecting him to a detriment because he had done a protected act? The respondents accept that the claimant did a protected act by bringing previous proceedings under the Equality Act 2010 and/or by making allegations that someone had breached the provisions of the 2010 Act; they also accept that they subjected the claimant to a detriment by not assessing him as having passed the advocacy assessment.

6. In the event that the claimant is successful in any or all of his claims, what remedy should be awarded by the Tribunal?

27. We should say that we sought to address the claimant's submissions, and his draft List of Issues, in our decision, and accordingly we have not disregarded those submissions. However, the above list is, we consider, an accurate reflection of the claimant's claims as represented in his pleadings.

Findings in Fact

28. Based on the evidence led and the information presented, the Tribunal was able to find the following facts admitted or proved.

29. The claimant, whose date of birth is 7 August 1979, worked as a trainee solicitor in the 2nd respondent's offices from 2004 to 2006. As part of his duties, he required to assist Advocate--Deputes. In 2006, having completed his traineeship, the claimant commenced devilling in preparation for being called to the Bar in 2007. As an Advocate, the claimant is self-employed, and has conducted a significant number of criminal appeals, trials and also civil hearings. He has primarily taken an interest in, and has his practice in, criminal defence work.

30. The claimant suffers from a number of disabling conditions which have affected his ability to carry out normal day-to-day activities. In 2013, he was diagnosed with ADHD; in 2014, he was diagnosed with a sleep disorder; in 2018 the claimant was diagnosed with depression, and in 2019, he was diagnosed with autism. He has suffered from anxiety for much of his life since suffering childhood trauma.

Previous Employment Tribunal Proceedings

31. On 9 August 2017, the claimant raised Employment Tribunal proceedings against the 1st and 2nd respondents (case no: 4102357/2017) alleging discrimination on the grounds of disability under a variety of sections of the Equality Act 2010. That claim was subsequently withdrawn against the 2nd respondent.

32. On 3 January 2019, the claimant raised a second claim against James Wolffe KC in a personal capacity (at that time being Lord Advocate) and the Scottish Ministers, against making allegations of disability discrimination. The claim against the Scottish Ministers was subsequently withdrawn.

33. On 9 and 10 January 2020, following a successful Judicial Mediation on 18 December 2019, entered into a COT3 agreement settling both claims.

Clause 3 of that agreement provided that the 1st respondent undertook that all future recruitment exercises inviting applications from persons interested in appointment as an Advocate-Depute (known henceforth as "AD") would invite applicants to declare whether they have a disability, whether they require reasonable adjustments at any stage of the process and that all applications would be anonymised before being sifted. They went on to undertake that disabled candidates who are not considered by the sift panel to require further assessment should be guaranteed an interview, and those who were considered by the sift panel to require further assessment should be guaranteed the opportunity to be assessed. If they passed the assessment, they would be guaranteed an interview, and if they did not, they would be advised of their right to feedback, which would be provided if requested.

Judicial Review Proceedings

34. In October 2019, the claimant served upon the 1st respondent (together with the then Advocate-General and the Secretary of State for Scotland) a Petition for Judicial Review of a decision to discontinue criminal proceedings against an accused individual for having sexually assaulted the claimant (519ff). The 2nd respondent wrote to the claimant on 30 October 2019 (534), in which they said that *"Crown Counsel has considered your application for review and has concluded that the decision made in relation to this charge was unreasonable. The section 76 indictment due to call on 31 October will not call. However, I cannot say, at this stage whether or not it will be possible to prosecute [the accused] for the charge which concerns you. That issue is being considered further and I hope to inform you of a decision in relation to that charge in the near future."*

35. Subsequently, the accused pled guilty to the more serious charge which was made against him. The claimant gave a press interview in which he criticised the 1st and 2nd respondents for their approach to vulnerable victims and witnesses, an item which appeared on the STV 6 o'clock

News, as well as on the STV website. The claimant was not identified in either.

Recruitment Process for ADs March 2021

36. A recruitment process for the appointment of ADs commenced in March 2021. An advertisement was issued by the 2nd respondent seeking the appointment as full time ADs. Essentially, the 2nd respondent relies upon the services of full time and ad hoc ADs. Full time ADs are employed full time in the role, and are available at all times to carry out AD duties. Ad hoc ADs are available to be called upon as and when required, but are able to accept instructions in other cases.

37. The advertisement (116/7) confirmed:

"The Lord Advocate invites applications for appointment to the position of Advocate Depute to fill anticipated requirements in the coming months to address both the current caseload levels and the plans for recovery and reduction of trial backlogs to pre-pandemic levels…

At this time the Lord Advocate is only seeking applications from those seeking to take up full time appointments, normally for a period of up to 3 years; experience of appearing in the High Court will normally be required, although the Lord Advocate may exceptionally waive that requirement…

In addition to good advocacy and legal skills, you will have integrity, be impartial and have sound judgement; you will protect confidence and be clear about objectives and priorities; you will be able to work as part of a team, accept and embrace change and have an awareness of the on-going changes being introduced to modernise the prosecution of serious crime.

Please note that this application process also includes the requirement to submit a written exercise which requires to be submitted with the application. A selection panel will consider applications. This will involve an initial sift of applications and those who have demonstrated potential

for appointment may be invited for further advocacy assessment. All applications will be anonymised before being considered by the sift panel.

All candidates who demonstrate the potential for appointment will be invited to an interview with the AD Appointments Panel, which makes recommendations to the Lord Advocate.

Please note that the selection panel may invite candidates directly to interview from application, and the Lord Advocate retains the ability to appoint applicants directly without the requirement to undertake the assessment process…

The Lord Advocate will appoint as Crown Counsel those who appear to be best qualified regardless of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation, or political affiliation. Please see below for further information in relation to those applicants asserting that they possess the protected characteristic of disability.

Those applicants are invited to indicate whether they require reasonable adjustments at any stage of the process.

In accordance with COPFS practice those applicants who are not considered by the sift penal to require further assessment and meet the minimum requirements for the role shall be guaranteed an interview.

Those applicants who are considered by the sift panel to require further assessment shall be guaranteed the opportunity to be assessed and will be informed in writing in advance of the assessment of the reasons giving rise to that requirement. If they pass the assessment they shall be guaranteed an interview.

An applicant who does not pass the assessment will be advised of their mark and shall be given the opportunity to request feedback, which request will be acceded to."

38. The provisions relevant to commission as an AD, an example of which was produced at 185ff, set out the terms and conditions upon which an AD's commission would be based. It was stated in paragraph 2 that the AD would be treated as a worker for employment law purposes and an office holder for the purposes of the Equality Act 2010.

39. In paragraph 3, it was provided that the AD would be assigned work from time to time by the Lord Advocate, Solicitor General for Scotland, Principal Crown Counsel, Deputy Principal Crown Counsel and the Assistant Principal Crown Counsel. It continued: *"Work is assigned, so far as possible, to ensure a fair distribution of work amongst Advocate Deputes, and a fair distribution of the need for travel and overnight accommodation."* The duties were said to include the preparation and presentation of cases at Preliminary Hearings, the prosecution of cases at trial diets in the High Court and the issue of instructions as regards the investigation and prosecution of crime and the investigation of deaths.

40. An AD is expected (paragraph 7) to be available for 220 days in any year.

41. In paragraphs 19 to 21, support arrangements in place were laid out, including the provision, as necessary, with a Crown Assistant (a noter or junior) in trial, the availability of library and other information sources within the 2nd respondent's office and a laptop computer to support the preparation of cases, and the need to attend a weekend conference and other training days from time to time.

42. As at 9 February 2022, the total remuneration available to an AD was £87,980 per annum (199).

43. The claimant submitted an application for appointment as AD (118ff). at the outset of the document, when asked if he considered himself to be disabled in terms of the Equality Act 2010, he ticked the box Yes. Further on in his application, the claimant set out some examples of work which he had carried out and which he regarded as relevant to the application.

44. Attached to his application, he presented a document headed "Reasonable Adjustments during Sift Process" (144). He set out the conditions from which he suffers, as mental impairments, and explained some aspects of those conditions, before setting out reasonable adjustments at paragraph 7 of the document, as follows:

"The following adjustments may be appropriate for the sift:

a. *allowances for deficits in memory;*

b. *allowances for a literal as opposed to the expected interpretation of the competency;*

c. *allowances for gaps in education or work experience;*

d. *allowances for spelling, grammar and idiosyncratic language; and,*

e. *feedback on the sift."*

45. This recruitment exercise resulted in 10 applications to be sifted (that is, assessed before being passed for the next stage, namely the advocacy assessment). The sift was conducted by 3 people: the Deputy Principal Crown Counsel (whose name is not among the respondents but who is not named herein in order to maintain as much confidentiality as possible), and the 4th and 5th respondents. The claimant's application had been accompanied by his request for reasonable adjustments, which was before the sift panel.

46. The panel agreed a pass mark of 11. They had each read all of the applications and decided upon their marks individually, and then met together to discuss and agree the final marks.

47. The marks were given to each of the candidates under different headings, displayed on the sift record (145). The headings were:

- Legal Knowledge & Advocacy Skills

- Integrity & Impartiality
- Intellectual Capacity & Sound Judgement
- Case Management Skills & Business Like Attitude
- Achievement of Objectives
- Interpersonal Skills

48. The claimant was marked 10, but was allowed to proceed to the next stage on the basis that his application fell under the guaranteed interview scheme. His application was marked either 1 or 2 under each heading. The range of marks available was:

- 0 – The candidate failed to demonstrate that they meet the requirements of the role and the level of competence required;
- 1 – The candidate provided evidence that partially demonstrated effective behaviour against the requirements of the role and level of competence required, but there are a few minor gaps that can be investigated at interview or developed on the job;
- 2 – The candidate provided evidence that demonstrated effective behaviour against the requirements of the role and level of competence required.
- 3 – The candidate provided evidence that demonstrated highly effective behaviour against the requirements of the role and level of competence required.

49. As a result of the sift process, the claimant was sent a letter dated 31 May 2021 by the 8th respondent (147). He was advised that he had been selected to take part in the next stage of the assessment process. The letter stated:

"The paperwork in relation to a separate case will be forwarded to you. That case will be used to assess your advocacy skills when you will be asked to conduct eh examination in chief of a Crown witness.

The assessment of the examination in chief will be time limited to 25 minutes. It is appreciate that this exercise may not be completed in the time provided.

The assessment will take place virtually using Microsoft Teams.

***The date and time of your advocacy assessment is 28 June 2021 at 11.55am.**"*

50. The letter did not disclose to the claimant that he had not reached the pass mark of 11 in the sift but had been allowed to progress due to the guaranteed interview scheme; nor did it disclose the reason why the sift panel had determined that the claimant required to undergo the further assessment.

51. It went on to confirm that following the assessment the panel would present its recommendations to the 1st respondent.

52. The claimant was pleased to have been selected for the next stage of the assessment process, and wrote to the 8th respondent (149) to say this.

53. He went on to say that he was "very anxious" about the process, especially about being taken into a room of people whom he did not know or whom he had met fleetingly but did not expect to see. He said that if he were conducting the trial relied upon, he would be expecting to enter the room and see a number of individuals, including the witness and the accused, and would likely know the identity of the Judge, defence counsel and clerk in advance.

54. He specifically requested further information, as follows:

    a) *"Is the witness going to be an actor or an AD or member of staff? If an AD or member of staff, can you please confirm their identity?*

b) *Who else will be in the room and will this be set out as a courtroom, with a judge, defence counsel, witness box etc, or just me facing a panel?*

c) *In total, how many people will be in the room?*

d) *The last time I saw her, LM indicated that there would be a lower pass mark for disabled applicants. Is that so?*

e) *Will the assessment be recorded?"*

55. The 8th respondent sought guidance from LB, in the 2nd respondent's Human Resources department, and received an email dated 24 June 2021 (151) in which advice was provided. LB explained that the 2nd respondent had a commitment to guarantee an interview to any eligible candidate who has declared a disability as defined by the Equality Act 2010, provided that they meet the minimum criteria for the post.

56. The 8th respondent also communicated with 6th respondent, who provided some advice by email dated 25 June 2021 (156).

57. The 8th respondent then replied to the claimant on 25 June 2021 (157). He stated:

"In relation to the matters that you have raised I would answer as follows.

a) *The witness Phoebe will be played by [the 7th respondent]. She is Deputy PF Specialist Casework. She is a qualified advocacy trainer and also has acting experience.*

b) & c) *The assessment is taking place on MS Teams, the details of which will be sent separately by meeting request. When you enter the meeting you will meet with the other assessors, [the 6th respondent], Procurator Fiscal Specialist Casework, and [the 5th respondent], Assistant Principal Crown Counsel, and possibly [the 4th respondent], Principal Crown Counsel. When the exercise is being conducted the assessors will switch off their cameras and it will only be the 'witness' and you who will be shown on the screen.*

d) The exercise will be recorded, to assist the assessment process.

e) You have asked about a lower pass mark for disabled candidates. [The 2nd respondent] is a Disability Confident Employer and as such is committed, to valuing diversity and to equality of opportunity. Part of this commitment is that we guarantee an interview to any eligible candidate who has declared a disability as defined by the Equality Act 2010, provided that they meet the minimum criteria for the post in question. The essential minimum criteria are set out in the job advert and any supplementary recruitment documentation.

What this means is that at the application stage candidates may be passed to the next phase of the process (in this case the Advocacy Assessment) where they otherwise might not have. There is no lower pass mark at the Advocacy Assessment.

[The 6th respondent] will be happy to discuss the Assessment and arrangements for you if you would find that helpful. Further, if there is anything else that we can consider to reduce your anxiety about the process please let me know."

58. The claimant did not subsequently contact any of the respondents prior to the Advocacy Assessment to request any further adjustments.

Advocacy Assessment

59. The claimant was asked to attend for the Advocacy Assessment on 28 June at 11.55am. He was one of 10 candidates who had been invited to the assessment.

60. The assessment was based on a fictional case study, in which the candidates required to ask questions in examination-in-chief of a particular witness. The assessment was written by the 6th respondent, who was a qualified and experienced advocacy trainer. She was the Advocacy Champion within the 2nd respondent's organisation at the time of the Hearing in this case; she qualified as an advocacy teacher in 2000, having completed the training delivered by the National Institute of Trial

Advocacy; she holds a Masters in Advocacy obtained in 2014 from the University of Strathclyde; and she has been involved in delivering advocacy training for a number of years, including training ADs. She herself holds higher rights of audience and has worked as an ad hoc AD.

61. The purpose of the assessment is to allow the candidates to encounter a case not dissimilar to the real-life situation which an AD may encounter within the High Court of Justiciary. The materials provided to the candidates (159ff) contained the indictment, summary of evidence, a Joint Minute of Agreement, statements by the 3 witnesses, including the witness to be questioned, a voluntary statement of the accused and a street plan.

62. Essentially, the accused WS was charged on indictment with assaulting the witness PC at a bookmaker's shop in Glasgow on 9 May 2020. The charge further specified that, acting with another, he *"did with your faces masked, demand that she disable the alarm, brandish a knife and a bat at her, strike her on the head with a bat, demand money from the till, place her in a state of fear and alarm for her safety, and did attempt to rob her of said money."*

63. The candidates were expected to present the evidence of the witness, demonstrate good advocacy techniques and deal with case strategy, while telling the story to the Judge or Jury in a chronological and engaging manner, all in a persuasive manner.

64. The panel set the pass mark at 8 out of 12. It was intended to be a difficult exercise with a high pass mark, and the assessors agreed that anything less than 8 out of 12 would not demonstrate a sufficient level of competence to be recommended for appointment.

65. The three assessors were the 6th, 4th and 5th respondents.

66. The 6th respondent was aware that the claimant had previously raised Employment Tribunal proceedings against, among others, the 2nd respondent, and was aware that the need to ensure that the

advertisement for this recruitment exercise had the proper wording in relation to disability as a result. She had little knowledge as to the detail of the claim, but was aware that it had been raised and subsequently settled. The 6th respondent was only aware of the claimant's Judicial Review proceedings several years after the Petition had been raised. It was a matter which related to a different department than the one in which she was based.

67. She was aware that the claimant was a disabled person before the assessment, on the basis that the 8th respondent had advised her that the claimant was seeking a number of reasonable adjustments in relation to the process.

68. The 4th respondent was aware that the claimant had benefited from the guaranteed interview scheme on the basis of disability, but had no further information about the nature of the claimant's disability. He had a "general awareness" of the claimant's previous Employment Tribunal claim, but maintained that this was not something which was in his mind when he conducted the claimant's assessment.

69. The 5th respondent was unaware of the claimant's disability at the time of the sift or the advocacy assessment. She had only seen the anonymised application form, and had not been made aware of the claimant's request for reasonable adjustments. In her evidence before us, under cross-examination, the 5th respondent advised that had she been aware of the claimant's disability, she would have judged the claimant more critically as she would be concerned about how the claimant would cope with the demands of being an AD.

70. She was not aware of the claimant's previous Employment Tribunal claim, or the Petition for Judicial Review, at the time she carried out her assessment.

71. The part of the witness was played by the 7th respondent, a qualified and experienced solicitor employed by the 2nd respondent throughout her career to the point when she resigned on 3 September 2021 in order to

take up appointment as a Summary Sheriff. She qualified as a National Institute for Trial Advocacy trainer in March 2007 and assisted the 6th respondent in her role as Advocacy Champion. The 7th respondent had previously played the part of the witness, as had other trainers in similar exercises before this one.

72. The Tribunal had the benefit of observing the video footage of the claimant's advocacy assessment, and the exchanges with the witness. We remind ourselves, however, that it is not our role or remit to carry out our own assessment of the quality of the claimant's performance. We viewed the footage at the request of the parties in order to allow questioning about the advocacy assessment to be placed in its proper context, and to confirm what had actually happened in the assessment, in relation to the claimant.

73. At the outset, the 6th respondent introduced the 3 assessors, namely herself, and the 4th and 5th respondents. A short transcript of the claimant's recording of the introduction (taken privately by the claimant without the knowledge of the assessors) was produced (563). The 6th respondent advised that the claimant would be given 25 minutes; she said that *"if you have completed your evidence in 25 minutes that will be the end of the exercise. If you have not I'll come back in in 25 minutes time and let you know that's the end of the 25 minutes and the exercise will stop but don't worry if you've not completed your evidence in chief at that time. I would ask you if you can play along with this pretend exercise is as close to reality as we can get in the circumstances. The only thing the witness won't be able to do for example would be to ask her to pick up something and show it to the ladies and gentlemen of the jury, she won't be able to do that but she has you can assume she access to the productions and labels and lodged there in the court…"*

74. The claimant then asked if he could assume that the productions and labels were properly lodged and could be referred to. The 6th respondent advised that he could, now that it had been drawn to her attention that the plan was not on the indictment.

75. The guidelines for completing and scoring the candidate rating form (175) provided scores of 0, 1, 2, 3 and 4, graded according to the candidate's performance and how it demonstrated effective skills.

76. The claimant was marked as having scored 6 out of 12 (174). He was marked 2 for each of the 3 categories, namely Presentation, Case Strategy and Advocacy Techniques.

77. Each of the assessors decided upon the marks which they wished to give each candidate under each heading, then came together to discuss and agree the mark to be given by the panel.

78. With regard to Presentation, the criteria included (176): *"Pace; Tone; Clarity; Variation; Interested & Interesting; Confidence; Familiarity with case; Language; and Eye contact."*

79. On the candidate rating form completed in relation to the claimant, the panel stated, under Presentation (177): *"Demonstrated familiarity with the case and the materials. There was some eye contact with the witness. He did not vary the pace or the tone of his questions. He appeared to be noting which gave the impression he was not focussed on listening to the answers. No conversational flow. Although more difficult to build rapport with the witness when done remotely the interaction with the witness appeared perfunctory. Thrown slightly from his train when the witness corrected a leading question ('you said you went to your locker'). Language a bit formal ('what was the extent of their enquiries'). Lots of distracting 'ehms'. Overall demonstrated effective skills."*

80. With regard to Examination in Chief, including Case Strategy, the criteria included (176): *"All elements of the charge proved; all essential facts relating to the identification of the accused led; no leading of previous convictions; dealt with weakness in case (theft by witness); dealt with prior inconsistent statement (original version to police)."*

81. In the exercise, the witness had stolen money from the till, but had lied to the police about this in her original statement; in addition, the accused

had spoken in the shop during the event about having a previous criminal conviction, which the advocate required to avoid bringing out from the witness. These were "traps", intended to test the skill of the advocate in maintaining the credibility of the witness before the jury and ensuring that the trial was not undermined by the disclosure of a previous conviction on the part of the accused.

82. On the candidate rating form relating to the claimant, it was noted (177): *"He failed to elicit all important facts relating to identification including hair colour and detailed of the tattoo. (Did not ask 'what colour hair' but rather started to put the prior statement to the witness). Did not elicit any details of the assault with the bat eg where she was struck. A significant part of the case strategy would have been dealing sympathetically with the theft by the witness and her lies to police. This was dealt with almost entirely by asking leading questions which limited the opportunity to create empathy. Failed to ask the witness why she had stolen, lied to the police and how she felt about those actions. Somewhat effective."*

83. Under Advocacy Techniques, criteria included (176): *"Clear structure; chronological; introduced/accredited/personalised the witness; set the scene; no leading questions; one fact per question; no false propositions; used headlines; exhausted the topic; listened to answers to ask follow up; demonstrated the proper use of documentary and labelled productions; no unnecessary questioning."*

84. The claimant's candidate rating form (177) recorded the following comments: *"Failed to set the scene fully by asking all appropriate questions about the security. Somewhat chronological but some questions about identification at beginning and at the end of the exercise (did not exhaust the topic) by putting statement to the witness to get further details re identification. At a crucial part of the examination he asked a serious (sic) of leading questions (not permitted in E-in-C). some use of headlines."*

85. There were 20 candidates assessed in this exercise by the panel, of whom 9 were assessed as having passed by scoring 8 or higher. The majority of the remaining candidates scored 6, as did the claimant, and two scored 7 and one scored 3. The Tribunal did not observe the assessment of any other candidate.

86. The 6th respondent's handwritten notes (183) confirm the conclusions reached, and pointed out that the claimant *"did get Glasgow accent, not read hair, but going to put statement, didn't get assault, didn't get the account in scene setting, didn't exhaust topic and moving back and forward."*

87. Following the assessment, the panel passed their results back to the 8th respondent, through his personal assistant. The 8th respondent then wrote to the claimant on 9 July 2021 (184):

"Dear X,

Application for Appointment as a Full-Time Advocate Depute

Thank you for your application to be appointed as an Advocate Depute, and for attending the recent Advocacy Assessment.

The assessments have now been processed; unfortunately on this occasion your assessment results did not meet the pass mark and therefore I regret to inform you that you have not been successful.

I appreciate that this will be disappointing news and should you wish detailed feedback please contact my PA…

May I again thank you for your interest and application."

88. The claimant was disappointed and accordingly contacted the respondents to seek feedback. As a result, the 5th respondent telephoned the claimant on 16 July 2021.

89. The claimant recorded this telephone call without informing the 5th respondent that he was doing so, nor seeking her permission. He

produced a transcript of the recording (560). The Tribunal had the benefit of listening to the recording, and found the transcript to be accurate.

90. It is appropriate to set out the full terms of the conversation (suitably anonymised, with the claimant noted as "X" and the 5th respondent as "D", as shown in the instance):

"X. Hello.

D. Hi (X), it's (D).

X. Hi (D). How are you?

D. I am very well thank you. How are you?

X. Och, not bad.

D. Good. It was really nice to see you the other day. I haven't seen you around and about so…

X. Yeah, it's been a while.

D. Yeah, it was really nice to see you and I am sorry that you didn't this time get through the assessment, em, what I would say (X) is that any other year, that we had to raise the pass mark this year just because of the number of people that we had, em so you're close and what I would say is please don't lose heart and reapply because your application has got through the process you've obviously done well on the written bit.

X. Mhmm.

D. And pretty close in respect of the advocacy bit so you know don't lose heart.

X. Okay. Yeah.

D. What so we had to be quite pernickety and we were mindful that em when you are doing these assessments it is always really artificial it is

much easier if you are just properly in court doing a witness than doing an assessment.

X. Mhmm.

D. And it is difficult because you are doing it over zoom whereas ordinarily you'd be in court but one of the interesting things in respect of covid of course is that we are having to rely much more on electronic means and partly that's how all the juries are seeing all of the evidence now down the lens of a camera.

X. Yeah.

D. But increasingly we're having to deal with all of our witnesses in that way because we're having to we're doing a lot of witnesses sort of by live link from wherever they are.

X. Mhmm.

D. As opposed to bringing them in. so that's quite interesting and it's just a pretty useful exercise because one of the things is that you have to it's all about just the purpose of the exercise is to ensure that you are getting on with the witness and building her up to be somebody that's an interesting story and for whom the jury and going to feel sympathy with and therefore be invested in their story, that's the crux of the case and that was just slightly missing in respect of your examination in chief.

X. Mhmm.

D. One of the things you were doing and you probably don't realise it but it's really distracting when you watch it on camera is you were writing down every one of her responses and of course it's slightly artificial because in court you won't have to do that you'll have a noter but albeit you're down a camera lens you have to just think about your reactions because the jury are looking at you on the camera but they want to see you responding to the answers that she is giving as opposed to, it looked a bit functional.

X. Mhmm.

D. Em, there were in all of these cases and the tip for next time as you'll understand is that they are just full of traps these examples.

X. Yeah.

D. And you did really well some people fell face first into the dog poo but you didn't that was really good.

X. (Laughter)

D. But there were certain and really important details you know the issue in the trial is one of identification and there were a couple of bits of the identification for example you didn't elicit the fact that it was the piece of red hair that was poking out from the balaclava.

X. Mhmm.

D. And whilst of course it's not specific to either the accused has red hair so that's just you know in a weak evidential and circumstantial case it's just those build up of adminicles of evidence that you need to rely on.

X. Mhmm.

D. And the only other the real issue was you went a little bit too quickly we weren't quite sure it seemed just as you were being stopped you were about to go to the previous statement and we weren't entirely sure why because it seemed you hadn't asked the question for which you were looking that you were going to the statement to get the evidence from.

X. Mhmm.

D. And one of those things and it struck among a number of people is sometimes when you are in that moment but it's really important when you are prosecuting particularly is just to always be really carefully listening to what the witness is saying.

X. Mhmm.

D. A lot of people for example, and you weren't this wasn't really your problem but a lot of people would were anticipating what the witness might say and would repeat it back and get it slightly wrong.

X. Mhmm.

D. And it's all just and I think you thought that the witness had probably said something but she hadn't and then you were diving into the previous statement and thought well that just gives the judge you know

X. Mhmm.

D. Stoooop

X. (Laughter)

D. And it gives the defence sort of ammunition against you but it's just about always getting it if you can getting it right so that you create the problems for the defence they've got nothing to work with. Em, so where you got slightly marked down as well is in how you dealt with the theft issue and that's in there obviously because it's the big well it's one of the two stinking dog turds in the room but the point about it is of course it's just a bit of a problem for the Crown because it's undermining the reliability potentially or the credibility of the witness.

X. Mhmm.

D. And as it came across it was just quite accusatorial the way in which you did it so It's fair to say you didn't tell the truth you told them, you had taken it for yourself, you put it in the locker, you plead guilty, and but just in terms of a sort of rapport building the point of it is to say yes it's a bit problem for us but it's not insurmountable and what we were looking is building up to this really traumatic incident that she's been a party to just overwhelmed by everything that's happened and sees a moment and out of sheer stupidity and for which shell be paying the consequences forever more because of that and it's creating a bit of sympathy for the witness and that was slightly lacking I have to say

X. Yeah.

D. Just in respect of your approach with the witness but you know it's really close and

X. Mhmm.

D. You know do reapply cos it was good, but it just wasn't this time

X. Yeah. That yeah I'll definitely do that thank that's very helpful thank you em em.

D. Good, great.

X. That's great.

D. Well hopefully we'll see you around in the high court.

X. Yeah, yeah absolutely yeah no that's great thanks (D).

D. Okay, alright take care.

X. Okay, take care thanks bye.

D. Cheers, bye."

91. The call was calm and friendly. However, the claimant said that he was upset by the feedback he received from the 5th respondent on the call, as he felt that he was being unfairly criticised. For example, it was said that he had been noting down answers, when in fact he had not been. He also felt that he was being criticised for some things which he did, in his view, as a result of his disability. The claimant did not accept that building rapport, demonstrating empathy or sympathy was a necessary ingredient of advocacy for this assessment or advocacy in general. He maintained that this was not taught in the advocacy training scheme.

92. The claimant felt that the 5th respondent was making excuses for his rejection.

93. Following the assessment exercise, the panel made its recommendations to the 1st respondent. None of the witnesses called to give evidence in this Hearing were involved in that process, and the 1st respondent was not called as a witness.

94. One candidate who had passed this advocacy assessment was not appointed by the 1st respondent, and two candidates who had failed the assessment were subsequently appointed. We heard no evidence as to the process leading to these decisions.

Submissions

95. The parties both presented detailed written submissions. The Tribunal read and took careful consideration of the submissions made, and while we do not summarise their terms in this section, we address points made as appropriate and necessary in the Decision section below.

Observations on the Evidence

96. We heard from a number of witnesses in this Hearing and it is appropriate to make some short observations about the evidence given by each. It is of course of importance to understand that the only oral evidence provided by each witness was either in cross-examination or, with the permission of the Tribunal, in additional questions put by the respondents' representative prior to cross-examination; and in re-examination.

97. The claimant emerged as an articulate, experienced advocate, able to answer questions in a straightforward manner. We considered that the claimant was open and honest in his evidence, and that where there was any dispute in cross-examination, either of him or by him, he remained calm and sought to be of assistance to the Tribunal. There were clear divergences between the claimant and the respondents' representative's interpretation of what was said or done at any given stage, but we have no reason to believe that the claimant was doing other than seeking to tell the truth.

98. It was also our observation that the regular breaks provided to the claimant enabled him to conduct the Hearing without any ostensible difficulties. We were satisfied that the reasonable adjustments which were put in place were sufficient to allow him to present his case to the best of his ability.

99. The respondents' witnesses, of whom all apart from AE were respondents in these proceedings, were similarly helpful to the Tribunal, by responding to questions in a calm and open manner. We were satisfied that each witness gave their evidence honestly and sincerely, and took seriously their obligations under oath or affirmation. We noted that each of the respondents' witnesses were experienced lawyers, of considerable seniority, but it was clear to us that they were each seeking to assist the Tribunal. We were particularly impressed by the evidence of 5th respondent, who spoke with precision, respect and at times warmth towards the claimant. She made clear, without exaggeration, that she was upset when she discovered that the claimant had carried out a covert recording of the telephone call on 16 July 2021, but we were of the view that she did not allow this to influence her manner in this Hearing.

The Relevant Law

100. Section 13(1) of the 2010 Act provides:

> *"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

101. We had regard to **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL**, and in particular to the requirement that the Tribunal must ask "why did the alleged discriminator act as he or she did? What, consciously or unconsciously, was his or her reason?"

102. We were also referred to **Gould v St John's Downshire Hill 2021 ICR 1, EAT**, and **Talbot v Costain Oil, Gas and Process Ltd and ors 2017 ICR D11, EAT**, which we took into account in reaching our decision.

103. Section 20 of the 2010 Act sets out requirements which form part of the duty to make reasonable adjustments, and a person on whom that duty is imposed is to be known as A. The relevant sub-sections for the purposes of this case are sub-section (3) and (5). Sub-section (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."* Sub-section (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."*

104. Section 21 of the 2010 Act provides as follows:

> *"(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…"*

105. Section 19 of the Equality Act 2010 provides:

> *"(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 sub-section (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."

106. Section 27(1) of the 2010 Act provides:

"A person (A) victimizes another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act."

107. Section 15 of the Equality Act 2010 provides:

(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."*

108. We had reference to **Pnaiser v NHS England and Another 2016 IRLR 170, EAT**, in relation to the guidance provided therein by Mrs Justice Simler. The Tribunal must identify, first, whether there was unfavourable treatment, and by whom; then it must determined what caused the

impugned treatment, or what was the reason for it, focusing on the conscious and unconscious thought processes of the alleged discriminator. There may be more than one reason for the impugned treatment, but it must have a significant influence so as to amount to an effective reason or cause for it.

Discussion and Decision

109. As we have set out above, the List of Issues for determination in this case are as follows:

1. Discrimination arising from Disability (section 15)

a. Did the 1st, 2nd, 4th, 5th, 6th and/or 7th respondents discriminate against the claimant by subjecting him to unfavourable treatment because of something arising in consequence of his disability? The less favourable treatment alleged by the claimant was the rejection of his application to become Advocate-Depute, that is, the decision of the assessment panel that the claimant had not passed the advocacy assessment. The claimant alleges that his performance in the advocacy assessment arose in consequence of his disability.

b. If so, was that unfavourable treatment a proportionate means of achieving a legitimate aim on the part of the respondents? The respondents submit that the legitimate aim was to ensure that Advocate-Deputes who were appointed possessed a very high level of professional skill in prosecutorial advocacy, were able to exercise good judgement, often in situations of extreme high pressure, were able to interact successfully with others including COPFS staff, victims of crime and their families, witnesses and defence counsel and be able to engage with the judge and jury in a manner appropriate to a prosecutor representing the Crown in the most serious criminal cases

2. Direct Discrimination (section 13)

a. Did the 1st, 2nd, 4th, 5th, 6th and/or 7th respondents discriminate against the claimant because of his disability by treating him less favourably than the respondents treat or would treat others not suffering from that disability? The less favourable treatment alleged by the claimant was the rejection of his application to become Advocate-Depute, that is, the decision of the assessment panel that the claimant had not passed the advocacy assessment.

3. Failure to make Reasonable Adjustments (section 20/21)

a. Were the 1st and/or 2nd respondents under a duty to make reasonable adjustments because a provision, criterion or practice (PCP) of the 1st or 2nd respondents put a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

b. If so, did the 1st and/or 2nd respondents fail to take such steps as it was reasonable to have to take to avoid the disadvantage? The claimant contends that reasonable steps for them to have taken included disapplying any criteria that he could not meet due to his disabilities (including building rapport via video link, having good eye contact, not looking down during questioning, not losing his train of thought); or that appointing him to work exclusively in the Appeal Court, as an ad-hoc Advocate-Depute, providing him with extra training or a trial period.

4. Indirect Discrimination (section 19)

a. Did the 1st, 2nd, 4th, 5th, 6th and/or 7th respondents discriminate against the claimant by applying to him a PCP which was discriminatory in relation to his disability? The PCP alleged by the claimant to be discriminatory is that the respondents

actively encouraged a system which is dependent upon close relationships with persons who are known to them, on good terms and with whom they have previously worked, who are then approached to come to work for the 2nd respondent?

b. If so, did the PCP put, or would it put, persons with whom the claimant shares a disability at a particular disadvantage when compared with persons with whom the claimant did no share it; and did it put, or would it put, the claimant at that disadvantage?

c. If it did, was the application of the PCP a proportionate means of achieving a legitimate aim?

5. Victimisation (section 27)

a. Did the 1st, 2nd, 4th, 5th, 6th and/or 7th respondents discriminate against the claimant victimise the claimant by subjecting him to a detriment because he had done a protected act? The respondents accept that the claimant did a protected act by bringing previous proceedings under the Equality Act 2010 and/or by making allegations that someone had breached the provisions of the 2010 Act; they also accept that they subjected the claimant to a detriment by not assessing him as having passed the advocacy assessment.

6. In the event that the claimant is successful in any or all of his claims, what remedy should be awarded by the Tribunal?

110. We addressed the Issues in turn.

1. Discrimination arising from Disability (section 15)

c. Did the 1st, 2nd, 4th, 5th, 6th and/or 7th respondents discriminate against the claimant by subjecting him to unfavourable treatment because of something arising in consequence of

his disability? The less favourable treatment alleged by the claimant was the rejection of his application to become Advocate-Depute, that is, the decision of the assessment panel that the claimant had not passed the advocacy assessment. The claimant alleges that his performance in the advocacy assessment arose in consequence of his disability.

d. If so, was that unfavourable treatment a proportionate means of achieving a legitimate aim on the part of the respondents? The respondents submit that the legitimate aim was to ensure that Advocate-Deputes who were appointed possessed a very high level of professional skill in prosecutorial advocacy, were able to exercise good judgement, often in situations of extreme high pressure, were able to interact successfully with others including COPFS staff, victims of crime and their families, witnesses and defence counsel and be able to engage with the judge and jury in a manner appropriate to a prosecutor representing the Crown in the most serious criminal cases.

111. There was no consensus between the parties as to the identification of the treatment of which the claimant is complaining here. Essentially, the claimant's position is that the treatment was that he was not only rejected in the advocacy assessment but also that he was not interviewed by the 1st respondent nor was he appointed. The respondents' position is that this cannot be correct, in that the only complaint he can have against those respondents who remain after the withdrawal of the claim against the previous 3rd respondent is that he was unsuccessful in the assessment process. Evidence was led to the effect that one person who had passed the advocacy assessment was not subsequently offered the position by the 1st respondent.

112. We considered that the respondents' position is correct here. The primary focus of the evidence in this case, and of the claimant's complaint, is the advocacy assessment. Had the claimant passed the advocacy

assessment, it is not certain that he would have been offered appointment as an AD. Certainly, when he failed the advocacy assessment, he lost the opportunity to be appointed, as he was not considered further.

113. We note at this stage that there was an anomaly in the evidence which was not explained nor explored, and upon which we can express no view: that two people who failed the advocacy assessment were subsequently appointed by the 1st respondent to become ADs. However, we have no information as to the reason for this decision, and in any event, as the respondents' representative pointed out, there is no claim remaining against the 3rd respondent, the individual who currently holds the 1st respondent's appointment. The focus of the claim is clearly, in our judgment, on the advocacy assessment. The claimant does not plead that he should have been appointed as AD on the same basis as two others who had failed the assessment were, perhaps unsurprisingly on the basis that he did not know that at the time he presented his claim to the Tribunal. It is plain that there was no process beyond that assessment, and no evidence available to us upon which to make any judgment about such a process and what its outcome would have been.

114. In any event, we consider that the unfavourable treatment which was applied to the claimant in this case was the rejection of his application to become an AD, which took place when the assessors determined that his advocacy assessment should attract a fail mark.

115. We do not consider, as the claimant seeks to argue, that the mark he was given at the sift stage amounted to unfavourable treatment. We have found that the claimant was awarded a mark of 10 against a pass mark of 11, but was granted a guaranteed interview (or assessment) because he was a disabled candidate. This does not amount to unfavourable treatment, as he was permitted to proceed to the advocacy assessment itself despite the fact that he, unlike others, did not meet the minimum standard.

116. It is accepted by the respondents that the decision that the claimant had failed the advocacy assessment amounted to unfavourable treatment.

117. Accordingly, we must consider whether or not the respondents' decision in the advocacy assessment arose in consequence of his disability.

118. The claimant primarily focused upon his disability of autism in making this complaint, and in particular that he was not informed in writing in advance of the reason for the requirement to be assessed, that he was marked down for not building rapport via video link, or being empathetic, or appearing functional; being marked down for not listening or temporarily losing his train of thought; being marked down for failing to have good eye contact or looking down; and being required in the context of a competitive and coveted recruitment exercise to adapt to being told that the plan could be used despite it not being on the indictment; being marked down for not completing the assessment within 25 minutes despite being told that he did not have to; and being assessed as unsuitable for appointment.

119. We dealt with these points in turn, in seeking to determine whether or not they arose in consequence of his disability.

120. It is correct that the respondent's advertisement advised that he would be advised in advance of the assessment of the reason why he was to be assessed. The claimant did not raise this at the time, and it is difficult to see why this could amount to unfavourable treatment. There was no evidence to suggest that any other person was told why they were to be assessed, and a total of 20 candidates were assessed. We did not consider this to be an issue arising in consequence of the claimant's disability.

121. The points on which the claimant was marked down did include criticisms about his approach to the witness.

- It was noted that although it is more difficult to build rapport with a witness when done remotely, the panel felt that his interactions

were perfunctory (177). The claimant seemed to focus on the fact that the process was entirely artificial because it was done in his home by video, and therefore unlike the normal court setting; however, it is clear that this was the setting for every person, and there was no suggestion on his part that he should have had a different process applied to him. The claimant's disability of autism makes it more difficult for him to make eye contact and build rapport with individuals, and accordingly we accepted that this criticism may have arisen in consequence of his disability.

- As to eye contact, all that was said in the rating form was that there was some eye contact with the witness. It is not clear that this was a significant criticism of the claimant.

- It is not clear to us that the criticism of appearing not to be listening or focused on the answers is something which arises in consequence of the claimant's disability. It is an observation about how he conducted the questioning.

- The reference to the plan was irrelevant, in our judgment. The claimant was told that it was not on the indictment and therefore he could refer to it if he wished, or not. There is no basis for suggesting that that amounted to unfavourable treatment of itself, nor that it was in any way linked to his disability.

- It is correct that he was told that he did not need to conclude the exercise within 25 minutes, but in our judgment, the criticism which was made was that he did not extract the critical evidence from the witness within the time given. There was criticism about his failure to set the scene fully, and about his failure to exhaust the topic of identification, rather than criticism of a failure to complete the exercise. The respondents' witnesses accepted that it was a complex exercise and that it would be very difficult to complete it within that timescale. There is no force in the claimant's criticism here.

122. It is important, then, to consider whether the decision to give him a fail mark in the assessment arose in consequence of his disability. In our judgment, it did not. There was a criticism about the claimant's failure to build rapport with the witness, and about not listening to answers, but in our judgment, the reason for the claimant's failure to achieve a pass mark was related much more significantly to the concerns which arose from his assessment.

123. In particular, the assessors were concerned that he was unable to obtain from the witness certain adminicles of evidence which were crucial to obtaining a conviction, such as the red hair visible under the first assailant's balaclava and the fact that the assailant with the baseball bat had not just waved it close to the witness but had actually struck her with it. Further, they were concerned about the advocacy techniques which he adopted with regard to the identification evidence, and to the witness's theft of the money from the business. The claimant's position on these two matters was slightly contradictory. On the one hand, he insisted that he could not ask the witness what colour hair the first assailant had, as that would amount to a leading question (with which the highly experienced assessors simply disagreed); and on the other hand, he maintained that leading the witness to bring out the evidence about her admitted wrongdoing was perfectly acceptable, when it was clear that the assessors were concerned that simply putting leading questions to such a witness would undermine any sympathy a jury might have for the witness if she were allowed to explain the situation in her own words.

124. Accordingly, we were of the view that the reason for the claimant's fail mark in the advocacy assessment arose because of the claimant's performance in that assessment, in failing to draw from the witness some (though not all) adminicles of evidence which were fundamental to the exercise. We did not consider that the comments about his failure to build rapport or his appearance that he was not listening were significant, though we do accept that they may have arisen in consequence of the claimant's disability of autism.

125. We must consider whether or not these matters, the something arising in consequence of the claimant's disability, were the effective cause of the decision by the respondents, that is, having a more than trivial influence upon the respondents' decision. In our judgment, it did not. The assessors were focused upon the claimant's inability to draw from the witness some of the most important adminicles of evidence which they were looking for the candidates to bring out.

126. However, even if the points identified as arising in consequence of the claimant's disability had played a part, no matter how small, in the decision to give the claimant a fail mark in the assessment, we considered whether or not the decision was one which was a proportionate means of achieving a legitimate aim.

127. The legitimate aim which the respondents relied upon in this case was that the advocacy assessment required to ensure that ADs who were appointed possessed a very high level of professional skill in prosecutorial advocacy, and the ability to carry out the tasks associated with the work of an AD, such as engaging with the court, the jury, the witnesses, the complainers and defence counsel. We accepted that this is a legitimate aim of this exercise. The prosecution of serious crimes in the High Court in Scotland is a critical function of the ADs, carried out under severe pressure and often considerable public scrutiny. It is necessary to ensure that those appointed to carry out such functions are capable of the advocacy and associated skills necessary to ensure that the prosecution of serious crime is effectively and efficiently carried out.

128. We noted that the claimant, helpfully, confirmed in his submission that the aims of ensuring that ADs possess a very high level of professional skill in prosecutorial advocacy, that they are able to exercise good judgement, often in situations of extreme high pressure, that they are able to interact successfully with others including COPFS staff, victims of crime and their families, witnesses and defence counsel, and that they are able to engage with the judge and jury in a manner appropriate to a prosecutor representing the Crown in the most serious criminal cases.

129. We then considered whether the advocacy assessment was a proportionate means of achieving that legitimate aim. We had no difficulty in finding that it was. As the respondents' witnesses repeatedly stated, this exercise is intended to be difficult, testing and at times unpredictable, precisely because the work of an AD is difficult, testing and at times unpredictable. We deal below with the question of reasonable adjustments, but we accepted that the respondents' intention in this exercise was to test rigorously the skills of those putting themselves forward for appointment to a position which is very demanding, public and pressurised. To apply a high standard in that assessment amounted to a proportionate means of achieving the legitimate aim in this case.

130. It may be said to amount to this: that if the assessment were not so rigorous, it would represent not only an inadequate test of the skills required but an unfair preparation to those appointed for what lies ahead.

131. The claimant suggested that there may be alternative means of achieving the legitimate aims above, such as appointing the claimant full time or ad hoc with close supervision and training, or allowing the claimant a work trial; allowing him to conduct a witness's evidence under supervision of a senior AD; allocating cases based on the claimant's level of experience; allowing the claimant to meet with any witness or vulnerable witness in advance or allowing the claimant to sit the assessment again.

132. In our judgment, these are perhaps more appropriately considered under the claim in respect of reasonable adjustments. This complaint, under section 15, requires us to consider what the respondents actually did in this case, and then to determine whether or not what was done amounted to a proportionate means of achieving a legitimate aim. Even if there were other, less demanding means of achieving that legitimate aim, the Tribunal would not be dissuaded that the means adopted were not proportionate. We are satisfied that the respondents have demonstrated that they were.

133. Accordingly, we have reached the conclusion that the claimant's claim that the respondents' decision to award him a fail mark in the advocacy assessment amounted to unfavourable treatment arising in consequence of his disability must fail, and be dismissed.

2. Direct Discrimination (section 13)

a. Did the 1st, 2nd, 4th, 5th, 6th and/or 7th respondents discriminate against the claimant because of his disability by treating him less favourably than the respondents treat or would treat others not suffering from that disability? The less favourable treatment alleged by the claimant was the rejection of his application to become Advocate-Depute, that is, the decision of the assessment panel that the claimant had not passed the advocacy assessment.

134. We considered whether the claimant had demonstrated that the respondents (other than the 8th respondent) had directly discriminated against him on the grounds of disability by treating him less favourably than others not suffering that disability.

135. The claimant, in his submissions, suggested that the respondents' decisions not to interview nor appoint the claimant were discriminatory. On the evidence, no such decision was taken by any of the respondents in this case apart from the 1st respondent, and no evidence was led from or about the 1st respondent's decision not to appoint the claimant as an AD. All that can be said is that the claimant was permitted to participate in the advocacy assessment, that he did not pass the assessment and that as a result his application went no further. Accordingly, we accept that the less favourable treatment to which the claimant is referring in this case is the decision by the panel which concluded that he had not passed the assessment.

136. In order to succeed in demonstrating that the respondents had discriminated against the claimant, he would require to show that he was

treated less favourably than named or hypothetical comparators, on the grounds of his disability.

137. We addressed some of the points which the claimant raised in his complaint of direct discrimination, in his submissions.

138. The claimant suggested that he was treated less favourably by the respondents "in automatically failing his application in order to achieve the objective of assessing him or him along with a group of non-disabled persons". Our interpretation of this is that the claimant appears to be suggesting that he should not have required to undergo the advocacy assessment at all, but that is not a suggestion he made at the time, nor did he query why he was being asked to undergo that assessment. In any event, the claimant's assertion is a considerable stretch. There was no evidence that the respondents "automatically" failed the claimant's application in order to achieve any objective. In fact, they did not fail his application at the sift stage; they gave him a mark which, without his disability, would have resulted in failure, were it not for the fact that, as a disabled person, he would be guaranteed an interview. None of the panel considered that he had failed at the sift stage – indeed, the 5th respondent believed, until presented with contrary evidence, that he had passed the sift without the need of the guaranteed interview scheme.

139. This did not amount to less favourable treatment. Had the claimant not been disabled, he would not have been guaranteed an interview.

140. The claimant also implies in his list of issues that not being told the reason why he had to undergo the advocacy assessment amounted to less favourable treatment. We have no evidence on which to determine this matter. He was not concerned at the time that he had not been told, as the advertisement had stated, why an assessment was required. However, there is no evidence that any of the other candidates or comparators were told why an assessment was required in their cases either. We formed the impression that this part of the advertisement was perhaps overlooked when it came to inviting candidates to the

assessment. There is no evidence that the claimant was treated differently to any other candidate in this regard.

141. The identity of the claimant's comparators was slightly unclear to us. There were 20 candidates in the recruitment exercise which was the focus of this case. The claimant referred in his statement and submissions to a number of individuals who had been appointed, but a number of these individuals were appointed in a separate recruitment exercise, and were not therefore in the same position or circumstances as the claimant.

142. It is clear that a significant number of the candidates who were part of the assessment of which the claimant complains did not pass it, and went no further, as did the claimant. The only evidence about the other candidates came from the 4th, 5th and 6th respondents, and they only spoke briefly about them. Their position was that the candidates were all assessed according to their abilities and to the criteria by which the claimant was also marked.

143. What the Tribunal must do is determine whether or not the claimant was subjected to subjectively discriminatory treatment in the assessment exercise by the panel, and, in terms of **Shamoon**, ask ourselves "Why did the alleged discriminator act as he or she did? What, consciously or unconsciously, was his or her reason?"

144. The 6th respondent was aware, at the time of the assessment, that the claimant was a disabled person, having been advised by the 8th respondent that he was seeking to have reasonable adjustments made for himself. The 5th respondent was not aware that the claimant was disabled, and the 4th respondent was only aware that the claimant had a guaranteed interview (or place on the assessment exercise).

145. In our judgment, the panel concluded that the claimant had not passed the advocacy assessment after conducting a thorough review of his skills as demonstrated in the assessment, and finding, as their rating form showed, that in some respects he had performed well, and in others he

had not. The claimant has focused a great deal in his claim on the aspects of the assessment which he believes created a disadvantage for him, but the panel expressed concern about more than eye contact or building rapport with the witness; they were concerned that he had failed to elicit any reference to the red hair of one of the assailants or to the assault by the other. They did not regard his performance as without merit. They considered that each category merited a mark of 2, which meant that he demonstrated effective skills. However, they were not sufficiently impressed to consider that he had met the high pass mark agreed by them in this case.

146. It was clear to us that the panel was comprised of 3 very senior advocates with considerable experience and knowledge of the prosecution of serious crime in the High Court. In our judgment, they each emerged as credible witnesses who had engaged with this exercise in a detailed and comprehensive manner. We are unable to conclude that the claimant was treated differently to any other candidate, nor that he was treated less favourably than any other candidate on the grounds of disability. We are not persuaded that the panel were in any way influenced by the claimant's disability, partly due to their lack of knowledge and partly because their focus was upon the standard of advocacy skills displayed by each of the candidate.

147. We also considered that the panel took the claimant's performance as it was presented. There was no evidence of any stereotypical assumptions having been made by them, and while it may be very unusual for direct evidence of discrimination to be available, we were satisfied that the panel approached their task in a highly professional manner.

148. The claimant also suggested that the 7th respondent, who was not part of the panel but who acted the part of the witness, was hostile in her responses and made his questioning very difficult. In our judgment, such a conclusion cannot be sustained on the evidence which we had available to us. We had no opportunity to observe how the 7th respondent behaved with the other witnesses, but we accepted her evidence that her role was

simply to answer the questions which were put. At one point, she did correct the claimant when he sought to ask a leading question about her having been at her locker, and reminded him that she had not said that. In our view, the witness was simply pointing out a fact. It is axiomatic for those who require to lead witnesses in court cases that from time to time a witness will not behave in a way which is either expected or welcome, and it is for the questioner to deal with that.

149. In our judgment, the 7th respondent's conduct as the witness appeared to be above criticism, and consistent with the respondents' general approach that the assessment required to be testing in order to ensure that the necessary standard of prosecutorial advocacy in the High Court was maintained.

150. Finally, a significant number of the other candidates also received the same or worse mark as the claimant, notwithstanding that none of the others were disabled. There is no statistical support for the claimant's suggestion that there was a discriminatory reason behind his failure of this assessment.

151. The reason why the claimant did not succeed in the advocacy assessment, in our judgment, was that he was unable to convince the panel that he was, at that point in his career, capable of carrying out the highly demanding role of AD in the High Court, and not because of his disability.

152. Accordingly, we have concluded that the claimant's claim of direct discrimination must fail.

3. Failure to make Reasonable Adjustments (section 20/21)

a. Were the 1st and/or 2nd respondents under a duty to make reasonable adjustments because a provision, criterion or practice (PCP) of the 1st or 2nd respondents put a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

b. If so, did the 1st and/or 2nd respondents fail to take such steps as it was reasonable to have to take to avoid the disadvantage? The claimant contends that reasonable steps for them to have taken included disapplying any criteria that he could not meet due to his disabilities (including building rapport via video link, having good eye contact, not looking down during questioning, not losing his train of thought); or that appointing him to work exclusively in the Appeal Court, as an ad-hoc Advocate-Depute, providing him with extra training or a trial period.

153. There was a disagreement between the parties as to the PCP which was alleged to have been applied by the respondents in this case. The respondents submitted that the appropriate PCP would be the requirement to score 8 out of 12 in the advocacy assessment process as a condition of progressing to the next stage of recruitment. The claimant submitted that the PCP comprised a number of requirements which were imposed upon the candidates.

154. In our judgment, the appropriate PCP is the requirement to score 8 out of 12 in the advocacy assessment as a condition of progress to the next stage of recruitment.

155. We are aware that there was reference to 2 candidates who were said to have failed the advocacy assessment who were subsequently appointed by the 1st respondent to be ADs. We have no evidence as to the process which was followed in leading to this decision, other than that the panel were aware that the final decision to be made in this exercise belonged to the 1st respondent.

156. However, in our judgment, the PCP which was applied in this exercise was that it was necessary to score 8 out of 12 in order to move to the next stage of the process.

157. We accept that the reason why the claimant failed was not fundamentally because he failed to make eye contact or build rapport with the witness,

but because he did not succeed in obtaining crucial adminicles of evidence from the witness, or carry out the advocacy assessment in a manner which impressed and reassured the panel of his ability to work as an AD in the High Court. As a result, we consider that the wider PCP adopted by the respondents is the appropriate one in this case.

158. Did that PCP then place the claimant at a substantial disadvantage owing to his disability, in comparison with non-disabled persons? In our judgment, it did not.

159. It is clear that more than half of the candidates in this exercise failed to achieve the pass score of 8 out of 12. All of the other candidates who, like the claimant, scored less than 8 were not disabled.

160. Further, it is clear from the scoring and from the evidence given by the panel that they were troubled by the claimant's failure to elicit some crucial evidence from the witness, and by the manner in which he sought to bring out the witness's admitted dishonesty by leading questions instead of allowing the witness to tell her own story.

161. From the evidence of the 4th, 5th and 6th respondents, it is clear that other candidates fell into some of the traps which were set in the exercise (such as allowing the witness to disclose a remark made by an assailant to the effect that he had a prior conviction, something the claimant cleverly avoided), and were marked down as a result.

162. We could not, therefore, conclude that the application of the PCP to the claimant placed him at a substantial disadvantage in this case when compared to non-disabled candidates. We regarded the criticisms relating to eye contact, rapport and note-taking to be observations about his performance rather than as the more fundamental criticisms about the results which he obtained by his advocacy. Those were the criticisms which the 5th respondent passed on to the claimant in the telephone conversation which he (covertly) recorded on 16 July 2021 (560).

163. The respondents pointed out the apparent inconsistency in the claimant's position – that on the one hand he submitted that he was placed at a substantial disadvantage by the PCP, and yet on the other hand remained a highly competent advocate who was capable of carrying out the demanding duties of an AD. We did not quite subscribe to the strength of that argument. For the Tribunal, that issue arose primarily in determining what reasonable adjustments might ameliorate any substantial disadvantage to which the claimant was put as a result of his disability.

164. However, in this case, we were not persuaded that the PCP did place the claimant at a substantial disadvantage on the basis of his disability in comparison with non-disabled candidates.

165. We went on to consider, however, whether or not the respondents had made reasonable adjustments in order to ameliorate any substantial disadvantage suffered by the claimant.

166. The claimant did ask for reasonable adjustments in advance of the assessment, and those were granted. For example, he asked who would be present at the assessment, and was told who would be present, including, possibly, the 4th respondent. He complained subsequently that the 4th respondent's presence came as a surprise to him, but we rejected that assertion since he had been clearly advised that it was a possibility. Had he been told that the 4th respondent would certainly not be present, it would justify criticism of the respondents had he been there on the day.

167. We accept, of course, that the obligation to make reasonable adjustments lies wholly with the respondents. However, it is helpful and appropriate to take into account the views of the individual, and in this case the claimant set out some adjustments in his letter to the 8th respondent.

168. In his submissions, the claimant has proposed a number of further reasonable adjustments which he maintained the respondents had failed to put in place for him.

169. The claimant suggested that the respondents should have disapplied the assessment criteria which could not be met due to his disability, such as building rapport via video link, eye contact and language, and disapplying the assessment criteria of demonstrating the proper use of documentary productions.

170. We consider the issue relating to the use of documentary productions to be irrelevant to the respondents' considerations here. It is not at all clear what complaint the claimant is seeking to make about this. There is no doubt that the plan which was shown and included among the documents was not referred to in the indictment, but that this was raised at the start of the assessment and made clear to the claimant that no issue would arise in its use. So far as we could discern the claimant did not refer to the plan, and was not in any way marked down for this.

171. So far as disapplying the criteria of building rapport, eye contact and language, we did not conclude that these amounted to reasonable adjustments in the claimant's case. The reality is that the process of engaging and eliciting evidence from witnesses is a subtle one, in which the advocate is required to relate to the witness in such a way as to make them feel as comfortable as possible in highly pressurised circumstances. In any event, the evidence does not persuade us that these matters were as significant as the claimant believes them to have been in the assessment.

172. Providing the reasons for the need to be assessed is certainly something which the claimant could expect, standing the terms of the advertisement. It might have been a reasonable adjustment to make, but there is no reason to believe that it would have had any impact at all on the claimant's performance at the assessment.

173. We do not consider it to be a reasonable adjustment to have provided the claimant with a copy of the criteria in advance, and the claimant plainly did not think so either, since he did not request it. Explaining the time constraints was something which the respondents did, at the start of

the exercise, but again it is unclear what alleged impact this may have had upon the claimant.

174. We concluded that allowing the claimant to sit the assessment again would not have been a reasonable adjustment, of itself. While reasonable adjustments are to be expected in order to ameliorate a disadvantage, we were of the view that this would have been an unreasonable adjustment, giving the claimant an advantage which could not be justified. In any event, that would have followed the assessment exercise.

175. The claimant also proposed that he should have been appointed full time or ad hoc to be an AD with close supervision and training. As we understand it, the respondents' position was that the candidates putting themselves forward were required, before appointment, to demonstrate advocacy skills so as to be able to take up appointment and immediately work in the position of AD. What the claimant proposed here was essentially that he should have been appointed without any rigorous assessment. We considered this to be an excessive and unreasonable suggestion, in light of our finding that the assessment exercise itself was one which we found to be a proportionate means of achieving a legitimate aim.

176. It is entirely unclear what the claimant envisaged as a "work trial", though it may be a reference to a probationary period. We have insufficient evidence on which to make any finding about what would be involved, how long it would last and on what criteria the outcome of the trial would be based. We did not regard this as a reasonable adjustment.

177. Allowing the claimant to take a witness in the High Court under supervision of a senior advocate would essentially involve the same assessment as the advocacy assessment which the claimant underwent. We did not consider this to be a reasonable adjustment in the circumstances.

178. The claimant also proposed that cases should be allocated based on the claimant's level of experience, and that he be allowed to meet in advance

in particular with vulnerable witnesses. We heard very little evidence as to how this process would work with ADs in practice once appointed, but it appeared to us that these would be steps which would be taken following appointment. We did not regard them as reasonable adjustments which would have ameliorated any disadvantage accruing to the claimant due to disability in the face of the PCP.

179. The claimant also identified a further step which he suggested the respondents should have put in place, namely to appoint him to the appeal court only. The evidence before this Tribunal established, in our judgment, that only the most senior ADs conduct appeals on behalf of the Crown, and that in effect his request would allow him to appear in a higher court than most ADs without requiring to fulfil the role for which this recruitment exercise was being conducted, namely to assist in reducing the backlog of High Court trials which had built up over the course of the Covid-19 pandemic.

180. We did not regard this as a reasonable adjustment, simply because, in effect, the claimant would be by-passing the assessment process, wherein he was not considered to have the necessary skills for appointment as an AD carrying out criminal trials in the High Court.

181. Accordingly, we have concluded that the claimant's claim that the respondents failed to make reasonable adjustments fails, and should be dismissed.

4. Indirect Discrimination (section 19)

a. **Did the 1st, 2nd, 4th, 5th, 6th and/or 7th respondents discriminate against the claimant by applying to him a PCP which was discriminatory in relation to his disability? The PCP alleged by the claimant to be discriminatory is that the respondents actively encouraged a system which is dependent upon close relationships with persons who are known to them, on good terms and with whom they have previously worked, who are then approached to come to work for the 2nd respondent?**

b. If so, did the PCP put, or would it put, persons with whom the claimant shares a disability at a particular disadvantage when compared with persons with whom the claimant did no share it; and did it put, or would it put, the claimant at that disadvantage?

c. If it did, was the application of the PCP a proportionate means of achieving a legitimate aim?

182. The claimant's assertion under this heading was that the respondents applied the PCP of actively encouraging word of mouth recruitment, dependent on close relationships with those with whom they work or are on good terms.

183. We considered that this PCP was not applied by the respondents. The 4th respondent accepted quite candidly that where he has had experience of dealing with or observing in court a practitioner whom he believes would be able to carry out the duties of an AD well, he has from time to time encouraged them to apply to become an AD. That is the extent to which any involvement may arise. In our judgment, that does not amount to the application of a PCP of "actively encouraging word of mouth recruitment". It does not involve recruitment. It involves no more than a suggestion to an individual to put themselves forward for appointment, which would then require them to undergo the rigorous selection process which the claimant had to do.

184. It may be that the claimant suggests that the 1st respondent does approach people directly and appoints them without any assessment. However, there is no evidence available to the Tribunal upon which we could make such a clear finding, and accordingly while the claimant may suspect it, we are unable to establish this as a fact. The only evidence on this was given by the 5th respondent, who advised that direct appointments are made on merit, based on business need, where funding for posts is made available. In our judgment, this did not establish the claimant's assertion that a discriminatory recruitment process is in place.

185. We noted that a number of candidates whom the claimant pointed to as having been appointed were individuals with experience in civil rather than criminal litigation, which suggests that the process of appointment allows entry to those who are not known to the 1st respondent or indeed any of the respondents.

186. In these circumstances, the claimant's claim of indirect discrimination must fail, and be dismissed.

5. Victimisation (section 27)

a. **Did the 1st, 2nd, 4th, 5th, 6th and/or 7th respondents discriminate against the claimant victimise the claimant by subjecting him to a detriment because he had done a protected act? The respondents accept that the claimant did a protected act by bringing previous proceedings under the Equality Act 2010 and/or by making allegations that someone had breached the provisions of the 2010 Act; they also accept that they subjected the claimant to a detriment by not assessing him as having passed the advocacy assessment.**

187. The respondents accepted that the claimant had done a protected act by raising his previous Employment Tribunal proceedings, and by raising a Petition for Judicial Review in respect of a prosecutorial decision to accept a plea in a case in which he was the complainer.

188. The respondents also accepted that they subjected the claimant to a detriment by not assessing him as having passed the advocacy assessment.

189. It is plain that the claims which the claimant relies upon as protected acts were known to the 2nd respondent as an institution, but while the 4th, 5th and 6th respondents, who formed the panel making the assessment of the claimant, were generally aware that the claimant had previously made a claim against the respondents to the Employment Tribunal, their evidence, which we accepted as credible and reliable, was that they were

unaware of the detail of the claim. As to the judicial review proceedings, they had ess knowledge.

190. However, even had they known about these claims, we did not accept that the 4th, 5th and 6th respondents had these matters in their mind when they made their assessment of the claimant. They gave clear, coherent and justifiable reasons for the mark which they gave the claimant, and it is plain that he was not the only candidate who received marks below the agreed pass mark. We did not consider that the decision to award the claimant a fail mark in the assessment could be described in any way as unreasonable. We were impressed by the openness of the three respondents in their evidence towards the claimant, and in particular by the 5th respondent who plainly knew him and was sympathetic to him as to the outcome of the process. That much was clear before us, but also in the manner in which she spoke to the claimant on the telephone in giving him feedback.

191. In our judgment, there is no basis upon which we could conclude that the respondents assessed the claimant as having failed the assessment because of his having done these protected acts, of which they either had no or only limited knowledge.

192. As a result, the claimant's claim of victimisation under section 27 of the 2010 Act must fail, and be dismissed.

6. In the event that the claimant is successful in any or all of his claims, what remedy should be awarded by the Tribunal?

193. In light of our conclusions, the claimant has not been successful in any of his claims, and accordingly no remedy is to be awarded by the Tribunal in this case.

5

Employment Judge: M Macleod
Date of Judgment: 09 May 2024
Entered in register: 10 May 2024
and copied to parties

15

I confirm that this is my Judgment in the case of X v respondents A to G and that I have signed the Judgment.