

Neutral Citation Number: [2026] EAT 153

Case No: EA-2023-001366-DXA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 October 2026

Before :

HER HONOUR JUDGE JOFFE

Between :

MR R BRYCE

Appellant

- and -

COVENTRY CITY COUNCIL

Respondent

Mr R Bryce, the Appellant, in person
Mr A Leonhardt (instructed by Coventry City Council) for the Respondent

Hearing date: 22 July 2026

JUDGMENT

SUMMARY

Disability discrimination

The claimant applied for, was interviewed for, and was not appointed to a role with the respondent. He has Asperger's Syndrome and dyslexia. He had asked for adjustments to the recruitment process, in particular because he required extra time to provide examples of how he met the requirements of the role. He was provided with the questions some time in advance of the interview. He claimed that further adjustments should have been made, including an adjustment to ask 'closed' rather than 'open' questions.

He also brought a claim of discrimination because of something arising from disability; one of the 'somethings' relied on was that the claimant suffered stress in new situations such as meeting new people in job interviews.

The claimant appealed the Tribunal's findings that:

- 1) An adjustment of asking 'closed' rather than 'open' questions was not connected to the substantial disadvantage caused by the PCP of 'Providing candidates with a certain amount of time to provide examples of how they met the job criteria', but that in any event that adjustment had been made and the version of the adjustment contended for by the claimant (asking 'yes or no' questions) was not reasonable;
- 2) That the claimant had not in fact been stressed in the interview and so had not been treated unfavourably because of something arising in consequence of disability.

The claimant also said that the Tribunal should have found, given its finding that he had not been able to give satisfactory examples of skills including 'ability to communicate' and 'empathy', that he was not appointed because of something arising in consequence of disability.

HELD:

- 1) Although the Tribunal erred in finding that the form of the questions was not 'connected to' the disadvantage arising from the PCP since the nature of a question could self-evidently influence the speed with which it could be addressed, the Tribunal did not err in concluding

that the questions asked satisfied the National Autistic Society guidance provided and that reasonable adjustments had in fact been made. The finding that there was no breach of the duty to make reasonable adjustments was upheld;

- 2) The Tribunal erred in accepting one of the interviewers' assessments of whether the claimant was stressed, which was in part based on the interviewer's observations about neurotypical people. The appeal on the section 15 claim succeeded;
- 3) The claimant could not succeed on appeal on a further section 15 case which he had not pleaded or pursued at Tribunal about the nature of the skills which he was required to evidence at the interview.

The case was remitted to a new Tribunal to consider the section 15 claim afresh.

Her Honour Judge Joffe:

Introduction

1. This is an appeal from the liability judgment of Employment Judge Childe and members, Ms S Fritz and Mr J Reeves, sent to the parties on 17 October 2023, dismissing the claimant's disability discrimination claims.

2. The parties are referred to as the claimant and respondent as they were before the Employment Tribunal.

3. The claimant appeared remotely by video link as an adjustment for his disabilities. We also had a break of ten minutes approximately every half hour. The claimant asked that, if I had questions on his submissions, I frame them as 'yes or no' questions. I explained the limitations of that approach in facilitating my understanding of the submissions and we ultimately agreed that I would put my questions in writing, the claimant would have a break, and would then provide his answers in writing. This arrangement appeared to work well and the claimant appeared to be focussed throughout.

4. I had been provided with a core bundle and a supplementary bundle. I asked for and was provided with some additional documents which had been before the Employment Tribunal. In particular I was provided with the National Autistic Society's 'Tips for interviewing people with Asperger syndrome' ('the NAS guidelines').

The background

5. The facts found by the Tribunal fall within a narrow compass.

6. The claimant applied for the position of team manager, revenue services, with the respondent and was not appointed to that role. In respect of that decision, the claimant brought claims of failure to make reasonable adjustments and unfavourable treatment because of something arising in consequence of his disability.

7. The Tribunal recorded the issues it had to decide, which it said had been agreed between the parties.

8. The issue of whether the claimant was disabled was not in dispute. The claimant has what he refers to as Asperger's Syndrome, now usually referred to as Autistic Spectrum Disorder or Autistic Spectrum Condition, and dyslexia. Knowledge of the disabilities was also not in dispute.

9. In respect of his claim that the respondent had failed in a duty to make reasonable adjustments, the claimant relied on a single provision, criterion or practice ('PCP'). This was recorded as:

'Providing candidates with a certain amount of time to provide examples of how they met the job criteria.'

10. That PCP had been the subject of a discussion with the claimant at the outset of the full merits hearing. I note that it can be difficult for a Tribunal to tread the line between appropriately assisting a litigant in person with articulating what might be called the technical components of a disability discrimination claim such as PCPs and stepping into the arena. Although this PCP could have been more clearly put, it is apparent that the Tribunal and the parties understood that 'certain amount' effectively meant 'certain limited amount'. The Tribunal called this the 'Time PCP'.

11. The disadvantage said to arise from the application of this PCP to the claimant was that was he was not offered the job of team manager because he was not given sufficient opportunity to provide examples of how he met the job criteria.

12. The respondent denied that it had knowledge that the claimant was likely to be placed at a disadvantage by the PCP.

13. The adjustments contended for were set out in the list of issues agreed at a case management preliminary hearing:

'a. the claimant says the respondent could have asked the claimant further questions and explored with him how he met the criteria for the team manager job; and/or
b. the respondent should have asked closed questions rather than open questions regarding experience for the job.'

14. The claimant also claimed that he had been treated unfavourably because of something arising in consequence of disability, a claim under section 15 of the Equality Act 2010. For the section 15 claim, the unfavourable treatment was simply the respondent not offering the claimant the job.

15. The 'somethings' which were said to have caused the unfavourable treatment were these:

'a. The claimant had difficulties communicating effectively. In particular, he misinterpreted questions put to him

and so he gave the wrong answer.

b. The claimant had difficulties remembering, so he struggled to recount examples on the spot or example in an interview.

c. The claimant suffered stress in new situations such as meeting new people in job interviews.’

16. The Tribunal heard evidence from the claimant and the two people who had interviewed him for the role: Mrs Stafford and Mr Stinton.

17. The Tribunal recorded that the claimant had had only one year of previous managerial experience, between 2017 and 2018

18. The claimant applied for the role with the respondent and then on 24 January 2022 telephoned the respondent’s recruitment department to declare his disabilities. He was told he had been shortlisted.

19. On 25 January 2022, the claimant had a discussion with Ms Prajapati of the respondent about reasonable adjustments for the interview. The interview was to consist of a presentation followed by seven questions related to the person specification for the role. The claimant’s appeal on the reasonable adjustments claim relates to the questions stage of the interview.

20. The Tribunal made the following findings about this conversation:

‘a...The claimant asked if the respondent could accommodate an interview at the end of the day on Friday 4 February 2022. This was to ensure the claimant did not feel time pressured as he knew he would be the final candidate of the day and the interview could run over the time allocated, if he required more time. The respondent did not originally offer this appointment to the claimant but made an adjustment and agreed to give the claimant this timeslot.

b. During that same conversation, Trisha Prajapati agreed that the interviewing manager would be able to prompt the claimant during the interview. We find that what was meant by that was if the claimant appeared to not understand the question put, the interviewing manager would ask the question in another way to give the claimant the opportunity to provide examples of how he met the relevant job specification criteria for the role.

c. During that same conversation the claimant and Trisha Prajapati discussed the amount of time before the interview itself that the claimant should be provided with the seven interview questions for the second part of the interview. What was said during this discussion is controversial. We find the following was said by the claimant during this discussion: the claimant said he required the interview questions to be sent to him 20 minutes before the interview and Trisha Prajapati agreed to this.’

21. It appears that the questions were in fact sent to the claimant 24 minutes before his interview.

The Tribunal made findings about the interview and further adjustments which arose during the interview itself:

‘85. The claimant did not tell the interviewing officers, Ms Stafford or Mr Stinton, at any time during the interview that he had been substantially disadvantaged by the time he had to prepare for the second part of the interview process. This is accepted evidence.

86. We accept Mr Stinton’s evidence that if the claimant had asked for more time to prepare for the

interview (specifically longer than the 24 minutes the claimant had been provided with) he would have consulted with HR and got some guidance, before making a decision. The claimant did not make such a request. We find that had a reasonable request been made for extra time in the interview, this would have been granted by Mr Stinton.

87. The claimant made a request for the following adjustments at the start of the interview. The claimant said he sometimes forgets the question asked. The claimant explained that if a question is in two parts, the claimant might need reminding of the different parts.

Also, sometimes the claimant might appear forgetful or might misunderstand the question and if so, they should refocus him and ask the question in a different way. We find these adjustments were carried out by Mr Stinton and Mrs Stafford.

88. We accept Mr Stinton's evidence that broadly the claimant was able to provide examples of how he met the job criteria in the second part of the interview. The only example where the claimant appeared to misunderstand the question was in response to question 2, which was about any barriers that exist when managing a team that may partly work at home and partly in the office. The claimant said no barriers existed but didn't explain why. Mr Stinton and Mrs Stafford thought he had misunderstood the point of the question and intervened and rephrased the question, to give the claimant the opportunity to provide further explanation. We accept Mr Stinton's evidence that the claimant complemented him on how well he had broken down this particular question, during the interview.

89. Mrs Stafford provided the claimant with feedback after his unsuccessful interview and the claimant raised no complaints about the interview process itself.'

22. There were eight candidates for two roles. The claimant received the lowest score, 24 points.

The successful candidates scored 51 and 61 points.

23. The Tribunal had a number of issues to make findings about. I note an idiosyncrasy of the reasons in this case is that the Tribunal made some findings of fact, set out some of the law to be applied to those facts, then made further findings of fact in the conclusions section of the reasons, interspersed with statements about the law it was applying to those facts. The Tribunal's approach in this case made the reasons harder to analyse but also may have made it more likely that the Tribunal would fall into error in carrying out the somewhat intricate structured analysis required by disability discrimination claims.

The Tribunal's relevant findings

Reasonable adjustments

24. The Tribunal found that the 'Time PCP' was applied and that it related to the time provided for preparation for the interview and in the interview itself.

25. So far as 'substantial disadvantage' was concerned, the Tribunal found:

'67. We find that the claimant was put at a significant disadvantage by the second part of the interview: the respondent's requirement that he provide examples of how he met the job criteria in response to the seven questions asked by the respondent, in real-time, in the interview itself.

68. This is because we accept the claimant's evidence, set out in his disability impact statement, that

he struggled to recount situations and sometimes had difficulty providing an account of an incident due to his disability. We find that this would include in practice the claimant having difficulty being able to provide examples of his skills on the spot, immediately and in the moment, when required to do so in an interview process, due to his conditions of Asperger syndrome and dyslexia.'

26. Knowledge of disability not being in dispute, the Tribunal had to consider the issue of knowledge of the disadvantage caused by the PCP. The Tribunal had directed itself in some detail as to the authorities on that topic. It had reminded itself of Judge Stout's observation in AECOM that an employer must know that the claimant is likely to be placed at the identified disadvantage by the PCP and quoted a long passage of the judgment on AECOM in which Judge Stout considered the guidance to be derived from a line of authorities on the subject of actual and constructive knowledge of disadvantage.

27. The Tribunal directed itself to relevant questions. It asked what knowledge the respondent had of the disadvantage and then scrutinised what information the respondent gleaned from the discussions the claimant had with Ms Prajapati and then with Mrs Stafford and Mr Stinton.

It arrived at these findings:

'90. We conclude that the knowledge Mrs Stafford, Mr Stinton and Trisha Prajapati had about the reasonable adjustment required, to remove any disadvantage the claimant might suffer due [to] the Time PCP, was:

a. he could not recall the specific examples on the spot, during the interview process: and
b. to remove this substantial disadvantage, he needed to be provided with the interview questions twenty minutes before interview (and no more than twenty minutes) and should he misunderstand a question or forget a question they should either prompt him or rephrase the question second part of the interview.

91. There was no need for Mrs Stafford or Mr Stinton to make further enquiries about the claimant's disability or the substantial disadvantage he might have as a result of the Time PCP, as the claimant had provided this information to them, respectively prior to the interview and during it. There was nothing to indicate to them prior to, during or after the interview that the claimant had been placed at a disadvantage by the Time PCP or indeed any other part of the interview process.

92. We reject the claimant's submission that the respondent should have taken further steps, of their own accord, to consider further reasonable adjustments. The respondent was entitled to take the information provided by the claimant about the reasonable adjustments he would require at face value.'

28. Having made those findings about the respondent's knowledge, the Tribunal went on to consider whether there were further reasonable adjustments which should have been made:

'96. We turn to look at what steps could have been taken to remove the disadvantage?

97. In short, there were no further steps that could have been taken in addition to those adjustments which had already been made. The claimant accepted in evidence that he completed his interview within the allocated time and did not request further time to provide examples of how he met the job criteria.

98. The claimant said under questioning that had he been given more time to prepare for the second part of the interview, he would have given better answers. He would have "soaked it in and digested it". The claimant felt he was rushing.

99. This, in our view, was a request for an adjustment which went above and beyond what was required

to remove the substantial disadvantage caused by the Time PCP. The adjustments put in place gave the claimant enough time to match the examples of his prior job experience as a manager to the questions that were asked in interview, which were designed to enable the claimant to demonstrate how he could meet the person specification competencies. As we have said, the claimant had primarily one year's worth of experience as a manager from which he could draw on examples of management experience. The claimant knew what questions the respondent was asking and therefore which examples to use, twenty-four minutes beforehand. We accept Mr Stinton's evidence that the claimant was able to do this in interview, with some additional prompting and re-phrasing of questions from him. If the claimant felt he was rushing he could have asked for extra time. He did not do so.

100. Providing the claimant with extra time to consider the examples he might have would not, in our view, have been a reasonable adjustment because the claimant had not requested it and the respondent did not therefore know it was required. In addition, in our view, it would not have changed the examples of the claimant's management experience the claimant was able to give in interview or his ability to explain those examples.

...

102. The claimant also suggests the respondent should have asked closed questions rather than open questions regarding his experience for the job. This is not in our view a reasonable adjustment connected to a substantial disadvantage suffered by the claimant in respect of the Time PCP. Instead, this relates to the way questions were put to the claimant, which is not part of his claim for a reasonable adjustment.

103. If we are wrong on that point, we go on to consider whether it would have been a reasonable adjustment to ask closed rather than open questions. We find as a matter of fact that the seven questions asked by the respondent were all closed questions. They required the claimant to provide examples to demonstrate specific competencies required by the respondent. They fell within the definition of closed questions set out in the 'tips for interviewing people with Asperger syndrome' as provided by the autistic Society. An example of the questions asked was 'what is your approach to dealing with conflicting priorities? Can you give an example? Here the interviewee was being asked to provide a specific example of how they had approached a scenario where they had to deal with conflicting priorities. This was not vague and it enabled the candidate to understand exactly what the interviewers wanted to know.

104. The claimant said in evidence that what he meant by a closed question was one that could only be answered yes or no. An open question, the claimant said, was any other question which had multiple responses. We do not accept that the respondent should be required to make an adjustment to designed interview questions that could only be answered yes or no. This would not give the candidates an opportunity to demonstrate examples of how they were able to meet the person specification competencies and it is hard to see how the respondent would be able to properly assess candidates if it took this approach.

105. We conclude therefore that the respondent has not failed in its legal duty to make reasonable adjustments under sections 20 and 21 Equality Act 2010.'

[Emphasis added]

29. The reasons do not set out the relevant extract from the NAS guidance but the passage the Tribunal must have been thinking of reads as follows:

'During an interview candidates will be encouraged to answer more productively if the following "reasonable adjustments" can be made:

- Ask closed questions and avoid open questions. For example, asking "Tell me about yourself" is very vague and the candidate may not be able to judge exactly what you want to know. A better question would be "Tell me about any jobs / voluntary work you have done in the last five years"
- Ask questions based on the candidate's real /past experiences, for example "In your last job, did you do any filing or data input? What processes / procedures did you use to do this effectively?'

The Section 15 claim

30. The Tribunal found that all three of the 'somethings' relied on arose from the claimant's disability. It found that the failure to appoint him to the role was unfavourable treatment. It turned to

the question of whether the ‘something’ defined as ‘the claimant suffered stress in new situations such as meeting new people in job interviews.’ had caused the unfavourable treatment:

‘121. We have accepted the evidence of Mr Stinton that the claimant appeared not to be more nervous about being interviewed and that he did not seem particularly stressed or anxious.

122. We accept Mr Stinton had extensive experience of interviewing candidates and was able to detect signs of stress or anxiousness. Mr Stinton fairly accepted that an interview process was stressful for candidates.

123. We accept Mr Stinton’s evidence that in fact the claimant seemed quite confident in the interview. Mr Stinton said he formed this view because the claimant was able to articulate the adjustments he required for the interview at the start. Mr Stinton also pointed to the claimant’s decision not to share his screen to deliver his presentation when asked to do so by the interviewers. Mr Stinton gave the opinion, based on his experience, that people who are stressed might do things that they did not want to do. In this case, if the claimant was stressed, he might have shared his screen when asked rather than choosing not to do so.

124. We also observe that Mr Stinton and Mrs Stafford were not new to the claimant and indeed it was not the first time he had been interviewed for a job by them. The claimant had been interviewed by them the year before for an alternative role.

125. We conclude that the reason the claimant was not offered the team manager, revenue services role was not because he was suffering from stress because he was placed in a new situation by meeting new people in a job interview.’

The grounds of appeal

31. The grounds of appeal as clarified and refined at a rule 3(10) hearing in front of Judge Keith on 18 December 2024 are:

‘Ground 1(a): The ET erred in concluding, at §102, p39, that the adjustment of asking closed questions was not connected to a disadvantage suffered by C in respect of the pleaded PCP

Ground 1(b)

i. Further or alternatively, the ET failed at §103, p39 to consider whether that adjustment was reasonable, instead going on to find as a matter of fact that it had been complied with

ii. Further or alternatively, that conclusion (that the adjustment was made) was unsupported by evidence and/or was perverse

Ground 1(c): Further or alternatively, the ET erred in its conclusion at §104, p40 that that the adjustment was not a reasonable one, in the context of the pleaded PCP, as it failed to consider that more complex questions could require more preparation time or could be re-formulated

Ground 2(a): The ET erred in its conclusion that C had not been stressed during the interview (and therefore this was not the reason that he did not get given the job):

i. An example relied upon is based upon the ET’s perception of what a (neurotypical) person would do, rather than a person with C’s disabilities;

ii. The conclusion was contrary to the ET’s own conclusions at §109(c), p41-2;

iii. The conclusion was not supported by evidence or was perverse.

Ground 2(b): The ET erred in its conclusion that the true reason for C’s treatment was something not arising from his disability:

i. It included a lack of skill on the part of C in, inter alia, “ability to communicate” and “empathy” which are arguably included in the matters the ET accepted as things arising from C’s disabilities at §109(a), p41;

ii. The ET’s conclusions were not supported by the evidence and/or were perverse.’

The law

Reasonable adjustments

32. The duty to make reasonable adjustments is contained in sections 20 and 21 Equality Act 2010:

‘20.Duty to make adjustments

(1)Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2)The duty comprises the following three requirements.

(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

...

21.Failure to comply with duty

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

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

33. Paragraph 21 of Schedule 8 of the Act contains the knowledge requirements:

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

...

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

34. In the much-quoted case of **Environment Agency v Rowan** [2008] ICR 218, Judge Serota QC emphasised the need for tribunals to take a carefully structured approach to reasonable adjustments claims:

‘In our opinion an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with the Section 4A duty must identify:

(a) the provision, criterion or practice applied by or on behalf of an employer, or

(b) the physical feature of premises occupied by the employer,

(c) the identity of non-disabled comparators (where appropriate) and

(d) the nature and extent of the substantial disadvantage suffered by the Claimant. It should be borne in mind that identification of the substantial disadvantage suffered by the Claimant may involve a consideration of the cumulative effect of both the ‘provision, criterion or practice applied by or on behalf of an employer’ and the ‘physical feature of premises’ so it would be necessary to look at the overall picture.

In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under Sections 3A(2) and 4A(1) without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.’

35. Guidance on the stage at which reasonable adjustments may be proposed was given by Elias J in **Project Management Limited v Latif**/UKEAT/0028/07:

‘53. We agree with Ms Clement. It seems to us that by the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative; that is what would be required if a respondent had to show that there is no adjustment that could reasonably be made. Mr Epstein is right to say that the respondent is in the best position to say whether any apparently reasonable amendment is in fact reasonable given his own particular circumstances. That is why the burden is reversed once a potentially reasonable amendment has been identified.

54. In our opinion the paragraph in the Code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached.

Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made.

55. We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.

...

57. We accept, however, that the proposed adjustment might well not be identified until after the alleged failure to implement it, and in exceptional cases, as here, not even until the tribunal hearing. Indeed, in certain circumstances we think it would be appropriate for the matter to be raised by the tribunal itself, particularly if the employee is not represented.’

36. It is clear that for breach of the duty to arise, a claimant need not himself or herself have identified the adjustment required at the point at which it was required.

37. In terms of the knowledge the employer is required to have for the duty to arise, it is actual or constructive knowledge of the *particular disadvantage* caused to the employee by the PCP in question. This was emphasised by Judge Stout in **AECOM Limited v Mallon** [2023] EAT 104 at paragraph 26:

‘An employer is not therefore subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know, both that the complainant has a disability and that he or she is likely to be placed at the substantial disadvantage. We observe that what is necessary is not that the employer know that the complainant is generally disadvantaged by their disability, but that it knows that they are “likely” to be placed at “the disadvantage referred to in the first ... requirement”, which is as specified in s 20(3) “a substantial disadvantage in relation to a relevant matter”’

38. The relationship between the various matters the tribunal will have to consider is highlighted in a passage cited in **AECOM** from the Court of Appeal in **Newham Sixth Form College v Saunders** [2014] EWCA Civ 73, per Laws LJ:

‘12. The stepped approach commended in Rowan and endorsed in Ashton requires, among other things, that the ET identify the nature and extent of the substantial disadvantage to which the disabled person is placed by reason of the PCP in question. Unless that is done, the ET cannot make proper findings as to whether there has been a failure to make reasonable adjustments.

13. Here the respondents say that the ET failed to undertake any proper analysis of the nature and extent, in particular the extent, of the substantial disadvantage in question; and they made no finding as to the state of the respondent employer's knowledge specifically concerning the nature and extent of the substantial disadvantage. They failed also, it is said, in any event to make a proper assessment of the reasonableness of the proposed adjustment.

14. In my judgment these three aspects of the case -- nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustments -- necessarily run together. An employer cannot, as it seems to me, make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and the extent of the substantial disadvantage imposed upon the employee by the PCP. Thus an adjustment to a working practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage. Implicit in this is the proposition, perhaps obvious, that an adjustment will only be reasonable if it is, so to speak, tailored to the disadvantage in question; and the extent of the disadvantage is important since an adjustment which is either excessive or inadequate will not be reasonable’

39. Judge Stout reviewed the case law on what will constitute constructive knowledge and said:

“30. An important theme in the case law on this issue is that consideration of whether an employer reasonably ought to have known whether the claimant was disabled and at the relevant substantial disadvantage requires the employer to make reasonable enquiries of the employee. An employer cannot ‘turn a blind eye’. This is a point made clear in the EHRC Employment Statutory Code of Practice 2011 (“the Code of Practice”) which states at paragraph 6.19 that an employer must “do all they can reasonably be expected to do to find out whether” an applicant/employee has a disability and is, or is likely to be, placed at a substantial disadvantage. In Ridout (quoted above at [26]) the EAT recognised that this is not, of course, an unlimited duty – the duty is only to make such enquiries as are reasonable and what is reasonable will depend on all the circumstances.

...

32. Ms Barsam has also referred us to the more recent authority of *A Ltd v Z* [2020] ICR 199, where the EAT (HHJ Eady QC, as she then was) summarised at [23] the principles applicable to consideration of knowledge for the purposes of a s 15 claim. From those principles, we take the following additional points that are not already covered by the authorities to which we have referred: “(6) It is not incumbent upon an employer to make every inquiry where there is little or no basis for doing so ... (7) Reasonableness ... must entail a balance between the strictures of making inquiries, the likelihood of such inquiries yielding results and the dignity and privacy of the employee, as recognised by the code”.”

40. The importance of properly identifying the nature and extent of the disadvantage was reiterated by Eady J in **Rakova v London North West Healthcare NHS Trust** UKEAT/0043/19 at para 50:

‘As was made clear in Rowan, absent a proper finding on the nature and extent of substantial disadvantage, an ET is unable to properly assess the reasonableness of any proposed adjustment.’

Discrimination arising from disability

41. Section 15 Equality Act 2010 provides in part:

- ‘15 Discrimination arising from disability
 (1) A person (A) discriminates against a disabled person (B) if—
 (a) A treats B unfavourably because of something arising in consequence of B's disability, and
 (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim....’

42. In **Pnaiser v NHS England** UKEAT/0137/15/LA, Simler J (as she then was) reviewed the authorities and set out the following structured approach to causation in section 15 claims:

“From these authorities, the proper approach can be summarised as follows:

- (a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
- (b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The ‘something’ that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
- (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A’s motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any *prima facie* case of discrimination arises, contrary to Miss Jeram’s submission (for example at paragraph 17 of her Skeleton).
- (d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is “something arising in consequence of B’s disability”. That expression ‘arising in consequence of’ could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.
- (e) ...
- (f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator. ‘

The parties' submissions

Ground 1

Claimant's submissions

43. On Ground 1, the claimant said that the ET erred in finding that an adjustment of asking 'closed' rather than 'open' questions could not be a reasonable adjustment in respect of the disadvantage caused by the Time PCP. The form a question takes affects the time required by a person with his disabilities to process the question and formulate an answer to it. The ET also erred in asking whether this adjustment had in fact been made, rather than whether it was reasonable.

44. The claimant said that the ET mischaracterised his case when it said that what he meant by closed questions was 'yes or no' questions. He very fairly said in answer to my question to him that he had not requested the Tribunal's notes or a transcript of the hearing in order to make good that challenge and I have determined this appeal on the basis that the Tribunal has correctly recorded the case the claimant presented.

45. The claimant said the ET had erred in describing the questions asked as closed questions.

46. The claimant said that the ET should have found that the respondent was under a duty to consider itself what adjustments were reasonable, not simply to accept those requested by the claimant, as per AECOM.

Respondent's submissions

47. Mr Leonhardt said that the claimant's appeal on Ground 1 was academic since the ET had found at paragraphs 91 and 92 in particular that the respondent did not have actual or constructive knowledge of the disadvantage caused by the PCP 'or any other part of the interview process'. That finding had not been challenged by the claimant.

48. The claimant would have to succeed on both Ground 1 (a) and one of (b) or (c) for the result to be affected. If the Tribunal had erred in concluding that the adjustment was unrelated to the Time PCP, the mistake was immaterial since it had gone on to consider the reasonableness of the proposed

adjustment.

49. As to Ground 1(a), the Tribunal was correct to say that the adjustment did not relate to the Time PCP; the claimant should have identified a PCP related to the form of the questions if he wished to argue for this adjustment. Although Mr Leonhardt conceded that very complex questions might need more time to process and answer, these were standard and predictable interview questions. It was appropriate to read the Tribunal's finding as a finding premised on the questions actually asked rather than as a conclusion about questions more generally.

50. As to Ground 1(b), there was no error of law in the Tribunal identifying that a particular adjustment had been made. The Tribunal had not reached a perverse conclusion on whether the questions were 'open' or 'closed' because it had decided the issue by reference to the NAS guidelines which had been provided by the claimant.

51. As to Ground 1(c), the Tribunal had cogent reasons for its conclusion as to the reasonableness of the claimant's proposed adjustment. Asking 'yes or no' questions would not have allowed the claimant the opportunity to demonstrate that he met the job requirements or the respondent the opportunity to assess candidates' ability to fulfil the job description. This conclusion was obviously correct.

Ground 2 (a)

Claimant's submissions

52. The claimant argued that there was inconsistency between the Tribunal accepting that the claimant suffered from stress in new situations such as interviews and apparently concluding that his performance in this interview was not affected by stress. It did not recognise that there was a difference between the experience of stress and the display of visible signs of stress. The example given about screensharing relied on assumptions about behaviour which were inappropriate when applied to a person who was not neurotypical.

Respondent's submissions

53. The Tribunal made a general finding that the claimant suffered from stress in new situations. That was not inconsistent with a finding that the claimant was not in fact stressed during the interview in question and/or that any stress he felt did not materially affect his interview performance. The Tribunal was entitled to accept Mr Stinton's view that the incident involving the claimant's refusal to share his screen showed a lack of stress and this was only one observation supporting Mr Stinton's view. These were findings of fact the Tribunal was entitled to make.

Ground 2 (b)

Claimant's submissions

54. The Tribunal identified that the claimant was found to lack skills which included 'an ability to communicate...empathy...' This was identified in his impact statement and his medical evidence as a feature arising in consequence of his disability. Given its findings as to his reasons for not being appointed to the role, the Tribunal should have found that the claimant was rejected for the role because of something arising in consequence of his disability.

Respondent's submissions

55. The 'somethings arising' in the list of issues did not include an inability to provide examples of particular competencies. This ground sought to argue a case not previously identified by the claimant. It was certainly not in the agreed list of issues in that form.

Discussion and conclusions

Ground 1

56. This appeal illustrates the difficulties which can be posed by the overlap between some of the questions a tribunal has to address in a reasonable adjustments claim.

57. At paragraph 102 of its reasons, the Tribunal found that the adjustment of 'closed' rather than 'open' questions was 'not connected to' the substantial disadvantage caused by the Time PCP. By this the Tribunal would appear to mean that it was not an adjustment which would reduce or eliminate the disadvantage.

58. How the Tribunal characterised the disadvantage appears at paragraph 68 and is that the claimant ‘struggles to provide examples of his skills on the spot, immediately and in the moment’.

What is not clear is *why* the Tribunal found that adjusting the nature of the questions, which was one of only two proposed adjustments put forward in the list of issues, could not have reduced that disadvantage. The nature of the disadvantage identified - a struggle to provide specific examples of skills - would appear as a matter of logic to lend itself to an adjustment to the questions which, as the claimant put it, reduced the ‘processing burden’. This was a proposition Mr Leonhardt accepted, at least in respect of complex questions. A conclusion to the contrary at the very least required explanation by the Tribunal and, even bearing in mind the high hurdle set for perversity challenges, in the absence of an explanation, can fairly be said to be perverse. If the Tribunal intended to say, as was suggested on behalf of the respondent, that the nature of the questions in this particular case was such that an adjustment to the form of the questions could not have addressed the disadvantage, in my judgment the Tribunal needed to say so.

59. The error may well be connected with the Tribunal’s statement at paragraph 92 of the reasons that the ‘respondent was entitled to take the information provided by the claimant about the reasonable adjustments he would require at face value’. That of course does not reflect the law: see **Project Management v Latif**. What the Tribunal seems to have had in mind is the authorities on knowledge it directed itself on, in particular those referred to in the long passage from **AECOM** quoted by the Tribunal. Those authorities emphasise the need for the employer to have actual or constructive knowledge of the nature and extent of the disadvantage for the duty to arise in respect of the disadvantage so defined and set some limits to the level of enquiry an employer is expected to make. In many cases where the claimant is an applicant for a job, much or all of the information the employer has about the disadvantage may be derived from the adjustments which have been requested. For example, where an employee says, as the claimant did in this case, that he requires twenty minutes of extra time to prepare interview questions, that is information about the *extent* of the disadvantage. It is not however, determinative of the question of what adjustments might address the identified

disadvantage or indeed the larger multifactorial question of what adjustments are reasonable. The fact that knowledge of the nature and scope of the disadvantage is derived from a proposed adjustment does not necessarily limit the duty to that adjustment. Whether it does so or not is fact sensitive.

60. Where does that leave the claimant in circumstances where the Tribunal has gone on to find that:

- a) The respondent in any event made an adjustment of only asking closed questions, using the National Autistic Society approach to what ‘open’ and ‘closed’ questions means;
- b) The adjustment or version of that adjustment contended for by the claimant – that of asking ‘yes or no’ questions – was found by the Tribunal not to be a reasonable adjustment?

61. The Tribunal’s finding that the questions asked were ‘closed’ within the meaning of the guidance seems to me to be an unimpeachable one, based on the example the Tribunal selected as indicative of the types of question asked. Further the Tribunal was entitled on the evidence it had to accept the specialist guidance as a steer as to what would alleviate the disadvantage and to conclude that the respondent had in fact provided a reasonable adjustment of asking ‘closed questions’.

62. The Tribunal rejected the version of this adjustment which was put forward by the claimant at the hearing – that only closed questions defined as ‘yes or no’ questions should be asked. It said that that would not give candidates the opportunity to provide examples of how they were able to meet the person specification competencies.

63. Unpacking that a bit, the interview was of a type, which will be familiar to jobseekers and employment tribunals, in which a candidate is expected to provide examples of occasions when they demonstrated particular skills or attributes that are required for a particular job. It may be that there are other and better ways to test the suitability of some candidates, including some candidates with the claimant’s disabilities. The question for the Tribunal in this case, however, was whether, in respect of the disadvantage the respondent was or should have been aware of – a struggle ‘to provide examples of his skills on the spot, immediately and in the moment’ - an adjustment of asking ‘yes or no’ questions only was reasonable. It clearly was not, since, as the Tribunal identified, it would be

difficult, if not impossible, to extract any such examples from the claimant in this way and it would appear to be a significant over-correction in circumstances where the disadvantage was not an inability to provide such examples at all but an inability to provide them at speed. The analysis by the Tribunal cannot be characterised as perverse. Adjustments which deprive an assessment method of any efficacy cannot be reasonable adjustments.

64. It follows that although the Tribunal erred in its analysis of whether an adjustment to the questions could be an adjustment which addressed the disadvantage created by this PCP, the error makes no difference to the Tribunal's ultimate conclusions on the reasonable adjustments claim and this ground of appeal fails. It was certainly not an error of law for the Tribunal to find that the adjustment was in fact made.

65. As to Mr Leonhardt's point that alternatively this ground could not succeed because of the Tribunal's unchallenged findings on knowledge of disadvantage, it seemed to me that argument was based on a misreading of what the Tribunal found. The Tribunal found that the Time PCP did put the claimant at a relevant disadvantage. Its further finding at paragraph 91 that there was nothing to *indicate* to Mr Stinton or Mrs Stafford at the interview that the claimant had in fact been placed at a disadvantage did not displace the earlier finding about knowledge of the disadvantage.

66. For these reasons, Ground 1 is dismissed.

Ground 2

67. What the Tribunal was required to decide in respect of the section 15 claim is clear from the guidance in Pnaiser, but what it did decide is not so clear.

68. At paragraph 110 the Tribunal found that 'each of the matters set out in para 109 above arose in consequence of the claimant's disability. The claimant has articulated this in his disability impact statement. This was not challenged by the respondent. We accept the claimant's evidence on this point.'

69. The Tribunal then found that there was unfavourable treatment in that the claimant was not

offered the team manager role and proceeded to analyse whether the reason for the treatment was any of the somethings identified.

70. The difficulty is in interpreting what exactly the Tribunal found at paragraphs 121 - 125. In this passage of the reasons, the Tribunal accepts the evidence of one of the interviewers that the claimant did not *appear* to be nervous and that the claimant *seemed* quite confident. The observation is made that the claimant had been interviewed a year previously by the same interviewers so that they were not in fact new to him. These observations then lead to the conclusion that ‘the reason the claimant was not offered the team manager, revenue services role was not because he was suffering from stress because he was placed in a new situation by meeting new people in a job interview’.

71. That last finding is ambiguous because it is not clear from what precedes it whether the Tribunal is there saying that whilst, as it found at paragraph 110, the ‘something arising’ is something which tends to occur, it did not as a matter of fact arise in this occasion, **or** it is saying that it did accept the something did arise but concludes that it did not materially cause the unfavourable treatment. A further possibility is that the Tribunal was saying that there was no ‘something arising’ as defined in the list of issues because the interviewers were not wholly new to the claimant, as he had met them in a previous interview.

72. In respect of Ground 2(a), the claimant has mounted his challenge on the basis that the Tribunal has found as a fact that the something, i.e. stress, did not arise at this interview and that finding is not supported by evidence and/or is perverse.

73. I concluded that the claimant was likely to be correct in his construction of the reasons and that the Tribunal did find that the claimant was not suffering from stress at this interview, given that the conclusion follows on from the recital of the evidence at paragraphs 121 – 123 about Mr Stinton’s impressions of the claimant. Was that conclusion perverse, bearing in mind again the high bar which a perversity appeal must reach?

74. The evidence which the Tribunal had was:

- Evidence it accepted at para 110 as to the claimant’s general tendency to feel stressed in an

interview situation;

- The evidence of Mr Stinton, who was an experienced interviewer, and who the Tribunal found was ‘able to detect signs of stress or anxiousness’, that the claimant did not seem particularly stressed or anxious;
- The further evidence of Mr Stinton that the claimant seemed quite confident, a view he formed because the claimant was able to ask for adjustments he required at the start of the interview and because the claimant did not share his screen with the interviewers when asked to do so. Mr Stinton’s view was that people who were stressed might do things they did not want to do, whereas the claimant had not done something he did not want to do;
- The fact that the claimant had been interviewed by the same interviewers a year previously.

75. Was the Tribunal entitled to reach the conclusion that the claimant was not stressed, based to a significant extent on the evidence of an individual they found to be experienced and skilled in detecting signs of stress, that the claimant did not appear to be stressed? Was that a permissible option?

76. The point the claimant has made is that the example given by Mr Stinton of the refusal to share the screen relies on an inference about behaviour which is based on Mr Stinton’s impression about how neurotypical people behave. The Tribunal has adopted Mr Stinton’s impressions and concluded that they reflected the reality of the situation without asking itself the question whether someone with the claimant’s disabilities would manifest stress in the same ways as a neurotypical person. In essence the Tribunal has preferred the conclusions of Mr Stinton, who, whatever else he was, is not said to have been an expert on the claimant’s conditions, as to the claimant’s mental state to the claimant’s own evidence about his experience of interview situations. In my judgment that was not a finding open to the Tribunal.

77. If, alternatively, the Tribunal’s conclusion was that the claimant was stressed but it did not materially affect his performance at the interview, it is has not given adequate reasons to explain that conclusion. Indeed the ambiguity as to the basis on which the Tribunal rejected this claim is itself a

failure to explain why the claimant has lost on this point.

78. For these reasons, this ground of appeal is upheld.

79. Ground 2 (b) relates to the positive finding the Tribunal went on to make as to the reason why the claimant was not appointed to the role. The Tribunal has found that the claimant's answers lacked the detail, breadth and depth of answers provided by other candidates and further that this was because of the claimant's lack of experience as a manager. For that reason he scored much less highly than the successful candidates.

80. The claimant has pointed to paragraphs 129 – 131 of the reasons, where the Tribunal asks itself the question whether, if it was wrong and there was a failure to make reasonable adjustments or section 15 discrimination, that discrimination made any difference to the outcome? The Tribunal has answered that question in the negative. It said that 'had the claimant been given more time to prepare for the interview it would have made no difference to the examples he was able to give to demonstrate competencies for the role.' The Tribunal says that this was because, as a matter of fact, the claimant only had a limited range of examples he was able to give to demonstrate skills 'articulated as being an ability to communicate, time management, empathy, and strategic thought'.

81. The fundamental problem with the claimant's complaint that the Tribunal has failed to find that the reason for non-selection was in part because of something arising from his disability is that an inability to provide examples of those skills was not identified as a 'something' leading to the unfavourable treatment. It is not open to the claimant on this appeal to advance a wholly new case which was not identified below and which, had it been advanced, would have influenced both the evidence called and the submissions made.

82. I canvassed with the parties whether the 'something' identified at paragraph 30 a. of the Tribunal's reasons - 'The claimant had difficulties communicating effectively. In particular, he misinterpreted questions put to him and so he gave the wrong answer' - could be taken to include the claimant having a paucity of examples of good communication to provide in an interview setting. I concluded it could not fairly be so read and was intended to encompass the way the claimant presented

at interview. From the Tribunal's reasons, that was clearly how the case was understood by the parties and the Tribunal. It would not be in the interests of justice to give the list of issues or indeed the pleadings a strained interpretation which resulted in a party being ambushed by an unexpected case. Ground 2(b) is dismissed.

Disposal

83. This is clearly not a case in which substitution by this Appeal Tribunal is permissible. The decision on whether and how stressed the claimant was in the interview requires to be remade by a tribunal carefully weighing the evidence it has heard. That tribunal will need to consider whether the stress materially contributed to the claimant's failure to be appointed to the role and, if so, whether the decision not to appoint the claimant was nonetheless justified.

84. Neither party was urging me to remit the case to the existing tribunal. I considered the guidance of Burton J in Sinclair Roche and Temperley and ors v Heard and anor [2004] IRLR 763, EAT. The original hearing was a short hearing. Given the given the passage of time, it might be difficult or impossible to reconstitute the original panel and there would seem to be little or no benefit in doing so. Whilst there is absolutely no reason to doubt the professionalism with which the original panel would approach the issue, the fact that there were a number of flaws in the reasoning weighed in the balance against remission to the same tribunal.

85. I am therefore directing that the case be remitted to a new tribunal to rehear the section 15 claim. It follows from my conclusions above that the decision is sufficiently affected by error that it is not in the interests of justice to seek to carve out only some elements of the cause of action for the tribunal to determine. The tribunal's role will be easier to perform if it approaches this claim afresh.