Neutral Citation Number: [2022] EAT 19

Case No: EA-2020-000636-BA & EA-2020-000637-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1 February 2022

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE
MS V BRANNEY
MR G WORTHINGTON

- -

Between :

MR L GARCIA	**Appellant**
- and -	
THE LEADERSHIP FACTOR LIMITED	**Respondent**

- -
- -

Mr L Garcia the Appellant in person
Mr R Morton, representative for the **Respondent**

Hearing date: 23 November 2021

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The claimant appealed a deposit order made in respect of his claim for direct and indirect disability discrimination. He has a stammer and was assumed to be a disabled person at this stage of the proceedings. His claim concerned the respondent's advertisement for telephone researchers. He alleged that a stated requirement for applicants to have "a clear voice" and a question that asked whether applicants were "in good health" were discriminatory and he claimed that in consequence he was deterred from applying for the position. The Employment Tribunal ("ET") considered that the claim had little reasonable prospect of success. As regards direct discrimination, the claimant was unable to identify why non-disabled candidates with comparable abilities would not have been equally put off from applying. Additionally, he would not be able to show that he was genuinely interested in applying for the role. As regards the alleged indirect discrimination claim, the tribunal concluded that it was very likely that the respondent would be able to make out a justification defence in relation to the clear voice PCP given the nature of the role; and that the claimant would not be able to show individual or group disadvantage in relation to the (assumed) PCP for applicants to be in good health.

The appeal was dismissed. The ET had correctly identified the comparator for the purposes of the direct discrimination claim as non-disabled potential applicants with the same abilities as the claimant (**Stockton on Tees Borough Council v Aylott** [2010] ICR 1278 CA; **High Quality Lifestyles Ltd v Watts** [2006] IRLR 850 EAT). Additionally, the ET was right to treat both the direct and indirect discrimination claims as requiring the claimant to show he was genuinely interested in the position (**Keane v Investigo** UKEAT/0389/09; **Berry v Recruitment Revolution & Ors.** UKEAT/0190/10/LA).

When assessing whether a claim or allegation had little reasonable prospect of success, a tribunal was entitled to assess the likelihood of factual issues being established at the full hearing provided

that a proper basis for doing so was identified, as the ET had done in this case. The tribunal's assessment of the justification defence was based on the self-evident nature of the advertised role, not on a premature resolution of disputed factual evidence. Similarly, its evaluation of the prospects of the claimant showing group disadvantage in respect of the "in good health" question was based on the evident difficulty in establishing that other potential applicants with stammers would have considered that they had to answer this in the negative. Finally, the conclusion that the claimant would not be able to show he was genuinely interested in the position was legitimately based on the objective factors that the ET identified (including his current residence in London and the need to relocate to Huddersfield; his current work as a legal adviser; and the rate of pay at just above the minimum wage); in circumstances where, despite being given the opportunity to do so, the claimant had been unable to identify any positive attraction for why he would have applied for the position.

The Honourable Mrs Justice Heather Williams DBE:

Introduction

1. This is the judgment of all three members of the appeal tribunal, to which the lay members have made a valuable contribution. We will refer to the parties as they were known below. The appeal is against the order of Employment Judge Maidment ("the EJ") sitting in the Leeds Employment Tribunal ("the ET") made on 1 May 2020 requiring the claimant, Mr Garcia, to pay a deposit of £500 not later than 21 days from the date of the order as a condition of being permitted to continue to advance his allegations of direct and indirect discrimination.

2. The deposit was not paid and accordingly, by a judgment dated 8 June 2020, these claims were struck-out under rule 39(4) of Schedule 1 to the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** ("**the ET Rules 2013**"). As the striking-out followed automatically from the non-payment of the deposit, there is no free-standing appeal against this judgment.

3. The claimant's original notice of appeal included 28 grounds. At the paper sift stage, Lavender J concluded that they disclosed no reasonable grounds for bringing an appeal. Following a rule 3(10) hearing, Choudhury J, President permitted grounds 5 – 9 and the first paragraph of ground 22 only to proceed to a full hearing.

The proceedings below

4. In proceedings commenced on 8 October 2019, the claimant alleged that the respondent's on-line job advertisement for telephone interviewers constituted direct and indirect disability discrimination. It was agreed that the advertisement included the following: "You will need a professional manner and be friendly and polite with a clear voice". It was also agreed that one of the questions posed of prospective applicants was: "As far as you are aware are you in good health?" The role was described as being 100% phone based, conducting customer satisfaction research. It was said that shifts were available to fit around schooling and education and those

"looking for a new job or to find work that fits with studying, family commitments, retirement hobbies or an existing job" were encouraged to apply. The text said that payment was made at an hourly rate and that there was a bonus scheme in place.

5. The claimant has a stammer. He did not apply for the position. He claimed that the references to "a clear voice" and for applicants to be "in good health" had deterred him from doing so. He contended that he was a "disabled person" within the meaning of section 6, **Equality Act 2010** ("**EqA**"). He sought compensation for injury to feelings and for financial losses caused because he was not able to work for the respondent in consequence of the discriminatory requirements. The claim was defended by the respondent.

6. The case management Summary following a preliminary hearing ("PH") on 28 November 2019 recorded the issues between the parties. After referring to the "clear voice" and "in good health" aspects of the advertisement, the issues regarding the direct discrimination claim were identified as:

> **"(iii) Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant states that a reasonable person reading this advert would infer that people with stammers should not apply.**
>
> **(iv) If so, was this because of the claimant's disability and/or because of the protected characteristic of disability more generally?"**

7. As regards the indirect discrimination claim, the alleged provision, criterion or practice ("PCP") was identified as: "A requirement that applicants had a clear voice" (hereafter "the clear voice PCP") and/or "A requirement that applicants were in good health" ("the in good health PCP"). The additional issues that arose in relation to indirect discrimination were identified as follows:

> **"(vi) Did the respondent apply the PCP to the claimant at any relevant time?**
>
> **(vii) Did the respondent apply (or would the respondent have applied) the PCP(s) to persons with whom the claimant does not share the characteristic?**
>
> **(viii) Did the PCP(s) put persons with whom the claimant shares the characteristic at one or more particular disadvantages when compared with persons with whom the claimant does not**

share the characteristic, in that:

a. People with a stammer do not have a clear voice?
b. People with a stammer are not in good health?

(ix) Did the PCP(s) put the claimant at that/those disadvantage(s) at any relevant time? The Respondent asserts that the claimant was not a prospective job applicant with a genuine intention to apply for a job with the Respondent.
(x) If so, has the respondent shown the PCP(s) to be a proportionate means of achieving a legitimate aim? The respondent relies on the following as its legitimate aim(s) to justify the first PCP:

a. The respondent was seeking applicants who would be able to comply with the MRS code (see ET3)[1].”

8. A PH was scheduled for 16 March 2020 to determine whether the claimant was a disabled person. In the event, the hearing was moved to 1 May 2020 and held remotely due to pandemic-related restrictions. It was agreed that this telephone hearing was not appropriate for resolving the disability question, which was to be re-listed; and the present hearing was converted to a case management discussion. The EJ considered that the respondent’s application to strike-out the claim as vexatious and/or without reasonable prospects of success could not be determined at this private telephone hearing; and this was also to be re-listed, as was noted at paragraphs 11 and 12 of the case management summary sent to the parties on 12 May 2020. However, as recorded in paragraphs 13 and 17 of this document, the EJ was prepared to hear the Respondent’s application for a deposit order at this stage; he also indicated he had been considering making such an order of the tribunal’s own motion, following discussion with the claimant as to basis of his claim.

The reasons for making the deposit order

9. The terms of the deposit order have been described in our introduction. The EJ’s reasons were included in the deposit order. He recorded that he assumed at this stage that the claimant was a disabled person at all material times. He noted that the claimant’s case was “that he was effectively put off from applying [for the advertised position] by reason of him suffering from a stammer”.

[1] “MRS” was a reference to the Market Research Society. Paragraph 10 of the ET3 stated that the Code ensures telephone researchers are able to clearly explain nine specified matters to participants at the start of a call.

10. The EJ indicated that he considered the complaint of direct disability discrimination had little reasonable prospect of success. He identified two reasons for this. Firstly, because the "the relevant comparator would be a person who was not disabled but respectively did not have a clear voice/was not in good health". The EJ observed that the claimant "points to no basis upon which he is able to suggest that such non-disabled candidates would not have been equally put off from applying for the position". Secondly, because he did not consider that the claimant "will be able to persuade the tribunal that he was genuinely interested in this position". He returned to the latter point when addressing the indirect discrimination claim.

11. The EJ also concluded that the indirect disability discrimination claim had little reasonable prospect of success. His reasoning was set out in five unnumbered paragraphs as follows:

> **"…The tribunal considers that the respondent requiring any candidate to have "a clear voice" will be objectively construed as a requirement that the candidate had good communication skills and is able to be understood by others. The tribunal can accept that those who share the claimant's disability, if proven, in suffering from a stammer would be disadvantaged by a requirement to have a "a clear voice" and might be put off from applying for the position. ("The first paragraph")**
>
> **Assuming the claimant also suffered from that disadvantage, however, the respondent will still have an opportunity to put forward that it had a legitimate aim in requiring employees for this particular type of role to have a clear voice and that it acted proportionately in seeking to encourage applications from those who had a clear voice. The tribunal considers it very likely that the respondent would be able to make out this defence in a role which involved call centre-based employees telephoning individuals in order to interview them for the purposes of market research. Having a clear voice must surely be a prerequisite for anyone holding such a position or certainly in performing it effectively. ("The second paragraph")**
>
> **This is not a complaint of reasonable adjustments. Had the claimant applied for the role, it may be the respondent ought to have considered whether any steps could have been taken to remove or alleviate the claimant's disadvantage caused by his stammer… ("The third paragraph")**
>
> **The question asked of candidates as to their being in good health was, the respondent maintains, in error and not a requirement. Assuming however for these purposes that it was, did or would that question put disabled people suffering from a stammer at a disadvantage? The tribunal considers that having a stammer does not render an individual as someone not in good health or that a person suffering from a stammer would consider that they would have to answer that question in the negative because of their stammer. The tribunal does not consider that the claimant will be able to show any group or individual disadvantage out of the question being asked in a job advertisement. ("The fourth paragraph")**
>
> **Further, the tribunal does not consider that the claimant will be able to persuade the tribunal that he was genuinely interested in this position. This was a temporary call centre position which the claimant accepts was paid at a rate just over national minimum wage and temporary in nature. The claimant told the tribunal that at the time he saw this job advert he lived in Hounslow. The position he says he was put off from applying for would have required him to work and inevitable reside in Huddersfield. The claimant is unable to present any positive**

> **attraction in his case for this position and in that location or to explain why he could and would not have sought such a position nearer to his home location. The speech therapist's report does not suggest it would be the type of role the claimant would desire or feel appropriate for him. The claimant's employment history does not suggest an obvious interest in such a position. The claimant currently describes himself as being self-employed as a legal adviser to companies." ("The fifth paragraph")**

12. The EJ said that he had arrived at these conclusions without having regard to what he described as the claimant's history of "bringing tribunal applications on a similar basis in a cynical manner and without any genuine wish to be successful in the application but rather with the aim of profiting from legal proceedings". He noted that this was the view expressed by the Watford Employment Tribunal when dismissing the claimant's sex discrimination claim against **The Gift Corner 3 Wishes Ltd** (Case Number 3318988/2019) in a judgment sent to the parties on 14 April 2020 ("the **Gift Corner** case"). The EJ said that the claimant had lied to him in asserting that he had not been the claimant in that case and that this "does not assist the claimant's credibility in bringing this current complaint against the respondent". The EJ amplified these matters by reproducing paragraphs 14 – 16 of his case management Summary, as follows:

> "**Ms Asch-D'Souza[2] referred to the decision of the tribunal in Watford in the aforementioned *Gift Corner* case. The Claimant was adamant that this claim had nothing to do with him. He explained that Garcia was a very common Spanish surname. It was pointed out that this case appeared to involve an individual who, like the Claimant, had spent time in France and who had been involved in similar employment activities…The Claimant prevaricated. He maintained that he had not had a chance to read the Gift Corner judgment and could not comment without reading it on whether the Claimant in that case was or was not himself. However, he clearly had some detailed knowledge of what was in the reasons. Furthermore, there was no need for the Claimant to read the judgment and reasons to determine if he had appeared before the Watford Employment Tribunal less than 2 months previously. The Claimant was again adamant that this case had nothing to do with him. Ms Asch-D'Souza raised…that they had made contact with the Respondent in that case. After further denials, the Claimant eventually suddenly confirmed, with reference to the *Gift Corner* tribunal: 'yes it is me'.**
>
> **The tribunal explained to the Claimant that it could reach no other conclusion but that the Claimant had just lied to the tribunal when denying that this claim had anything to do with him.**
>
> **Ms Asch-D'Souza raised this case in support of her argument that this claim against the Respondent was vexatiously brought and had no reasonable prospect of success. In the Gift Corner case the Claimant had seen a shop assistant job advertised in a manner which was discriminatory because of sex in seeking female applications. However, the tribunal decided that whilst discriminatory, it had no hesitation in concluding that the Claimant never really wanted the job. It came to its conclusion in part based upon what it described as his 'untrue**

[2] The Respondent's representative below.

> **evidence' regarding him not being the Claimant in yet further earlier employment tribunal cases which he had brought. The tribunal in the Gift Corner case concluded that this was a vexatious claim and a cynical attempt by him to profit from legal proceedings brought against the Respondents. The evidence indicated a pattern of behaviour in which the Claimant sought to find prima facie discriminatory conduct and then to bring proceedings to profit from his discovery. It was noted that, within those proceedings, he had denied under oath that he had anything to do with other tribunal claims, showing a cynical pattern of behaviour."**

The Claimant's reconsideration applications

13. By an 18 page document dated 22 June 2020 the claimant requested that the ET review / reconsider the deposit order and the consequential striking-out of his claim. Many of the points that he included also formed part of his grounds of appeal. Amongst other contentions, he took issue with the EJ's interpretation of the clear voice PCP, referring to the Cambridge dictionary definition of "voice". He also disputed the EJ's assessment of the respondent's justification defence. In a judgment sent to the parties on 15 July 2020, the ET rejected the application, concluding that there was no reasonable prospect of the original decision being varied or revoked. The EJ pointed out that strictly speaking the tribunal was not dealing with an application to reconsider as the deposit determination was an order rather than a judgment and no application to vary that order had been made prior to the expiry of the time for paying the deposit; and that in the circumstances the tribunal had no discretion and had to dismiss the claim pursuant to rule 39(4) of the **ET Rules 2013**. In the circumstances, the ET treated the claimant's correspondence as an application to reconsider the judgment dismissing his claims. However, the EJ concluded that there was nothing in the application that caused him to come to a different conclusion on the ordering of the deposit, noting that the arguments were advanced in one form or another during the telephone preliminary hearing.

14. By a document dated 27 July 2020, the claimant made an application for reconsideration of the reconsideration decision. This was rejected by the ET in a judgment sent to the parties on 13 August 2020 indicating that there was no reasonable prospect of the earlier decision on the reconsideration being varied.

15. By a document dated 16 August 2020, the claimant forwarded material from the British Stammering Association and links to other websites contained within that material. He said this

showed that people who stammer could succeed in a variety of roles where communication was central to the role, and he asked for a further reconsideration. This further application was refused in a judgment sent to the parties on 8 September 2020. The EJ commented that the new evidence did not impact on his basis for making the deposit order, as it was uncontroversial that individuals who stammered could succeed in a variety of roles that involved the need to communicate; and had the claimant applied for the role, then a duty to make reasonable adjustments may have arisen.

16. Thereafter the claimant made two further reconsideration applications which were rejected in judgments sent to the parties on, respectively, 1 October 2020 and 2 November 2020. There was no appeal before us from the ET's rejection of the various reconsideration applications.

The grounds of appeal

Contentions outside the scope of the appeal

17. In light of the way that the appeal was presented to us, it is important to identify the contentions that the claimant was not permitted to proceed with following the rule 3(10) hearing. In particular, these included complaints that: making a deposit order at the hearing on 1 May 2020 was procedurally unfair as the claimant was given insufficient opportunity to prepare to resist this (ground 2); it was unfair to make a deposit order when no such order had been made at the first PH in front of Employment Judge Buckley on 28 November 2019 (ground 3); it was procedurally irregular for the EJ to have taken into account the earlier **Gift Corner** case (grounds 10, 11 and 19) and he was wrong to have found that the claimant lied to him about his involvement in that case (ground 13); the deposit order and strike-out application should have been heard together (ground 21); and the number of issues considered and level of detail in the EJ's reasons showed that the case was inappropriate for making a deposit order (grounds 1, 23 and 24).

18. As specified in paragraph 2 of the order following the rule 3(10) hearing, the claimant was only permitted to pursue grounds 5, 6, 7, 8, 9 and the first paragraph of ground 22. The other grounds were dismissed. Ground 22 contained multiple sub-paragraphs at (a) – (q). The first of

these (sub-paragraph (a)) said that the EJ's reasons for making the deposit order were not good ones for the reasons explained above. The majority of the remaining sub-paragraphs objected to the EJ's reliance on the **Gift Corner** case, repeated the complaints of procedural unfairness made in earlier grounds and contended that the EJ had been biased against the claimant and had victimised him. It was clear that these contentions did not form part of the permission to proceed granted at the rule 3(10) hearing. In the "Reason/s Allowed to Proceed" document, Choudhury P explicitly linked the grant of permission in relation to the first part of ground 22 to the earlier grounds he had permitted to proceed ("my view that it is just about arguable that the Tribunal erred on the detriment issue (see above), it seems right to treat this ground as arguable too"). He did not suggest that any free-standing basis of appeal should proceed from ground 22 and indeed, to do so would have been inconsistent with him declining to permit the claimant to proceed on the rejected grounds we summarised in the previous paragraph.

19. The order sealed on 12 May 2021 required the claimant to lodge draft amended grounds of appeal, reflecting the limited permission to proceed. In the event the claimant lodged an extensive document that was even longer than the original notice of appeal. By an order sealed on 14 June 2021, Choudhury P directed that the revised grounds of appeal were not accepted and that the appeal would proceed on the basis of grounds 5 – 9 and the first paragraph of ground 22 only "as drafted in the original Notice of Appeal".

20. However, the claimant's skeleton argument for the appeal hearing ranged more widely. Accordingly, we reminded him at the outset of the hearing that his complaints that the ET had erred in taking into account his previous claims, that the EJ was biased, that no deposit order should have been made because EJ Buckley had not made one at the earlier hearing and that there had been procedural unfairness, were not before us. We encouraged the claimant to focus his oral submissions on the issues that had been permitted to proceed. Nonetheless, the claimant sought to revisit these topics at various points during the hearing, when we again reminded him that these matters were not before us. He also sought to persuade us that the permission to proceed with

ground 22 had been granted on a wider basis and was not confined to sub-paragraph (a). We explained to him that we rejected that proposition, giving the reasons that we have indicated above.

21. After the respondent's oral submissions, when we gave the claimant an opportunity to reply, he raised the ground 2 complaint again, namely that he had not been given sufficient time to prepare a response to the prospect of facing a deposit order. Accepting that it was not within the current grant of permission, he asked if he could be given permission at this stage to rely on this ground. We refused his application on the basis that the matter had already been decided against him at the rule 3(10) hearing, as confirmed in the 12 May 2021 order and reiterated in the 14 June 2021 order; there had been no appeal against the earlier decision and no basis for reconsideration had been shown; and this was being raised at a very late point in the hearing.

22. Whilst we confined the appeal to the grounds specified in para 2 of the 12 May 2021 order, the claimant contended during his oral submissions that he should be allowed to reformulate grounds 6 and 9 to reflect the basis upon which they had been permitted to proceed. We address this when we come to the relevant grounds.

The permitted grounds

Ground 5

23. Ground 5 concerns the EJ's conclusion on the first complaint of indirect discrimination, namely the clear voice PCP. His reasoning is contained in the first and second paragraphs that we set out above. Ground 5 in the notice of appeal is lengthy, but it essentially contains two complaints. Firstly, that the EJ wrongly identified the PCP as "a requirement that the candidate has good communication skills and is able to be understood by others". Secondly, that the EJ reached an erroneous conclusion on justification in the absence of any or any sufficient supporting evidence from the respondent.

Ground 6

24. As set out in the notice of appeal, the essence of ground 6 was a complaint that the "burden

of proof is now shifted but the respondent has not discharged it because it has not proven an 'occupational requirement' to require applicants with a 'clear voice'", and that this was an issue that should be evaluated at a full hearing.

25. The claimant had not included this ground in his skeleton argument, but he confirmed at the outset of the hearing that he intended to pursue it. We pointed out that the ground appeared to be misconceived as the respondent had not raised an occupational requirement defence (pursuant to Schedule 9, **EqA**) in these proceedings and nor had the existence of such a defence formed any part of the EJ's reasoning. However, the claimant said he wished to pursue this ground as a challenge to the EJ's conclusion on the direct discrimination claim, specifically his approach to comparators. He submitted that this was consistent with the decision at the rule 3(10) hearing. He pointed out that Choudhury P's reasoning for allowing this ground to proceed was that it was arguable that the ET "erred in its identification of the comparator and/or in assuming that they would be equally dissuaded. There also appears to be an assumption that being dissuaded from applying for a job is not enough to amount to a detriment". In fairness to the claimant, we permitted him to develop his argument on this point, albeit noting that to do so did not accord with the literal terms of the 14 June 2021 order, which confined his grounds to the original notice of appeal.

Ground 7

26. Ground 7 concerns the EJ's evaluation of the second complaint of indirect discrimination, namely the in good health PCP. His reasoning is contained in the fourth paragraph that we set out earlier. The claimant challenged the EJ's assessment that "having a stammer does not render an individual as someone not in good health", on the basis that: (a) stammering was a health issue as it was a condition treated by the NHS; and (b) the EJ had himself used the word "suffering" when referring to people with a stammer.

Grounds 8 and 9

27. These grounds both concern the conclusion expressed in the fifth paragraph that the claimant would not be able to persuade the ET that he was genuinely interested in the advertised

position. By ground 8 the claimant contended that the EJ erred as there was no statutory requirement for him to show this. By ground 9 he submitted that the reasons identified by the EJ in support of this conclusion were not good ones and that as this issue involved a dispute of fact it should be resolved at the full hearing. In his oral submissions to us, the claimant maintained these points, but also contended that ground 9 included a point identified by Choudhury P when permitting this ground to proceed, namely that "[t]here was a plea that the claimant was 'upset' by the advert and it is arguable that there is some detriment even though no application was made". We took the same approach to this expanded version of ground 9 as we adopted in relation to ground 6.

Ground 22 first paragraph

28. We have already explained the limited extent of this ground.

Documentary materials and new evidence

29. Both parties submitted bundles of documents for the appeal hearing. The Registrar directed that as the contents of the two bundles were essentially the same, the respondent's bundle would be used as the hearing bundle, but the claimant's bundle would also be made available to us. In the event, the only point of distinction between the two was that the claimant's bundle contained what he said was the original advertisement, placed on-line on 24 March 2016 and which he subsequently viewed. By contrast, the respondent's bundle contained the text of the advertisement shown in a different format and without the reference to "in good health" apparent. During the hearing before us a dispute emerged between the parties as to whether the claimant had made the version of the advertisement that he relied upon available to the respondent and the ET at or before the 1 May 2020 hearing. After the appeal hearing, the claimant sent two further emails with attachments to the Employment Appeal Tribunal ("EAT") on 24 and 26 November 2021, which he said reinforced his position on this point. In the event, we did not find it necessary to resolve this issue as nothing turned on this for the purposes of the appeal. As we have already noted, the respondent accepted that one of the questions would-be applicants were asked in the advertisement was whether they

were "in good health". Furthermore, the elements of the advertisement that the claimant relied upon in support of his ground 9, such as flexibility of shifts and the availability of bonuses, were contained within both versions of the text of the advertisement. In so far as the claimant also submitted in these emails that the length of time that the advertisement appeared on-line belied the respondent's pleaded case that the "in good health" reference was a mistake, rather than a PCP it would actually apply, the EJ assumed this issue in the claimant's favour when he made the deposit order, as he indicated in the fourth paragraph.

30. The later part of the respondent's bundle (pages 184 – 202) contained documents from the claimant which it said were not before the ET at the 1 May 2020 hearing. The claimant contended that pages 184 – 189 were before the ET but accepted that the other pages comprised new materials. Page 184 was a table from the ONS Annual Population Survey 2017, included by the claimant to show that a significant proportion of graduates took employment in non-graduate roles. The next few pages comprised various on-line entries relating to "voice" or "clear voice" and identifying signs of a confident communicator. Pages 190 – 202 were print-outs from various websites on the topic of avoiding discrimination in advertisements.

31. Just before the appeal hearing we were provided with a further bundle of documents from the claimant ("the further bundle"). Aside from the speech therapist's report dated 14 March 2020 prepared by John Doleman, they were admittedly new materials. The new documents were as follows: a chart comparing the cost of living in Huddersfield and London; documents relating to the claimant's complaint against a circuit judge in relation to the making of a General Civil Restraint Order; an extract from the EAT's website listing the grounds upon which appeals could be brought; an extract from a guide to assist employers and colleagues understand more about stammering ("the Guide"); an extract from an NHS website referring to treatments for stammering; and correspondence with the EAT over the bundles.

32. At the commencement of the hearing, we explained to the parties that we proposed to permit them to make reference in their submissions to the new materials in the hearing bundle and in the

further bundle on a provisional basis and that when we came to make our substantive decision we would determine whether in fact the documents were admissible. We outlined the **Ladd v Marshall** [1954] 1 WLR 1489 criteria for admitting new evidence (that the material could not have been obtained with reasonable diligence for use at the 1 May 2020 hearing; that it was relevant and would probably have had an important influence on the hearing; and it was apparently credible). We explained that we considered it desirable to take this course, rather than hearing submissions on admissibility and ruling on this item by item at the outset of the hearing, in the interests of time management and because we would be in a better position to assess the relevance and importance of particular documents once we had heard the substantive submissions. Both parties indicated that they agreed with this approach. In the event, the claimant did not refer to some of the documents in his oral submissions and we need say no more about those. Where the claimant did rely upon aspects of the new material in his submissions, we address its admissibility when we come on to our substantive conclusions below.

The legal framework

Deposit orders

33. As relevant for present purposes, rule 39, **ET Rules 2013** provides:

> **"(1) Where at a preliminary hearing…the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ('the paying party') to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.**
>
> **(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.**
>
> **(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out…"**

34. Rule 34(2) states that enquiries should be made into a party's means before the order is made. That aspect is not raised by the current grounds of appeal, so we need not refer to it in any detail. Rule 34(5) addresses the position where the sum is paid in compliance with a deposit order

and the allegation or argument does not succeed at the merits hearing for substantially the reasons given in the deposit order. The paying party is treated as having acted unreasonably for the purposes of costs consequences unless the contrary is shown; and the deposit is paid to the other party/parties. If this scenario does not eventuate, then the deposit is refunded to the paying party.

35. Rule 37 contains the power to strike out all or part of a claim or a response where (amongst other grounds) "it is scandalous or vexatious or has no reasonable prospect of success". Unsurprisingly, that threshold test is a more demanding one.

36. Deposit orders have a valuable role to play in discouraging claims or defences that have little reasonable prospect of success, without adopting the far more draconian sanction of dismissing the claim or response altogether. The deposit order affords a paying party the opportunity for reflection.

37. We respectfully agree with the observations of Simler P (as she then was), sitting with lay members in **Hemdan v Ishmail & Al-Megraby** UKEAT/0021/16/DM ("**Hemdan**") regarding the purpose of a deposit order:

> "**10. …if the money is paid and the claim pursued, it operates as a warning, rather like a sword of Damocles hanging over the paying party, that costs might be ordered against that paying party (with a presumption in particular circumstances that costs will be ordered) where the allegation is pursued and the party losses. There can accordingly be little doubt in our collective minds that the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. That, in our judgment, is legitimate, because claims or defences with little prospect cause costs to be incurred and time to be spend by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resource, and unnecessary anxiety. They also occupy the limited time and resources of courts and tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit.**
>
> **"11. The purpose is emphatically not, in our view…to make it difficult to access justice or to effect a strike out through the back door. The requirement to consider a party's means in determining the amount of a deposit order is inconsistent with that being the purpose… Likewise, the cap of £1,000 is also inconsistent with any view that the object of a deposit order is to make it difficult for a party to pursue a claim to a Full Hearing and thereby access justice…"**

38. Evaluating the likelihood of success for these purposes entails a summary assessment intended to avoid cost and delay and a mini-trial of the facts is to be avoided: **Hemdan**, paragraph 13. If the tribunal considers that an allegation has little reasonable proposed of success, the making

of a deposit order does not follow automatically, but involves a discretion, which is to be exercised in accordance with the overriding objective, having regard to all the circumstances of the particular case: **Hemdan**, paragraph 15.

39. The extent to which the tribunal may have regard to the likelihood of disputed facts being established at the full merits hearing, has been considered by the EAT on a number of occasions. **Jansen Van Rensburg v Royal Borough of Kingston-Upon-Thames** UKEAT/0096/07/MAA concerned an unsuccessful appeal against a deposit order made under the earlier rule 20 of schedule 1 to the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004**. The threshold criterion in rule 20(1) was not identical, but the difference in wording is not material for present purposes. Under rule 20 a tribunal could order a deposit where it concluded "that the contentions put forward by any party in relation to a matter required to be determined by a tribunal have little prospect of success". The EAT addressed whether the tribunal had been entitled to consider whether the facts as asserted appeared credible, or whether its role was confined to assessing the claim on the basis of the pleaded facts. Elias P (as he then was) indicated he was persuaded by the submission that the references to "contentions" and to "a matter required to be determined" in the rule indicated that the assessment was a broad one and that there was no justification for limiting the matters to be determined to purely legal ones (paragraphs 19 and 23). Rule 39(1) of the **ET Rules 2013** adopts equivalently broad language in referring to "any specific allegation or argument".

40. After noting that in **North Glamorgan NHS Trust v Ezsisas** [2007] IRLR 603 the Court of Appeal recognised that in exceptional circumstances a claim could be struck out on the basis of disputed facts, Elias P observed that it would be "very surprising if the power of the Tribunal to order the very much more limited sanction of a small deposit did not allow for a similar assessment, particularly since in each case the tribunal is assessing the prospects of success, albeit to different standards" (paragraph 26). He then referred to the less rigorous test that applied to the making of a deposit order, noting that "a tribunal has a greater leeway when considering whether or not to order

a deposit. Needless to say it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response" (paragraph 27).

41. Elias P's approach was followed by HHJ Eady QC (as she then was) in relation to the **ET Rules 2013** in **Wright v Nipponkoa Insurance (Europe) Ltd** UKEAT/0113/14/JOJ ("**Wright**"). At paragraph 33 she observed that a tribunal must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim. She confirmed this approach in **Tree v South East Coastal Ambulance Service NHS Foundation Trust** UKEAT/0043/17/LA at paragraph 23. In the latter case she referred to the well-known appellate guidance in the **Anyanwu v South Bank Students' Union** [2001] IRLR 305 HL line of authorities concerning the caution to be applied to striking-out discrimination claims, noting that this was potentially relevant to the making of deposit orders as well, albeit the potential risk of a deposit order resulting in the summary disposal of a claim should be mitigated by the express requirement on the tribunal to make reasonable enquiries into the paying party's means (paragraphs 20 – 21).

42. We observe that the assessment of factual matters may extend, as in the present case, to the prospects of the other party making out a defence; the approach we have just discussed is not confined to doubting that the paying party will be able to make out facts essential to the case it advances, but again there must be a proper basis identified to support the tribunal's evaluation.

43. In light of the claimant's submissions, we also note that in response to a contention in **Wright** that the Employment Judge should have recognised that the disputed matter was something that could only be determined at trial, HHJ Eady observed at paragraph 73 that "of course, he was not preventing the matter going to trial; he was simply ordering that a deposit should be paid as a condition".

Direct and indirect disability discrimination

44. Section 13(1) **EqA** provides that: "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".

45. Section 19 defines indirect discrimination, as follows:

> **"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
>
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –**
>
> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
>
> **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
>
> **(c) it puts, or would put, B at that disadvantage, and**
>
> **(d) A cannot show it to be a proportionate means of achieving a legitimate aim**."

46. Disability (as defined by section 6 **EqA**) is a relevant protected characteristic for the purposes of both of these provisions.

47. Section 23(1) **EqA** provides that for the purposes of sections 13 and 19 "there must be no material difference between the circumstances relating to each case". Further, section 23(2)(a) clarifies that a comparison for the purposes of section 13 where the protected characteristic is disability is to "include a person's abilities". Accordingly, when making a comparison for the purposes of a direct discrimination claim, a tribunal must take account of how a non-disabled person with the same abilities as the claimant would have been treated: **Stockton on Tees Borough Council v Aylott** [2010] ICR 1278 CA, following **High Quality Lifestyles Ltd v Watts** [2006] IRLR 850 EAT on this point.

48. In terms of the relevant circumstances that will give rise to unlawful direct or indirect discrimination, section 39(1)(a) **EqA** provides that an employer must not discriminate in the arrangements he makes for deciding to whom to offer employment. In contrast to some of the other forms of conduct by employers that are included in section 39, there is no explicit requirement that the person in question (B) must have been subjected to a detriment. However, the EAT has determined that the claimant must have been genuinely interested in the advertised job to be able to rely upon section 39. In **Keane v Investigo & Ors** UKEAT/0389/09 ("**Keane**") the claimant unsuccessfully argued that it was unnecessary for her to show that she was genuinely interested in the roles advertised and it was sufficient if the terms of the advertisement indicated age

discrimination. Underhill P observed that the definition of direct discrimination, requiring "less favourable treatment" and the concept of indirect discrimination requiring the claimant to have been put at his or her "disadvantage" both connoted the need to show a comparative detriment on the part of the claimant and if she was not interested in the positions she could not be said in the ordinary sense of the word to have suffered a detriment (paragraphs 20 and 21). In **Berry v Recruitment Revolution** UKEAT/0190/10/LA, paragraph 15 Underhill P endorsed his earlier approach in **Keane**. He concluded his judgment by noting that "the purposes of the Regulations is not to provide a source of income for persons who complain of arguably discriminatory advertisements for job vacancies which they have in fact no wish or intention to fill" (paragraph 29).

The parties' submissions

Claimant's submissions

49. As regards ground 5, the claimant submitted that the EJ had erred in indicating in the first paragraph that he equated the clear voice PCP with a requirement that a candidate had "good communication skills and is able to be understood by others". He said this was wrong because a person could have good communication skills even if they did not have a clear voice and he noted the material submitted with his third reconsideration application, which he said indicates that people with a stammer could nevertheless work successfully in roles involving communication skills. He also submitted that this material showed that a requirement for candidates with a clear voice was not a proportionate means of achieving a legitimate aim and the respondent had failed to adduce any supporting evidence to show that. He said that the EJ had failed to take its claim at its highest, as the law required and that as justification defence involved disputed facts, it was inappropriate for him to make an assessment of its likely prospects of success.

50. In relation to ground 6, the claimant submitted that the correct comparator for the purposes of the direct discrimination claim was someone who did have a clear voice and it therefore followed that he was treated less favourably than such a person.

51. As regards ground 7, the claimant relied upon the materials in his further bundle from the

guide and from an NHS website as supporting his contention that people with a stammer are not in good health / would not perceive themselves to be in good health. He also said that this was a disputed issue of fact which the EJ should not have assessed prior to the full merits hearing.

52. We have already set out the essence of the submission on ground 8 when identifying the claimant's grounds. In relation to ground 9 he advanced a number of factors that he said showed he was genuinely interested in the advertised telephone researcher role, which he said the EJ had failed to properly consider. In summary those factors were: (i) as a temporary position, it would have been compatible with him leaving London for a limited period; (ii) payment was not in fact limited to the national minimum wage as the advertisement referred to bonuses; (iii) the cost of living would be lower for him if he moved to Huddersfield; (iv) he was interested in improving his English and the role would give him the opportunity to do so; (v) he had in fact undertaken work of this nature before, as shown by paragraph 5.2 of the speech therapist's report and paragraph 11 of **Gift Corner**; (vi) the post involved flexibility that could allow him to undertake other work in addition; and (vii) no qualifications or expertise were required for the position. More generally, the claimant said that there was no objective evidence to support the EJ's conclusion to the contrary and that it was based on speculation. He said that it was "his right" to have factual matters assumed in his favour at the stage when the deposit order was made. He emphasised that he also relied upon the proposition that he found the terms of the advertisement upsetting.

53. We note for completeness, that after the respondent's oral submissions, the claimant indicated (for the first time) that he was unable to reply to them in the absence of a summary of the points made by Mr Morton. This was shortly before 1 pm. We then provided an oral summary of the key points advanced on behalf of the respondent (which Mr Morton confirmed was accurate) and gave the claimant the lunchtime adjournment to consider his reply, which he duly provided when the hearing resumed.

Respondent's submissions

54. Mr Morton emphasised that the EJ did not make findings in relation to any aspects of the

claim; rather he assessed the likelihood of matters being established at the full hearing. He said that the EJ did take the claimant's case at its highest, save he accepted that this was not the position in relation to the clear voice PCP, where the EJ had a proper basis for the view he expressed in respect of the justification defence.

55. He submitted that the EJ identified the correct comparator when considering the direct discrimination claim. As regards ground 7, he said the fact that the NHS offered support to people with stammers did not mean that those individuals were not in good health; and in any event the EJ was entitled to conclude that the reference in the advertisement to good health would not necessarily put them off from applying.

56. As regards grounds 8 and 9, Mr Morton emphasised that the undisputed facts included that the claimant did not apply for the advertised job; that he lived in the London Borough of Hounslow and was working as a legal adviser; and that the position advertised was a temporary position in Huddersfield, paid at just above the national minimum wage. He said that the **Gift Corner** judgment afforded legitimate confirmation of the EJ's concerns.

57. More generally, he submitted that the EJ was entitled to form an overall opinion that the claim had little reasonable prospects of success. He emphasised that the claim was only struck out because the claimant decided not to pay the deposit.

Discussion and conclusions

58. Before turning to the specific grounds, we make some more general observations. Firstly, given the stage at which a deposit order is usually made and the need to avoid conducting a lengthy and unnecessary mini-trial, it is inevitable that a tribunal's assessment will be impressionistic. Secondly, in determining that a claim or an allegation has little reasonable prospect of success, a tribunal is not making a finding in relation to that claim or allegation but is assessing the likelihood of success at the subsequent full hearing.

59. Thirdly, consistent with the exercise that we have described in the previous paragraph, in most cases at least, a tribunal's reasons for making a deposit order can be expressed relatively

concisely. Of course, sufficient reasons must be provided to comply with the duty to give reasons contained in rules 39(3) and 62 of the **ET Rules 2013**; and to enable the subsequent assessment envisaged by rule 39(5) if the claim or allegation fails, as to whether it was for "substantially the reasons given in the deposit order". In our collective experience the reasons provided by the EJ on this occasion were unusually detailed. Whilst we regard this as nothing more than a sign of his conscientious approach (and certainly not an indicator of a flawed decision, as the claimant earlier suggested in grounds he was not allowed to pursue), it is part of the context in which we consider the criticisms levelled at these reasons. We deprecate any tendency on the part of parties or their advisers to pick over reasons provided in support of a deposit order with the same level of scrutiny or precision as would be applied to the supporting reasons for a judgment on the merits following a full hearing.

60. Fourthly, as Mr Morton pointed out, Mr Garcia could have made the stipulated deposit payment and thereby ensured that his claim continued to a full hearing. He was not deprived of the opportunity to have a hearing on the merits; he chose not to make the payment, in circumstances where there is no live ground of appeal challenging the assessment of his means or his ability to pay the ordered sum of £500. When asked why he had not simply paid the £500 he said this was because it would have been a "humiliation" for him to do so and would have constituted an admission that the deposit order was properly made. We do not see any force in the former point; and if his claim proved to be meritorious, the sum would have been refunded to him. Furthermore, we do not consider that paying the deposit would have precluded an appeal, particularly if he had made his intention to appeal clear when he made the payment. If his appeal succeeded we see no reason why re-payment could not have been ordered.

61. Fifthly, when making his assessment the EJ assumed a number of matters in the claimant's favour. We have already alluded to this, but we list those assumptions here as the claimant's submissions rather lost sight of this at times. The EJ assumed: (i) that the claimant was a disabled person; (ii) in relation to the "clear voice" aspect of the advertisement, that this was a PCP which

might put off those with a stammer from applying for the position; and (for the purposes of considering the justification defence) that the claimant also suffered from this disadvantage; and (iii) that the "in good health" question asked in the advertisement was a PCP. The EJ's conclusion that the indirect discrimination case had little prospect of success was based on his assessment of the justification defence in respect of the clear voice PCP; and based on his assessment that the claimant would not be able to show group or individual disadvantage in relation to the in good health PCP.

62. We will now address the individual grounds of appeal. We consider ground 6 first, as it relates to the direct discrimination claim, whereas grounds 5 and 7 relate to the indirect discrimination case.

Ground 6

63. As we indicated earlier, the original formulation of ground 6 is not pursued as it was based on a misconception that the respondent was raising an "occupational requirement" defence. However, the re-formulation which the claimant advanced in his oral submissions before us does not assist him. The appellate authorities that we referred to in paragraph 47 above, make it clear that the appropriate comparator is someone who had the equivalent abilities to a person with a stammer and who also did not have a clear voice and/or was not in good health. Accordingly, the EJ correctly identified the comparator when he assessed the likelihood of the direct discrimination claim succeeding and the claimant's submission that the comparator should have been a person who did have a clear voice is incorrect. Furthermore, as we have indicated earlier, the claimant's case was that the challenged aspects of the advertisement had put him off from applying for the advertised role. Accordingly, there was no error of law in the EJ relying on the point that the Claimant had not identified why a non-disabled candidate with the same abilities as him would not have been equally put off from applying; this was the correct approach.

64. It therefore follows that no error of law has been shown in relation to the EJ's conclusion that the complaint of direct disability discrimination had little reasonable prospect of success given

the identified difficulties with the claimant establishing that he was treated less favourably than the correct comparator. In turn, this conclusion in itself provided a sound basis for the deposit ordered in respect of the direct discrimination claim, whether or not the EJ was also correct in concluding that the claimant would not be able to establish that he was genuinely interested in the role (which we address when we consider grounds 8 and 9 below).

Ground 5

65. As we have indicated, this ground concerns the clear voice PCP. We consider that the first part of this ground is misconceived, as it fails to appreciate the assumptions that the EJ made in the claimant's favour in relation to this part of the claim (see paragraph 61 above). Furthermore, in the second paragraph, where the EJ considered the prospects of the respondent showing that the PCP was a proportionate requirement that pursued a legitimate aim he repeatedly described the PCP as a requirement to have "a clear voice" and he plainly focused his consideration upon this requirement. Accordingly, there is no merit in the claimant's submission that the EJ applied an incorrect, reformulated or watered down version of the PCP. In turn, it follows that the claimant's case is not assisted by the materials he has put forward relating to the meaning of "voice" and a "clear voice" whether or not they were before the EJ at the time (which, as we indicated earlier, is disputed).

66. The real question in relation to ground 5 is whether the EJ erred in law in making the assessment that he did as to the prospects of the justification defence succeeding, when it would be incumbent on the respondent to prove the defence in due course and it rested, at least in part, on matters of fact. As we have already noted, Mr Morton accepted that the EJ did not simply take the claimant's case at its highest in this respect.

67. However, we consider that there was no error of law in the approach taken in the particular circumstances of this case. As set out in the fourth paragraph, the EJ's conclusion rested on the proposition that it was very likely the respondent would be able to show that "a clear voice must surely be a prerequisite for anyone" performing effectively "a role which involve call centre-based employees telephoning individuals in order to interview them for the purposes of market research".

As we explained in paragraphs 39 – 42 above when identifying the relevant legal principles, a tribunal applying the rule 39(1) test may assess the likelihood or otherwise of factual propositions being established at the full hearing, provided it identifies a proper basis for the conclusion that it draws. The claimant was not correct in contending that he had an unqualified right to have his factual case taken at its highest.

68. Furthermore, we emphasise that in arriving at this conclusion the EJ did not purport to evaluate or resolve disputed factual evidence, nor did he attempt to interpret a matter involving inference or nuance that would depend upon the specifics of oral evidence given by witnesses at a future hearing (as will often be the position in a discrimination case); rather, he simply relied on what appeared to him to be a self-evident proposition, given the nature of the role. We see the force of his observation in that regard. Bearing in mind the impressionistic exercise that was being undertaken and applying the test identified in the caselaw, we consider that in the circumstances the EJ did identify a proper basis for his conclusion regarding the prospects of the justification defence.

69. The claimant's material at pages 190 – 202 of the respondent's bundle is of a general nature in relation to avoiding discrimination in advertisements; it has no bearing on this specific issue and it does not assist his case. Further, the fact that people who stammer are able to work in some fields involving communication skills was not in issue, as the EJ noted in response to the third reconsideration application (paragraph 15 above). The EJ's reasoning was limited to the terms of an advertisement for a job that involved conducting research from a call-centre entirely via telephone calls. The narrowness of the claimant's objection to this assessment is underscored by the fact that he accepted in response to questions put during his submissions that a PCP requiring good communication skills would have been unobjectionable.

Ground 7

70. As we have explained earlier, ground 7 relates to the EJ's conclusion that the claimant would be unlikely to establish group disadvantage or individual disadvantage in respect of the in good health PCP. His reasoning was that having a stammer does not mean that a person is not in

good health and potential applicants with a stammer would not consider that they had to answer this question in the negative because of their stammer. Comments that we have made in relation to ground 5 also apply to ground 7. The EJ's reasoning was not based on a premature resolution of disputed factual evidence, but rather on an aspect that he regarded as self-evident. Leaving aside for now the claimant's own position, it is indeed hard to see how he would be able to prove the requisite group disadvantage in this case. It does not follow from the fact that the NHS provides treatment for stammering that a significant number of potential applicants with a stammer upon reading the advertisement would regard themselves as not in good health and, in turn, would be deterred from applying. Equally, the short extract from the guide, does not address the question of how readers would perceive this aspect of the advertisement. The claimant did not explain how he proposed to establish this issue, upon which he would bear the initial evidential burden.

71. Accordingly, we consider that the EJ identified a proper basis for his conclusion in this respect. We do not consider that there is any significance in the EJ's use of the word "suffering"; this would not assist the claimant in showing the necessary group disadvantage at a full hearing.

Grounds 8 and 9

72. These grounds are of limited significance. We have already found that the EJ did not err in assessing the direct discrimination claim as having little reasonable prospects of success in light of the comparator issue; and that he did not err in assessing both limbs of the indirect discrimination claim as having little reasonable prospects of success, for the reasons we have identified in respect of grounds 5 and 7. Accordingly, there was a legitimate basis for making the deposit order. However, we will also consider grounds 8 and 9 in the interests of completeness and lest it be suggested that a flawed conclusion in relation to this aspect of the EJ's reasoning might impact on his overall, discretionary decision to make a deposit order.

73. As we have indicated earlier, grounds 8 and 9 relate to the EJ's additional conclusion that he did not consider the claimant would be able to persuade the tribunal that he was genuinely interested in the position.

74. We consider that ground 8 is simply misconceived. Although section 39(1)(a) **EqA** does not spell out a requirement of detriment, the EAT has recognised that this is implicit in the definitional elements of both direct and indirect discrimination and that in consequence, in the context of claims about allegedly discriminatory job advertisements, a claimant is required to show that he or she was genuinely interested in the position (see paragraph 48 above).

75. Ground 9 is largely an expression of disagreement with the EJ's assessment of the prospects of the claimant being able to show this, rather than an identification of any legal error. For the reasons we have already identified, the EJ was entitled to evaluate the likelihood of this and was not required to simply take the claimant's factual case at its highest. Furthermore, as Mr Morton highlighted and the fifth paragraph shows, the EJ's assessment largely rested on matters of undisputed fact, namely that he did not apply for the role; that the position would have required him to work and reside in Huddersfield, when he currently lived and worked in London; and he currently worked in an entirely different field as a legal adviser. In the fifth paragraph, the EJ also referred to the claimant accepting that the position was temporary and it was paid at just above the minimum wage. As the claimant's calculation of his losses set out in box 9.2 of his ET1 was made on this stated basis, the EJ can hardly be criticised for taking that approach.

76. It is unclear whether the claimant made all of the points that he made to us at the 1 May 2020 hearing (for example, that he was interested in taking the position to improve his English and he was attracted by the stated flexibility that the post offered). In any event, the weight which the EJ accorded to particular factors was a matter for his assessment. His assessment was plainly a composite evaluation of the position and it is trite law that it cannot be inferred from the absence of mention of a particular factor that it was not taken into account.

77. We are not persuaded by the claimant's specific point about his previous experience of related work, which he says the EJ failed to appreciate. The reference in the speech therapist's report was a single sentence of a general nature (after referring to his practice as a self-employed legal adviser and him taking work as an interpreter it said: "Additionally, he takes work in market

research"). Furthermore, as the claimant's primary position at the hearing was that he was not the person who brought the claim against **Gift Corner**, it is hardly surprising that the EJ did not attach weight to the employment history summarised in paragraph 11 of that judgment. Of relevance to this point and more generally is the fact that the EJ plainly gave the claimant an opportunity to present such material and submissions as he wished to do so on this issue; and he was "unable to present any positive attraction in his case for this position and in that location to explain why he could and would not have sought such a position nearer to his home location". It is unclear whether the claimant referred to the lower cost of living in Huddersfield at the hearing, but in any event this would have been self-evident, and we do not consider that the claimant's case is assisted by the additional data on this point which he included in the further bundle. Nor is it assisted by the statistics on graduates employed in non-graduate roles; the issue was what the claimant personally would have done.

78. The question of whether he was genuinely interested in the role depended largely, if not entirely, on the claimant's own account, rather than on any evidence that the respondent would give at the full hearing. The EJ had the opportunity to evaluate the account that the claimant provided during the telephone hearing and, as we have noted, gave him the opportunity to identify any material that supported his case on this issue. We consider that the EJ's reasoning in the fifth paragraph identifies a proper basis for his conclusion that the claimant would be unable to establish his genuine interest in the position. As he went on to describe in his reasons, the matters concerning the **Gift Corner** case and the claimant's initially untruthful denials of his involvement in this case, only served to reinforce the impression that the EJ had properly formed.

79. As regards the additional point raised in the claimant's submissions, the proposition that he was upset by the contents of the advertisement would not enable him to make out his case if he was not genuinely interested in applying for the position, in light of the caselaw we have summarised at paragraph 48 above. Furthermore, in terms of his indirect discrimination claim, the statutory definition in terms required him to show that the relevant PCP put him at a disadvantage (in

comparison with those who did not share his protected characteristic); his case was that this disadvantage was that he was put off from applying from a position that he was interested in.

80. Accordingly, we reject ground 9 for these reasons.

Ground 22 first paragraph

81. We have already explained that this part of the notice of appeal referred back to earlier grounds which we have evaluated. It did not raise a free-standing issue.

New material

82. We have addressed the claimant's reliance on particular aspects of his new material as we have considered each of his grounds of appeal. For the reasons we have identified none of this material satisfies the **Ladd v Marshall** criteria, in particular we do not consider that any of the documents meet the requirement that they probably would have had an important influence on the hearing.

Outcome

83. For the reasons we have identified, we reject each of the claimant's grounds and the appeals are dismissed.