EMPLOYMENT TRIBUNALS

Claimant: **Mr T. Milson**
Respondent: **London Borough of Islington**

London Central Remote Hearing (CVP) **On:** 15-16,19-20 April 2021

Before: Employment Judge Goodman
Mr D. Schofield
Ms C. James

Representation
Claimant: in person
Respondent: Mr J. Braier, counsel

RESERVED JUDGMENT

1. **The unfair dismissal claim fails.**
2. **The disability discrimination claims fail.**
3. **The age discrimination claims fail.**

REASONS

1. The claimant, who has cerebral palsy, worked for the respondent council for 21 years. In August 2020 he was dismissed by reason of redundancy. He has claimed unfair dismissal, disability discrimination, and age discrimination in the way he was chosen for redundancy.

2. The claim was presented on 16 November 2019, with a brief account of the complaint. The respondent sent a holding response, and the claimant provided further information. There was a preliminary hearing for case management (by telephone) before Employment Judge Jeremy Burns on 16 July 2020, when he discussed the issues with the parties, and refused the respondent's application that the claimant be ordered to pay a deposit as a condition of proceeding. The respondent was ordered to file an amended response in the light of the clarification, and to draft a list of issues.

Issues for Decision

3. In the unfair dismissal claim, respondent asserts redundancy as the reason

for dismissal, and in the alternative, that there was some other substantial reason justifying dismissal.

4. In the disability claim, the claimant contended that the four provisions (PCPs) imposed by the respondent on which he relied were:

   (a) making technical support officers apply for regulatory assistant roles in a competitive selection process
   (b) requiring them to answer a test in handwriting
   (c) limiting that time to 40 (now agreed in fact to be 45) minutes
   (d) answering questions at interview.

   These placed the claimant at a disadvantage, he said, because: he had to work 100% harder than non-disabled persons to achieve the same results; he processes information differently and gets anxious and nervous in formal situations; he works more slowly than non-disabled persons; he struggles to write well by handwriting, and prefers to use a computer. On whether the respondent knew or could reasonably be expected to have known of the substantial disadvantage, the claimant argued that the respondent should have known, because he had worked for them for many years.

5. The claimant contended for the following adjustments: slotting him into one of four new regulatory assistant roles; exempting him from the application process altogether; if he had to undergo the process, allowing an extra 10 minutes to do the test from the outset; and allowing him to answer questions on the computer rather than by hand.

6. The age discrimination claim was both direct and indirect. The direct claim was that the respondent failed to appoint him, and another technical support officer, to the regulatory assistant role because of age - they were in their 50s, whereas the successful candidates were in their 30s. The indirect discrimination claim was the requirement (PCP) to make the technical support officers apply in a competitive selection process for the regulatory assistant roles, undergo a handwritten test, complete that within 40 minutes, and submit to questioning by an interview panel. It was asserted that this put people in their 50s at a particular disadvantage compared to those in their 30s because they were unlikely to have recent experience of competitive job interviews, compared to younger applicants, and the format hindered the older candidates in demonstrating their length of prior relevant experience.

Amendment of Claim

7. At the outset of the hearing counsel for the respondent identified a number of areas in the witness statements filed by the claimant and Ms McCormick, his union branch secretary, dealing with matters not previously identified as issues in the case. Bearing in mind that the claimant had acted in person throughout, without legal assistance, and that Ms McCormick is an employee of the council assigned to trade union duties who is involved as a witness, and had not acted, and does not act, as his representative, the tribunal proposed to examine these matters as if the claimant had applied to amend, and in the light of the factors identified as relevant to such an application in **Selkent Bus Company v Moore,** namely, whether this was a new matter or the relabelling of an existing claim, the effect of addition on

any time limit, and the manner and timing of the application, and then to balance the prejudice to the claimant against the prejudice to the respondent of allowing or not allowing the amendment.

8. The claimant had some difficulty in discussion in formulating what exactly he meant, but as identified they appeared to be:

   (1) that as he worked slowly and there was a lot of work on during the notice period, he had no time to apply for redeployment;
   (2) in his application for an estate services role in redeployment, they had not followed paragraph 5.2.2 of their own policy, or
   (3) slotted him in, and
   (4) they had delayed in answering his post-dismissal grievance.

9. Having heard from respondent, and after further clarification from the claimant, the tribunal decided to allow the claimant to amend as follows:

   (1) that during the redeployment period, the respondent was *insufficiently proactive* in getting him to apply for posts

   (2) and (3) as identified, on the basis that although the claimant did not mention redeployment in his claim, the relevant witnesses for the respondent were due to give evidence and had dealt with the redeployment process as it concerned the claimant, as had the amended response, and 5.2.2 was their own policy, of which they had knowledge.

   We did not allow (4), about delay in processing the grievance, in essence a victimisation claim, because although the claimant could not have brought this claim at the outset, he could have mentioned it to Employment Judge Burns at the case management hearing last summer. As it was, the respondent had not had an opportunity to research why it took them five months to answer the grievance, which might involve reviewing many emails, and it was not part of the set of facts already before the tribunal, but a separate matter.

10. Other matters arose from Ms McCormick's witness statement, which were clarified with her on day 2 of the hearing. One of these was that the process was demeaning and humiliating for the claimant, without giving more detail, and that the claimant had been subjected to unnecessarily offensive remarks in the course of the appeal hearing. We considered this could refer to the claimant saying in his claim form that the appeal hearing "became an undignified examination of why I wasn't suited to the new role". As such it was potentially a harassment claim. However, neither the claimant nor Ms MacCormick referred to particular remarks that were offensive or undignified, and on a reading of the appeal meeting minutes it was not at all clear what they were. We considered that if further details were now given orally, there was prejudice to the respondent in having to answer nearly 2 years after the event.

11. Two other matters appeared to arise from Ms McCormick's statement, but discussion suggested that these were particularization of the issue already

before the tribunal, namely why TSOs were not simply assimilated to the regulatory assistant role, rather than ring fenced, and why he was not provided with an interview at the consultation stage. Of the latter, the tribunal proposed to take this as raising the issue whether the respondent had actual or constructive knowledge of the claimant's disability.

Conduct of the Hearing

12. The online hearing was open to the public, although in practice no one unconnected with the case joined. Participants were provided with an electronic bundle of documents and electronic witness statements, and the claimant also had hard copies of the documents and the witness statements. On the first morning the claimant had some connection difficulties which he succeeded in overcoming and thereafter the technical aspects of the hearing went smoothly.

13. At the end of the claimant's cross examination but before tribunal questions the claimant was observed during the break to make a telephone call. It turned out this was to his union representative, Ms McCormick, who was to be the next witness. On enquiry, Ms McCormick said she had phoned the claimant to clarify answers he had given in cross- examination, because hitherto she had believed he had been given no explanations or assistance with the process, but he had told the tribunal he had, and she did not want to mislead the tribunal by continuing to say this in her statement. The tribunal accepted the explanation, noting lack of familiarity with procedure as she had not been involved in a tribunal hearing before, in any case that the claimant had already given his answers, and there would have been no point in her coaching him, while her own statement was so very general that it was unlikely he was coaching her.

14. On conclusion of the evidence at midday on day three of the hearing, it was agreed that counsel for the respondent would supply his written submission within the hour, and we would wait to hear from the claimant until the following morning, to give him time to read it and consider what to say on his own behalf. A 40 page submission, and a bundle of authorities was sent. On the morning of day four the claimant explained he had prepared a written submission himself that morning, and it was then emailed to the respondent and tribunal. After reading it, the tribunal explored with the claimant a number of points made by the respondent, and the respondent had an opportunity to respond to the claimant's points.

15. Some of the claimant's submission added factual matters. He included a link to a website on cognitive effects of cerebral palsy in children. The tribunal said it would treat this material with caution, as introducing it at this stage deprived the respondent of the ability to test the evidence in cross-examination or with their own witnesses.

Evidence

16. The tribunal heard from the following:

Tom Milson, the claimant

Marie McCormack, GMB trade union branch secretary

Jan Hart – service director, public protection division, who designed the reorganisation plan

Keith Stanger - service manager for community safety and crime reduction in the public protection division, one of the three panel members who interviewed the claimant for the regulatory assistant role

Spencer Reynolds – business integration manager in public protection division, the division which the claimant worked

Paul Tannett - human resources business partner assigned to assist managers with the reorganisation process in the public protection division.

17. There was a 387 page hearing bundle, and we read those documents to which we were directed.

Findings of Fact

18. The respondent is a local authority with statutory responsibilities for government in its area. It employs around 4,500 people. The Public Protection division includes trading standards enforcement and environmental health protection, requiring, among other duties, inspection and enforcement of food hygiene standards in shops and restaurants. In spring 2019, 104 people were employed in the division.

19. The claimant has worked for the council in temporary posts since 1991, and as a permanent employee from 1 April 1998, always in clerical and administrative roles.

Disability

20. The claimant suffers from cerebral palsy and epilepsy. He told Employment Judge Burns at the preliminary hearing that he did not rely on epilepsy as disability The respondent has admitted that cerebral palsy made him a disabled person within the meaning of the Equality Act. It is necessary however for us to assess the degree to which the diagnosis impaired his ability to carry out normal day-to-day activities, as part of judging what adjustments could and should reasonably have been made for disability.

21. The only medical document provided was a photograph of part of a letter from the GP confirming that the claimant had been diagnosed in infancy with cerebral palsy, causing right hemiplegia, and left temporal lobe epilepsy, diagnosed when he was 10 or 11. The claimant does not reply on epilepsy in his claim.

22. The claimant's witness statement is silent on how he is impaired or the impact of impairment on his ability to carry out normal day to day activities. In answer to direct questions from tribunal, he explained that he has difficulty controlling his right arm, and that until he had a tendon release operation when he was 9 or 10, his right hand was always a fist. Now, with concentration, and slowly, he can use the right hand to hold something

down, such as a piece of meat he is trying to cut up with the left hand, or keyboard operations that require the use of two hands, such as control – alt – delete, but for most tasks it is of little use. There is an additional difficulty in that he is right hand dominant. He has had to write with his left hand all his life. He can shrug off a coat, and manage to get one on. He had not used a headset the respondent had provided to save staff having to hold the phone in one hand while using the keyboard with the other, because he struggled to fit the headset on his head with one hand. He said he had no trouble using a keyboard, except that it took him "slightly longer" to log on when starting work. There is also a restriction in his right leg, causing it to drag, so he has a lot of wear on his right shoe, but he can run on a treadmill. Spencer Reynolds said the claimant did not talk much about his disability; asked how he knew what the disability was, he replied "I can see it".

23. The claimant stated that because of his condition he "processed information differently", but he did not explain what this difference was.

24. In the hearing bundle there is a stress risk assessment the claimant had a few weeks before dismissal, and there he told his line manager he might have dyslexia, as he had noticed over the years difficulty taking down information; his managers had then enquired how to get a dyslexia assessment, but it was not possible to arrange this in time for the reorganization process. It seems to have been the first time dyslexia was ever mentioned to the respondent. It has never featured in the claim as a disability.

25. Of information processing, the claimant said: "sometimes at interview I miss the point of things". In the appeal hearing, he said: "I have to concentrate more sometimes", without being more explicit. Our own judgement, reached after limited interaction with the claimant over three days, is that he is articulate, but not good at critical thinking, or taking the initiative. Sometimes when answering a question he did not know when to stop. How that relates to the physical restrictions of cerebral palsy is not clear, when there are people without cerebral palsy who also have these difficulties.. We did note that he could be tentative and over-apologetic, which we speculated could result from earlier bullying of a visibly disabled person (we do not suggest this occurred in the respondent's employment, but it may well have been part of his experience in life). We can also understand that physical restrictions could have delayed his educational development; he had attended a school specializing in children with physical disabilities. But we do not have any material from which to make a finding about cognitive impairment, other than his comment about interview questions and needing to concentrate. We do know that the claimant had never said this was an effect of his disability, or that he needed more time to complete tasks, and his managers had never noticed this. The material he supplied in closing on childhood cognitive impairment is very general, and as cerebral palsy is a condition ranging in severity from mild physical impairment to near total incapacity, we cannot draw much from it about the claimant's own impairment. We *could* conclude, loosely, there was some impairment, but at the time neither he nor his managers considered any lack of cognitive function was part of his disability. It has emerged from this hearing. Until the hearing, both he and they seem to have had in mind his physical limitations, notably limited use of his right hand and arm.

The Claimant's Work

26. When the Claimant was first employed, most of the work was paper-based and required handwriting. In time there was more keyboard work. In 2003 the department became paperless, and the claimant and his TSO colleagues attended Word and Excel courses to enable this.

27. As a technical support officer, the claimant filed documents, whether paper or electronic, sent out forms and renewal letters, took payment and issued receipts, arranged couriers when necessary, and answered telephone queries, either himself, or by referring the caller to the relevant officer. He told the appeal panel later that he did handwritten calculations for table and chair licences. Most of his work was office-based, but from time to time he had accompanied environmental health officers and trading standards officers on site visits, either as training so as to become familiar with their jobs, or, as he put it, in connection with licensing, for their protection. He was familiar with many of the documents for inspection and enforcement, and assisted with documents for prosecutions, though he had not drafted them.

28. Spencer Reynolds said the claimant did the work well, and did not talk about his disability. We have not seen any performance assessments. There was a comment by his line manager in the April 2019 stress risk assessment, when he complained of overwork, to the effect that he had already been given advice about prioritising tasks. This was in the context of one TSO having been seconded elsewhere, so that the other three were covering for him or her.

29. There were four TSOs in the team. As to their ages, the claimant was 52, and another, GG was 55. The other two were 41 and 37.

The Reorganisation

30. In the last 10 to 11 years all local authorities have faced repeated cuts in funding. In 2018 respondent had to reduce the budget by 20% over three years. Each department was asked to make savings. It was recognised that in the Public Protection division, almost all its activities were statutory, which limited the scope for cutting services, so the division was required to find only 5% savings. To do this, Ms Hart decided to try to cut out support roles, leaving just the frontline staff. Four technical support officers posts were to be deleted, and in their place she added four Regulatory Assistants, who were to assist the Regulatory Officers. The new Regulatory Assistant job roles, it was announced:

> "will not include general support functions which are subject to the corporate support review. Regulatory Assistants will be embedded into the enforcement teams.. .These new posts will focus on the technical regulatory elements of the previous posts and removal of generic support functions in line with the impending corporate support review."

31. She added: "Any displaced officers following selection will be available for redeployment or being subsumed into the Corporate Review of support".

32. Regulatory officers were to do their own technical support from now on, for example, by taking and answering all phone calls on a duty basis, rather than have a Technical Support Officer answer them and send messages on to Regulatory Officers. The former Technical Support Officers were now, as Regulatory Assistants, to do front-line inspections and prosecution of low risk premises. Once the new Regulatory Assistants were trained, this could mean a saving in Regulatory Officers. However, Ms Hart said in evidence, if anything the workload was increasing over time. For example, Ms Hart said, within Islington over 300 new food premises requiring inspection opened each year (though we assume that some must also have closed), the growth of private rentals meant pressure of demand on inspection of substandard rental accommodation, and they had recently acquired a duty to inspect cladding on high-rise buildings, for which they had a one-off grant, though the duty continued year on year. Some support tasks were eliminated. This included taking payment for hire of tables and chairs, a job done by the claimant - indeed when asked at the appeal what his job was he replied "support officer for tables and chairs", before adding that he monitored emails for other sections. The tables and chairs task was automated by putting the ordering function online. In general they now had to do more work for less budget.

33. In the reorganization plan, in addition to the switch from Technical Support Officers to Regulatory Assistants, one management post was deleted. The remaining manager had to do the duties of both the old management posts.

34. Regardless of the change in duties, both the old TSO and the new RA posts were graded 6 on the pay scale.

35. In the announcement Ms Hart had referred to displaced TSOs being absorbed in the Corporate Review. In November 2018, a colleague of Ms Hart, Kevin O'Leary, had proposed a Corporate Support reorganization, to streamline technical support across divisions, to share technical support where they shared a building, and to reduce the number of agency staff. Ms Hart herself was not involved in this policy, which she says has not come to pass. In evidence she explained that once the policy was looked at more deeply, the prospective savings were not as straightforward as had been thought. In some areas technical support workers were specialists, and departments did not want to give them up, so the plan was deferred, and has still not been implemented. The documents show that this difficulty was known by April 2019.

36. The proposed corporate support reorganization had been announced in November 2018 at a meeting at which the claimant was present. It was stated at that meeting that there would be no compulsory redundancies among the council's permanent staff. The claimant was therefore surprised when he was eventually made redundant.

37. Ms Hart having produced her plan for her division of 104 people, it went out for consultation, with individuals and with the recognised trade unions, Unison and GMB, from 15 January to 22 February 2019. This plan, as noted, envisaged redeployment or staff being subsumed into the corporate review.

38. By agreement with the recognized unions, where there is a reorganisation, if posts are sufficiently similar, staff in the old post are "slotted in" (also known as "assimilated") to the new post. If there is an overlap in duties in old and new post, they are "ring fenced", meaning that only those in the old posts may apply for the new posts. In the case of the technical support officers, as there were four people from the old posts, applying for four new posts, this was not a competition between them, but it did require each of them to meet a minimum standard set by the respondent for the new role.

39. In the event the claimant and another were found not to meet this minimum standard. It is part of the claimant's case that this requirement was unnecessary.

40. The claimant himself did not respond to the consultation. On 21 February, Miss MacCormick, as union representative, raised a point by email about the secondment in the TSO team, and added that "one of the TSO's has a protected category under the Equalities Act and I wonder what accommodations will be put in place to ensure they have a level playing field" (a reference to the claimant, though not by name). Ms Hart replied that it would be best to discuss it at the staff side meeting on 26 February. She said the secondment was ending, and that there would be opportunities for TSOs to apply for corporate support roles, though she did not deal directly with the "level playing field" point.

41. Ms McCormick was not able to attend the staff side meeting; she was told that she could ask other managers about it, including Spencer Reynolds, but it seems her enquiry about the claimant's position was not followed up by her or Ms. Hart.

42. Next there was a general meeting to announce the plan to staff, led by Spencer Reynolds. The claimant was present.

43. On 2 April 2019 the claimant and others affected by the reorganisation proposal went on a job interview preparation course.

44. The claimant became depressed and complained of stress. We do not know if this had to do with the impending organization or work levels while one of the four was on secondment. His line manager got him to complete a stress risk assessment on 17 April 2019 , and then inserted her answers to points he made. The claimant complained of overwork because the fourth TSO had been seconded elsewhere and they all had to cover for him. His line manager commented that she had recommended before that he use to-do lists to prioritise work better. He also complained that he was unjustly accused of not performing. He added that because of the effect of cerebral palsy on his speech, he shied away from "an effective response" to what he thought were unfair accusations. The manager's comment is that there had two complaints (about him) which were justified. The claimant also mentioned that in the last year to he thought he had dyslexia, because he had trouble dealing with new procedures.

45. His line manager and Spencer Reynolds looked at getting a formal dyslexia assessment through occupational health but the timescale was such that it could not be carried out straightaway.

46. On 29 April 2019 Spencer Reynolds met the claimant and explained that the test for the Regulatory Assistant role would consist of a practical skills written test, and then some interview questions. On 3 May he was told the tests would take place on 8 May. The written test would take 45 minutes. The claimant did not say he would need more time than that.

47. Late in the afternoon of 7 May, when the test and interviews for the new Regulatory Assistant Role were to take place the next morning, Ms MacCormick emailed an HR assistant asking if they could be postponed, as assimilation was more appropriate than ring fencing as the posts were so similar. Failing that, she asked for a reasonable adjustment for a disabled candidate to be slotted in, as an exception, to the new post. This was forwarded on 10 May, and on 13 May (so after the event) she had a reply from Paul Tannett in HR. He said the posts had been ring fenced because they were not identical; in any case this had formed part of the consultation, and should have been dealt with at that stage. He added that the written test had allowed a reasonable time.

48. On the day, the claimant sat the written test in a room by himself. He did not ask for extra time. Just as time was up, Spencer Reynolds told him there was an overrun and he could have another 10 minutes. After the written test he had the interview before the three person panel. The claimant has not objected that any member of the panel was biased or unpleasant.

49. The tribunal has seen the test questions, the model answers, and the scoring for the four candidates, though only the claimant's answer papers.

50. On the written test, candidates had to achieve a 3/5. There were two parts. The first was to write out a witness statement for a potential prosecution about visiting an electrical shop to buy an item to be tested. The second was to review a list of tasks that came up on a busy day, and put them in order of priority for action. The claimant scored 2. We have seen his answer to the question where he had to write a statement for an intended prosecution after visiting a shop selling second-hand electrical equipment. There is a page of written work, with accurate spelling and grammar. However, he has not inserted the information considered essential (looking at the mark scheme) by the markers, for example, the name of the shop, the time he went in, and who he spoke to, which would be required in court for a prosecution.

51. The second part of the test paper involved reading 6 scenarios in the team's work which might crop up in a day, and then considering how to prioritise them and what to do about them. Answers were not written down. Instead these scenarios formed the basis of the first interview question, which was given double marks, and thein the remaining questions the interviewers went on to discuss some of the scenarios in more detail. The three testers' notes of the answers are consistent. The marks scheme shows they had to rate the answers as basic, adequate or comprehensive, showing some appreciation of the need to plan, not to be reactive, and to recognize there may be consequences for not completing a task. There are model answers.

52. Of the four candidates, the claimant got a total of 18, GG got 22, the others two got 24 and 29.5. The claimant and GG did not achieve the minimum

required (3 on each exercise), and were told they would be made redundant if they could not obtain a vacant post. The claimant was given a letter confirming this (though delayed because it had to be forwarded from his old address), and also had verbal feedback at the time from Spencer Reynolds.

53. The detailed breakdown of marks shows that the claimant scored 2 and the other three scored 3 each on the written test requiring writing a prosecution statement. Looking at the totals, even if the claimant had scored the same as the others on the written test, he would still only have got 19 marks in total. On the interview questions, in all but one of these he got lower marks than GG. This leads us to the conclusion that whatever adjustment had been made to the written test if the claimant's difficulty was that he wrote slowly, it would have made no difference to the test and interview score outcome that he was not appointable to the regulatory assistant role.

54. The unsuccessful candidates, GG and the claimant, were then sent vacancy lists daily.

55. The claimant appealed the decision. In his appeal letter he complained it had been unnecessary to test and interview him because the old and new roles were so similar they should have been assimilated. He should also have been told at the start that he could have more time, rather than being given another 10 minutes at the end, and then he could have paced himself. Further, having to write by hand, rather than use an electronic device, disadvantaged him, because of his disability, and was unnecessary, because if he was out on site he could use a dictaphone and type it up later.

56. There was an appeal meeting on 4 July, continuing on 16 July, where the claimant was assisted by Ms McCormick, and Paul Tannett assisted Kevin O'Leary, who chaired it. Keith Stanger and Spencer Reynolds attended as witnesses. The appeal points were explored.

57. On writing, Kevin O'Leary asked if the claimant wrote more slowly than others. The claimant answered: "I've never really thought about it. I would say I was about average speed." He confirmed that he could read instructions, but he had to concentrate more sometimes. Keith Stanger explained that the new role involved directly collecting evidence to use in prosecutions. They needed people who could think on their feet, as it was stand alone, more than teamwork. He added there could be career progression to Regulatory Officer in the new role.

58. The claimant received a letter rejecting his appeal on 24 July 2019. Kevin O'Leary said he was satisfied the roles were substantially different and it was right not to assimilate them, that his test score was such that he was not appointable, and he had had more time As for age, candidates had only been assessed on their ability, and age had played no part.

59. At the time of the appeal meetings, the claimant had been receiving job vacancies reserved for redeployment by email, but had not yet applied for any. He explained to the tribunal this was because he had been covering for GG who was on leave, implying he had not had the time.

60. After the first of the appeal meetings, the claimant did download and apply

for a job as Estate Services Development Officer. On 12 July he asked Spencer Reynolds for advice, and we can see that on 17 July Mr Reynolds annotated the claimant's draft application, and made a list of suggestions of what he could say about his experience that related to the person specification. Mr Reynolds could not actually make the application for him, as only the redeployee could access the link to the redeployment vacancies. The claimant made the online application, though we do not know when. He heard no more. He told the tribunal he did not ask about it, and assumed he had been unsuccessful. He did not recall having had a reply receipt when he submitted his application. Spencer Reynolds said he was disappointed the claimant did not get the job, as he thought it suitable. He had intended giving the claimant some coaching if he was offered an interview.

61. According to the respondent, as set out in the response on ET3, the reason for hearing no more about the job is that when the claimant ticked answers to preliminary questions on the online form, asked about his right to work in the UK, he ticked to say he was a *visitor*. As a result the application was automatically rejected, as he could not lawfully have been employed. No document was available in connection with his application, nor did any witness make this point. We do not know whether he would have been sent some kind of automated rejection if rejected.

62. The claimant, with the help of Ms McCormack, lodged a grievance about his case under the Workplace Resolution procedure. On the form for this, dated 25 October 2019, he said the administrative function had been exported to a central function, not left in the department; he should have had a dyslexia assessment; there should not have been a pen and paper test; the appeal hearing had been an unsavoury discussion of why he was not fit for the new role, even though it overlapped with his old one; and he should have been given extra help in the redeployment process, not left to his own devices; he should have been found a job in the corporate review, and he repeated that he should not have had to handwrite, and been allowed more time from the outset.

63. The reply was very slow. Only when Ms. Mc Cormack chased it up did Paul Tannett reply. He said the reply on the test process was the same as given him on the appeal, that despite the aim of the corporate review to provide technical support roles, it had "been necessary to delete much of this work", and on redeployment support, he had from the day of the interviews onward been offered help and support by Spencer Reynolds, Keith Stanger and Paul Tannett, but had not approached them.

64. The respondent has a detailed "Organisational Change Procedure", and an undated copy was in the hearing bundle. It is comprehensive, ranging from general principles to scoring systems for redundancy selection, the appeals procedure and a list of template letters. We assume, because the respondent disclosed it and it is in the bundle, that it was in force at the time of this reorganization. There is a section headed "Special Cases" – the special cases were staff on maternity leave, disabled staff, and those on fixed term contracts. Paragraph 5.2 covers disabled staff and states:

> 5.2.1 Subject to 5.1 above, if a disabled employee is at risk of dismissal on the grounds of redundancy and is not assimilated into a post, either directly or

through competitive assimilation, and following interview, a ring-fenced post is identified as suitable s/he should be offered that post in preference to other candidates.

5.2.2 If a disabled redeployee expresses interest in redeployment to a post they should always be interviewed if it appears they could meet the essential requirements. In deciding whether the requirements could be met, managers must give special consideration as to whether reasonable extra training or a period of planned experience would help the redeployee meet the person specification. Any other reasonable adjustments to the working arrangements and physical features of the premises should also be considered to ensure the disabled redeployee is not placed at a disadvantage by reason of his/her disability.

65. Neither the respondent's managers nor Ms McCormack for the trade union referred to this section at the time. Spencer Reynolds said it was not known to him. Paul Tannett, employed in HR, said he was not involved in the Estates Development team and would not have known whether the claimant had applied. If the claimant had met the criteria for the job, and was successful at interview, he would get preference if there as a tie. The clause was only mentioned in the branch secretary's recent witness statement, and after disclosure by the respondent. With respect to the claimant's case, the provision is relevant not to whether his post should have been assimilated to the new regulatory assistant role, but to the redeployment process. It provides that if a ring fenced post is identified as suitable, he should be interviewed for it, and adjustments considered to mitigate disadvantage related to the disability.

Relevant Law

Unfair Dismissal – Reason for Dismissal

66. By section 98 of the Employment Rights Act 1996, it is for the employer to show "the reason (or, if more than one, the principal reason) for the dismissal", and "that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held". Subsection (2) lists the potentially fair reasons, which include "that the employee was redundant".

67. The respondent argues that the reason for this dismissal was redundancy or that the reorganisation was some other substantial reason. The claimant did not seek to challenge either of these as the context in which his employment Hospital Trust (no2) (2001) IRLR 555.was terminated.

68. Redundancy is defined in section 139 as where the dismissal is wholly or mainly attributable to:

"(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii)for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish".

69. Tribunals must assess whether the effect of reorganisation of duties was to reduce the need for employees to carry out work of a particular kind – **Shawcat v Nottingham City NHS Hospital Trust (no 2) (2001) IRLR 555, Robinson v British Island Airways Ltd (1977) IRLR 477, Murphy v Epsom College (1984) IRLR 278.**

70. Reorganisation, if not in the strict sense a redundancy, could be some other substantial reason justifying dismissal.

71. Having regard to the evidence, the tribunal concluded this was a redundancy. The respondent's need for employees dedicated to administrative support had diminished, whether by automation, or by requiring more senior officers to take phone calls, though there were still administrative tasks, they were redistributed among the team. So if the claimant does not show the reason for not selecting him for a Regulatory Assistant role was age or disability, and subject to the duty to make adjustments, the reason for dismissal was redundancy, which is potentially fair.

72. If the reason for not selecting the claimant was not age or disability, and subject to the duty to make reasonable adjustment for disability, we would otherwise conclude the dismissal was fair, given that there was a detailed process, which had been the subject of union consultation (the claimant's case was raised but not followed up by the union), the tests were objective and relevant to the job, and there was an appeal when his objections were listened to.

Direct discrimination

73. Age and disability are protected characteristics under the Equality Act. By section 13 of the Equality Act 2010:

(1)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.

(2)If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

74. These days, employers seldom state that a discriminatory reason is the reason for their actions, they may not even be aware of it themselves. The Act provides a reverse burden of proof in section 136: "if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred, unless (A) shows that (A) did not contravene the provision". As described in **Igen v Wong 2005 ICR 931**, this is a two stage test, and as confirmed in **Madarassey v Nomura international, 2007 EWCA Civ 33**, the fact of unfavourable treatment and a difference in protected characteristic are not enough to shift the burden – there must be something else. Where there is no actual comparator, it may be in order simply to look for the reason why the claimant received the treatment he did – **Shamoon v Chief Constable of RUC 2003 ICR 337**

Indirect Discrimination

75. Indirect discrimination, prohibited by section 19 of the Equality Act, occurs where a neutral provision is applied which puts a group sharing a protected characteristic at a disadvantage , puts the claimant at a disadvantage, and can be justified by the employer.

76. The burden is on the employer to show a legitimate aim, and that the means chosen to reach it was necessary and proportionate (the same applies to justification of age direct discrimination). It is the PCP that has to be justified, rather than the treatment of a particular individual – **Essop v Home Office (2017) IRLR 588**.The tribunal must assess the weight to be given to the employers chosen means, balanced against the discriminatory effect, and it is not a question of a range of reasonable responses- **Hardys & Hansons plc v Lax (2005) IRLR 726.**

Discussion – Direct Age Discrimination

76. The claimant appears to have been abandoned this claim during the hearing, but we discuss it for completeness. We could see no evidence from which we could find or infer that in the absence of explanation age was the reason why the claimant and GG were found not suitable for the Regulatory Assistant role. It happened that the two TSOs of the four who did not pass the minimum mark were older than the two who passed, but in the absence of anything else suggesting the respondent did not want to keep older people on, we conclude this was chance, if there was no indirectly discriminatory requirement. The respondent's explanation, that they wanted to check the existing post holders were capable of the new role, rings true. The new post would require the regulatory assistants to take direct responsibility for enforcement, and use some initiative, and draft statements for a prosecution. The questions about priorities were relevant to the work, and setting priorities would be necessary in a busy team. The post holders would not be able to reply on a more senior person setting them for them.

77. Nor could we see anything indicating that disability was the reason for not selecting the claimant as a Regulatory Assistant. It is conceivable that the changes were designed to eliminate "dead wood". There was a note of exasperation in the managers' comments on his need to prioritise (the stress risk assessment) and not wearing a headset designed to help (an aside when giving evidence). But it was hard to conclude this was in fact the reason for the change in duties in the light of the explanation that with budget cuts and statutory duties increasing rather than decreasing, a wider range of duties had to be carried out by all team members. In any case it is not suggested GG was disabled, and she was not selected either.

Discussion – Indirect Age Discrimination

78**.** The claimant argues that the requirement to pass an interview put older people at a disadvantage because they are more likely to have been in post a long time and so be out of practice when it comes to an interview. It is not shown to our satisfaction that this is true of people in their 50s (the claimant and GG) as against people around the age of 40 (the other two). Any of them could have been in post for, say 10 or 15 years, long enough to be out of practice. Other than the claimant we do not in fact know how long the others had been in post. If

this *was* a feature for the older group, the four TSOs had been sent on an interview course, so it is not clear that either the claimant or GG *was* at a substantial disadvantage.

79. The claimant's other argument is that the tests did not enable older (meaning longer serving) employees to demonstrate their experience, which put them at a disadvantage. The tribunal disagrees. The interview questions were all about scenarios familiar to the four TSOs from their daily work. The claimant has not pointed to anything unfamiliar in what he was asked in the interview. They did provide him with an opportunity to demonstrate his experience, as longer serving people might have come across more of these situations than more recent arrivals.

80. In any case, supposing there *was* disadvantage to people in their 50s, we would consider the employer has justified the requirement. Their aim was to discharge their statutory functions in this area at even lower cost than before, and we hold this was necessary and a legitimate aim. Their solution was that staff would be devoted to the frontline role rather than to supporting frontline staff. The respondent had to check they were capable of operating on their own, even in more minor enforcement cases. We are not sure we understand what alternative way there could have been of checking that without having a test or interview. Speculatively they could have appointed all four and then set out to train them where they fell short, but if they could not pass a test based on tasks that were reasonably familiar at the time, it is not clear that additional training could have helped, and it would have taken longer and may have ended in failure. These tests were a proportionate means of meeting that aim.

Duty to make adjustments for Disability

81**.** Section 21 of the Equality Act provides that it is discrimination not to discharge the duty to make reasonable adjustments for disability. Section 20 describes the duty (here, of an employer) to make reasonable adjustments for disability. Emphasis has been added for clarity.

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

(2)The duty comprises the following three requirements.

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

(4) The second requirement is a requirement, where a *physical feature* puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an *auxiliary aid,* be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

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

82. Schedule 8, paragraph 20, provides that the duty does not apply if the employer "does not know, and could not reasonably be expected to know…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."

83. The tribunal has to identify the PCP or physical feature, and the nature of the substantial disadvantage it imposes – **Environment Agency v Rowan (2008) IRLR 20.** There must be relative disadvantage (compared to non-disabled people) for the duty to arise – **Sheikholeslami v University of Edinburgh (2018) IRLR 1090**.

84. The first PCP (provision, criterion or practice) relied on by the claimant is having to undergo a competitive selection process at all, rather than being slotted in to the new role. We note that it was not in fact a *competitive* selection process. There were four jobs and four candidates, they only had to meet a minimum threshold. It is not clear to us that the physical impairments making up the claimant's disability reasonably required an adjustment. He could read and write, he was familiar with the tasks he was being asked about. Having to undergo a selection process at all (leaving aside how that process operated) was necessary as the new role was different. The only way an adjustment could have been made to avoid a selection process was to keep at least one TSO job, perhaps made up of administrative duties now being done by regulatory officers and assistants, and reserve it to the claimant. However, the respondent did not know there was any mental or cognitive impairment that put the claimant at a disadvantage. The claimant has not described one in his witness statement. He has never conceded he was not up to the new job, indeed he has complained how humiliating it was to have this suggested at the appeal hearing. His managers had observed the physical impairment, but if he was not as sharp as others, they could not, on the evidence, have been expected to know that was the nature of his disability. We have considered **Mid Staffordshire General Hospital NHS Trust (2003) IRLR 566**, and **Tarbuck v Sainsburys Supermarkets Ltd UKEAT 2006 0136/06**. The respondent was aware of the physical disability, and the claimant had worked for them for many years. We considered whether there was a failure to assess the nature of his disability at the consultation stage, when Ms McCormack raised it, though in very general terms, and whether they should then have considered slotting him in, if necessary with a collection of administrative support duties. The claimant has not argued that failure to consult at this stage is a breach of the duty. Our conclusion is that had the respondent considered the claimant's case at this stage, it is unlikely they would have learned from the claimant of anything other than a physical impairment. Nor is it clear there was relative disadvantage (to someone with claimant's disability) in having to pass a minimum standard. There is a range in human ability. GG also did not pass; it is not suggested she had a disability. The claimant does not rely on dyslexia in this claim, and it is not even known that he has dyslexia. It was not suggested to the respondent by Ms McCormack that they should put a job together for him, only that they should "level the playing field", which suggests adapting the selection process, not giving him an alternative job. The discussion went no further until the eve of the test, when she asked for a post to be ring fenced for him, or for him to be slotted in. The respondent replied it was too late, as they were past the consultation stage. In terms of reorganising the work of the Public Protection team, in our view it was now too late to be a *reasonable* adjustment. It was reasonable for the employer to think (as Ms Hart suggested back in February) there may have been a support-only job elsewhere in the council for those who did not reach the minimum standard for the regulatory assistant role, which would come up on redeployment.

85. Moving to the second PCP, the claimant seeks an adjustment to the handwritten test, so it could be done by computer, as if he had been appointed as

regulatory assistant it might have been a reasonable adjustment to give him a tablet to work with when away from the office (as suggested by Ms McCormack in the appeal meeting, when she was told they did not have any). The difficulty for the claimant in our view is that he cannot show that by handwriting the test he was at a substantial disadvantage. He could write clearly and legibly with his non dominant hand. He did not say on appeal that he wrote more slowly than others, though we could accept that even with a lifetime's experience of using his non-dominant hand he may have written a little more slowly than others. If he did, he still produced a lot of writing; the error was that he included material that was not on the mark sheet as essential, and omitted material that was essential, which is not related to the speed of writing it down.

86. The third PCP relied on is more time for the written test. We understand the point that it is better to be told at the outset that there will be more time, when there is a chance to plan, than to have extra time tacked on unexpectedly at the end and then just because the interviews were running over. It is not however clear that the claimant did work more slowly than others. He did not say so before being told he had not met the minimum standard. He did not say so in the risk assessment in April, when he blamed not being able to meet deadlines on having to cover for a seconded colleague, not that he was a slow worker. He suggested he might have dyslexia, but this is not relied on in the claim, and we do not know if he does have dyslexia; it seems never to have been suggested before in his long career in the team. But even if the claimant could show a disadvantage as a disabled person compared to those who were not disabled, we cannot find it was a substantial disadvantage, when if he had got 3 rather than 2 for the written test, he would still have failed to meet the interview score requirements, which did not depend on writing.

87. The fourth PCP advanced in this claim is the respondent's reliance on answers to the interview questions. In the hearing before us he said he could be slow to get the point of what was being asked, but it seems never to have been something he himself was aware of before then, or that his managers were aware of, as something related to cerebral palsy. It was not something he raised when he appealed, which is odd, when he raised other points about disability at that stage. It is hard to see how the respondent ought reasonably have been aware of this as part of the disability when the claimant and his representative did not mention it– they advanced only the unfairness of interviews on older people.

88. Moving to the first of the additional PCPs added by amendment, this is that the respondent was "insufficiently proactive" when it came to redeployment. The respondent had offered both generally and on specific days help from Spencer Reynolds, Keith Stanger and Paul Tannett. We know the claimant was late starting to look at redeployment vacancies, (though he also insisted he did review daily vacancies) ; we do not know which he downloaded other than the ESD role. The claimant did not seek out the advisers offered, but we know that when he did identify that the ESD job that might fit him, either Spencer Reynolds volunteered, or the claimant asked him for help. Either way, the claimant was looking for redeployment vacancies, and got good help from Spencer Reynolds on this application. We know there must have been *a* role that would suit him, as GG obtained a post just before her employment was due to end. In evidence the claimant's main complaint about this stage was that by covering for holiday in June he did not have time to check the redeployment list for vacancies, not that he lacked initiative and needed a push.

89. In July and August it might have helped if Spencer Reynolds (say) had asked the claimant if he had heard anything about his ESD application, as then he could have followed it up and detected the error, but as the claimant was already in contact with him about the application, and as neither the claimant nor his union representative thought about the outcome or follow it up before he left, it is hard to say asking him whether he had heard back, and then checking why not, was a reasonable adjustment. It could have been *an* adjustment to get a manager to monitor the claimant's progress in applying for redeployment vacancies, but in the circumstances we cannot say, in the light of what was known about the claimant's disability, that this would have been a reasonable adjustment.

90. The final part of the case for a reasonable adjustment is that the respondent did not follow 5.2.2 of their own procedure, requiring that a disabled person should be interviewed for any post he expressed interest in if it appeared he could meet the essential requirements. If this did not happen, it was likely to have been for the unfortunate reason that the claimant completed the online application in such a way that he did not appear to have the right to work in the UK, so it will not have come to the attention of a human (rather than a computer programme) that he was interested in the post. Spencer Reynolds knew of the application and was expecting to help with the interview, but unaware of the policy. Paul Tannett of HR did not mention it at the time. Had the rejection of the application because of the unfortunate and mistaken answer about his immigration status come to light at the time, this might be different, but as it did not, the respondent did not know he was interested and should have an interview. The claimant has not suggested he made the mistake because of disability; he has not mentioned difficulty filling in questionnaires with a keyboard. The claimant left without raising it or mentioning his lack of success to Spencer Reynolds. We cannot hold that failing to make this adjustment for the claimant was, in the circumstances, a breach of duty.

91. In consequence, and with some regret as we can understand how unfair it felt to someone who faces more difficulties than many people in his life, we do not uphold the claim of failing to make reasonable adjustments for disability.

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Employment Judge Goodman

Date:21st May 2021

JUDGMENT and REASONS SENT to the PARTIES ON

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24th May 2021.

FOR THE TRIBUNAL OFFICE