



EMPLOYMENT TRIBUNALS

Claimant
Mr T Peck

-v-

Respondent
Royal Mail Group Limited

Heard at: Nottingham **On:** 10 to 12 June 2019

Before: Employment Judge Evans, Mr R.N. Loynes, Mr Z Sher

Representation

For the Claimant:

In person

For the Respondent:

Mr S Peacock, Solicitor

JUDGMENT

The Respondent did not unlawfully discriminate against the Claimant. His claims fail and are dismissed.

REASONS

Preamble

1. The Claimant decided to apply for a post with the Respondent towards the end of 2017. He made various applications, some of which are considered in more detail in the Findings of Fact made below. On 20 February 2018 he made the application which gave rise to this claim. On 13 August 2018 he presented a Claim Form to the Employment Tribunal in which he brought a complaint of disability discrimination.
2. That complaint came before the Employment Tribunal in Nottingham at a hearing held between 10 and 12 June 2019 ("the Hearing"). The parties were represented as set out above. Before the Hearing the parties had agreed a bundle of documents, the numbering of which ran to page 398. Pages 399 to 405 were added to the bundle during the course of the Hearing with the consent of all parties. All references to page numbers in these reasons are to the bundle page numbers unless otherwise stated.
3. The Claimant provided a witness statement for himself and gave oral evidence. The Respondent provided witness statements for the following individuals who also gave oral evidence: Rob Bailey (the Head of Custom Assessment at Korn Ferry), Phoebe

Woods (a Contract Manager on the Respondent's Flexible Recruitment Team) and Alison Westwood (the Head of Recruitment and Resourcing of the Respondent).

4. Following submissions on 12 June 2019 the Tribunal reserved its judgment. It deliberated and reached a decision on the same day. The Tribunal's decision as set out in these reasons is unanimous.

Preliminary matters and the beginning of the Hearing

5. The Respondent had conceded that the Claimant had a disability for the purposes of the Equality Act 2010 ("the EQA"). That disability was agreed at the beginning of the Hearing to be "severe depression, stress and anxiety".
6. At the beginning of the Hearing there was a discussion about what steps – reasonable adjustments – the Tribunal should take to ensure that the Claimant could participate fully in the Hearing. The Tribunal noted that the Claimant had previously explained at a Preliminary Hearing that he would like breaks in the morning and afternoon sessions. At the Hearing the Claimant clarified that such breaks should ideally last for 10 minutes and the lunch break an hour. The Tribunal said that this would be possible (and indeed such breaks were taken) and enquired whether there were any other adjustments which the Claimant would like to be made. He said that he would like to have a 10 minute break after each witness had given evidence. Such breaks were subsequently taken (if the witness' evidence did not end before a longer break or at the end of the day).
7. The Hearing began at 10.05am on 10 June 2018 and, after a discussion of the reasonable adjustments which should be made and an explanation of the timetable for the Hearing and the order of witnesses etc, the Tribunal adjourned until 1.30pm to review the witness statements and bundle.

The issues

8. There was a discussion of the issues arising in this claim at a Preliminary Hearing which took place at the London Central Employment Tribunal on 5 December 2018 before the claim was transferred to the Midlands East Region. Those issues were set out in Appendix B to the Case Management Summary subsequently sent to the parties. The list of issues was then revisited and revised to a limited extent at a further Preliminary Hearing which took place on 29 January 2019 in Nottingham.
9. There was a further discussion of the list of issues on the first day of the Hearing once the Tribunal had read the witness statements and the bundle documents referred to in them. Following that discussion, the final list of issues was agreed to be as set out below.
10. During the discussion the Respondent made various concessions which are reflected in the list of issues as set out below. In particular the Respondent conceded knowledge of the Claimant's disability at all relevant times.

Section 13 of the EQA - Direct Discrimination

Direct disability discrimination occurs where, because of disability, a person (A) treats another (B) less favourably than A treats or would treat others (section 13(1) of the EQA).

1. Whether the Respondent treated the Claimant less favourably than it treats or would treat others in the following ways because of disability:

- 1.1 By subjecting the Claimant to the same recruitment process as those without disabilities;
- 1.2 By delaying the Claimant's ability to take the online Aspects Test by failing to send the correct link to him as it said it would in its email of 20 February 2018 (page 283 of the bundle) with the result that his application was not further considered;
- 1.3 By Ms Woods alleged instruction to the Claimant in an email dated 28 June 2018 (page 344 of the bundle) not to apply for any other posts.

B. Section 19 of the EQA – Indirect Discrimination

Indirect disability discrimination occurs where:

- *A applies to B a provision, criterion or practice (PCP).*
- *B has a disability.*
- *A applies (or would apply) that PCP to persons who do not have B's disability.*
- *The PCP puts (or would put) those with B's disability at a particular disadvantage when compared to other persons.*
- *The PCP puts (or would put) B at that disadvantage.*
- *A cannot justify the PCP by showing it to be a proportionate means of achieving a legitimate aim.*

(Sections 6 and 19 of the EQA.)

2. **The PCP:** The requirement for all applicants to meet a minimum standard in the two parts of the Aspects Test in order to progress to interview without any allowances for the effect of disability on responses in the Aspect Styles part of the test ("the PCP"). The Respondent agreed the PCP was applied. The issues in relation to it were:

2.1 Whether the PCP puts (or would put) those with the Claimant's disability (severe depression, stress and anxiety) at a particular disadvantage in comparison with non-disabled persons.

2.2 If so, the Respondent concedes that the PCP puts (or would put) the Claimant at that disadvantage;

2.3 If so, whether the Respondent can show that the treatment was a proportionate means of achieving the legitimate aim of identifying and selecting people with the required skills and attributes necessary for the job on offer.

C. Sections 20 & 21 of the EQA - Reasonable Adjustments

3. The Respondent concedes that the PCP put the Claimant at a substantial disadvantage in relation to the Aspect Styles part of the test in comparison with persons who are not disabled at the relevant time.
4. Were there any steps that were not taken that could have been taken by the Respondent to avoid such disadvantage? The Claimant says that the following steps should have been taken:
 - a. Allowances should have been made for the effect of his disability on his responses to the Aspect Styles part of the test;
 - b. A lower minimum requirement (or pass mark) should have been set for the Aspect Styles part of the test;

- c. The Claimant should have been allowed to bypass the Aspect Styles part of the test completely;
 - d. Instead of requiring the Claimant to complete the Aspect Styles part of the test, reviewing the relevant competency requirements by consideration of the Claimant's work history;
 - e. Instead of requiring the Claimant to complete the Aspect Styles part of the test, referring the Claimant to Occupational Health specialists for suitability assessment;
 - f. Instead of requiring the Claimant to complete the Aspect Styles part of the test, taking up employment references relating to the Claimant.
5. If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?

The disclosure issue

11. One disclosure issue arose at the beginning of the second day when Mr Bailey began to give his evidence. It became apparent that the bundle did not contain the Aspects Styles part of the test that the Claimant had taken online. That is to say the bundle did not contain a document which set out either the questions that the Claimant had been asked or what answers he had chosen or how he had been scored for them.
12. The Tribunal took the view that such documents should have been disclosed in light of the issues as set out above in the indirect discrimination and reasonable adjustment claims. Mr Peacock for the Respondent accepted that such documents were relevant and should have been disclosed. It appeared that they had not been disclosed because the Respondent took the view that they were commercially confidential: if the Aspects Styles questions, the answers given by the Claimant, and his scores were all disclosed then it would be possible to reverse engineer that information and so access Korn Ferry's intellectual property – the algorithms or formulae which translated the answers given into a score.
13. There was then a 60 minute adjournment for the Respondent to obtain a document containing the relevant information ("the Document"). Mr Peacock said that the Respondent would disclose the Document provided that the Claimant agreed to respect its confidentiality. The Claimant indicated such agreement and was given a copy of the Document. The Tribunal then asked the Claimant what he wanted to do. It gave him time to consider (1) whether he wished to apply for an adjournment so that he could consider the Document at his leisure; (2) if so, how long an adjournment he wished to have. The Tribunal explained to the Claimant that if he wished to have an adjournment lasting longer than the rest of the day then, unfortunately, the Hearing would have to be adjourned generally. EJ Evans said that he suspected that this would mean that the Hearing would have to be adjourned until the autumn (and so it turned out to be when the Tribunal considered their diaries in the subsequent adjournment).
14. After 15 minutes Mr Peck indicated that he could do little with the Document if the adjournment just lasted for the rest of the day and that he did not wish to apply for a longer adjournment because it was important to him that the case was concluded without further delay. He therefore handed the Document back to the Respondent.
15. The Tribunal was concerned that it would be unable to consider the question of group disadvantage for the indirect discrimination claim if the Document was not

included in the bundle. How could it take a view whether the questions disadvantaged people with the Claimant's disability if it did not know what the questions were?

16. At this point it became clear that in fact the Document did not contain the answers the Claimant had given to the questions but rather the questions and his score. The Respondent again accepted that the document containing his answers was relevant and should have been disclosed. The Tribunal again asked the Claimant if he wished to apply for an adjournment so that such document could be obtained but he said that he did not.
17. The conclusion of the lengthy discussion lasting from 11.30am to 12.20pm was that (1) the Claimant did not wish to apply for any adjournment; (2) the Document would be included in the bundle but with the Claimant's scores and the formulae redacted. This was to alleviate the Claimant's concerns about confidentiality (he was worried that he would be blamed if the information in the Document somehow found its way into the public domain) and on the basis that his scores/the formulae as set out in that document would not assist him in arguing his claim.

The Law

Disability discrimination

18. Section 39(1) of the EQA provides that an employer must not discriminate against a job applicant in the arrangements it makes for deciding to whom to offer employment or by not offering him employment.
19. Section 13 of the EQA (direct discrimination) provides that an employer discriminates against a job applicant if it treats him less favourably than it treats or would treat others because of a protected characteristic. Section 4 of the EQA provides that disability is a protected characteristic.
20. Section 19 of the EQA (indirect discrimination) provides that an employer discriminates against a job applicant if it applies a PCP which is discriminatory in relation to a relevant protected characteristic of a job applicant. A PCP is discriminatory if the employer applies (or would apply) it to persons with whom the job applicant does not share the characteristic, it puts (or would put) persons with whom the job applicant shares the characteristic at a particular disadvantage when compared with persons with whom the job applicant does not share it, it puts (or would put) the job applicant at that disadvantage, and the employer cannot show it to be a proportionate means of achieving a legitimate aim.
21. Section 20 of the EQA imposes a duty on employers to make reasonable adjustments to premises or working practices to help disabled job applicants and employees. A failure to comply with this duty to make reasonable adjustments is a form of discrimination (section 21).
22. The duty can arise in three circumstances, the first of which is relevant in this case: where a PCP puts a disabled person at a substantial disadvantage in comparison with those who are not disabled, the employer must take such steps as it is reasonable to have to take to avoid the disadvantage (section 20(3)).
23. Section 20 is supplemented by Schedule 8 to the EQA. Paragraph 20 of Schedule 8 now provides that the duty to make reasonable adjustments only arises where the employer knows or ought reasonably to know of the disabled person's disability and of the substantial disadvantage at which the person is placed.
24. Pursuant to section 136 of the EQA, it is for the Claimant who complains of discrimination to prove on the balance of probabilities facts from which the Tribunal

could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant which is unlawful. If the Claimant does not prove such facts, he will fail.

25. Where the Claimant has proved such facts then the burden of proof moves to the Respondent. It is then for the Respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of a protected characteristic, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

Findings of Fact

26. We are bound to be selective in our references to the evidence when explaining the reasons for our findings. However, we wish to emphasise that we considered all the evidence in the round when reaching our conclusions.

Background

27. The Claimant, who was born in 1959, had for many years worked in Social Housing. In 2012, whilst working as a Housing Officer, he was attacked by a tenant with a knife during an eviction. As a result of his injuries he was unable to continue in that role. Although his physical recovery was (in his words) "reasonably speedy", his mental health "spiraled rapidly downwards". He described in his witness statement how he lost self-confidence (especially when dealing with new or unexpected situations) was withdrawn and distrusting of others and would for long periods not leave his home. He suffered from severe depression, stress and anxiety. He was still suffering from this as at the date of the Hearing.
28. In early 2018 the Claimant felt that his condition had improved sufficiently for him to consider a return to work, with the psychological and financial benefits that might bring. He considered "what type of employment might be suitable for me in terms of my preferences, work history and the way my mental health continues to impact on me on a day to day basis, still causing me to be insular, withdrawn and distrusting of others" ([6] of his witness statement). He thought employment with the Respondent as a post person would be an "ideal fit" because it was "ostensibly a lone worker job with minimal interaction with colleagues and customers" ([7] of his witness statement).

The Respondent's application process for OPG roles

29. The relevant roles within the Respondent in this claim are all Operational Postal Grade ("OPG") roles.
30. The Respondent uses psychometric testing to choose candidates for interview for OPG roles. This testing is conducted by a third party, Korn Ferry. The psychometric testing has two parts: the Aspects Ability Checking test and the Aspects Styles test. Both tests are taken online. The Aspects Ability Checking test is timed and assesses an individual's ability to compare information accurately and quickly. It also measures verbal and numerical reasoning and clerical checking skills.
31. The Aspects Styles test is a self-assessment of competencies. It is not timed. The Aspects Styles test is the same for all OPG roles. However the competencies which are assessed by reference to it differ between OPG roles. The potentially relevant roles and the associated competencies in this claim are (principally):

- 31.1. **Network Driver OPG role:** Teamwork, Efficiency and Reliability, Resilience, Resourcefulness, Adaptability, Drive and Motivation; and (to a lesser extent)
- 31.2. **Postman/postwoman with driving OPG role:** Teamwork, Customer Orientation, Planning and Organising, Stress Tolerance, Adaptability and Safety.
32. The Respondent aims to invite six candidates for interview for each OPG vacancy. Its starting point is that it will invite to interview the six candidates who have scored most highly, provided that they have reached the “benchmark” of being in the 47th percentile or above in both tests. However, this is subject to the following qualifications:
- 32.1. First, if fewer than six candidates have reached the 47th percentile benchmark, the next best candidate(s) will be interviewed provided they have reached at least the 40th percentile;
- 32.2. Secondly, any candidate with a disability who reaches the 47th percentile will be interviewed in preference to the lowest scoring of the top six candidates.
33. The percentile figures are set by reference to candidates and job holders who have previously taken the tests across various industries and functions. That is to say they are not set not by reference to employees of the Respondent only.
34. The six best candidates are then interviewed by a local manager, often the Delivery Office Manager, in the location where the relevant role is based. They are asked questions by reference to a standard guide. The questions are competency based and relate to the competencies of Commercial Orientation, Customer Orientation, Efficiency and Reliability, Interpersonal Skills, Planning and Organising and Stress Tolerance but the focus varies from role to role and the terminology used by the Respondent to describe different competencies has evolved and changed over time. The interview guides at pages 223 and 245 show that the following competencies are assessed at interview for the following roles relevant to this case:
- 34.1. **Network Driver OPG role:** Planning and Organising, Efficiency and Reliability, Resilience, Customer Orientation, Stress Tolerance, Commercial Orientation, and Drive and Motivation.
- 34.2. **Postman/postwoman with driving OPG role:** Teamwork, Stress Tolerance, Customer Orientation, Resilience, Efficiency and Reliability, and Adaptability.
35. The overall intention, however, is to test again some of the competencies tested by the Aspects Styles test and the Aspects Ability Checking test and, also, some other competencies which are better tested face to face (for example, interpersonal skills).
36. Candidates are also asked questions specific to the particular OPG role for which they have applied. An offer will then be made to the successful candidate and as part of the subsequent process they are asked to identify any disability. They may then be referred to pre-employment Occupational Health screening for necessary adjustments to be identified and considered.
37. From January 2017 to December 2018 696,293 applications were initiated for OPG roles with the Respondent, 475,218 applicants completed both the Aspects Styles test and the Aspects Ability Checking test, 287,994 reached the benchmarks in both tests, and 67,443 were invited for an interview. The Respondent had 17,432 OPG roles to fill in the period.

Adjustments made to the application process for OPG roles for disabled people

38. Any applicant for an OPG role will fill out a general application form online. This invites applicants to identify reasonable adjustments which they require for either the online tests or the subsequent interview (if they are shortlisted).
39. As stated above, any disabled job applicant will be shortlisted for interview provided that they reach the benchmark 47th percentile. The Respondent will not make adjustments to the benchmark 47th percentile because it considers that such adjustments would not be reasonable. This is because the Respondent believes that would involve diluting the competencies required for carrying out an OPG role ([15] and [34], witness statement of Ms Westwood).
40. The possible positive effect of the adjustments made in this way can be seen at page 260 of the bundle: overall, the Respondent interviews 10% of applicants for OPG roles but 16% of applicants who identify themselves as having a disability are interviewed.

The applications of the Claimant

41. The Claimant applied for the role of “Postman/Postwoman with Driving Job” on 5 January 2018 (page 268). He did not request any reasonable adjustments. He took the Aspects Styles test and the Aspects Ability Checking test. He was not shortlisted. No claim was brought in relation to this application.
42. The Claimant then applied on 20 February 2018 for a Collections and Network Driver role (another name for the “Network Driver” role referred to above) in Nottingham. On this occasion he did request that reasonable adjustments be made. The only adjustment he requested was that he be given “a little extra time” (page 267) to take the tests. The Claimant received an acknowledgment of his application on that same day (page 282) but things did not progress smoothly thereafter:
 - 42.1. He was sent a further email on 20 February 2018 (page 283). It was meant to include Logon and Password details but in fact the relevant sections were blank. It also stated in bold “**if you have indicated that you require reasonable adjustments DO NOT complete these assessment(s) until you receive a further email. If this is the second time you have received this email, please proceed with the assessment(s) as the additional time has now been added;**”
 - 42.2. The Claimant had requested reasonable adjustments so he did nothing – as instructed by the email. He then heard nothing from the Respondent until 27 February 2018 when he received an email (page 284) stating: “We are sorry to inform you that on this occasion your application has not been successful as you did not complete your online tests as per the required deadline”;
 - 42.3. The Claimant was understandably upset by the email of 27 February 2018 because he had never received the promised second email. He therefore complained by an email dated 2 March 2018 (page 285). The email was directed to the “myapplication” email address and the Claimant received a reply from Mr Will Walker on 7 March 2018 (page 287) which referred to a system failure and said the Respondent would be in touch “in around 7 – 10 days”;
 - 42.4. In fact Mr Walker did not reply until 26 March 2018 (page 290) after a further two chasing emails from the Claimant. His reply was unsatisfactory: it did not deal with the substance of the Claimant’s complaint of 2 March 2018 but rather stated that due to a “system error” “the job had progressed already we are unable to consider your application for this role any further. Please be assured this will not affect your ability to apply for any other roles which interest you.”;

42.5. The Claimant complained again on 26 March 2018 (page 291) reminding the Respondent of its obligation to make reasonable adjustments. Unfortunately neither Mr Walker nor anyone else dealing with the “myapplication” inbox responded to that email and so on 26 April 2018 the Claimant complained to his Member of Parliament, Mr Norris (page 293);

42.6. Mr Norris’ staff contacted the Respondent using a different email address. This resulted in Michael Hogg, Senior Public Affairs Manager, writing to Mr Norris (page 300) on 16 May 2018. The letter accepted that errors had been made and went on to state:

I have asked our Recruitment team to contact [the Claimant] so that arrangements can be made for him to complete the online tests. Although we are no longer able to offer [illegible] for which Mr Peck applied, we would consider him for similar roles in the area should he be successful at the online test stage. If successful Mr Peck would be put on a “waiting list” and he will be alerted when opportunities arise in the NG postcode area.”

42.7. On 18 May 2018 Ms Woods emailed the Claimant (page 311). She apologized and made the following offer to the Claimant:

In order to remedy the situation, we would like to offer you the opportunity to take the online tests, with the reasonable adjustments. If you are successful in meeting the minimum criteria, we would then arrange an interview for you, although this would be to be added to our waitlist if you were successful at interview, as there are no current vacancies in your area. In the meantime if you see any vacancies on our website which are of interest to you please can you email me directly so I can ensure the automated emails reach you to avoid any future technical issues.

42.8. The Claimant was unsure whether he wished to pursue the possibility of employment with the Respondent further in light of his experiences to date but on 1 June 2018 he and Ms Woods spoke by telephone. He decided to proceed with an application and so Ms Woods caused emails to be generated which should have enabled the Claimant to take the online tests with the extra time he had requested for the Aspects Ability Checking test (there was no time limit for the Aspects Styles test) (pages 315 to 317). In fact the links contained in the emails did not work on that date and the Claimant told Ms Woods so (page 318). Ms Woods then contacted the Claimant again on 6 June 2018 with a hyperlink and logon details for him to take the tests. This he duly did on 13 June 2018.

42.9. After completing the tests on 13 June 2018 the Claimant emailed Ms Woods (page 321) stating:

...I’ve completed the assessment although I’m not especially hopeful as the Aspect Styles element would not appear to favour someone with issues around depression, stress and anxiety and obviously it’s important to be honest and open when providing responses.

42.10. The tests were marked and although the Claimant exceeded the 47th percentile in the Aspects Ability Checking test (reaching the 60th percentile) he did not reach the 47th percentile in the Aspects Styles test. He reached the 5th percentile. On 15 June 2018 Ms Woods emailed the Claimant (page 322) stating:

You exceeded the minimum criteria in the checking elements of the assessment, but not on the personality questionnaire. This questionnaire is a well-researched model of competencies designed specifically to reflect those required of people working in our frontline roles, and

provides a clear indication of suitability for the role. If you feel that you are suitable for the frontline roles at Royal Mail, we welcome further applications from you in the future.

42.11. The Claimant replied to Ms Woods on the same day (page 336) stating:

As I said in my earlier message it's obvious to determine that you are seeking outgoing individuals who will be good team players and interact well with customers. Unfortunately since I was attacked in the last role, these are not attributes that I can guarantee to exude on a consistent basis and to that end, is the basis of my disability.

I suppose I will have to accept that my illness will preclude me from most types of frontline customer service.

42.12. However, having reflected on the matter further, the Claimant then emailed Ms Woods again on the following day, 16 June 2019. In that email he said the Respondent's testing process automatically discriminated against applicants disabled by a mental health condition. He said:

... it is clear that the personality questionnaire is looking for positive personalities who will be good team players, etc when, in practice, the posts I am interested in involve ostensibly loan working with minimal customer contact. Based on the nature of the questions asked it would be impossible for anyone suffering from depression or stress related disability to "pass" this test.

42.13. Ms Woods replied on 27 June 2018 (page 341) explaining why the Respondent used the Aspects Styles test. After that, correspondence from the Claimant had a pre-litigation feel to it and the replies of Ms Woods were brief. On 28 June, Ms Woods emailed the Claimant stating:

Thank you for your email.

All roles that are recruited for by the Frontline Team are delivery roles which require the same skills and competencies.

Reasonable adjustments are subject to a variety of considerations, not limited to cost.

Please note that I will be taking no further action at that time.

43. Ms Woods explained that the reason for the Claimant not being contacted after his application of 20 February 2018 was an "interface error" ([18] of her witness statement) which meant that the second email referred to in the email of 20 February 2018 (page 283) was not in fact generated. The evidence of Ms Woods which the Tribunal accepted as true was that (1) the interface error did not affect any other applicant who had applied for the role for which the Claimant had applied (including another candidate who had requested reasonable adjustments); (2) it was not related as such to the Claimant having asked for reasonable adjustments; and (3) in other recruitment exercises other candidates who had not requested reasonable adjustments had suffered comparable problems.

44. The Tribunal accepted the evidence of Ms Woods in this respect because:

44.1. It found her to be a credible witness: her evidence was generally externally and internally consistent, coherent and plausible;

44.2. It was supported by the email of 20 February 2018 (page 283): things had clearly already gone wrong when this email was sent. Whether or not the Claimant had requested reasonable adjustments, it should have contained Logon and Password details but it included neither.

45. In making these findings the Tribunal has taken account of the contents of the letter from Mr Hogg (page 300). It is true that this suggests that the reason for the system error was the request for reasonable adjustments. However, having heard all the evidence, and in particular that of Ms Woods, the Tribunal concludes that in fact this was not the case. Mr Hogg was of course several steps removed from events.

Group disadvantage

46. The Claimant contended that the Aspects Styles test placed those who suffered from “severe depression, stress and anxiety” as a particular disadvantage.

47. In so contending, the Claimant relied on his own experience of suffering from severe depression, stress and anxiety as was only natural and it is not in dispute that the PCP puts him at a particular disadvantage.

48. Beyond his own experience, the Claimant invited the Tribunal to consider the questions asked by the Aspects Styles test and contended that 12 out of 48 put an applicant with severe depression, stress and anxiety at a particular disadvantage. The Tribunal understood why the Claimant argued this and on a common-sense level his evidence did make sense. However the Tribunal puts only limited weight on the evidence of the Claimant in this respect and its own experience of people with severe depression, stress and anxiety because neither the Claimant nor the Tribunal is qualified to comment on how that part of the population with severe depression, stress and anxiety would answer such questions and so whether they would be placed at a particular disadvantage in a recruitment process by being asked them (although of course the Tribunal accepts that the Claimant is well-placed to comment on his own position).

49. The only other evidence relating to this issue was the oral evidence provided by Mr Bailey. He is a chartered occupational psychologist with the appropriate professional registration as such. The Tribunal finds that as such he does have the necessary professional experience to comment on this issue.

50. Mr Bailey’s evidence was that he did not accept that it was the case that as a rule the Aspects Styles test put people with severe depression, stress and anxiety at a particular disadvantage in terms of how their answers would result in the relevant competencies being measured. He said that it would differ. For example, some might avoid team work, others might seek solace in it. Some might have lowered resilience, others would not. When asked by the Tribunal whether people with severe depression, stress and anxiety would as a rule score lower he said that he did not have the necessary data to answer that question. When pressed to venture a professional opinion, he said that he did not know.

51. In light of all this evidence, the Tribunal finds that the Claimant has failed to prove group disadvantage on the balance of probabilities. This is above all because, realistically, Mr Bailey was far better placed to opine on this issue than the Claimant and his evidence did not support the Claimant’s contention that there was group disadvantage.

The relevance of the Aspects Styles test to the role of OPGs

52. The Respondent’s case revolves to a considerable degree around a contention which, in broad terms, is that there is a correlation between scoring well in the Aspect Styles test and good performance in the OPG roles.

53. The Tribunal finds that, in light of the number of applications the Respondent receives each year for OPG roles, it is necessary for it to have a standard way of short-listing applicants for interview, i.e. a system which identifies those with the

necessary competencies and ranks them by reference to those competencies. This is particularly the case given that OPG roles are not roles which require any particular standardized qualifications (except, in the case of driving roles, a driving licence).

54. Against this very general background, the Tribunal finds that the Respondent has expended considerable resources and effort in both introducing the Aspects Styles the Aspects Ability Checking tests and checking whether there is a correlation between doing well in those tests and performing well in OPG roles. In particular the Tribunal finds that:

54.1. before the Aspects Styles test was introduced the Respondent carried out a job analysis to decide which of the competencies that the Aspects Styles test could measure would be the most relevant to the various OPG roles;

54.2. there were reviews of the competencies in 2012, 2013 and 2014 to ensure that the competencies remained relevant;

54.3. such reviews are in effect an ongoing process given the evolving nature of the roles at the Respondent in light of the changing requirements of customers.

55. The Tribunal finds that:

55.1. the review in 2012 to 2013 (which involved 85 employees in OPG roles undertaking the Aspects Styles test and their line managers assessing their suitability without reference to that test) showed a high degree of correlation between a high suitability score in the Aspects Styles test and “overall performance” as rated by line managers;

55.2. the study of October 2013 (which involved comparing the scores 122 OPGs had obtained during the application process in the Aspects Styles test with their line managers’ assessment of their performance during employment) showed that five out of six of the scores for competencies measured by the Aspects Styles test were predictive of one or more performance measures;

55.3. the study of October 2014 of 130 drivers in OPG roles showed “validity” (i.e. a correlation between performance in the Aspects Styles test and “real life” performance in the role) for four out of six competencies measured which resulted in an adjustment to which competencies were measured for the purpose of the score resulting from the Aspects Styles test.

56. When the evidence is taken in the round, the Tribunal finds that there is a clear correlation between suitability for OPG roles as assessed by the Aspects Styles test and how well employees actually perform in those roles as assessed by their line managers.

The Collections and Network Driver OPG role and the Claimant’s suitability for it

57. The role for which the Claimant had applied on 20 February 2018 and that for which he would have been interviewed if he had been successful when he took the tests in June 2018 was that of Collections and Network Driver. Indeed, this is the role against which the Aspects Styles test was marked when he took it. The Tribunal so finds because this is what Ms Woods said in her evidence and because this is what the document at page 325 shows.

58. A job description for this role was at page 264. As a result of the job description, the evidence given by the witnesses, the interview guide at page 223 and other evidence contained in the bundle, the Tribunal finds:

- 58.1. The role involves “teamwork” because although the role involves being “out on the road”, this may be with another employee and, also, a significant part of the role will be interacting with colleagues in relation to deliveries and collections at the Delivery Office;
- 58.2. The role involves significant customer interaction – with business customers from who mail is delivered and with others customers whose signatures must be obtained when mail is delivered. There is a substantial “people” component to the role and interactions may be fraught when customers are dissatisfied that items have been delivered or collected late or not at all;
- 58.3. It involves driving and working in all kinds of weather, sometimes under pressure of time. It can be very stressful.
59. The Tribunal finds that the competencies specifically assessed in relation to the Collections and Network Driver OPG role by the Aspects Styles test (as set out in paragraph 31 above) are clearly relevant to the suitability of an employee to undertake the role (as is to be expected given the correlation between suitability for OPG roles as assessed by the Aspects Styles test and how well employees actually perform in those roles as assessed by their line manager as detailed in the previous section of these findings of fact).
60. The Tribunal further finds that the additional competencies assessed by the interview process (as set out in paragraph 34.1 above) are also clearly relevant. There is of course a substantial overlap between them and the competencies tested in the Aspects Styles test.
61. The Tribunal finds that the Claimant would not have been able to perform the role of Collections and Network Driver to the minimum acceptable standard for the following reasons:

61.1. The Aspects Styles test put the Claimant in the 5th percentile, that is to say the lowest possible category, when his suitability for the job was considered by reference to the competencies assessed by the test;

61.2. In light of the findings of fact set out above, there is a correlation between a high suitability score in the Aspects Styles test and “real life performance as an employee”. There is consequently likely to be a correlation between very poor performance in the Aspects Styles test and lack of suitability for the role;

61.3. It is clear simply by looking at the other evidence available to the Tribunal (i.e. without making reference to the studies detailed above) that the competencies tested by the Aspects Styles test are relevant to the Collections and Network Driver role;

61.4. The Claimant did not dispute that his Aspects Styles test score was a reasonable reflection of the competencies that that test sought to measure. The Claimant was commendably frank about this. In his witness statement he commented:

To my mind the questions were couched in such a way as to be reasonably obvious what the required answer might be. My disability however, effects my personality in such a way that it makes me insular, distrustful of others and to feel vulnerable in unfamiliar situations so, in order to be completely honest, I answered the questions posted by selection the option which I considered most applicable to me subsequent to the onset of my disability, although I was conscious at the time that I was, effectively, failing the test.

- 61.5. It is also clear that the competencies assessed by interview are relevant to the Collections and Network Driver role and that in light of the clear and intended overlap between them and the Aspects Styles test competencies the Claimant would have been assessed as unsuitable for the role if he had been interviewed;
- 61.6. His lack of suitability was also reflected in his witness statement and other evidence available. For example, the medical report of 27 December 2018 at page 42 notes “He does not leave the home unless accompanied by his wife or adult daughter, even to go to the local corner shop. He is unable to engage in social situations... Having previously been a keen golfer, he has not played since 2012” and his own witness statement paints a similar picture describing himself at the beginning of 2018 as being “insular, withdrawn and distrusting of others” ([6] of his witness statement). However the role would require him to be out and about and communicating with a variety of individuals (both colleagues and customers) sometimes in situations of stress;
- 61.7. His lack of suitability is further reflected in that he was applying for a driving role although he had not as a result of his disability driven for more than six years. Whilst the Tribunal accepts that he could drive, i.e. he had a driving licence, it is not likely that he would have been able to go from not driving at all to a job which was, essentially, a driving job in a short period of time;
- 61.8. The Tribunal finds that there is an underlying factual issue here. This is that the Claimant had misunderstood the nature of the role. He thought it involved lone working and minimal customer interaction (see paragraph 42.12 above). It was not unreasonable that he thought this as he had gone to the trouble of discussing matters with his own post person. However the Tribunal finds that his understanding of the Collections and Network Driver OPG role did not reflect its reality.

Conclusions

Direct discrimination claim

62. Whether the Respondent treated the Claimant less favourably than it treats or would treat others in the following ways because of disability:

- **By subjecting the Claimant to the same recruitment process as those without disabilities;**

63. The Claimant relied on hypothetical comparators in relation to all of his direct discrimination claims – that is to say he did not argue that he had been treated less favourably than a named individual.

64. The Respondent treated the Claimant in exactly the same way as it would have treated any other job applicant when it subjected him to the same recruitment process. As such the Claimant has failed to prove a *prima facie* case that he has been less favourably treated by the Respondent by it subjecting him to the same recruitment process as those without disabilities.

65. This claim therefore fails and is dismissed. The underlying reality is, of course, that the Claimant argues that he should not have been treated exactly the same as other job applicants – rather, reasonable adjustments should have been made to the recruitment process.

- **By delaying the Claimant's ability to take the online Aspects Test by failing to send the correct link to him as it said it would in its email of 20 February 2018 (page 283 of the bundle) with the result that his application was not further considered;**
66. The Claimant was less favourably treated than a hypothetical comparator because the hypothetical comparator would not have been delayed as the Claimant was. This is demonstrated by the fact that the Claimant was the only applicant who applied for the job for which he applied who did not receive the correct links at the correct time. The Tribunal concludes that, when this is taken together with the fact that the Claimant was one of only two applicants who requested reasonable adjustments, the Claimant has proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed an act of unlawful discrimination.
67. However, in light of its findings of fact above, the Tribunal concludes on the balance of probabilities that the reason for the less favourable treatment was in no sense whatsoever on the grounds of the protected characteristic of disability. The Tribunal finds for the reasons set out in paragraphs 43 and 44 that the reason for the less favourable treatment was a computer glitch (an "interface error") which was not related to the fact that the Claimant had a disability.
68. This claim therefore fails and is dismissed
- **By Ms Woods alleged instruction to the Claimant in an email dated 28 June 2018 (page 344 of the bundle) not to apply for any other posts.**
69. The Tribunal concludes that it is simply not possible to read the email of 28 June 2018 as being "an instruction to the Claimant... not to apply for any other posts". The offending sentence reads "All roles that are recruited for by the Frontline Team are delivery roles which require the same skills and competencies". The Tribunal concludes that telling the Claimant this was quite clearly not an "instruction" of any kind.
70. In fact, the email was a response to the Claimant's email of 28 June 2018 in which the Claimant raised the issue of indirect discrimination (page 343). It was when read in the context of previous correspondence between the Claimant and Ms Woods a short explanation of the justification for the Aspects Styles test, i.e. it measures the skills and competencies relevant to OPG roles which is why all applicants for OPG roles must take it.
71. In conclusion, Ms Woods did not treat the Claimant less favourably than a hypothetical comparator because she did not give any instruction – overall the correspondence makes it perfectly clear that the Claimant was free to apply for any role he wished to apply for. This claim therefore fails and is dismissed.
72. Again, the underlying reality of this complaint is that the Claimant does not believe that he should have been treated in the same way as other job applicants, i.e. adjustments should have been made to the recruitment process. This issue is considered below in the context of the Claimant's claims of indirect discrimination and a failure to make reasonable adjustments.
73. The Tribunal notes that in his oral submissions at the end of the Hearing the Claimant accepted that the first and third of his direct discrimination claims were in reality about the way in which the PCP affected him as a person with a disability. This reflected the generally realistic way in which the Claimant pursued his claims as a litigant in person. The Claimant is to be complimented on this and in all the circumstances the Tribunal could understand why as an unrepresented party he had

brought the direct discrimination claims, despite its clear conclusions above in relation to them.

Indirect discrimination claim

The PCP: The requirement for all applicants to meet a minimum standard in the two parts of the Aspects Test in order to progress to interview without any allowances for the effect of disability on responses in the Aspect Styles part of the test (“the PCP”). The Respondent agreed the PCP was applied. The issues in relation to it were:

- **Whether the PCP puts (or would put) those with the Claimant’s disability (severe depression, stress and anxiety) at a particular disadvantage in comparison with non-disabled persons.**

74. The Tribunal has set out its findings about group disadvantage at paragraphs 46 to 51 above. In light of those findings, the Tribunal concludes that the Claimant has failed to prove group disadvantage on the balance of probabilities as he must. It is therefore not necessary to consider the remaining questions under the heading of “indirect discrimination”. The Claimant’s claim fails and is dismissed.

Reasonable adjustments

75. The Respondent concedes that the PCP put the Claimant at a substantial disadvantage in relation to the Aspect Styles part of the test in comparison with persons who were not disabled at the relevant time.

75.1. Were there any steps that were not taken that could have been taken by the Respondent to avoid such disadvantage? The Claimant says that the steps set out below should have been taken

75.2. If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?

76. There was considerable discussion with the Claimant about the nature of the “substantial disadvantage” to which he was put by the Aspects Styles part of the test. This focused on whether:

76.1. the “substantial disadvantage” lay in the nature of the competencies assessed (with the result that the “substantial disadvantage” was that he could not reach the required suitability level and so he could not be employed by Royal Mail); or

76.2. the “substantial disadvantage” lay in the way in which the competencies were assessed - that is to say by the job applicant taking an online test. That is to say, was the Claimant arguing that if the same competencies were assessed differently (for example, by an interview) he would have reached the required suitability level.

77. The Claimant was commendably straightforward in relation to this issue. He accepted that the substantial disadvantage lay not in how the competencies were assessed but in their very nature. This did of course reflect both his witness evidence (see, for example, paragraph 61.4 above) and also what he had said in contemporaneous correspondence to the Respondent (see, for example, paragraphs 42.9 to 42.12 above).

78. Turning now to the issue of whether the adjustments which the Claimant contends for would have had the effect of removing that substantial disadvantage and the

reasonableness of such proposed adjustments, the Tribunal reaches the following conclusions:

78.1. Allowances should have been made for the effect of his disability on his responses to the Aspect Styles part of the test: Making “allowances” for the effect of his disability on his responses to the Aspects Styles test would have only assisted the Claimant by leaving open the possibility of him being employed if the effect of the allowances had been to consider him for employment even though he had scored only in the 5th percentile. In relation to this adjustment the Tribunal concludes:

78.1.1. It would not have avoided the substantial disadvantage identified because the Claimant would then have proceeded to an interview at which he would have again been measured against some of the same competencies and others which the Respondent regarded as being closely connected and the overall outcome would have been the same – he would not have reached the required suitability level and so would not have been employed;

78.1.2. Further and separately, in light of: (1) the correlation between a high suitability score in the Aspects Styles test and good performance in the OPG role and (2) the Tribunal’s finding that the Claimant was not suitable for the Collections and Network Driver role, it would not have been a reasonable adjustment. In reaching this conclusion the Tribunal has taken account of the fact that the Claimant did not *just* fall short of the 47th percentile benchmark. Rather he fell a very long way short, with the 5th percentile being in the lowest scoring group as categorized by the Respondent. Overall, an adjustment which would have required the Respondent to employ the Claimant when he was so clearly not suitable for the relevant role would not have been a reasonable adjustment.

78.2. A lower minimum requirement (or pass mark) should have been set for the Aspect Styles part of the test: Setting a lower minimum requirement (or pass mark) for the Claimant for the Aspects Styles test would have only assisted the Claimant by leaving open the possibility of him being employed if the pass mark had been lowered so that he was considered for employment even though he had scored only in the 5th percentile. In relation to this adjustment the Tribunal concludes:

78.2.1. It would not have avoided the substantial disadvantage identified because the Claimant would then have proceeded to an interview at which he would have again been measured against some of the same competencies and others which the Respondent regarded as being closely connected and the overall outcome would have been the same – he would not have reached the required suitability level and so would not have been employed;

78.2.2. Further and separately, in light of: (1) the correlation between a high suitability score in the Aspects Styles test and good performance in the OPG role and (2) the Tribunal’s finding that the Claimant was not suitable for the Collections and Network Driver role, it would not have been a reasonable adjustment. In reaching this conclusion the Tribunal has taken account of the fact that the Claimant did not *just* fall short of the 47th percentile benchmark. Rather he fell a very long way short, with the 5th percentile being in the lowest scoring group as categorized by the Respondent. Overall, an adjustment which would have required the Respondent to employ the Claimant when he was so clearly not suitable for the relevant role would not have been a reasonable adjustment.

78.3. **The Claimant should have been allowed to bypass the Aspect Styles part of the test completely:** In relation to this adjustment the Tribunal concludes:

78.3.1. It would not have avoided the substantial disadvantage identified because the Claimant would then proceeded to an interview at which he would have again been measured against some of the same competencies and others which the Respondent regarded as being closely connected and the overall outcome would have been the same – he would not have reached the required suitability level and so would not have been employed;

78.3.2. Further and separately, in light of: (1) the correlation between a high suitability score in the Aspects Styles test and good performance in the OPG role and (2) the Tribunal's finding that the Claimant was not suitable for the Collections and Network Driver role, it would not have been a reasonable adjustment. In reaching this conclusion the Tribunal has taken account of the fact that the Claimant did not *just* fall short of the 47th percentile benchmark. Rather he fell a very long way short, with the 5th percentile being in the lowest scoring group as categorized by the Respondent. Overall, an adjustment which would have required the Respondent to employ the Claimant when he was so clearly not suitable for the relevant role would not have been a reasonable adjustment.

78.4. **Instead of requiring the Claimant to complete the Aspect Styles part of the test, reviewing the relevant competency requirements by consideration of the Claimant's work history:** The Tribunal concludes:

78.4.1. It would not have avoided the substantial disadvantage identified because the suggestion by the Claimant is that this is another way of measuring the "relevant competency requirements". However, as the Claimant accepts, the problem lay not in how the competencies were measured but in their nature;

78.4.2. Further and separately, it would not have avoided the substantial disadvantage identified because the Claimant would then have proceeded to an interview at which he would have again been measured against some of the same competencies and others which the Respondent regarded as being closely connected and the overall outcome would have been the same – he would not have reached the required suitability level and so would not have been employed;

78.4.3. Further and separately, it would not have been a reasonable adjustment because, the Tribunal concludes, the Respondent would not have been able to form any sensible view on the Claimant's ability to perform the role of Collections and Network Delivery Driver by reference to his work history given, in particular, that he had not worked for over six years;

78.4.4. Further and separately, in light of: (1) the correlation between a high suitability score in the Aspects Styles test and good performance in the OPG role and (2) the Tribunal's finding that the Claimant was not suitable for the Collections and Network Driver role, it would not have been a reasonable adjustment. In reaching this conclusion the Tribunal has taken account of the fact that the Claimant did not *just* fall short of the 47th percentile benchmark. Rather he fell a very long way short, with the 5th percentile being in the lowest scoring group as categorized by the Respondent. Overall, an adjustment which would have required the Respondent to employ the Claimant when he was so clearly not suitable for the relevant role would not have been a reasonable adjustment.

78.5. Instead of requiring the Claimant to complete the Aspect Styles part of the test, referring the Claimant to Occupational Health specialists for suitability assessment: The Tribunal concludes that:

78.5.1. It would not have avoided the substantial disadvantage identified because the medical evidence available to the Tribunal suggested that the Claimant would not have been able to perform the role. For example, the medical report of 27 December 2018 at page 42 notes “He does not leave the home unless accompanied by his wife or adult daughter, even to go to the local corner shop. He is unable to engage in social situations... Having previously been a keen golfer, he has not played since 2012” and his own witness statement paints a similar picture describing himself at the beginning of 2018 as being “insular, withdrawn and distrusting of others” ([6] of his witness statement). By his own admission he had not driven for a number of years. Overall, therefore, the Tribunal concludes that an assessment by the Respondent’s Occupational Health specialists would have been likely to conclude that the Claimant was not able to perform the role of Network and Collections Driver;

78.5.2. Further and separately, it would not have avoided the substantial disadvantage identified because the Claimant would then have proceeded to an interview at which he would have again been measured against some of the same competencies and others which the Respondent regarded as being closely connected and the overall outcome would have been the same – he would not have reached the required suitability level and so would not have been employed;

78.5.3. Further and separately, it would not have been a reasonable adjustment because, the Tribunal concludes, the Respondent would not have been able to form any sensible view on the Claimant’s ability to perform the role of Collections and Network Delivery Driver by reference to an occupational health report. At best this would have assessed whether he was fit to do the job, not how competently he would be able to perform it;

78.5.4. Further and separately, in light of: (1) the correlation between a high suitability score in the Aspects Styles test and good performance in the OPG role and (2) the Tribunal’s finding that the Claimant was not suitable for the Collections and Network Driver role, it would not have been a reasonable adjustment. In reaching this conclusion the Tribunal has taken account of the fact that the Claimant did not *just* fall short of the 47th percentile benchmark. Rather he fell a very long way short, with the 5th percentile being in the lowest scoring group as categorized by the Respondent. Overall, an adjustment which would have required the Respondent to employ the Claimant when he was so clearly not suitable for the relevant role would not have been a reasonable adjustment.

78.6. Instead of requiring the Claimant to complete the Aspect Styles part of the test, taking up employment references relating to the Claimant: The Tribunal concludes:

78.6.1. It would not have avoided the substantial disadvantage identified because the Claimant would then have proceeded to an interview at which he would have again been measured against some of the same competencies and others which the Respondent regarded as being closely connected and the overall outcome would have been the same – he would not have reached the required suitability level and so would not have been employed;

- 78.6.2. Further and separately, it would not have been a reasonable adjustment because, the Tribunal concludes, the Respondent would not have been able to form any sensible view on the Claimant's ability to perform the role of Collections and Network Delivery Driver by asking for references. This is because (1) any reference would have related to employment at least six years ago; (2) it is common practice of employers to limit references to dates of employment. It is as such unlikely that detailed information would have been provided that would have enabled the Respondent to form any sensible view on the Claimant's suitability for employment as a Collections and Network Driver;
- 78.6.3. Further and separately, in light of: (1) the correlation between a high suitability score in the Aspects Styles test and good performance in the OPG role and (2) the Tribunal's finding that the Claimant was not suitable for the Collections and Network Driver role, it would not have been a reasonable adjustment. In reaching this conclusion the Tribunal has taken account of the fact that the Claimant did not *just* fall short of the 47th percentile benchmark. Rather he fell a very long way short, with the 5th percentile being in the lowest scoring group as categorized by the Respondent. Overall, an adjustment which would have required the Respondent to employ the Claimant when he was so clearly not suitable for the relevant role would not have been a reasonable adjustment.
79. The Claimant acted in person and the Tribunal tried to give him appropriate assistance in formulating his arguments. However, in the end the question for the Tribunal was whether there were any reasonable adjustments which the Respondent could have made which would have avoided the substantial disadvantage faced by the Claimant. In this case the question is really this: given that the Claimant was not (by his own admission) capable of scoring to the benchmark level in any assessment process that measured the competencies which the Respondent had identified as relevant to the role of Collections and Network Delivery Driver, was there an adjustment that the Respondent could reasonably have been expected to make that would have avoided that disadvantage so that the Claimant could have gained employment with the Respondent as a Collections and Network Driver? The Tribunal has concluded that there was not. This is quite simply because the Claimant was not for the reasons set out above a suitable candidate for the role for which he had applied and no reasonable adjustment would have made him able to perform it to a satisfactory standard. This reflects the fact that his original application for the role was based on a misapprehension of what it involved. The Claimant's claim that the Respondent failed to make reasonable adjustments therefore fails and is dismissed.
80. The Tribunal concludes with this final observation. The Claimant conducted himself with dignity and significant skill during the three day hearing and the Tribunal had much sympathy for him. Clearly, he suffered an appalling attack at work in 2012 and has since then been doing his best to get things "back on track". The Claimant conducted himself entirely appropriately when he made his application in February 2018 and it is a great shame that the Respondent did not sort things out more speedily when it was apparent something had gone wrong. If it had, it seems to the Tribunal very likely that the Claimant would not have become as understandably frustrated as he did and that this claim might very well have been avoided.

Employment Judge Evans

Date: 3 July 2019

Case No: 2205648/2018
JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS