



EMPLOYMENT TRIBUNALS

Claimant: Mr A Yaqub
Respondent: West Yorkshire Combined Authority

Heard at: Leeds Employment Tribunal
Before: Employment Judge Deeley, Ms Fawcett and Mr Taj
On: 28 and 29 September 2020 (in person), with deliberations in chambers (by CVP) on 1 October 2020

Representation
Claimant: In person
Respondent: Mr N Newman (Solicitor)

RESERVED JUDGMENT

1. The Claimant's claim for disability discrimination under section 15 (discrimination arising from disability) and sections 20 and 21 (failure to make reasonable adjustments) of the Equality Act 2010 fails and is dismissed.

REASONS

INTRODUCTION

Tribunal proceedings

2. We considered the following evidence during the hearing:
 - 2.1 a joint file of documents;
 - 2.2 witness statements and oral evidence from:
 - 2.2.1 the claimant;
 - 2.2.2 Andrew Fitzpatrick (respondent's Research and Spatial Intelligence Manager);
 - 2.2.3 Peter Glover (respondent's Economic Evidence Manager); and
 - 2.2.4 Natalie Morrison (respondent's HR Advisor).
3. We also considered the oral and written submissions made by both representatives.

Adjustments

4. Employment Judge Shepherd agreed with the parties at the Preliminary Hearing of this claim on 13 September 2019 that the claimant could prepare his key written questions for the Tribunal panel to ask the respondent's witnesses during the hearing. The claimant provided a copy of his questions to the Tribunal on the morning of the hearing. It was also agreed that it would not be appropriate to provide a copy of these questions in advance to the respondent and a copy would be provided to them after the respondent's witness evidence had concluded.
5. I also reminded both parties and their witnesses that they could request additional breaks during the hearing at any time if required.

CLAIMS

6. The claimant brought a claim for disability discrimination under the Equality Act 2010 ("EQA"). The claimant's claim arises from the respondent's rejection of his application for the role of Data Analyst on 12 June 2019.

ISSUES

7. The draft issues to be decided were set out in the case management summary from the Preliminary Hearing held by Employment Judge Shepherd on 13 September 2019.
8. The respondent conceded that the claimant's stammer amounts to a disability for the purposes of s6 of the EQA in their email of 25 November 2019. The respondent also conceded that they had knowledge of the claimant's condition.
9. The list of issues was discussed with the parties in detail at the start of the hearing. The revised list of issues that the Tribunal considered in reaching its conclusions on this claim is set out below.

LIST OF ISSUES

1. Discrimination arising from disability (section 15 Equality Act 2010)

The unfavourable treatment alleged by the claimant is that he was not offered the role of Data Analyst by the respondent.

The respondent accepts that this is 'unfavourable treatment' for the purposes of the EQA.

a. Was such unfavourable treatment due to something arising in consequence of the claimant's disability?

The claimant relies on "the content, and quality of that content communicated at interview" as the "something arising" in consequence of his disability.

The respondent will say that this is not something arising in consequence of the claimant's disability.

b. If so, can the respondent show that treatment was a proportionate means of achieving a legitimate aim?

The respondent will rely on the following legitimate aims:

- i) the recruitment of candidates with the required skills and experience for a particular job role (in the Claimant's case, the role of Data Analyst); and*
- ii) to ensure that the service provided by the respondent's Research and Intelligence team was effectively maintained.*

The respondent will say that the legitimate aims were achieved proportionately as the appropriate adjustments were made to the recruitment process to accommodate the claimant's stammer.

2. Failure to make reasonable adjustments (sections 20 and 21 Equality Act 2010)

The provision, criterion or practice ("PCP") complained of by the claimant is that the respondent required candidates to undertake an oral presentation and answer oral questions during the interview process for the role of Data Analyst.

The respondent accepts that this amounted to a PCP and that it maintained this PCP for the purposes of s20(3) of the EQA.

a. Did the PCP put the claimant at a substantial disadvantage in comparison to non-disabled persons?

The parties agreed that his comparators are the other candidates who were interviewed for the Role.

The claimant relies on the following alleged disadvantages of his stammer:

- (i) he takes more time to communicate;*
 - (ii) he experienced difficulties during his oral presentation, relating to both his communication skills and the oral content of his presentation;*
 - (iii) his perception that his difficulties had a negative impact on the respondent's assessment of his responses to their interview questions, relating to both his communication skills and the content of his responses.*
- b. If the claimant is found to have been at a substantial disadvantage in comparison to non-disabled persons, did the respondent know (or could the respondent reasonably be expected to have known) that the claimant was likely to be at a substantial disadvantage compared to persons who are not disabled?**
- c. Did the respondent fail to make the adjustments set out in this paragraph?**

The claimant alleges that the following adjustments (as identified by the claimant) would have avoided such substantial disadvantage:

- (i) identifying the actual communication needs of the Data Analyst role and/or to consider how this was to be assessed;*
- (ii) arranging for and/or explicitly offering an extended interview prior to the interview date.*

- (iii) swapping the claimant's interview slot with that of the last candidate;
 - (iv) arranging for the panel actively asking follow up questions and/or to expand/clarify the content and/or quality of the claimant's oral responses; and
 - (v) arranging for a scribe to record oral answers, removing the need for the panel to make written notes, and enabling natural eye contact to be unbroken when the claimant was providing his responses.
- d. **If so, would the adjustments set out in paragraph 2(c) above have removed the substantial disadvantage suffered by the claimant?**
- e. **If so, were those adjustments which the Respondent failed to make reasonable adjustments within the meaning of sections 20 and 21 Equality Act 2010?**

RELEVANT LAW

10. The Tribunal considered any legal points raised in both parties' helpful submissions, in addition to the relevant law set out below.

Discrimination arising from disability (s15 EQA)

11. The right not to suffer discrimination arising from disability is set out at s15 of the EQA:

15 *Discrimination arising from disability*

- (1) *A person (A) discriminates against a disabled person (B) if –*
 - (a) *A treats B unfavourably because of something arising in consequence of B's disability, and*
 - (b) *A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
- (2) *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

Failure to make reasonable adjustments (s20 and 21 EQA)

12. The legislation relating to a claim for failure to make reasonable adjustments is set out at sections 20 and 21 of the EQA:

20 *Duty to make adjustments*

- (1) *Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
- (2) *The duty comprises the following three requirements.*
- (3) *The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter*

in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

...

21 Failure to comply with duty

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

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

...

13. The parties agreed that the comparators for the purposes of this complaint are the other candidates interviewed by the respondent for the role and in particular Candidate D (who was offered the Role).

14. We note that 'substantial' in the context of 'substantial disadvantage' is defined at s212(1) of the EQA as: "*more than minor or trivial*".

15. We note that the duty to consider making reasonable adjustments falls on the employer. There is no onus on a disabled person to suggest adjustments. However, the courts have held that a failure to 'consult' about reasonable adjustments is not in itself a failure to make reasonable adjustments. In *Tarbuck v Sainsbury Supermarkets Ltd* [2006] IRLR 644 EAT, Elias J held at paragraph 71: "*[t]he only question is, objectively, whether the employer has complied with his obligations or not*". The EAT went on to state: "*whilst, as we have emphasised, it will always be good practice for the employer to consult ...there is no separate and distinct duty of this kind*".

Burden of proof

16. The burden of proof is set out at s136 EQA, as follows:

136 Burden of proof

...

(2) 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.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

...

(6) A reference to the court includes a reference to -
(a) an employment tribunal;

...

17. The Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 made clear that it is important not to make too much of the role of the burden of proof provisions. Those provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they are not required where the Tribunal is able to make positive findings on the evidence one way or the other.

FINDINGS OF FACT

Background

18. The respondent is a statutory authority, whose purpose is to liaise with local council and businesses in promoting the interests of the West Yorkshire region. It employed around 400-500 staff at the relevant time. The respondent has internal HR and legal teams.

Claimant's application for the Data Analyst role

19. The respondent advertised a part-time Data Analyst role within its Research and Intelligence team on in May 2019 (the "**Role**"). The Role was a permanent part time position based at the respondent's office in Leeds. The team undertook research projects, such as detailed analysis of transport information in the West Yorkshire region to assist with transport planning.

20. The respondent's job description stated that the successful candidate would undertake tasks including:

- *“Undertake research and analysis to better understand the characteristics and behaviours of citizens of Leeds City Region to support the organisation's corporate priorities.*
- *Work across a range of service areas within the organisation to draw intelligence from all available operational data sets, with a particular focus on better understanding public transport user's characteristics and travel behaviour, applying statistical techniques to identify key trends and linkages.*
- *Assist with the development of reporting processes to create regular intelligence products e.g. written reports and data visualisations/dashboards.”*

21. The respondent set out the personal qualifications and experience for the role and stated that the successful candidate would:

- *“Have experience applying techniques used to manage and analyse a wide variety of data.*
- *Have strong numerical and analytical skills and the ability to produce reports and data visualisations.*
- *Be confident analysing large data sets, including experience of data cleansing, validation and enrichment.*
- *Have a broad knowledge of and experience of using a wide range of data analysis tools and packages...*
- *Have experience of writing reports suitable for a range of audiences.*
- *Have good communication skills and be capable of building relationships with key external and partner contacts...”*

22. The claimant completed the respondent's online application for the Role on 21 May 2019. He enclosed a cover letter and his two page CV with his application, outlining his experience and skills. The claimant's cover letter did not mention his disability. The claimant ticked the respondent's equal opportunities monitoring form to indicate that he had a disability. However, he did not provide further details of his disability on the form and the form was not provided to the respondent's recruiting managers.

23. The respondent received 64 applications for the Role. Dr Fitzpatrick and Mr Glover reviewed the applications received and prepared a shortlist of six candidates for interview, including the claimant.

Claimant's interview arrangements

24. Dr Fitzpatrick prepared an interview schedule for the six shortlisted candidates. He arranged one hour interview slots for each of the six shortlisted candidates on 7 June 2019, starting at 9am and ending at 4.30pm. Fifteen minute gaps were scheduled between each interview. The claimant was the fourth candidate scheduled to be interviewed at 1pm and the next candidate's interview was scheduled to start at 2.15pm. The final interview of the day (scheduled for 3.30pm) was cancelled because that candidate decided not to attend the interview.

25. Dr Fitzpatrick emailed the claimant on 30 May 2019, inviting him to attend an interview at 1pm on 7 June 2019 and setting out various practical arrangements. His email stated:

"As part of the assessment process we would like...you to prepare a short presentation (10 minutes max). The presentation can be on a topic of your own choice, but must demonstrate your competencies as a Data Analyst (please refer to the role profile attached). An example might be describing a project you have worked on, including what you did, how you worked with others, how you overcame any challenges and what the outcome was. If you intend to use slides, please email a copy to [Dr Fitzpatrick's email address] by 8am on the day of your interview."

26. Dr Fitzpatrick attached the role profile to his invitation, which included further detail about the Role including:

"Job Overview

- *Work across a range of service areas to draw intelligence from all available operational data sets, with a particular focus on better understanding public transport user's characteristics and travel behaviour, applying statistical techniques to identify key trends and linkages.*
- *Develop and support reporting processes to create regular intelligence products (reports/dashboards/visualisations)...*

People Contacts

- *Establish effective engagement across internal teams...*
- *Establish effective relationships within the Research and Intelligence Team...*

Technical Duties

- *...Mine and analyse the organisation's large operational data sets, draw inferences and present them as reports or visualisations.*
- *Commission or undertake primary research..., analyse the data and present the results to stakeholders."*

27. The role profile also set out the personal knowledge, skills and experience required for the Role, including:

"Knowledge

- *Experience of analysing large data sets.*
- *Knowledge of the range of tools for analysing and visualising data.*

- *Experience of using statistical techniques to validate changes across and between different data sets.*
- *Experience of report writing.*

People

- *...Capable of managing key external and partner contacts...*
- *Capable of listening and effectively interpreting the needs of clients...*

Technical

- *Strong numerical and analytical skills and demonstrable ability of producing reports and data visualisations.*
- *Knowledge of data cleansing, validation and enrichment.*
- *Broad knowledge of and experience of using a wide range of data analysis tools and packages..."*

28. Dr Fitzpatrick's email concluded with the following statement:

"We welcome applications from people with disabilities and wish to ensure that any needs you may have are met during the interview process. Please contact me if you would like us to make any adjustments to enable you to participate fully."

29. The claimant responded on 2 June 2019, confirming that he would attend his interview. The claimant's email stated:

"I am pleased to confirm my attendance for interview on Friday 7th June at 1pm.

As declared on my application I have a disability and I will need some adjustments to be made to the interview arrangement as outlined.

Below is a guide to my condition from the British Stammering Association: [website link]

To mitigate the effects of stammering at interview, I request the panel actively asks follow-up questions particularly if my answers appear overly short or concise.

For the short presentation I will make use of PowerPoint slides. This will be more of an informal discussion and I will email these slides the day before.

Look forward to meeting on the day."

30. Dr Fitzpatrick tried to open the link to the British Stammering Association ("**BSA**") website but it would not open from his computer. He instead searched for the BSA website and found it via an internet search engine.

31. The hearing bundle included information that the claimant printed out from the BSA website on 4 November 2019. The Tribunal noted that the contents of the BSA's website may have changed in the interim. Dr Fitzpatrick was unable to recall specifically which pages of the BSA website he had visited. However, we accept Dr Fitzpatrick's evidence that he had visited the BSA website and reviewed some of their web pages, including information recommendations regarding possible reasonable adjustments. He recalled seeing information in a tabular format regarding reasonable adjustments, which he believed was similar to the information set out at page 176 of the bundle. This table included the following recommendations regarding individual exercises:

Individual exercises (such as interviews or presentations) can put extra pressure on my speech and therefore make my stammer more pronounced	Not being forced to give training or lead sessions	By not being prescriptive as to how I show my wider communications skills, I can demonstrate what I will bring to the business and deliver value for the organisation.
	Option to present with a colleague or in a group	By not being prescriptive as to how I show my wider communications skills, I can demonstrate what I will bring to the business and deliver value for the organisation (such as data visualisation, presentation materials, planning and organisation, research, analysis etc)
	Additional time or no time limit for interviews	I will not be disadvantaged by having a stammer as I know there is time for me to contribute
	Able to take notes into interviews	

32. Dr Fitzpatrick noted that the impact of an individual's stammer may vary from person to person. He took on board the BSA website's advice that stammering is a condition of a sensitive personal nature. He took the view that the individual was best placed to suggest adjustments for potential employers to consider, although he accepted that a prospective employer is responsible for considering what adjustments to make.
33. Dr Fitzpatrick and Mr Glover discussed the adjustments requested in the claimant's email and the information that Dr Fitzpatrick had found on the website potential adjustments. They agreed that:
- 33.1 they would make the adjustments requested by the claimant in his email of 2 June 2019, i.e.:
 - 33.1.1 to ask follow up questions if the claimant's answers appeared to be overly short or concise; and
 - 33.1.2 to treat the presentation as an 'informal discussion', rather than a formal presentation; and
 - 33.2 the claimant would be permitted additional time during his interview if required. They did not change the interview schedule because they envisaged that the interviews would last up to 45 minutes (rather than the allotted hour) and they had allowed for a gap of 15 minutes between the interviews. Their estimate of the interview duration was based on:
 - 33.2.1 candidates providing a 10 minute presentation; and
 - 33.2.2 candidates taking around 30 minutes to answer the ten competency-based questions for the Role and to deal with any questions that they may have for the respondent.
34. We have concluded that it is highly unlikely that Dr Fitzpatrick and Mr Glover discussed adjustments to their note taking and eye contact practices for the claimant's interview. However, we accept their evidence that normally one of them would ask questions (and maintain natural eye contact) whilst the other took notes during each candidate's interview.
35. The claimant emailed his interview presentation slides to the respondent on 6 June 2019. He did not mention his request for adjustments in that email. Dr Fitzpatrick did not respond to either of the claimant's emails.

Claimant's interview on 7 June 2019

36. The claimant arrived early for his interview. The interview panel were running around five minutes late. Dr Fitzpatrick met with the claimant at around 1.05pm and the interview commenced around 5 minutes later. The interview lasted for around an hour and the claimant left the building at 2.17pm.
37. The interview set up for all candidates was the same. The interviews took place in a small room, with Dr Fitzpatrick, Mr Glover and the candidate sat around a small table. All candidates could use slides during their presentation if they wished to do so. The candidates' slides were pre-loaded onto Dr Fitzpatrick's laptop for their presentation. Candidates could choose whether to present sitting down or standing up. The claimant was not the only candidate who chose to present whilst sitting down.
38. The respondent assesses candidates' performance at interviews using competency based questions for each particular role. Dr Fitzpatrick and Mr Glover had a standard interview question matrix that they used to assess each candidate which consisted of:
 - 38.1 a score for the oral presentation (out of a maximum of three points); and
 - 38.2 separate scores for the responses to each of ten questions (out of a maximum of three points for each question).
39. It is not disputed that Dr Fitzpatrick and Mr Glover welcomed the claimant to the interview and tried to put the claimant at ease.
40. The claimant's presentation lasted for around 20 minutes. Dr Fitzpatrick and Mr Glover did not attempt to stop the claimant's presentation after 10 minutes, despite the 10 minute time limit set out in the brief. The claimant accepted in his witness evidence that he had the opportunity to express what the content that he wanted to express during his presentation.
41. The claimant accepted that Mr Glover asked one follow up question at the end of his presentation regarding how he shared information from the 2011 Census in order to inform decision-making. In response, the claimant referred to his work with the West Yorkshire Regional Observatory. Dr Fitzpatrick revisited this topic in relation to question six and they had a discussion regarding the Observatory. We accept Dr Fitzpatrick and Mr Glover's evidence that Dr Fitzpatrick also raised a specific question about the claimant's skills in handling large data sets, relating to the GIS team and noted the claimant's response in their handwritten comments.
42. We accept the evidence of Dr Fitzpatrick and Mr Glover that the claimant gave what they thought to be full answers to their questions and that they did ask follow up questions where appropriate. The reason why we accept this is that:
 - 42.1 Dr Fitzpatrick and Mr Glover both took handwritten notes during the claimant's interview, parts of which they referred to during their oral evidence in this hearing;
 - 42.2 the claimant did not complain that either Dr Fitzpatrick or Mr Glover prevented him from answering their questions as fully as the claimant would have wished to do so, either by asking him to move on or by sending implicit signals that they were short of time (e.g. by looking at their watches). The claimant stated during his oral evidence that he believed they were under implicit time pressure but he was unable to point to any explicit signals that demonstrated this; and

- 42.3 the claimant did not identify any specific points in his witness statement or in oral evidence that he could have raised during his interview, if he had been asked further follow up questions. The claimant did say in his witness evidence that he would have referred to his CV which consisted of a two page overview of his employment and qualifications. We note that the claimant's most recent role (from 2011 until his redundancy in July 2015) was with Bradford Council. The only specific project that the claimant's CV referred to in detail regarding his previous role with Bradford Council was the 2011 Census (i.e. the subject of his 20 minute oral presentation). The claimant's CV did not refer to any roles from July 2015 onwards.
43. There was no explicit discussion of any adjustments made to the claimant's interview during the interview itself. Neither Dr Fitzpatrick nor Mr Glover mentioned making adjustments for the claimant's interview because they were mindful that this may be a sensitive personal issue that the claimant may not wish to discuss during the interview itself. We accept Dr Fitzpatrick's evidence that he regretted with hindsight that he had not replied to the claimant's email of 2 June 2020 and had not discussed the adjustments for the claimant's interview, either before the interview took place or at the start of the interview itself.
44. The claimant did not ask whether adjustments had been made before he attended the interview or during the interview itself. He stated that he assumed that Dr Fitzpatrick had made the adjustments that he requested in his email of 2 June 2019. The Tribunal asked the claimant why he did not raise any issues regarding his oral presentation at the interview. The claimant said that he just continued with the presentation because he felt that he was 'already in a weaker place'.

Respondent's candidate selection

45. Dr Fitzpatrick and Mr Glover scored the candidates independently against the respondent's interview criteria and averaged their scores together. The maximum score was a total of thirty-three points (including up to a maximum of three points for the presentation). The claimant scored joint fourth out of the five candidates interviewed by the respondent.
46. The candidates were ranked as follows:

Candidate	Dr Fitzpatrick's total score (out of 33)	Mr Glover's total score (out of 33)	Average assessment/ presentation score (out of 3)	Average Score including presentation score (out of 33)
1. Candidate D	22	25	3	23.5
2. Candidate A	20.5	22	2	21.25
3. Candidate C	17.5	22	2.5	19.75
Joint 4 th /5 th Candidate B	16.5	19	1	17.75
Joint 4 th /5 th the claimant	16.5	19	0.5*	17.75

*The claimant's presentation scores were: one mark (Dr Fitzpatrick) and zero marks (Mr Glover).

47. Dr Fitzpatrick's notes of the claimant's presentation stated:

- *"Described the 2011 Census and described role in team (Research and consultation at Bradford Council).*
- *Slide part very text heavy...*
- *...Presentation was very basic. Slides were very text heavy and it wasn't clear what the point of it was.*
- *Presentation lasted a lot longer than 10 minutes (as requested in brief). Did not ask [the claimant] to stop.*
- *Didn't properly demonstrate Data Analyst competencies as per brief."*

48. Mr Glover's notes of the claimant's presentation stated:

- *"Brief was to give 10 minute presentation about a project which demonstrates candidate's analytical skills.*
- *Presentation did not meet brief – was a general overview of Census with little focus on using analytical skills to address a defined need.*
- *Presentation ran for much longer than 10 minutes."*

49. The Tribunal questioned whether Dr Fitzpatrick and Mr Glover took into account the length of the claimant's presentation when scoring him. We accept that they did not and that their references to the length of the presentation were simply a record of the time taken. We note that they permitted another candidate to overrun the 10 minute time limit for the presentation, albeit that the other candidate's presentation did not overrun by a lengthy period.

50. The Tribunal also questioned Dr Fitzpatrick regarding his comment that the claimant's slides were 'text heavy'. We accept Dr Fitzpatrick's explanation that his view was that each slide should try to get across 'one key take home message' in each slide.

51. We heard evidence from Dr Fitzpatrick and Mr Glover on why they reached the view that the claimant's presentation did not meet the brief given by Dr Fitzpatrick in his email of 30 May 2019. We accept their evidence that the claimant's presentation was very descriptive. He failed to explain the challenges that he faced on the project, how he worked with others to overcome those challenges when analysing the data and the outcome of the project (e.g. informing decision making through effective analysis and presentation of data). Dr Fitzpatrick also explained that the data that the claimant used in his presentation is 'open data' (i.e. data that anyone could obtain from the ONS). He said that it was not an example of a data set that a candidate has processed himself/herself, validated, cleansed, analysed and presented for a specific purpose.

52. In addition, we accept Dr Fitzpatrick's evidence that the visual slides did not meet the standards that the respondent expected for the visualisation of the data. For example, the claimant used a line chart for discrete data. In addition, some of the data in his area chart was hidden (i.e. it was not possible to see the births minus deaths information because this was hidden).

53. We also questioned the references to 'communication skills' in the role profile and in the assessment comments. For example, the role profile referred to the respondent's need for:

"Good communications skills and committed to raising awareness of the role and outputs of the Combined Authority's Research & Intelligence team"

54. We note that the marking criteria did not specifically allocate any marks for communication skills. We questioned why Dr Fitzpatrick and Mr Glover both included comments on the candidates' communication skills. For example, Candidate D (the successful candidate) was referred to as having 'good clear communication skills'. Dr Fitzpatrick commented that the claimant's "*comms skills were ok*", but both he and Mr Glover noted their concerns over inappropriate comments made by the claimant regarding local government cuts.
55. We accept Dr Fitzpatrick and Mr Glover's evidence that 'communication skills' was not limited to oral communication skills. Instead, their view of communication skills included the ability to engage with customers, build relationships with colleagues and stakeholders, to prepare reports and to prepare data visualisations. We also accept their evidence that candidates could demonstrate these skills in the content of their oral presentation and in their responses to the interview question, but that no specific scores were given for these skills during the interview. This is because there were no marks allocated to communication skills in the marking criteria as a standalone criterion.
56. Dr Fitzpatrick and Mr Glover scored all candidates against the same criteria. They offered the Role to Candidate D because she had demonstrated the best technical skills and experience for the Role. Candidate D accepted the Role and remained working for the Respondent in the Role as at the date of this hearing. The respondent wrote to the claimant on 12 June 2019, confirming that his application for the Role was unsuccessful.

Claimant's complaint regarding the recruitment process

57. The claimant contacted the respondent's Human Resources team on 17 June 2019, asking how he could raise a complaint regarding his unsuccessful application for the Role. The claimant emailed his complaint later that day. Natalie Morrison investigated the claimant's complaint. Mrs Morrison wrote to the claimant on 17 July 2019, setting out the respondent's response to the claimant's complaint. She noted several 'learning points' in her letter. The learning points included that the respondent's recruiting managers should speak to HR if they are notified that an individual has a disability. The claimant did not respond to Mrs Morrison's letter.
58. We have not made detailed findings of fact regarding the claimant's complaint because he has not claimed that the handling of his complaint was an additional act of disability discrimination.

APPLICATION OF THE LAW TO THE FACTS

59. We applied the law to our findings of facts as set out below.

1) Discrimination arising from disability (section 15 Equality Act 2010)

a. Was the fact that the claimant was not offered the Data Analyst role due to something arising in consequence of the claimant's disability?

60. We have concluded that "*the content, and quality of that content communicated at interview*" was not something arising in consequence of the claimant's disability. The reasons why we have reached this conclusion are set out below:

60.1 *Oral presentation* – We found that the reason why the claimant received a low score for his oral presentation was because he did not meet the presentation

brief for the reasons given by Dr Fitzpatrick and Mr Glover in their evidence. We found that the length of the claimant's presentation did not affect his score. The claimant stated in his oral evidence that, broadly speaking, he was able to communicate the content of his presentation that he wanted to get across during the interview.

60.2 Q&A - We accepted Dr Fitzpatrick's and Mr Glover's evidence that the claimant provided what appeared to be full answers to their questions during the interview and that they asked follow up questions where appropriate. The claimant did not provide any specific examples of what he would have said, if additional questions had been asked.

61. In addition, we note that the claimant scored significantly lower than Candidate D (the successful candidate). For example, even if the claimant had scored full points for his oral presentation, then he would have had a total score of 20.25 points, which would have put in him in third place behind Candidates D (23.5 points) and Candidate A (21.25 points).

b. If so, can the respondent show that treatment was a proportionate means of achieving a legitimate aim?

62. We do not need to consider this issue in light of our conclusion on the 'something arising' issue.

2) Failure to make reasonable adjustments (sections 20 and 21 Equality Act 2010)

a. Did the respondent's requirement for candidates to undertake an oral presentation and answer oral questions during the interview process put the claimant at a substantial disadvantage in comparison to non-disabled persons?

The claimant relies on the following alleged disadvantages of his stammer:

- (i) he takes more time to communicate;
- (ii) he experienced difficulties during his oral presentation, relating to both his communication skills and the oral content of his presentation; and
- (iii) his perception that his difficulties had a negative impact on the respondent's assessment of his responses to their interview questions, relating to both his communication skills and the content of his responses.

63. We concluded that the claimant's stammer meant that he took more time to communicate with the respondent during the interview. We also concluded that the claimant experienced difficulties relating to his speech fluency than non-disabled persons during his oral presentation.

64. We concluded that, contrary to the claimant's perception, his difficulties did not have a negative impact on the respondent's assessment of his responses to their interview questions. This is because we found in our findings of fact that the claimant's

communication skills were not scored as part of his responses to interview questions. In addition, we found that the claimant appeared to have provided full responses to the interview questions (with the assistance of follow up questions where appropriate). The claimant was unable to identify any specific examples of what more he could have said during the interview.

b. If the claimant is found to have been at a substantial disadvantage in comparison to non-disabled persons, did the respondent know (or could the respondent reasonably be expected to have known) that the claimant was likely to be at a substantial disadvantage compared to persons who are not disabled?

65. We concluded that the respondent knew that the claimant was likely to be at a substantial disadvantage compared to persons who are not disabled in relation to both the time he took to communicate and his speech fluency during his presentation.

66. However, we have found that the respondent did not know and could not reasonably be expected to have known that the claimant had any difficulties in expressing the oral content of his presentation. The reasons why we reached this conclusion were that:

66.1 the claimant's email of 2 June 2019 to Dr Fitzpatrick did not raise any concerns with presenting, other than to request that the presentation took place as an informal discussion;

66.2 the claimant did not request any alternatives to carrying out an oral presentation, e.g. providing a written report; and

66.3 the claimant stated in his oral evidence that he was able to express the content that he wished to express during his presentation.

c. Did the respondent fail to make the adjustments set out in this paragraph?

67. We have considered each potential adjustment in turn in our conclusions. Before turning to our conclusions, we would like to express our view that the parties should have discussed potential adjustments for the claimant (whether orally or by email), in advance of or at the start of the claimant's interview as a matter of good practice. However, we also note that a failure to discuss reasonable adjustments is not a failure to make reasonable adjustments under the EQA (as per the case of *Tarback* referred to in the section on Relevant Law above).

(i) Identifying the actual communication needs of the Data Analyst role and/or to consider how this was to be assessed.

68. We found that the respondent did assess the communication needs of the Data Analyst role. We also found that the 'communication skills' considered were not limited to oral communication (as set out in our findings of fact above). We found that no additional points were awarded for communication skills.

(ii) Arranging for and/or explicitly offering an extended interview prior to the interview date.

69. We found that the respondent did not offer explicitly to extend the claimant's interview. However, we also found that the claimant's interview lasted for around an hour and that the respondent did not prevent him from completing his presentation or place any time limit on the question and answer session.

(iii) Swapping the claimant's interview slot with that of the last candidate.

70. We found that the respondent did not change the claimant's interview slot and that his interview took place before the last candidate was interviewed (i.e. Candidate D).

(iv) Arranging for the panel actively asking follow up questions and/or to expand/clarify the content and/or quality of the claimant's oral responses.

71. We found that Dr Fitzpatrick and Mr Glover did ask follow up questions and discussed the claimant's oral responses where appropriate.

(v) Arranging for a scribe to record oral answers, removing the need for the panel to make written notes, and enabling natural eye contact to be unbroken when the claimant was providing his responses.

72. The respondent did not arrange for a scribe to record the claimant's oral answers.

d. If so, would the adjustments set out in paragraph 2(c) above have removed the substantial disadvantage suffered by the claimant?

(ii) Arranging for and/or explicitly offering an extended interview prior to the interview date.

73. We found that the respondent did allow the claimant's interview to continue for as long as required. We have concluded that an explicit offer of an extended interview would not have removed any substantial disadvantage suffered by the claimant.

(iii) Swapping the claimant's interview slot with that of the last candidate.

74. We found that the respondent did allow the claimant's interview to continue for as long as required. We have concluded that swapping the claimant's interview slot with that of the last candidate would not have removed any substantial disadvantage suffered by the claimant.

(v) Arranging for a scribe to record oral answers, removing the need for the panel to make written notes, and enabling natural eye contact to be unbroken when the claimant was providing his responses.

75. We found that Dr Fitzpatrick and Mr Glover took it in turns to ask questions and write notes, enabling the other to maintain natural eye contact whilst the claimant was providing his responses. We have concluded that arranging for a scribe would not have removed any substantial disadvantage suffered by the claimant.

e. If so, were those adjustments which the Respondent failed to make reasonable adjustments within the meaning of sections 20 and 21 Equality Act 2010?

76. We do not need to consider this issue in light of our conclusions on 'substantial disadvantage' and whether the adjustments would have removed any such 'substantial disadvantage'.

CONCLUSION

77. We have concluded that the claimant's claim for disability discrimination (i.e. discrimination arising from disability and reasonable adjustments) fails and is dismissed.

Employment Judge Deeley

2 October 2020