



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102198/2020 (V)

**Held via Cloud Video Platform (CVP) on 8,11 & 12 October and 13, 16 and 17
December 2021 (and Members' meetings on 17 December 2021 and 4 February
2022)**

**Employment Judge: M Sutherland
Members: L Brown
A Matheson**

Valerie Findlay

**Claimant
Represented by:
Mr R Findlay
(Husband)**

NHS Education Scotland

**First Respondent
Represented by:
Ms J Connelly
(Counsel instructed
by H Craik, Solicitor)**

Health Education England

**Second Respondent
Represented by:
Ms J Connelly
(Counsel instructed
by Hill Dickinson LLP)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the complaint of discrimination arising from disability does not succeed and is dismissed.

REASONS

Introduction

1. The Claimant presented a complaint of discrimination arising from disability.
2. It was not in dispute: that that the Claimant had applied for a place on the Public Health Specialty Training Scheme; that the First Respondent was the Claimant's prospective employer; that the Second Respondent was the First Respondent's agent in respect of the recruitment process for determining who would be offered places on the Training Scheme; that the Respondents would be jointly and severally liable as principal and agent for any discrimination against the Claimant in respect of that recruitment process; that the Claimant was disabled by reason of the mental impairment of Generalised Anxiety Disorder ('GAD') at the relevant time and this was known to the Second Respondent; that the Claimant did not progress from the Assessment Centre stage to the Selection Centre stage of the recruitment process because she did not achieve the minimum required standard in (i.e. pass) the Situational Judgment ('SJ') Test; that the Claimant was consequently ineligible for offer of a Public Health Specialty Training place; and that this amounted to unfavourable treatment.
3. The Claimant asserts that she did not pass the SJ Test because she had a panic attack which arose in consequence of her disability. The Respondent disputes this and in any event asserts that her treatment was a proportionate means of achieving the legitimate aim of appointing the best applicants who have the core skills at the time of the Selection Centre and who are the best and most suitable applicants available in that year's cohort.
4. In correspondence with the Respondent the Claimant had sought use of her scores from a previous application by way of reasonable adjustment. During case management the Claimant had confirmed that she was not making a complaint of failure to make reasonable adjustments and was not seeking to include this by way of amendment.
5. The Claimant was represented by her husband, Mr Findlay. The Respondents were represented by Ms Connelly, Counsel.

6. A final hearing was listed to consider the issue of liability only with the issue of remedy being considered at a later date (if required).
7. The Claimant gave evidence on her own behalf. The Respondent led evidence from Marcia Reid (Recruitment Lead, Second Respondent), Clare Wright (Recruitment Manager, Second Respondent), Helen Baron (Senior Associate, Work Psychology Group), Dr Catherine Johnman (Public Health Training Programme Director, First Respondent).
8. The parties lodged a joint set of documents.
9. The Claimant has GAD and the tribunal was advised that her representative has dyslexia and attention deficit hyperactivity disorder. Adjustments were made to accommodate associated difficulties.
10. Parties made closing submissions.

List of Issues

11. Parties were unable to agree a list of issues. Following discussion it was understood that the issues to be determined were as follows –

Discrimination arising in consequence of disability (Section 15, EA 2010)

- a. Did the Claimant fail to pass (i.e. achieve the required minimum standard in) the SJ Test in January 2020 because of something arising in consequence of her disability of GAD namely having a panic attack during the test?
- b. Was it a legitimate aim to appoint trainees who have the core skills at the time of the Selection Centre and who are the best and most suitable applicants available in that year's cohort?
- c. Was it a proportionate means of achieving that aim to require the Claimant to pass the SJ Test in 2020 to allow her to progress from the Assessment Centre stage to the Selection Centre stage of the recruitment process?

Findings in fact

12. On 9 November 2019 the Claimant applied for a place on the First Respondent's Public Health Specialty Training Scheme with a view to ultimately becoming a Consultant or Director of Public Health.
13. The First Respondent is a Special Health Board whose statutory remit is to provide, co-ordinate, fund and advise on education and training for persons who provide NHS services. Local Health Boards support the First Respondent in provision of those services.
14. The recruitment process for determining who will be offered a place on that Training Scheme is carried out on a national UK-wide basis. The First Respondent, together with the equivalent bodies for England (the Second Respondent), Wales and North Ireland collaborate to design, implement and oversee the recruitment process. The Second Respondent was appointed lead recruiter for the Public Health Training Scheme and performed that role through a Local Education Training Board for the East Midlands.
15. The recruitment process for determining who would be offered a place on that Training Scheme is a regulated and thorough process comprising an initial eligibility screening of the application, an Assessment Centre stage, and a Selection Centre stage. These stages were intended to assess the essential competencies identified in the person specification for the role which included technical knowledge and clinical expertise, academic and research skills, communication skills, conceptual thinking and problem solving, managing others and team involvement, organising and planning, coping with pressure, values, professional integrity and learning and personal development. Applicants are provided an Applicant Handbook which provides a detailed guide to the recruitment process.
16. As part of the recruitment process the Claimant advised that she was disabled by reason of an anxiety disorder. Applicants are advised of their right to request reasonable adjustments including time related adjustments, personal assistance and specialist equipment. A number of applicants requested adjustments which were considered and some of which were accommodated. The Claimant confirmed that she was not seeking any reasonable adjustments. Disabled applicants are eligible for a guaranteed interview under the 'two ticks scheme' i.e. to progress to the Selection Centre Stage provided they meet the eligibility

requirements and provided they meet the minimum required standard at the Assessment Centre stage. The Claimant confirmed that she was seeking a guaranteed interview under the two ticks scheme.

17. Applicants are advised that if they have a problem at the Assessment Centre they should notify a member of staff present on the day and subsequently email the recruitment team to discuss the issue within 7 days. An additional Assessment Centre event, with alternative questions/ scenarios, is scheduled for shortly after the Assessment Centre day to enable any applicants who experience extenuating circumstances through illness etc on the day to attend a 'mop up' event. There is a limited bank of questions/ scenarios and limited time prior to the Selection Centre stage and accordingly it is not practical to hold multiple 'mop up' events.

Initial Eligibility Screening

18. An initial eligibility screening was undertaken to determine that the applications met the minimum criteria and were therefore eligible to progress to the Assessment Centre stage. Applicants must have a relevant degree and relevant work experience. The Claimant's application met those criteria.
19. In respect of the 2019 applications there were around 500 eligible applicants for around 75 places.

Assessment Centre Stage

20. At the Assessment Centre Stage the applicants sit three exams: Watson-Glaser Critical Thinking Appraisal (W-GCTAUK), Rust Advanced Numerical Reasoning Assessment (RANRA), and Situational Judgement Test (SJT). The purpose of the Assessment Centre stage is intended to assess the essential competencies identified in the Person Specification.
21. The W-GCTAUK is a relatively short exam of around 30 minutes comprising five subtests that are intended to assess critical thinking, that is ability to critically evaluate written information. The RANRA is also a relatively short exam of around 40 minutes comprising of two subtests intended to assess numerical reasoning, that is ability to analyse and evaluate numeric information. The SJTs is a longer exam of around 100 minutes comprising psychometric tests intended

to measure individuals' judgement regarding situations encountered in the workplace. The majority of the test questions used are different each year. (In evidence the Claimant described the SJT as "such a subjective test compared with the logic or numeracy tests.") The SJT is devised and marked by a third party, the Work Psychology Group.

22. In order to progress to the Selection Centre stage, the applicants must meet a minimum standard for each of the exams and must also rank amongst the highest scoring applicants. The minimum standard is set each year with reference to the performance of that year's cohort. The minimum standard in respect of the 2019 applications were t-scores of 45 for RANRA, 47 for W-GCTAUK and 46 for SJT. The purpose of setting a minimum standard for each exam is to ensure that all candidates eligible for selection meet a minimum standard in respect of each of the essential competencies identified in the Person Specification.
23. On 10 January 2020 the Claimant attended the Assessment Centre in respect of her 2019 application. The Claimant's t-scores from the Assessment Centre were 62 for RANRA, 61 for W-GCTAUK and 37 for SJT. Accordingly the Claimant met the minimum standard for the RANRA and W-GCTAUK but not for the SJT. She was considered not to have passed the Assessment Centre stage and was accordingly not progressed to the Selection Centre stage.

Selection Centre Stage

24. The highest scoring 216 applicants from the Assessment Centre stage, who have met the minimum standard, are progressed to the Selection Centre stage. However, under the two ticks scheme, disabled applicants who have met the minimum standard on all three tests are progressed to the Selection Centre stage, and this may displace non-disabled applicants who would otherwise progress. In respect of the 2019 recruitment process, around 17% of disabled applicants secured a post (7/41) compared with around 11% of non-disabled applicants (70/645).
25. The Selection Centre stage lasts about 5 hours and involves a written test, a group exercise, and a series of structured interviews/assessments. The purpose of the Selection Centre stage is intended to further assess essential

competencies identified in the Person Specification. The majority of tests, exercises and assessments used are different each year. In order to progress to the ranking stage, the applicants must meet a minimum standard. In respect of the 2019 recruitment process, the Selection Centre stage took place in mid February 2020.

Ranking and preferred geographic location

26. If an applicant meets that minimum standard, their t-scores from the Selection Centre stage are combined with their t-scores from the Assessment Centre stage and these combined scores are ranked. The purpose of the ranking is to ensure that the best candidates are selected having regard to the essential competencies identified in the Person Specification.
27. Places on the training scheme are offered based upon an applicant's preferred geographic location, the number of vacancies within that location and the applicant's ranking amongst those other applicants. Accordingly the applicant who ranked highest will be offered their first-choice training placement and so on until all vacancies are allocated. There are around 3 to 5 places on the training scheme in Scotland each year.

Public Health Specialty Training Scheme (Scotland)

28. The Public Health Speciality Training Scheme takes around 4 to 5 years to complete. In limited circumstances Trainees may be able to defer the start of their training or transfer to another location. Trainees on the Scheme in Scotland are employed by the First Respondent, are paid a salary and are expected to work on-call. The training is rigorous and demanding. Trainees are subject to annual assessment which may result in removal from the training programme. Between 30% to 70% of candidates pass the final diploma (the % variation is large because only a small number sit the diploma). Taking into account staff costs and administration, the training costs are around £300-£400k per trainee.
29. Upon successful completion a trainee may apply for positions of Consultant or Director of Public Health in the UK. The purpose of these roles is to promote, protect and improve public health and well being and these are accordingly important roles in society whose work may affect an entire population.

Observations on the evidence

30. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur. Facts may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).
31. The Respondents' witnesses came across as entirely credible and reliable in their testimony which was fair and measured, and consistent with the documentary evidence.
32. The Claimant asserts in her complaint of having a panic attack in the SJ Test, arising in consequence of her disability of GAD, which caused her to fail the test. In evidence she advised that someone with GAD has a broken fight or flight alarm and the most severe alarm is a panic attack. She described having difficulty breathing, her heart racing, and stomach cramps related to IBS. She described an acute inability to concentrate. She advised second and third guessing all of her answers. She advised of catastrophizing, creating a negative feedback loop that led to the continuation of these symptoms. She gave evidence of actively engaging in CBT by trying to recognise what was happening, and stop and try to challenge the thoughts. She advised that the effect of the panic attack was that she was unable to perform to her normal standard. When asked when it had started she advised it arose towards the start of the exam and when asked how long it lasted she stated "I don't know...I think it was a significant proportion of the test".
33. The Claimant completed the SJT quicker in 2020 than she had in 2021 leaving 18 minutes of unused time. The Claimant asserted that, notwithstanding the second and third guessing of her answers, the panic attack caused her to speed up and she finished early because she was keen to be out of the exam.

Medical evidence

34. The Claimant's medical records confirm that she has chronic (long standing) generalised anxiety disorder which has been managed through medication

(citalopram) and CBT-informed coping strategies. The Claimant advised having about 3 panic attacks a year (until a recent change in medication). The Claimant advised having a panic attack during an undergraduate exam in around 2005 which caused her to drop grades. The Claimant regularly attended her GP in 2019 and 2020 in respect of a number of issues. There was no medical evidence regarding the panic attacks. The Claimant advised she did not seek medical advice regarding panic attacks because she already had the CBT tools to deal with them.

35. The Claimant had a baby on 12 September 2019. The Claimant gave evidence that she was affected by morning sickness at the Assessment Centre Stage in respect of the 2018 application. The Claimant stated in her impact statement that “The post-partum period from September 2019-January 2020 also saw high levels of anxiety due to hormones, sleep deprivation, and shorter periods of daylight” which period included the Assessment Centre Stage in respect of her 2019 application. The Claimant gave evidence that significant upsetting medical events had affected her during the Selection Centre stage of her 2020 application but she had still performed to an extremely high standard.

2018 and 2020 applications – performance at the Assessment Centre stage

36. The Claimant had previously applied for a place on the First Respondent’s Public Health Specialty Training Scheme in 2018 and also applied subsequently in 2020. The Claimant sought to rely upon her performance at the Assessment Centre Stage in respect of those applications as evidence that she had a panic attack at the Assessment Centre Stage in 2020 (in respect of the 2019 application).
37. In respect of the 2018 applications the minimum standard at the Assessment Centre Stage (held in 2019) were t-scores of 45 for RANRA, 46 for W-GCTAUK and 46 for SJT. The Claimant’s scores were 56 for RANRA, 66 for W-GCTAUK and 50 for SJT. Accordingly the Claimant met the minimum standard for the RANRA, W-GCTAUK and the SJT held in 2019. She was considered to have passed the Assessment Centre stage and was accordingly progressed to the Selection Centre stage.

38. In respect of the 2019 applications the minimum standard at the Assessment Centre Stage (held in 2020) were t-scores of 45 for RANRA, 47 for W-GCTAUK and 46 for SJT. The Claimant's scores were 62 for RANRA, 61 for W-GCTAUK and 37 for SJT. Accordingly the Claimant met the minimum standard for the RANRA and W-GCTAUK but not the SJT held in 2020. She was therefore considered to have not passed the Assessment Centre stage and was accordingly not progressed to the Selection Centre stage.
39. In respect of the 2020 applications the minimum standard at the Assessment Centre Stage (held in 2021) were t-scores of 45 for RANRA, 46 for W-GCTAUK and 46 for SJT. The Claimant's scores were 66 for RANRA, 55 for W-GCTAUK and 51 for SJT. Accordingly the Claimant met the minimum standard for the RANRA, W-GCTAUK and the SJT held in 2021. She was considered to have passed the Assessment Centre stage and was accordingly progressed to the Selection Centre stage.
40. To the extent that comparisons can be made across the three years, the Claimant's t-scores for RANRA varied by 10, for the W-GCTAUK by 11 and for the SJT by 14 (in respect of her 2019 application her SJT score decreased by 13 from the previous year and increased by 14 the following year).
41. Each exam at the Assessment Centre stage generates a raw score. In respect of 2018 applications the mean raw score for the SJT was 624 and the Claimant's raw score was 622. In respect of the 2019 applications the mean raw score for the SJT was 645 and the Claimant's raw score was 602. In order to determine whether those raw scores are significantly above or below the average scores for the applicant cohort those raw scores are converted into t-scores. T-scores are calculated using the standard deviation from the mean (i.e. average). The standard deviation from the mean is calculated using the mean score for the applicant cohort and the number of applicants in the cohort.
42. The Respondents assert that there is insufficient overlap in the cohort of applicants and in the tests (and scenarios) to enable meaningful comparison from one year to the next. Of the SJT scenarios that were scored in 2020, around a third were the same as the previous year. Of the tests and assessments used at the Selection Centre stage, the majority are different from the previous year. The tests have not been designed and tested to enable comparison across the

years. There was a 12% increase in eligible applications between 2018 and 2019. Of the 216 applicants who attended the Section Centre in 2019 and the 216 applicants who attended the Section Centre in 2020, 36 applicants (around 17%) attended in both 2019 and 2020.

43. We therefore accepted that it is not possible for a meaningful comparison to be made between a candidate's score in one year and a score in another year because the score in each year is a product of different variables: the content of test (the majority of which changes each year); and the performance of the cohort (the majority of the cohort changes each year).

2018 and 2020 applications – performance at the Selection Centre stage

44. The Claimant sought to rely upon the outcome of the Selection Centre Stage in respect of those applications as evidence that she met the minimum standard and had the core skills for appointment in respect of her 2019 application.
45. At the Selection Centre stage in respect of the 2018 application the Claimant ranked 47th which ranking was sufficiently high to be eligible for appointment in England but not in Scotland. Competition ratios are generally higher for Scotland than England. The Claimant declined to be appointed in England because of her geographic location preference.
46. At the Selection Centre stage in respect of the 2020 application the Claimant ranked 19th which ranking was sufficiently high to be eligible for appointment in Scotland. The Claimant was appointed to a 5 year contract starting August 2021. The Claimant advised that the failure to appoint in respect of her 2019 application resulted in a loss of one year's salary of around £68k, being behind on the salary scale and pension losses of around £11k.

Raising of concerns regarding the Assessment Centre stage

47. The invite to the Selection Centre advised the Claimant that any concerns regarding the Assessment Centre stage should be raised with the Invigilating

Officer on the day and afterwards with the Recruitment Office within 7 days. The Claimant did not raise any concern with the Invigilating Officer on the day and did not raise matters with the Recruitment Office within 7 days. The Claimant gave evidence that after the exam she engaged in an active process of CBT of trying to challenge the negative thoughts and this prevented her from raising concerns (she wanted to avoid admitting to herself and thereby to others that she might not have passed). The Claimant stated in evidence that she thought she was in any event guaranteed an interview under the two ticks scheme.

48. On 28 January 2020 the Claimant was advised that she would not be progressing to the Selection Centre stage because her score in one or more of the papers was lower than the minimum standard required. In response the Claimant advised "I am guaranteed an interview as long as I meet the minimum criteria as specified in the Person Specification. I meet the minimum criteria. I ranked 47 last year--passing all three exams--and have a disability that can affect my performance on exams."
49. In response the Claimant was advised that she required to pass all three assessment centre exams to progress to the selection centre under the guaranteed interview scheme. The Claimant replied advising that she is a qualified candidate and her performance at last year's assessment demonstrates that she exceeds the minimum standards. She advised "My disability can affect performance on any given day...My lower performance in the exams this year is a direct consequence arising from my disability". She explained the financial implications arising from her exclusion which she described as substantial. She suggested as a reasonable adjustment either progressing her to the Selecting Centre this year based upon her Assessment Centre scores from last year or, if there were insufficient places, using her combined scores from last year instead to produce a final ranking. The Claimant advised that the recruitment process falls foul of the Equality Act 2010, she was open to other suggestions, and referenced a lawsuit. The Second Respondent accordingly took legal advice.
50. On 3 February 2020 the Second Respondent replied advising that use of scores from a previous recruitment round was not considered to be a reasonable adjustment and that the recruitment process did not amount to unlawful

discrimination. The Second Respondent did not make any other suggestions. The Claimant replied advising that as can be seen from her 2018 application and scores that she exceeds their minimum standards.

51. On 3 April 2020 the Claimant was provided with feedback regarding the Assessment Centre stage. She was advised that the minimum standard in respect of the 2019 applications were t-scores of 45 for RANRA, 47 for W-GCTAUK and 46 for SJT. The Claimant' was advised that her scores were 62 for RANRA, 61 for W-GCTAUK and 37 for SJT. Accordingly the Claimant was advised that she met the minimum standard for the RANRA and W-GCTAUK but not for the SJT.
52. The Claimant first mentioned having a panic attack as part of the process of raising her employment tribunal claim which commenced with ACAS early conciliation and was lodged on 16 April 2020.
53. Having regard to all of the above it is considered more likely than not that the Claimant did not have a panic attack in the SJ Test arising in consequence of her disability of GAD which caused her to fail the test. The evidence the Claimant gave regarding the panic attack struck the tribunal as evidence regarding panic attacks in general rather than evidence regarding what she could genuinely and accurately recall about how her performance had been affected by her GAD (if at all) during the SJT test she sat on 10 January 2020.

The law

Offering employment

54. Section 39(1) of EA 2010 provides that "An employer (A) must not discriminate against a person (B) - in the arrangements A makes for deciding to whom to offer employment; as to the terms on which A offers B employment; by not offering be employment".

Burden of Proof

55. Section 136(2) of EA 2010 provides that "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes 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 provisions”.
56. The burden of proof provisions apply where the facts relevant to determining discrimination are in doubt. The burden of proof provisions are not relevant where the facts are not disputed or the tribunal is in a position to make positive findings on the evidence (*Hewage v Grampian Health Board [2012] UKSC 37, SC*).
57. It is for the Claimant to prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the Respondent has treated the Claimant unfavourably because of the something arising ('Stage 1' *prima facie* case). If the Claimant does not satisfy the burden of Stage 1 their claim will fail (*Igen v Wong [2005] ICR 935*).
58. The burden of providing objective justification is on the Respondent.

Discrimination arising from disability

59. Under Section 15 of the EA 2010 “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.”
60. The tribunal must determine whether the Respondent treated the Claimant unfavourably because of something. This involves establishing the reason for any unfavourable treatment. The tribunal must then determine whether the something arose in consequence of the Claimant's disability (*Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305, EAT*).

Unfavourable treatment

61. Unfavourable treatment requires the Claimant to have been put to a disadvantage (a “relatively low threshold”), but, unlike less favourable treatment, it requires no comparison with how a comparator was or would be treated (*Williams v Trustees of Swansea University Pension and Assurance Scheme*

[2019] IRLR 306). This raises two questions of fact: what was the treatment and was it unfavourable to the Claimant?

Reason for the treatment

62. The approach to the question as to the reason for the treatment follows the approach taken to direct discrimination (*Pnaiser v NHS England [2016] IRLR 170, EAT*). It is for the Claimant to prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the Respondent has treated the Claimant unfavourably because of the something arising ('Stage 1' *prima facie* case). The something need not be the main or sole cause but must have a significant (more than trivial) influence – that the something arising operated consciously or unconsciously on the mind of the Respondent so as to amount to an effective reason. If the Claimant satisfies Stage 1, it is then for the Respondent to prove that the Respondent has not treated the Claimant unfavourably because of the something arising (Stage 2) (or that the treatment was objectively justified).

Something arising in consequence of disability

63. The something must arise in consequence of the Claimant's disability. There must be a connection between the reason for the unfavourable treatment and the Claimant's disability. It does not encompass associative or perceptive discrimination.
64. The consequences of a disability include anything which is the result, effect or outcome of a person's disability (*Para 5.9 Equality and Human Rights Commission Code of Practice on Employment 2011* ('EHRC Code')).
65. There may be multiple causal links between the disability and the something that causes unfavourable treatment.

Respondent knowledge

66. Discrimination does not arise if the Respondent did not know, and could not reasonably have been expected to know, that the Claimant had the disability. However the Respondent does not require to know that the something arises in consequence of disability.

Objective justification

67. The discrimination arising from disability is justified if the Respondent can show that the unfavourable treatment is a proportionate means of achieving a legitimate aim. The onus is upon the Respondent to establish justification. The test is objective and is therefore not limited to what the Respondent considered at the time of the treatment. Justification may be established by reasoned and rational judgement and not based simply on subjective impression or stereotyped assumptions (*Chief Constable of West Yorkshire Police and anor v Homer 2009 ICR 223, EAT*).
68. Whilst there is a material overlap between objective justification of indirect discrimination under Section 19 and discrimination arising from disability under Section 15, the former involves consideration of group disadvantage whilst the latter involves consideration of individual unfavourable treatment (*Stott v Ralli Ltd UKEAT/0223/20*).

Legitimate aim

69. A legitimate aim must be legal, should not be discriminatory in itself, and it must represent a real, objective consideration (4.28 EHRC Code). The health, welfare and safety of individuals may constitute a legitimate aim.
70. Reasonable business needs and economic efficiency may be legitimate aims but solely aiming to reduce costs does not (4.29 EHRC Code).

Proportionate means

71. In deciding whether the means adopted to achieve the legitimate aim are proportionate the tribunal must apply an objective test based upon a fair and detailed analysis of the working practices, business considerations and needs of the employer and the discriminatory effect of the means adopted (*Hardy and Hansons plc v Lax 2005 ICR 1565, Court of Appeal*).
72. The tribunal must conduct a balancing exercise between the discriminatory effects of the unfavourable treatment on the Claimant against the reasons for that treatment taking into account all relevant facts (4.30 EHRC Code).
73. Treatment is proportionate if it is an appropriate and necessary means of achieving a legitimate aim. (4.31 EHRC Code). Necessary means reasonably necessary – the employer does not have to demonstrate that no other means

are possible (*Chief Constable of West Yorkshire Police v Homer [2012] UKSC 15, [2012] IRLR 590*). It is relevant to consider whether any less discriminatory measure would have achieved the legitimate aim.

74. Cost can only be taken into account as part of the employer's justification if there are other good reasons for adopting the treatment (4.32 EHRC Code).
75. If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment it will be very difficult for them to show that the treatment was objectively justified (5.21 EHRC Code).

Claimant's Submissions

76. The Claimant's submissions were in summary as follows –
 - a. There may be more than one link between a Claimant's disability and behaviours (*Sheikholeslami v The University of Edinburgh UKEATS/0014/17/JW*)
 - b. The inherent probability of an event should be taken into account when assessing the probability of an event (*H & Ors (minors), Re [1995] UKHL 16*). It is inherently probable that a person with GAD would have a panic attack in an exam and would perform poorly as a consequence.
 - c. The Claimant had previously had a panic attack in an exam. The Claimant gave detailed testimony regarding her panic attack in the SJT.
 - d. Her t-score of 37 on the SJT of was an outlier compared with her past and subsequent performance in the same exam (50, 37 and 51 for SJT in 2019, 2020 and 2021 respectively). Her scores for the RANRA and WG were not outliers compared with her past and subsequent performance in the same exams (56, 62, 66 for RANRA and 66, 61 and 55 for WG in 2019, 2020 and 2021 respectively). This suggests that an issue rose in the SJT rather than with her exam preparation generally.
 - e. There had been no analysis of whether comparisons can be made between the performance of the cohorts from year to year. There is an assumption that these comparisons cannot be made. Comparisons can be made because the proportions who come from medical / non-medical

backgrounds are broadly the same each year. Like school exams (e.g. Highers), performance comparisons can be made across the years.

- f. The Tribunal must balance the needs of the employer against the discriminatory effects on the individual (*Department of Work and Pensions v Boyers UKEAT/0282/19*)
- g. The objective must be sufficiently important, the means chosen must be rationally connected to the objective and must be no more than is necessary to accomplish the objective, and impact must not be disproportionate to the likely benefit of the means (*Akerman- Livingstone v Aster Communities Ltd [2015] UKSC 15*)
- h. The unfavourable treatment was not reasonably necessary and the legitimate aims could have been achieved by other means. The measures adopted are disproportionate if a less restrictive measure could have been adopted which would have attained the objective pursued (*Lumsdon & Ors, R (on the application of) v Legal Services Board [2015] UKSC 41*). *There must be no*
- i. The Claimant ranked 47th in respect of 2018 application and was deemed appointable to a post – she has already proven her competency and that she is not a danger to public health and patient safety.
- j. Transposing the Claimant's score would affect the rankings by only one spot meaning only one other candidate would miss out. Mitigating the effects of the Claimant's disability is more important to perceived fairness to the rest of the cohort otherwise Equalities legislation is undermined.
- k. Ensuring accurate rankings is not sufficiently important given it is affected by geographical allocation
- l. Excluding the Claimant from the Selection Centre stage prevents her from demonstrating her ability relative to that year's cohort and is therefore counter productive
- m. The Claimant demonstrated in respect of her 2018 and her 2020 applications that she was competent in the core skills required and was one of the best and most suitable candidates in that year's cohort because she ranked 47th and then 29th respectively. The Respondent therefore failed to

identify one of the best and most suitable candidates in respect of her 2019 application.

- n. The Respondents could have used the Claimant's Assessment Centre scores from 2019 and progressed her to the 2020 Selection Centre to combined those scores and assess her relative to the cohort.
- o. The Respondents did not propose alternative means
- p. The disadvantage caused to the Claimant was disproportionate to the aims pursued

Respondent's Submissions

77. The Respondent's submissions were in summary as follows –
- a. The first issue is to identify R's aims and determine whether they are legitimate. This is a question of fact. A legitimate aim can encompass a real need on the part of a business. The second issue is whether the treatment is capable of achieving the aims – this is an objective assessment and does not depend upon the reasonableness of the Respondents decision making; the availability of an equally effective but less discriminatory treatment is relevant but not wholly determinative (*Homer*).
 - b. Whilst justification of under Section 19 (indirect discrimination) involves consideration of group disadvantage, justification under Section 15 (discrimination arising) involves consideration of individual unfavourable treatment (*Stott v Ralli Ltd UKEAT/0223/20*).
 - c. The burden of proof is upon the Claimant that she suffered a panic attack. It is not credible that the Claimant suffered a panic attack as a consequence of her GAD in the SJT on 10 January 2020 given that –
 - i. she did not let anyone know either immediately on the day or shortly after the exam (despite the nature of the attack she described, despite having been exhorted to raise any issue and despite the brief window of opportunity of a 'mop up' assessment, despite a prior attack in an undergraduate exam having caused her to drop grades, given the importance of the exam to her career, given the requirement to pass to progress, and given the importance of

achieving a high score which would affect her overall ranking and her ability to secure a place in Scotland).

- ii. When she was advised on 28 January 2020 that she had not achieved the minimum score in 1 or more of the tests, her reply made no reference either to a panic attack or the SJT. Instead she merely stated “[I] have a disability that can affect my performance on exams” and later “My disability can affect performance on any given day , e.g. performing below a minimum threshold on an exam one year while ranking in the 96th percentile another year.” The example that she gave related to the W-GCTAUK exam and not to the SJT exam. In cross the Claimant was unable to give a satisfactory explanation for the failure to simply state that she had a panic attack in the SJT.
- iii. Only when she was provided with on 3 April 2020 a detailed breakdown of her individual exams scores did the Claimant then asserted in her claim form in April 2020 that she experienced heightened anxiety in the SJT which affected her ability to perform to her normal standard. In her impact statement of 27 August 2020 she described this as a panic attack.
- iv. Her description of the panic attack of repeatedly revisiting her answers by not just second guessing but fourth guessing suggested this had slowed her down but the evidence showed she had in fact answered the questions more quickly in 2020 than she had done in 2019 and had more time available at the end
- v. There was no medical evidence that the Claimant suffered panic attacks and the medical evidence showed that her mood was stable and her medication works well for her and that she had not taken medical advice about the panic attack she was said to have suffered
- vi. It cannot be inferred from her lower score in 2020 compared with her higher scores in 2019 and 2021 that she must have had a panic attack which materially affected her performance, because t-scores are a product of the particular test (which varies from year to year), and the particular cohort who sit the SJT (which varies from year to year); in any event the Claimant’s performance varied across all the

tests; she consistently performance lowest on the SJT and only ever exceeded the minimum standard by 4/5 points; any drop in performance is equally explicable by the amount of preparation she did given that she had just had a baby.

- d. The unfavourable treatment (of not being progressed to the Selection Centre and/or selected for a training role) arose because of her scores at the Assessment Centre stage which scores are relied upon as a gateway for progressing to the Selection Centre stage and also as part of the overall ranking. The aim of the Assessment Centre stage is to ensure that those who progressed to the Selection Centre stage and who were potentially eligible for Public Health Speciality Training were at the time of the recruitment process competent in the core skills, were the best and most suitable applicants in that year's cohort, had the greatest likelihood of succeeding both in their training (which is lengthy and costly) and ultimately in their work as Public Health Consultants. The Claimant accepted that these were legitimate aims.
- e. These legitimate aims accord to a real need on the part of the NHS employers because the role of public health consultant is an important, skilled and responsible role which affects public health, patient's safety and people's lives (e.g. Salisbury poisoning and the COVID-19 pandemic), the training is therefore rigorous and demanding, and the training costs are accordingly high (around £300-£400k per trainee).
- f. The means of achieving these aims is achieved by –
 - vii. Setting eligibility requirements for applicants and excluding those who are not eligible
 - viii. Setting 3 tests at the Assessment Centre Stage in critical reasons, numeracy and situational judgment
 - ix. Setting a minimum standard for each test at the Assessment Centre stage by reference to the performance of that year's cohort to assess whether the applicants are competent in the core skills at the time of the recruitment process and excluding those who do not pass.
 - x. Allowing only the top ranking applicants to progress to the Selection Centre Stage (unless eligible under the two ticks scheme)

- xi. Setting a minimum standard at the Selection Centre Stage to assess whether the applicants are competent in the core skills at the time of the recruitment process and excluding those who do not pass.
 - xii. Ranking the applicants based upon an aggregate of their Assessment Centre and Selection Centre scores
 - xiii. Offering the limited training places based upon the highest scores and preferred geographical location. The best applicants in each cohort are therefore identified by using a competitive selection process to score and rank applicants.
- g. The unfavourable treatment of the Claimant arose because under the recruitment process applicants who do not meet the minimum standard for each test at the Assessment Centre stage do not progress to the Selection Centre stage. It is appropriate and reasonably necessary to test and rank the applicants in order to identify applicants who are competent in the core skills at the time of the recruitment process and who are the best and most suitable. Adjustments are made for disabled applicants to the delivery of the tests including holding a mop up Assessment Centre event for those who had an issue on the day and progression under the two ticks scheme to the Selection Centre stage. A greater proportion of disabled applicants secured a post than non-disabled applicants. The recruitment process incorporated ways of reducing, minimizing or avoiding impact on disabled applicants.
- h. The Claimant lost a meaningful chance of an offer of a training place. The Claimant had the opportunity to avoid the impact she asserts by informing the recruitment team either on the day or immediately afterwards and asking to participate in the mop up event. The Claimant could and indeed did apply again the following year.
- i. The Claimant sought to carry forward her Assessment Centre scores from the previous year (or, if there were insufficient places at the Selection Centre stage, using her combined scores from last year). This proposal would not achieve the legitimate aims identified or was not equally effective. The system of identifying the best and most suitable applicants each year depends upon ranking applicants each year based upon their performance in tests which are materially different each year compared with applicants

who are materially different each year. To carry forward her Assessment Centre scores from a previous year would not be comparing like with like and would distort the accuracy of the ranking. The mean raw scores in the SJT in 2019 and 2020 differed by 20 marks reflecting different tests and different cohorts.

Discussion and decision

78. We decided (for the reasons noted in our Observations), that the Claimant did not fail to achieve the minimum standard in the SJ Test in January 2020 because of something arising in consequence of her disability namely having a panic attack during the test. Accordingly her claim for discrimination arising in consequence of disability does not succeed and is dismissed.
79. In recognition of the considerable time and effort spent by the parties on the issue of objective justification we have in any event set out our position in the alternative i.e. if the Claimant had failed to pass the SJ Test because of something arising in consequence of her disability (which we did not find).

Unfavourable treatment

80. The Second Respondent decided not to progress the Claimant to the Selection Centre stage of the recruitment process because she did not achieve the minimum required standard in the SJ Test. This rendered her ineligible for offer of a Public Health Specialty Training place with the Second Respondent. The Respondents accept that this decision amounted to unfavorable treatment. This was a hearing on liability only and for the purposes of considering objective justification we have accepted the Claimant's case at its highest, namely that she suffered financial loss of £94,583, and injury to feelings valued at £15,000, in consequence of that treatment.

Legitimate aim

81. The role of a Public Health Consultant is to promote, protect and improve public health and well being. This is accordingly an important role in society. The training to become a Public Health Consultant is difficult, demanding and expensive. The Respondents' aim is to select applicants who are competent in the core skills for the role at the time and are the best and most suitable

candidates in that year's cohort to complete the training and to perform the role. This aim was considered objectively to correspond to a real need and was therefore accepted as legitimate.

Proportionate means

82. A national recruitment process was devised in order to determine who would be offered a place on the training scheme. The recruitment process comprised an initial eligibility screening of the applications, an Assessment Centre stage, and a Selection Centre stage, each of which were closely regulated and thorough. The screening and assessment at each of these stages was intended to assess the essential competencies identified in the person specification for the role. Progression and selection in the recruitment process depended upon meeting the minimum standard at each stage and also being the highest ranking applicant. The recruitment process pursued the aim of selecting applicants who are competent in the core skills at the time and are the best and most suitable candidates in that year's cohort to complete the training and to perform the role.
83. The minimum standard at each stage of the recruitment process is a relative standard and is set and assessed each year with reference to the performance of the cohort that year. This is in fulfilment of the Respondents' aim to select candidates who are competent in the core skills and are the best and most suitable candidates. It is therefore possible for an applicant to meet the minimum standard in one year and fail to meet it in another year. The Claimant met the minimum standard in the previous year (and was deemed appointable that year) but failed to meet that standard in the following year (and was deemed not appointable that year).
84. Applicants whose performance in a test is affected by their disability have the opportunity to sit a further assessment. The Claimant asserted that her CBT prevented recourse to that opportunity. The Claimant asserted that the Second Respondent should have instead used her Assessment Centre scores from the previous year which would have achieved the legitimate aim but avoided her unfavourable treatment.
85. It is not possible for a meaningful comparison to be made between an applicant's score in one year and a score in another year because the score in each year is

a product of different variables: the content of test (the majority of which changes each year); and the performance of the cohort (the majority of the cohort changes each year). It is not possible to transpose scores accurately because a meaningful comparison cannot be made. Use of the Claimant's previous scores would not have assessed her competence that year relative to the performance of the cohort and would have distorted the accuracy of the rankings. The alternative means proposed by the Claimant would not therefore have achieved the legitimate aim of selecting applicants who are competent in the core skills for the role at the time and are the best and most suitable candidates in that cohort.

86. Balancing the importance of the aims, the means adopted in fulfilment, and the significant impact on the Claimant, the treatment of the Claimant was considered to be proportionate.

87. Accordingly the treatment of the Claimant was a proportionate means of achieving a legitimate aim.

Employment Judge: Michelle Sutherland
Date of Judgment: 10 February 2022
Entered in register: 10 February 2022
and copied to parties