Neutral Citation Number: [2024] EAT 37

Case No: EA-2021-001110-NLD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 March 2024

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

RENTOKIL INITIAL UK LTD **Appellant**

- and -

MR M MILLER **Respondent**

- -
- -

Mr E McFarlane, (Representative, Peninsula Business Services Limited) for the **Appellant**
Mr O Lawrence (instructed by Thompsons Solicitors LLP) for the **Respondent**

Hearing date: 16 January 2024

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JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION

Where a disability places an employee at the substantial disadvantage that they cannot continue in their present job, and are at risk of imminent dismissal, there is no rule of law that it cannot be a reasonable adjustment to give them a trial period in a new role. Nor is there any rule of law that it must be certain, or likely to some particular degree, that the employee will be successful in a trial.

Any change which would or might avoid the substantial disadvantage caused by the PCP is in principle capable of amounting to a relevant step. The only question for the tribunal is whether it was reasonable for it to be taken. Unlike a process of consultation or medical investigation, neither of which itself involves any change in the employee's job, terms or working conditions, putting the employee into a different role on a trial basis involves a substantive change. It may, in the given case, be found to affect the risk of dismissal to a sufficient degree to make it a reasonable step. *Obiter* observations in **Environment Agency v Rowan** [2008] ICR 218 not followed.

If the PCP and the substantial disadvantage are shown, and the knowledge requirements are met, and the employee identifies a role that the tribunal finds could potentially have been considered appropriate and suitable, then the burden may pass to the employer to show that it was not reasonable to have put the employee into that role, or to have done so at least on a trial basis.

Whether the role was in principle suitable, whether the employee met essential requirements for it, and the prospects of the employee successfully passing a trial period (judged as at the time when the decision fell to be taken), are ordinarily relevant considerations. The employer's assessment of these matters, and the evidence produced to the tribunal by the employer to support its case, should be carefully considered and weighed by the tribunal. But the employer's assessment is not necessarily to be treated as decisive, as the question is an objective one for the appreciation of the tribunal.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. The claimant in the employment tribunal was employed by the respondent as a pest control technician, described as a "field role", from April 2016. In March 2017 he was diagnosed with multiple sclerosis. Over the succeeding months various adjustments and modifications to his working arrangements and terms and conditions were made, with a view to mitigating the ongoing impacts of the claimant's disability on his ability to continue in his current role.

2. However, the point reached by the beginning of 2019 was that the respondent had now concluded that there was no viable way in which the claimant could continue in that role, and the possibilities for him moving into a different role began to be explored. In February 2019 the claimant applied for a service administrator role. However, following a process involving an interview and written tests, the decision was taken not to offer the claimant that role. There followed a capability meeting on 13 March 2019 at which it was concluded that there were no adjustments that could be made that would enable the claimant to remain in his existing field role. As he had been unsuccessful in his application for the service administrator role, and there was no other suitable alternative role for him, the claimant was dismissed at the end of that meeting. His internal appeal was unsuccessful.

3. The claimant complained to the employment tribunal of failures to comply with the duty of reasonable adjustment, discrimination arising from disability (section 15 **Equality Act 2010**) in respect of the dismissal, and unfair dismissal.

4. There was a full merits hearing held by CVP at Reading before Employment Judge Hawksworth, Mr A Kapur and Ms H T Edwards. In a reserved decision the tribunal upheld the reasonable adjustment complaint in respect of the service administrator role, specifically on the basis that it would have been a reasonable adjustment to transfer the claimant into that role for a trial period. The section 15 complaint succeeded on the basis that the dismissal was because of something arising from the disability, and, in view of the conclusion on the reasonable adjustment claim, dismissal was

not justified. The outcome of the reasonable adjustment claim also led to the conclusion that the dismissal was unfair. The tribunal addressed remedy in the same decision, making financial awards.

5. This is the respondent's appeal. The substantive challenges are to the conclusion that it would have been a reasonable adjustment to offer the claimant a trial period in the service administrator role. But Mr McFarlane, who appeared for the respondent, confirmed in the course of oral submissions that it was his position that, if the appeal succeeded, I should also quash the tribunal's decisions on justification for the purposes of the section 15 claim, and that the dismissal was unfair.

The Facts and the Tribunal's Decision

6. The tribunal made findings in full detail as to the chronology of events from the claimant first being diagnosed with multiple sclerosis, through to the end of 2018 when he was sent home on full pay, while future options were further considered. It is not necessary for the purposes of this appeal to say very much about that. In summary, the claimant's existing field role ordinarily involved him working at heights with ladders, and was generally physically demanding. Because of the unfolding impact of, or risks posed by, his disability, over time, and notwithstanding changes that were made, keeping him in the role became increasingly problematic. At a certain point the respondent concluded that there was no viable way in which the risks and difficulties could be satisfactorily mitigated.

7. I turn to what then happened in respect of the claimant's application for the service administrator role or roles. Mr Willis, the Senior Local Operations Manager with responsibility for the claimant, sent his CV to the Head of Operational Support, who was the recruiting manager in respect of the role, and who decided whether or not to offer it to the claimant. I interpose that Mr Willis was a witness before the tribunal, but the tribunal noted that this recruiting manager was not.

8. The tribunal continued:

> **"52. On 25 February 2019 the claimant had an interview for the service administrator role. Mr Willis thought that the claimant was interviewed before other candidates because Mr Willis had been made aware of the vacancy before it was advertised more widely. He was not sure whether the claimant was interviewed on a different day to**

> **other candidates, although he thought he could have been. However, he was not sure how the process was handled and said that other people were interviewed around the same time.**
>
> **53. The interview process included written tests on verbal usage and maths as well as a standard interview. The claimant scored 16 correct answers out of 30 in the verbal usage and 7 correct answers out of 30 in the maths test (page 394). All candidates for jobs with the respondent have to take maths and spelling assessments. There were no documents before us as to whether the claimant took the same or similar assessments when he first applied to join the respondent. Mr Green did not think they were in place when the claimant joined, but was not sure.**
>
> **54. The claimant was interviewed by the recruiting manager, the Head of Operational Support. He said that the claimant had irrelevant skills and experience for the role (page 394). He noted that the claimant did not have much experience of using the spreadsheet programme Excel (page 307).**
>
> **55. The recruiting manager decided after interviewing the claimant that the claimant could not be offered the role (page 306). Neither Mr Willis (nor Mr Green, who considered the claimant's appeal) had the authority to move the claimant to the role, it was entirely the decision of the Head of Operational Support whether he would be offered the role or not. The respondent did not consider offering the claimant the position on a trial basis or providing him with any re-training."**

9. As I have described, there followed the capability meeting, which was with Mr Willis, and at which he took the decision to dismiss. The internal appeal was heard by Michael Green, Area Operations Manager, who upheld the dismissal. He was also a witness. The tribunal said:

> **"59. Mr Green wrote a detailed appeal outcome letter to the claimant on 31 May 2019 (page 389). The dismissal was upheld. Mr Green felt that the company had explained why the claimant was not successful in his application for the service administrator role, namely the poor test results and the recruiting manager's view from the interview that the claimant had irrelevant skills and experience for the role. In his evidence to us, Mr Green did not know whether the claimant was considered before or at the same time as other candidates."**

10. The tribunal's self-direction as to the law set out the relevant requirement falling within section 20 **Equality Act 2010** in this case, which was at section 20(3), as follows.

> **"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."**

11. The self-direction also included the following;

> **"64. The leading authority on reasonable adjustments and redeployment, *Archibald v Fife Council* [2004] ICR 954, concerns a claim brought by a local authority employee who had become unable to carry out manual duties owing to the onset of a disability**

> **but who was unable to secure an office-based role through the council's interview processes. Explaining the duty to make reasonable adjustments, Lady Hale said in paragraphs 67 to 70:**
>
> > **'… to the extent that the duty to make reasonable adjustments requires it, the employer is not only permitted but obliged to treat a disabled person more favourably than others.**
> >
> > **….[the duty] is capable of including the step of transferring a disabled person from a post she can no longer do to a post which she can do, provided that this is a reasonable step for the employer to have to take.**
> >
> > **This will depend upon all the circumstances of the case… There is no law against discriminating against people with a background in manual work, but it might be reasonable for an employer to have to take that difficulty into account when considering the transfer of a disabled worker who could no longer do that type of work. I only say "might" because it depends upon all the circumstances of the case...' "**

12. The self-direction on the law also included the following:

> **"67. Sections 136(2) and (3) provide for a shifting 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) This does not apply if A shows that A did not contravene the provision.'**
>
> **68. This means that if there are facts from which the tribunal could properly and fairly conclude that there has been unlawful discrimination, the burden of proof shifts to the respondent.**
>
> **69. In a complaint of failure to make reasonable adjustments, for the burden to shift, the claimant must demonstrate that there is a PCP causing a substantial disadvantage and evidence of some apparently reasonable adjustment that could have been made (*Project Management Institute v Latif* 2007 IRLR 579, EAT).**
>
> **70. If the burden shifts to the respondent, the respondent must then provide an "adequate" explanation, which proves on the balance of probabilities that the respondent did not fail to make reasonable adjustments.**

13. The first of two complaints of failure to comply with the duty of reasonable adjustment, relating to the hours of the claimant's field officer role, failed. The second PCP was the requirement that field staff work in their substantive roles. That PCP was applied. The tribunal continued:

> **"85. The PCP put the claimant at a particular disadvantage in comparison to people who are not disabled because:**
> **85.1 he was permanently restricted from working at height because of the risk of falling, and working at height made up around 40% of his role;**
> **85.2 his MS symptoms made him relatively slower at executing his tasks at work**

> **relative to an unaffected peer;**
> **85.3 he was therefore at risk of dismissal from his substantive role."**

14. The tribunal continued at [87] that the respondent knew of the disadvantage, so it was under a duty "to take reasonable steps to avoid the substantial disadvantage … which arose from the PCP." I will set out the next part of the tribunal's reasons in full.

> **"88. The claimant says the respondent could have made an adjustment to allow him to work in an office based role, such as the service administrator role. This adjustment would have removed the disadvantage to the claimant of facing dismissal because of being unable to perform his technician role.**
>
> **89. Transferring an employee to another role when they become unable to perform their role is an example of a reasonable adjustment included in the EHRC Code of Practice. Here, there were vacancies for two service administrator roles which may have been suitable for the claimant. We conclude that the burden shifts to the respondent at this stage to satisfy us that the decision not to transfer the claimant to the service administrator role was not a failure to make a reasonable adjustment.**
>
> **90. We have concluded that the respondent has not satisfied us that it was not reasonable to have offered the claimant the service administrator role, for the following reasons:**
>
> **90.1 By February 2019, when the claimant was being considered for the alternative role, it was clear that because of his MS he was permanently restricted from working at heights and that a further reduction in his workload would be required. The health and safety concerns had meant that he had not worked alone in his role since 12 November 2018 and he had not been at work at all since 10 December 2018. It was clear that it was very unlikely that he would be able to remain in his substantive role and therefore dismissal was a real likelihood if another role could not be found;**
> **90.2 The service administrator role was a more junior role than the claimant's technician role;**
> **90.3 We do not agree that the claimant had limited relevant experience, because the service administrator role was a support role to the role the claimant had been performing for over two and a half years, and knowledge of the substantive role would be expected to be helpful to someone working in a position supporting that role;**
> **90.4 the claimant's technician role included a number of administrative functions such as report writing, record keeping and stock check functions which would also be relevant experience for the support role;**
> **90.5 The claimant's lack of experience with the Excel spreadsheet programme could have been addressed by providing him with training on Excel;**
> **90.6 The claimant performed poorly on the maths and verbal written tests, however the respondent did not provide us with cogent evidence as to whether or not he had passed the same or similar tests at the time he successfully applied to be a technician (and that role included functions which could have been expected to require some verbal and maths skills);**
>
> **90.7 We accept that the claimant's poor performance on the written tests may have given the respondent some concerns about whether the claimant would be able to perform the role. However, these concerns could have been met by offering the claimant a trial period.**
>
> **91. We accept that as part of its consideration of whether the claimant should have**

> **been offered the alternative role as a reasonable adjustment, the respondent would want to consider whether the claimant could do the role. However, the procedure in this case seemed to us to go beyond that and to be more like a process to assess whether the claimant should be appointed to the role.**
>
> **92. Mr Willis thought the claimant was given priority consideration for the service administrator role. However, we were not provided with cogent evidence of this. There was no written evidence of this. The recruiting manager was not a witness before us. The respondent's witnesses were unsure. From the point at which the claimant applied for the alternative role, there was no cogent evidence before us that he was considered any differently to any other candidate for the role. In other words, there was no cogent evidence that the respondent considered the role as a reasonable adjustment, rather the recruiting manager considering whether he wanted to appoint the claimant to the role.**
>
> **93. There was no evidence that the respondent considered whether, because of his disability, the claimant's application for the service administrator should have been treated more favourably than other candidates, and the claimant offered a trial period in the role rather than the decision being made on the basis of the interview and written tests. The decision was taken by a manager who had not managed the claimant and was making the decision on the basis of the claimant's performance in interview and written tests only rather than knowledge of his performance in his substantive role. Mr Willis, who had been dealing with the claimant's adjustments, did not feel he had the authority to move the claimant into the role or offer a trial without any competitive interview. Mr Green, who heard the claimant's appeal, also felt that it was not his decision.**
>
> **94. We conclude that it would have been a reasonable adjustment to transfer the claimant to the service administrator role for a trial period. There was a reasonable chance that the claimant would have been able to perform better in the role than his interview and tests suggested. A reasonable trial period would have been 4 weeks. The claimant was entitled to be treated more favourably than other candidates in respect of the service administrator position. There was no evidence that he was. Given the nature of the role which was a more junior support role for the claimant's substantive role, and given the administrative tasks which the claimant was already required to perform in his substantive role, the service administrator role would on the face of it have been suitable for the claimant. Although he performed poorly in the interview and written tests, this could have been addressed by allowing the claimant a trial period in the role. The failure to offer a trial period in this role meant that dismissal was almost inevitable, because there were no other suitable roles available, and the claimant was unable to perform his substantive role.**
>
> **95. The complaint of failure to make reasonable adjustments therefore succeeds in relation to the second PCP. The respondent's failure to offer a trial period in the service administrator role was a failure to make reasonable adjustments for the claimant."**

15. The tribunal went on to deal with remedy, including a finding that, had the claimant been offered a trial period in the service administrator role, there was a 50% chance that it would have succeeded, and the role would then have been made permanent.

The Grounds of Appeal

16. There are four grounds of appeal. The headline challenges mounted by them are as follows.

17. Ground 1 contends that the tribunal erred by regarding the giving of a trial period in a new role as a reasonable adjustment. It is contended that it should have regarded a trial period as a process or tool of investigation, but not as something capable in law of itself amounting to an adjustment. Ground 2 contends that the tribunal erred at [89] in concluding that the existence of vacancies for two service administrator roles which may have been suitable for the claimant caused the burden of proof to shift to the respondent to show that it had not failed to make reasonable adjustments. Ground 3 contends that where an employer genuinely and reasonably concludes that an employee is not qualified and suitable for a role, it cannot be a reasonable adjustment to appoint them to it, and that the tribunal erred in this respect, given its findings at [90.7] about the respondent's concerns in that regard. Ground 4 contends that the tribunal erred at [92] and [93] in focussing upon what was going on in the mind of the relevant decision-maker, as this is irrelevant to the test of whether an adjustment should reasonably have been made, which is a purely objective question.

Arguments, Discussion, Conclusions

Ground 1

18. As always, the starting point is the words of the statute. Where the other elements of section 20(3) (and the knowledge requirements in the relevant schedule) are, as here, found to be fulfilled, then the duty on the respondent is to take such steps as it is reasonable to have to take "to avoid" the substantial disadvantage at which the PCP puts the disabled claimant. The immediate predecessor of this provision was section 4A **Disability Discrimination Act 1995** which referred to a duty on an employer to take such steps as it is reasonable for him to have to take in order to prevent the PCP having the effect of placing the employee at the disadvantage in question.

19. In its much-cited decision in **Tarbuck v Sainsburys Supermarkets Limited** [2006] IRLR 664 the EAT (Elias P and members) held that a failure by the employer to consult the employee about reasonable adjustments could not, in itself, be a breach of the duty. At [71] it said:

> **"The only question is, objectively, whether the employer has complied with his obligations or not. That seems to us to be entirely in accordance with the decision of the House of Lords in *Archibald v Fife Council* [2004] ICR 954. If he does what is required of him, then the fact that he failed to consult about it or did not know that the obligation existed is irrelevant. It may be an entirely fortuitous and unconsidered compliance: but that is enough. Conversely, if he fails to do what is reasonably required, it avails him nothing that he has consulted the employee."**

20. In **Spence v Intype Libra Limited**, UKEAT/0617/06, 27 April 2007, the EAT (Elias P and members) similarly held that obtaining a medical report is not a reasonable adjustment. It said [43]:

> **"We accept that the concept of reasonable adjustment is a broad one, but we do not consider that this assists the argument. The nature of the reasonable steps envisaged in s4(A) is that they will mitigate or prevent the disadvantages which a disabled person would otherwise suffer as a consequence of the application of some provision, criterion or practice. … the duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise. The carrying out of an assessment or the obtaining of a medical report does not of itself mitigate or prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing."**

21. In **Smith v Churchill Stairlifts plc** [2005] EWCA Civ 1220; [2006] ICR 524 an offer to the claimant of a travelling sales job was withdrawn because of a concern that, on account of a physical disability, he would be unable to carry a heavy sample of the product, a full-size radiator cabinet. The matter gave rise to a number of issues of law, and took a number or twists and turns in the employment tribunal, EAT and Court of Appeal. For present purposes, what needs to be noted is that at the time the **1995 Act** provided for a duty of reasonable adjustment, in section 6, and a concept of discrimination, in section 5(1), both subject to a justification defence, and inter-related.

22. The tribunal had decided that, for the purposes of the duty of reasonable adjustment, there was no substantial disadvantage. But it went on to hold, that, if there had been, then the respondent should have made the reasonable adjustment of allowing a trial period for the claimant to try selling by some means not involving carrying the cabinet. But it also concluded for the purposes of the section 5(1) complaint, that withdrawing the offer of the permanent position was justified.

23. The Court of Appeal decided that, comparing him with the correct comparator group, the claimant *was* placed a substantial disadvantage by the requirement to carry a cabinet, so that the duty

of reasonable adjustment did arise; and that there was no incompatibility between the tribunal's finding of justification in relation to the section 5(1) complaint, and its conclusion that, if the duty of reasonable adjustment was engaged, then it would have been a reasonable adjustment to offer the claimant a trial period using a different selling method. Accordingly, it upheld the claim.

24. In **The Environment Agency v Rowan** [2008] ICR 218 the employee, who worked as an office-based clerk/typist, was disabled by a back condition. Following her resignation, her complaints included failure to comply with the duty of reasonable adjustment. Among other things, she contended that the employer ought reasonably to have made the adjustment of permitting her to work from home or at least permitting an initial trial of home-working for one or two months. The tribunal upheld the claim by reference to the failure to afford the claimant a trial period of home-working.

25. The EAT accepted that it could be inferred that the tribunal had found that the employer had applied a PCP of requiring the employee to work in the office. But it upheld the appeal because the tribunal had failed to make any, or any sufficient, findings, about how that placed the claimant at a substantial disadvantage compared to colleagues who did not have her disability, nor, if it did, as to how the proposed adjustment of a trial period of home working would have prevented or alleviated that disadvantage.

26. Further on, at [61], the EAT added these observations:

> "**We do not decide the question as to whether the trial period of home-working was capable of constituting a reasonable adjustment because for some reason the matter was not fully argued. However, we have considerable difficulty in seeing how an investigation or trial period as such can be regarded as a reasonable adjustment; we do not need to decide the point but express our doubts. A trial period is a procedure that an employer should sensibly adopt in an appropriate case but does not appear to be an adjustment as such. It is not a procedure specifically referred to in S4A or S18B(2). As has been observed in other cases what S4(A) and S18D(2) envisage is that steps will be taken which will have some practical consequence of preventing or mitigating the difficulties faced by a disabled person at work. It is not concerned with the process of determining what steps should be taken; It is prudent for employers to adopt a trial period in an appropriate case to see whether home-working for example is a reasonable adjustment. An employer who has failed to investigate the possibility of home-working by a trial period may find it difficult to establish that home-working was not a reasonable adjustment. We consider that a trial period is akin to a consultation, or the obtaining of medical and other specialist reports; these do not of**

> **themselves mitigate or prevent or shield the employee from anything. They serve to better inform the employer as to what steps, if any, will have that effect, but of themselves they achieve nothing. In circumstances such as the present case, where there is an issue as to whether home-working would be a reasonable adjustment a trial period of home-working is a tool which may enable the parties to determine whether home-working is in fact capable of being a reasonable adjustment that would, in this case, prevent or mitigate the difficulties said to be faced by the claimant when working in the Respondent's office."**

27. I note that section 18B(2) of the **1995 Act** at that time contained a non-exhaustive list of examples of types of steps that might, in a given case, be considered to amount to reasonable adjustments. There is no counterpart in the **2010 Act**, but something similar is now to be found in the *EHRC Code of Practice on Employment* (2011).

28. This ground relies particularly on **Rowan**. Mr McFarlane accepted that it does not decide the point, but contended that the analysis it puts forward is sound and applicable to the present case. He argued that a trial period in the service administrator role would not prevent the substantial disadvantage. Only permanent appointment to a different role (which this tribunal did not find was a reasonable adjustment) could have done that. There is, he submitted, necessarily an element of permanence or finality in terms of the outcome that a reasonable adjustment is required to achieve. A trial period would not have removed the risk of the claimant being dismissed. **Smith**, he submitted, is not binding authority that offering a trial period can be a reasonable adjustment. In any case, it was distinguished by being about adjustments in the context of a job application process.

29. Mr Lawrence submitted that **Smith** (which was not cited in **Rowan**) is binding Court of Appeal authority to the effect that a trial period can, in law, be a reasonable adjustment. That was a necessary premise of the outcome, as the tribunal's decision, that the employer should reasonably have made such an adjustment, was upheld by the Court of Appeal. Further, in the present case, unlike in **Rowan**, the tribunal had followed the structured approach, and made a finding that the PCP did place the claimant at a substantial disadvantage, being that he was at imminent risk of dismissal.

30. Further, the present tribunal properly found at the end of [94] that the failure to offer a trial

period in the service administrator role "meant that dismissal was almost inevitable". By contrast, transferring the claimant to the service administrator role on a trial basis would have reduced that risk because, as the tribunal found, when discussing the section 15 claim at [101], this "would have meant the claimant would not have been dismissed when he was, and he would have the opportunity of demonstrating that he could perform the role on a permanent basis." Making the adjustment would have had the substantive effect of reducing the risk of the claimant being dismissed. The law does not require the adjustment sought to be guaranteed to eliminate the substantial disadvantage. The statute now uses the expression "avoid the disadvantage". Even when the word used was "prevent" the EAT in **Rowan** spoke of whether homeworking would "prevent or mitigate" the difficulties, and in **Romec Limited v Rudham** UKEAT/0069/07 (cited in **Royal Bank of Scotland v Ashton** [2011] ICR 632 at [23]) the EAT indicated that if there was a "real prospect" of a rehabilitation programme resulting in a return to work, it might be reasonable to expect the employer to take that course.

31. My conclusions on this ground are as follows.

32. First, the wording of section 20(3) refers simply to "such steps as it is reasonable to have to take to avoid the disadvantage." The statute does not attempt to restrict or sub-categorise what form such steps might take in the given case. Further, it is well-established that the proposed step does not have to be guaranteed to work. Apart from the discussion already mentioned, in EAT cases such as **Romec** and **Ashton**, I note also that in **Griffiths v Secretary of State for Work and Pensions** [2015] EWCA Civ 1265; [2017] ICR 160 at [65] the Court of Appeal said that any change "which would or might remove the substantial disadvantage caused by the PCP is in principle capable of amounting to a relevant step. The only question is whether it is reasonable for it to be taken."

33. Secondly, as **Spence** and **Tarbuck** discuss, engaging in consultation or requesting a medical report are not, as such, steps of that type, because taking either of those steps would not *in itself* have any impact on the substantial disadvantage, though it might lead to other steps being taken that do.

34. Thirdly, as to a trial period in a new role, I would not have been content to rest my answer on **Smith**, as such, because, although a number of difficult points of law were at issue in that case, there does not appear to have been a live issue as to whether, as a matter of law, such a trial period could have been a reasonable adjustment, and so there is no consideration of the point by the Court of Appeal. That said, there is certainly nothing in that decision to indicate that, for some reason, it cannot be. Conversely, there is no dispute that what the EAT said in **Rowan** on the subject does *not* bind me. It was not necessary for it to decide the point, and it said in terms that it was *not* doing so.

35. In my judgment, and in respectful disagreement with that passage in **Rowan**, offering an employee a trial period in a different role, in the way that the tribunal in the present case considered the respondent ought reasonably to have done, is not, for the purposes of this statutory test, analogous to consulting the employee or seeking a medical report. Neither of those things, in or of themselves, involves any change to an employee's substantive terms, working conditions or arrangements. By contrast, putting an employee into a new role on a trial basis does. It effects a substantive change in what they are doing, though it remains to be seen how it will work out, and how long it will last.

36. Further, where, as in this case, the substantial disadvantage is that the claimant is at almost certain risk of dismissal, it is then open to the tribunal to consider whether, in the given case, the proposed trial period in another particular role would remove the risk of dismissal, or had sufficient prospects of averting dismissal, such that it was reasonable for the employer to be expected to take that step. Thus, I conclude that there is no rule or principle of law that a trial period in a new role cannot, in law, be a reasonable adjustment. Conversely, a tribunal is not bound in every case where the employee was facing dismissal, to conclude that the employer ought to have given them a trial period in a particular other role. Whether or not it ought reasonably to have done so is a matter for the appreciation of the tribunal, taking account of all the circumstances, including the suitability of the role, and the prospects of the employee succeeding at the role and passing the trial.

37. So, in the present case, putting the claimant into the service administrator role on a trial basis

would have not merely involved postponing the date of his inevitable dismissal by four weeks. It would not be just a short stay of execution, but held out the prospect of the axe being lifted entirely. The tribunal plainly considered that it had a real prospect of avoiding the disadvantage altogether by the claimant being confirmed in the new role at the end of the trial period – a chance which the tribunal when considering remedy put at 50%. I conclude that the tribunal did not err in holding, as such, that offering the claimant a trial period in the service administrator role was a reasonable step for the respondent to have to take to avoid the disadvantage in this case, on the basis that a trial period could not ever in law be a reasonable adjustment. That is not the law. Ground 1 therefore fails.

Ground 2

38. I start by noting that section 136 of the **2010 Act** undoubtedly applies to complaints of failure to comply with the duty of reasonable adjustment. As section 136(1) states, it applies to *any* proceedings relating to a contravention of the **2010 Act**. Mr McFarlane however contended that the tribunal erred by holding that the burden shifted to the respondent by virtue of vacancies (for the service administrator role – it appears there were two) which might be suitable for the claimant having been identified, and then putting the onus on the respondent to show that they were not suitable. He submitted that this wrongly put the burden on the respondent to prove a negative.

39. Mr McFarlane referred to the following authorities.

40. In **Project Management Institute v Latif** [2007] IRLR 579 the EAT said this

> **"53. We agree with Ms Clement. It seems to us that by the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative; that is what would be required if a respondent had to show that there is no adjustment that could reasonably be made. Mr Epstein is right to say that the respondent is in the best position to say whether any apparently reasonable amendment is in fact reasonable given his own particular circumstances. That is why the burden is reversed once a potentially reasonable amendment has been identified.**
>
> **54. In our opinion the paragraph in the Code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could**

> **properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made.**
>
> **55. We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not."**

41. In **Jennings v Barts and the London NHS Trust** the EAT noted at [44] that the employment tribunal had postulated at [180] of its decision that **Latif** "states that there is a duty on a claimant employee to specify the reasonable adjustments in the Tribunal proceedings, as opposed to in the workplace. The employee needs to raise at least a *prima facie* case as to show the Respondent has failed to comply with some identified reasonable adjustment." The EAT commented, at [92]:

> "**We have been troubled by the penultimate sentence of paragraph 180. It does not seem to us that any reading of the judgment of the EAT in Project Management Institute v Latif justifies the proposition that the Claimant "needs to raise at least a *prime facie* case as to how the respondent has failed to comply with some identified reasonable adjustment." The Employment Tribunal was clearly right to say that the Claimant had not done this. We do not think that he was obliged to do so; what any Claimant has to do, in our judgment, is to raise the issue as to whether a specific adjustment should have been made; he or she can, if they wish to do so, given evidence as to its practicability, its economic impact or, even, as to its reasonableness. So, too, of course, can the Respondent. On that material the Employment Tribunal must then decide whether or not that was a reasonable adjustment."**

42. I was also referred to a passage in **Efobi v Royal Mail Group** [2021] UKSC 33; [2021] ICR 1263. The contention for the claimant in that case was that the change in wording from the burden of proof provisions of the predecessor legislation, to that found in section 136 of the **2010 Act**, signified that there was no longer an *initial* burden of proof on a claimant at all. The Supreme Court rejected that proposition. At [29] Lord Leggatt JSC, with whom the other Justices agreed, held that under ordinary common law principles, the burden lies on a claimant to prove, to the civil standard, the facts relied upon by him for the purposes of section 136(2). He continued:

> **"30. As counsel for the claimant properly accepted when questioned on this point, it follows from the application of this basic rule of evidence that an employment tribunal may only find that "there are facts" for the purpose of section 136(2) of the 2010 Act if the tribunal concludes that it is more likely than not that the relevant assertions are true. This means that the claimant has the burden of proving, on the balance of probabilities, those matters which he or she wishes the tribunal to find as facts from which the inference could properly be drawn (in the absence of any**

> **other explanation) that an unlawful act was committed. This is not the whole picture since, as discussed, along with those facts which the claimant proves, the tribunal must also take account of any facts proved by the respondent which would prevent the necessary inference from being drawn. But that does not alter the position that, under section 136(2) of the 2010 Act just as under the old provisions, the initial burden of proof is on the claimant to prove facts which are sufficient to shift the burden of proof to the respondent.**
>
> **31. Counsel for the claimant sought to support the submission that the burden on the claimant to prove facts at the first stage of the analysis has been replaced by a "neutral burden" by drawing an analogy with the law of unfair dismissal. In unfair dismissal cases the burden lies on the claimant to prove that he or she was dismissed from employment and then on the employer to show what the reason for the dismissal was and that it was a potentially fair reason. Whether the dismissal was fair or unfair depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating the reason established by the employer as a sufficient reason for dismissing the employee: see section 98(4)(a) of the Employment Rights Act 1996. At this final stage there is no burden on either party. The determination is simply one for the tribunal to make "in accordance with equity and the substantial merits of the case": see section 98(4)(b).**
>
> **32. I do not think that this comparison assists the claimant. Deciding whether a dismissal was fair or unfair is not a fact-finding exercise. It is a purely evaluative assessment made after all the relevant facts have been found. If there is an analogy with section 136(2) of the 2010 Act, it is with the determination which the tribunal is required to make as to whether or not it can conclude from the facts found that, in the absence of any other explanation, an unlawful act was committed. That determination involves an exercise of evaluation which - like section 98(4) of the Employment Rights Act 1996 - is neutral in that the legislation does not impose on either party a burden of satisfying the tribunal that one or other conclusion should be drawn. Section 136(2) of the 2010 Act is no different in this respect, however, from the old provisions, which also did not impose any such burden of persuasion on either party."**

43. What **Latif** means is that the burden is on the employee, initially, to show (if disputed) that the PCP was applied and that it placed the employee at the substantial disadvantage asserted. They also need to put forward and identify some at least potentially or apparently reasonable adjustment which could be made. But, if they do, *then* the burden may pass to the employer to show that it would not have been reasonable to expect them to make that adjustment. I do not agree with Mr McFarlane that **Jennings** shows that the burden is neutral at that point. The EAT was just making the point that, once the burden has passed, the employee does not have to adduce further evidence, though they *may* do so; and the tribunal will take account of all the evidence that is relevant to the point.

44. Nor do I agree with Mr McFarlane that what was said at [32] of **Efobi** assists his case on the

law. That paragraph reaffirmed that the burden is on a claimant to show the facts relied upon by him at the section 136(2) stage. The further point made there is that the further *evaluative* exercise as to whether those facts are ones from which the tribunal could infer a contravention, is one that falls to the tribunal, on its overall appreciation of the facts relied upon and shown, without either party bearing any particular burden in respect of that evaluative process. But, as Mr Lawrence pointed out, **Efobi** is all about these elements of section 136(2). There is nothing in it to indicate that, at the section 136(3) stage, if reached, the burden does *not* fall on the respondent to show that the contravention did not occur. To the contrary, the statute unambiguously provides that it does.

45. In the present case the tribunal properly concluded that the claimant had shown that the PCP was applied, and the substantial disadvantage at which he was put. He had also identified the particular adjustment which he contended should have been made, namely to put him in to the service administrator role at least for a trial period. The tribunal plainly considered that this was a potential reasonable adjustment for the respondent to be expected to make. It therefore was entitled to take the view that this was sufficient to pass the burden to the respondent to show why it should not be reasonably expected to have given the claimant at least a trial period. Ground 2 therefore fails.

Ground 3

46. This ground contends that the tribunal erred because, where an employer genuinely and reasonably concludes that an employee is not qualified or suitable for a role, it cannot be a reasonable adjustment to require the employer to appoint them to it. **Wade v Sheffield Hallam University** UKEAT/0194/12 is cited in the ground, although Mr McFarlane acknowledged in his submissions that that authority does not in fact establish any rule of law.

47. The ground relies upon what the present tribunal said at [90.7] about the respondent's concerns, in light of the claimant's poor performance in the written tests, about his ability to perform in the service administrator role. Mr McFarlane submitted that the tribunal was asking the respondent to disapply essential criteria for the role by disregarding the results of those tests. While **Archibald**

v Fife Council [2004] UKHL 32; [2004] ICR 954 makes clear that putting the employee into another role *might* be a reasonable adjustment in a given case, it depends on the circumstances of the case; and, he submitted, it cannot be reasonable to expect an employer to put an employee into a role regardless of their qualification for it. In this case the tribunal wrongly disregarded the respondent's view of that, and, at [91], wrongly criticised the process that it had followed.

48. Mr Lawrence submitted that the essential point of law is that whether an adjustment ought reasonably to be made is an objective question for the tribunal, which is not bound to agree with, or defer to, the employer's view. In this case the tribunal was entitled to disagree with the respondent that the claimant's performance in the written tests ruled him out for the role, and to consider that a trial period would have been a reasonable way of testing the respondent's concerns.

49. My conclusions on this ground follow.

50. First, in every case, whether the employer ought reasonably to have put the employee into a given role, whether on a trial basis or not, is an objective question for the appreciation of the tribunal based on the facts found by it, drawing upon all of the evidence presented to it. It is not bound to defer to the view of either the employer or the employee.

51. Secondly, that said, plainly a usually relevant consideration for the tribunal will be whether the employee met essential requirements of the role, in terms of skills, qualifications, knowledge, experience, or otherwise. If the employer contends that the employee did not do so, and presents evidence, such as the results of a test or assessment process that it carried out, in support of its case, that is evidence that should be carefully considered and weighed by the tribunal, bearing in mind also that the issue, while a matter for the tribunal's objective determination, is whether *this* employer ought reasonably to have put *this* employee (on a trial or not) into *this* role. What is reasonable is also to be judged by reference to the facts as they stood, and information that was available, at the relevant time when the decision fell to be taken.

52. The tribunal may, in a given case, be satisfied by such evidence that it would not be reasonable in all the circumstances to have expected the employer to have put the employee into that role, even on a trial basis. **Wade** was such a case. The employee did not narrowly miss being appointed to the role, but was found wanting under the majority of eight essential criteria [19]. Unsurprisingly the tribunal concluded that the employer's decision that the claimant was not appointable "was genuine and one which they were entitled to reach" [15] and the EAT upheld that decision. But it is not the law that in every case the tribunal must defer to the employer's view. The tribunal should properly take the evidence which is said to support it, into account, and give it due weight. But, having done so, it may nevertheless conclude, on all the evidence available to it, and facts found, that the employee should reasonably have been given the role, or at least a trial in it.

53. In the present case the tribunal gave cogent reasons as to why it was not persuaded that the facts relating to the outcome of the written tests that were carried out by the recruiting manager as part of the interview process showed that the respondent ought not reasonably to have been expected to give the claimant a trial in the service administrator role. These were set out at [90]. They included that the service administrator role was a support role to the field role that the claimant had been doing, that the claimant's field role had included a number of administrative functions such as report writing, record keeping and stock check functions, that would also be relevant experience for the service administrator role, that he could have been trained on Excel, and that the claimant's existing role included functions which could have been expected to require some verbal and maths skills.

54. At [90.7] the tribunal acknowledged that the claimant's poor performance on the written tests may have given the respondent some concerns; but it did *not* find – there or at all – that those concerns meant that the respondent reasonably took the view that the claimant should not be tried in the role at all. Rather, it concluded that those concerns could have been met by offering him a trial period. In light of its earlier conclusions in the course of [90], that was an entirely permissible conclusion. It took account of the respondent's concerns, and the evidence the tribunal had supporting them, but

gave cogent reasons, drawing on the overall picture, as to why it was not reasonable to treat those as ruling the claimant out for the job entirely. The tribunal did accept that it would not have been reasonable to expect the respondent immediately to appoint the claimant permanently, but properly concluded that it would have been reasonable to test the concerns by giving the claimant a trial period.

55. That conclusion was reinforced by the tribunal's findings that the assessment and interview process on which the manager who dismissed, and the manager who considered the appeal against dismissal, relied, had been carried out by a colleague, from whom the tribunal did not hear evidence [51], [55]; and its conclusion that it did not have clear evidence that the claimant was given priority consideration for the role or considered any differently from any other candidate for it, as opposed to the recruiting manager considering whether he wanted to appoint the claimant to the role: [91], [92].

56. It seems to me that the substantive point the tribunal was making here, as it explained at [93], was that it would not be enough for the respondent to show that the claimant was considered not to have performed well enough by the standards that the recruiting manager would ordinarily apply in a competitive exercise; as the tribunal needed to be satisfied that the claimant's performance assessment was such that it would not be reasonable to put him into the new role, at least on a trial basis, for section 20 purposes. Further, as the tribunal found at [93], the decision was based purely on the recruiting manager's assessment of the interview and tests, and was not taken by a manager who had the benefit of knowledge of how the claimant had performed in his current role. This was properly taken into account by the tribunal, in assessing how the evidence of the assessment process informed its own view of whether the claimant should reasonably at least have been given a trial period.

57. In the present case the tribunal therefore had cogent reasons, based in its findings of fact, for disagreeing with the view that the employer took at the time, taking into the evidence it had as to the information available at the time. Ground 3 therefore fails.

Ground 4

58. The legal premise of this ground, is that it does not matter, for the purposes of a reasonable adjustment claim, what went on in the mind of the decision maker at the time. Whether they failed to make an adjustment which they ought reasonably to have made is an objective question for the tribunal, and there is no "mental element" of this wrong. Mr McFarlane cited **Ashton** at [24].

59. That is a correct statement of the law as such (although, of course, it is a separate requirement that the respondent have actual or constructive knowledge of the disability and the likely disadvantage – see schedule 8 paragraph 20). However, I do not agree that the tribunal erred in this regard.

60. This ground relies in particular on the tribunal's observations, at [92], about the lack of evidence that the claimant was "considered" any differently to any other candidate, or that the respondent "considered" the role as a reasonable adjustment, rather than the recruiting manger "considering" whether he wanted to appoint the claimant to the role; and, at [93], as to the lack of evidence that the respondent "considered" whether, because of his disability, the claimant's application should be treated more favourably than that of other candidates.

61. However, I think it is clear, from these paragraphs, and the decision, read as a whole, that the tribunal did not conclude that the respondent had failed to make a reasonable adjustment *because* it had failed to follow a particular process, or failed to consider the matter in a particular way. Rather, it was making the point that, because the recruiting manager had not considered the matter at the time from the point of view of whether the claimant should have been treated more favourably, or given a trial, on account of the impact of his disability, this affected what *evidence* the respondent was able to present to the tribunal, and the significance or weight which the tribunal could place on it, when considering what it contributed to the assessment of what it should reasonably have done.

62. In short, an employer which has investigated, assessed and decided what to do with the duty of reasonable adjustment in mind, may then be in a better position to produce evidence which persuades the tribunal (if the burden passes to it) that it ought not reasonably to have been expected

to have taken the step at issue; conversely, an employer that has not done so, may struggle to produce evidence that convinces the tribunal of that. That was the tribunal's conclusion in this case.

63. Nor do I think that this tribunal erred, as suggested by Mr McFarlane (under this ground and others), having regard to its observations at [90.6] about the lack of evidence as to whether the claimant was or was not subjected to similar tests when he first applied for his field job. The tribunal was simply considering there, whether it had any evidence on that question, which, had it been available and presented to it, might have contributed to its overall picture of whether the information the respondent had about the claimant's skills in this area meant that he should not reasonably have been expected to have been given a trial in the service administrator role.

64. Ground 4 therefore also fails.

Outcome

65. As there was no error, as contended by any of the grounds, in the decision on the reasonable adjustment complaint relating to the dismissal, the parasitical challenges to the outcome of the section 15 and unfair dismissal complaints must also fail. I do not need to consider the rival arguments as to the consequential implications for those other complaints, had one or more of the grounds succeeded.

66. The appeal is dismissed.