EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4114485/2019

Held at Dundee on 10 November 2020

Employment Judge I McFatridge
Tribunal Member W Canning
Tribunal Member P Fallow

Mr Peter Kennedy	**Claimant** **In person**
Hillcrest Homes (Scotland) Limited	**Respondent** **Represented by:** **Ms D Miller,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the respondent did not discriminate against the claimant on grounds of disability. The claim is dismissed.

REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that the respondent had unlawfully discriminated against him on grounds of disability. The claim related to a post that the claimant had applied for where he had not been called to interview. The respondent submitted a response in which they denied the claim. The case was thereafter subject to a degree of case management including two preliminary hearings. The

parties agreed a list of agreed facts in advance of the hearing. At the hearing the claimant gave evidence on his own behalf. Evidence was then led on behalf of the respondent from Carrol Douglas-Welsh an HR Business Partner with the respondent and Shirley Nicoll an Area Housing Manager with the respondent. A joint bundle of documentary productions was lodged which is referred to by page number in this judgment. On the basis of the evidence and the productions the Tribunal found the following essential facts relevant to the claim to be proved or agreed.

Findings in fact

2. The respondent is a registered social landlord and care provider. They provide social housing to a wide range of tenants. They have an office in Arbroath from which are managed 1700 properties. The majority of these are in Angus however the respondent is increasing their presence in Aberdeen. They currently have around 160-200 properties in Aberdeen but many more are coming on-stream. It is their intention that within a few years they will have around 700 properties in Aberdeen. Currently the properties in Angus and Aberdeen are run by the Area Housing Team based in Arbroath which consists of an Area Manager, four Housing Officers, two Maintenance Officers and a team of Housing Assistants.

3. The respondent identified a need for a new Housing Officer based in Aberdeen in order to deal with the properties there and take responsibility for the additional properties they would be providing in Aberdeen. The Aberdeen properties were coming on-stream which meant that houses required to be allocated and let to new tenants. The respondent wished this process to be carried out as quickly as possible with minimum void times. They decided to advertise for a Housing Officer. The job advert relating to the post is at page 39 of the bundle of documents. This stated

> "Hillcrest Homes is a registered charitable Social Landlord with stock across Angus, Dundee, Edinburgh, Fife, Perth and Kinross and most recently we have started developing in Aberdeen. We have a significant ongoing new build development programme and our aim is to provide good quality affordable homes.

The job

Due to our extensive new build programme in Aberdeen and Aberdeenshire, we are looking to recruit a Housing Officer to manage these properties. You will be based in Aberdeen and be a member of the Angus Housing Team and line managed from our local area office in Arbroath. As a member of this busy team you will be responsible for delivering high quality Housing Management Services. Key duties will include, housing allocations, tenancy and estate management, managing complex anti-social behaviour cases and visits for the Income Management Team.

The Candidate

You should be educated to SCQF level 7, have previous housing experience and knowledge of current Housing Legislation. You must be enthusiastic, confident, flexible and highly motivated. Excellent organisation and prioritisation skills are essential as the role will involve mobile working and an element of home working."

4. The respondent uses a software package called "Logic Melon" to assist with their recruitment process. This package allows applicants to complete an online application form which retrieves, stores and shortlists the applications.

5. The respondent has a group Recruitment and Selection Policy which was lodged (pages 42-47). They also have an Equality and Diversity Policy (pages 47-54).

6. As part of the process the Recruiting Manager who in this case was Shirley Nicoll the Area Housing Manager for Angus, prepares a job specification and job description. This contains within it essential and desirable criteria which candidates for the role are measured against.

7. The job specification relating to the post the claimant applied for is at page 39 of the bundle. The job description relating to the post the claimant applied for is at page 40 of the bundle.

8. The respondent has a policy that all disabled applicants who meet the essential requirements of the job as set out in the job description and person specification will be guaranteed an interview. This policy can be

found in the respondent's Recruitment and Selection Policy (page 44) and is also stated on the respondent's application forms.

9. The claimant applied for the role of Housing Officer with the respondent. A copy of the application form submitted by the claimant was lodged (pages 61-67).

10. The claimant is a disabled person within the terms of section 6 of the Equality Act 2010.

11. The claimant completed the section headed General. This is page 66 of the documentary productions. The claimant completed the boxes stating where he learnt of the vacancy and whether he held a current UK driving licence. The following box has the following words alongside it:

> "Candidates with a disability are guaranteed a job interview subject to meeting the 'essential' criteria detailed in the person specification. Please indicate that you have a disability and wish to be considered under the disability guaranteed job interview scheme."

The claimant entered "Yes" in the box next to this. The next box has alongside it

> "Disability details".

The claimant completed this box stating

> "My disability is covered by the Equalities Act in that it".

12. By the closing date for applications the respondent had received 40 applications for the role including that of the claimant.

13. The application forms were then gone through by Shirley Nicoll who was the Recruiting Manager. She looked at them on screen.

14. Ms Nicoll had been on a course sponsored by the respondent to provide her with training in selection and recruitment. She had also been on diversity training which had been provided by the respondent. Her understanding was that the purpose of the question "disability details" was so that the respondent might make adjustments to their interview or

recruitment process should this be required by any candidate. She was also aware that if the candidate answered yes to the question asking whether they had a disability then that person would be invited to interview provided they met the essential criteria. Ms Nicoll was unaware that the respondent had only very recently introduced the question "disability details?" into their application form in that this had been added by their software provider Logic Melon. She was not aware that this question had not been asked in previous version of the application form.

15. The respondent had changed their provider to Logic Melon a few months previously. Logic Melon had introduced this question into the application form. The respondent's HR department had not been aware of this at the time. They were aware that if an employee was disabled then they were under a duty to make reasonable adjustments to their recruitment and interview process and would require details of the candidate's disability in order to enable them to do this.

16. Ms Nicoll went through all 40 applications and initially set aside 11 of those for further checking with a view to inviting the candidate to interview. The claimant's application was one of these which was in the initial 11 which were set aside. Ms Nicoll then went back through all 11 applications to check whether each candidate did have the essential criteria. She carried out this check along with her manager Mr Rob Hughes. On this second check she decided that the claimant did not meet the essential criteria for the job. She made this decision based on the information in his application form. She was satisfied that the claimant met the academic educational qualifications for the role but considered that he did not have any experience whatsoever as a Housing Officer. She considered that he did not meet three of the essential criteria for the role. In particular, he did not have the following experience which was described as essential

    1. "A broad range of operational housing experience gained through a housing management role, for example, a similar role or working as a Housing Assistant."

As a matter of fact the claimant had not worked either as a Housing Officer or as a Housing Assistant. The claimant had worked as a Chair of a

Housing Association and had also worked as a Support Officer where one of his duties was to support individuals in keeping their tenancy. The role of Support Officer was different from that of a Housing Officer or Housing Assistant in that the claimant had been acting on the tenant's behalf rather than the landlord's behalf.

17. Ms Nicoll also considered that the claimant did not have

2. "Working knowledge of the statutory and voluntary Housing sectors, including relevant and current Housing legislation".

She noted that he had previously been on the Board of a Housing Association but considered the key point was "working knowledge". He had not previously been employed in Housing. She did not consider that his experience as detailed in his application form would have given him this working knowledge.

18. Finally, she did not believe that the claimant had

3. "Track record of delivering a variety of high quality tenancy services".

19. The claimant had not been involved in the actual delivery of tenancy services other than in his role as a member of the board and chairman of a housing association. Ms Nicoll considered that this was a key part of the role.

20. As noted above, the respondent was at the allocation phase. Generally speaking the respondent would expect to get 50% of the tenants as nominees of the local authority. The other 50% would be applicants who applied via an online system. Houses for rent would be made available in tranches. There was considerable pressure on the Housing Officer to complete the allocation speedily and efficiently. Potential tenants would require to be offered viewings and then offer letters and acceptances would require to be sent out within a very short time. Key handover would then require to be arranged. She considered that the envisaged role required someone who had experience of doing this and would be able to "hit the ground running". She decided that the claimant did not have this experience which as noted, was marked as essential criteria for the job in

the job description (page 40). Having gone through the 11 applications Ms Nicoll took out four of these applications including the claimant's.

21. Seven people were invited to interview. One of these was a person who had also ticked the box to indicate that they were disabled and were seeking an interview under the guaranteed interview scheme. All of the seven applicants who went forward for interview did meet the essential criteria for the job. Their application forms were lodged (pages 68-95).

22. The respondent interviewed these candidates and decided to offer the post to the candidate whose application form starts at page 95. That particular candidate had considerable experience as a Housing Officer. They met the essential criteria and most of the desirable criteria. They were essentially carrying out the same role for another organisation. Even if he had proceeded to interview the claimant would not have been offered the job in preference to that candidate who was an ideal fit for the role.

23. The claimant wrote to the respondent on 2 September 2019. It is as well to set out the terms of his letter in full.

> "I am writing in connection to a recent application I made for a Housing Officer vacancy with your organisation. I note from the email I received informing me that my application was not being taken forward that it is your organisation's policy 'not to offer feedback to unsuccessful job applications'.
>
> That may well be the case, but in considering whether to take formal action against you in relation to possible discrimination I would wish to give you the opportunity to consider my complaint that the recruitment process was not equitable and was also not legal.
>
> First, I had some difficulty completing the application form – the form was submitted before it was fully completed and although after speaking with colleagues in your Human Resources department who advised that a link would be sent which would enable me to edit and resubmit the form – the email with these links was never received. I therefore had to submit a second application using an alternative email address, peter@sra.scot – I have never received any emails to that

second email address and so I would ask you to confirm which application was considered by your recruiting managers?

I would wish to have a full and detailed explanation in which ways my application did not meet the essential criteria for the vacancy, thus meaning I should have received a guaranteed interview. I hold qualifications and experience in housing that were over and above what was required in the advertisement and job description. It is disappointing that an organisation that publicly purports to promote inclusion and to 'to listen to others', and 'to learn best practice', as stated in your Visions and Values statement. From my experiences these seem hollow words of rhetoric.

In addition to the failed recruitment process it would appear that the General details area of your application process does not comply with relevant legislation e.g. whilst an employer may be able to ask what reasonable adjustments may be required, your application form specifically asks for 'details of the disability' – my understanding of employment legislation is that such a question contravenes the Equality Act 2010 as you do not require that information when seeking to short list candidates. Such a direct question at recruitment stage could mean that direct discrimination against applicants with that protected characteristic could occur. Are you able to give any justification for your application form asking such a question?

I look forward to hearing from you in the near future."

24. Following receipt of this e-mail the respondent arranged for a search to be carried out to ascertain whether or not a second application form completed by the claimant had been received by the respondent. No second application form was found. The only application form which the claimant submitted was the one previously referred to and lodged at pages 60-67. The respondent's Chief Executive then wrote back to the claimant later that day. She stated

"I have reviewed the points raised in your e-mail below and requested further information from the individuals involved in this process.

I can confirm the following:

(1) – we do not have any note of an application being made under the e-mail address 'peter@sra.sco'. The system we use is called Logic Melon. We have searched the system and there is no record of the e-mail address noted above.

(2) – I have consulted with the individuals responsible for the shortlisting. Although you had the correct qualification and submitted a good application form, there were some areas where it was felt that you did not meet the essential criteria. Your application form did not mention things like 'dealing with housing tasks such as allocation, ASB, estate management and rent arrears'. In the following 2 areas it was not felt that you met the essential criteria;

- A broad range of operational housing experience gained through a housing management role, for example, a similar role or working as a Housing Assistant;
- Track record of delivering a variety of high quality tenancy services

(3) - If you do not meet the essential criteria you will not get an automatic interview.

(4) - I note your point regarding the Equality Act. This was not on our previous application form. Hillcrest has now contacted Logic Melon to ensure that this box is now removed.

I hope this is sufficient information to answer the various queries you have raised."

25. The salary for the role the claimant applied for was in the range £30,952-£34,931. Had the claimant been appointed he would have been appointed at the lowest level of this range £30,952. The claimant is currently employed as an Employability Officer on an annual salary of £30,654. The claimant having received a pay rise in April 2020.

26. The respondent's software providers Logic Melon have now removed the box with the question "disability details?" from the application form used by the respondent.

Matters arising from the evidence

27. The Tribunal was entirely satisfied that both the respondent's witnesses were credible and reliable. They gave thoughtful and careful answers to

the questions which were asked and were clearly trying to assist the Tribunal by giving truthful evidence. The claimant at first appeared somewhat reluctant to give any evidence at all other than to refer the Tribunal to the respondent's application form and in particular the question on disability details. The claimant set out his belief that section 60 of the Equality Act provided a blanket ban on potential employers asking a question about the nature of an applicant's disability and this could amount to a stand-alone claim which would entitle him to compensation. When giving evidence he had to be prompted by the Employment Judge into giving evidence to the fact that he had not been invited to interview which was the basis of all of his claim. During cross examination he initially sought to refuse to answer all questions however after the Employment Judge prompted him that he required to answer questions even if the answers did not suit his case he did proceed to do so. In general terms, the Tribunal was less impressed by his evidence when compared to that of the respondent's witnesses. That having been said he was prepared to concede a number of points and we felt that when asked a direct question he was giving a truthful answer. He was carefully taken by the respondent's solicitor through the essential criteria. His position was that he had been involved in allocations as chair of a housing association. He accepted he had no direct experience as a Housing Officer. He also indicated that he had experience as a Support Officer where one of the supports he gave was to assist individuals in retaining their tenancy. He accepted that this role was different in that he was working for the tenant rather than the landlord although it was his view that the skills were similar. His view was that he had knowledge of the sector and current legislation. He did not accept the distinction between knowledge and working knowledge. His view was that as a member of the governing body of a housing association he required an awareness of the statutory position.

28. The claimant's position was that although he did not have direct experience he had a diploma in Housing which was a higher qualification than the other applicants. He agreed that he did not have physical experience but believed that he would not have been awarded his diploma unless it was thought he had sufficient knowledge and experience to do the role.

29. The claimant was taken through the application forms of those candidates who had been shortlisted and agreed that they all had greater experience than him albeit he required prompting on several occasions before he admitted this. At the end of the day the Tribunal's impression was that the claimant genuinely believed that all he had to do to win his case was to show that the respondent had asked the question in the application form which he objected to. He did not give any reason beyond this as to why the respondent's decision not to invite him to interview was based on anything other than Ms Nicoll's honest assessment that on the basis of his application form he did not have the appropriate practical experience to do the job.

Issues

30. The case was subject to a degree of case management with two case management preliminary hearings. At the first preliminary hearing on 27 March 2020 the claimant was recorded as confirming that his claims were for direct discrimination under section 13 of the Equality Act, indirect discrimination under section 19 of the Act and the failure to make reasonable adjustments under sections 20 and 21 of the Act. At the commencement of his legal submission at the hearing the claimant also indicated that he was making a claim under section 15 of the Act. This was objected to by the respondent's representative. The claimant stated in the strongest terms that it would be extremely unfair on him were he not to be allowed to proceed with his claim under section 15. He pointed out that he was not legally trained nor was he legally represented. He was extremely vehement in stating that he wished to proceed to set out his claim under section 15. I indicated that it appeared very odd that the claim was being made at such a late stage given that the matter had been canvassed on two occasions before a different Employment Judge and the claimant had not made any mention at that time that he wanted to claim under section 15. That having been said, given that the claimant was unrepresented I decided that it would be appropriate to allow the claimant to advise how he considered his claim under section 15 could arise and the Tribunal would reserve its position as to whether he would be permitted to make such a claim at this stage. The claimant then made

his submissions. With regard to the section 15 claim it became very clear that essentially the claimant was making the same claim as his claim under section 13 for direct discrimination. What the claimant set out did not amount to a claim under section 15. Indeed, it appeared to me on considering matters that there could not possibly be a claim under section 15 in this case.

31. The position is that the claimant has claimed that he is disabled. The claimant provided certain medical information to the respondent and the respondent has accepted that he is disabled. The Employment Judge and Members hearing the case were not at any time advised what the claimant's disability is. It was not the subject of any evidence whatsoever from the claimant or anyone else. For a claim to arise under section 15 there must be some thing arising from the claimant's disability which leads to the claimant being disadvantaged. In the absence of any evidence whatsoever as to the nature of the claimant's disability it would be logically impossible for the Tribunal to make a finding that the claimant had been disadvantaged as a result of some thing arising from his disability. As noted above the claimant, when asked to explain his section 15 claim, essentially repeated the claim he was making under section 13. I therefore advised the respondent's representative that there was no need for her to make a specific submission on this as the tribunal would not be considering any claim under s15.

32. The claimant's remaining submissions essentially paraphrased (and wrongly paraphrased) the Equality Act. For example, he stated that section 60 states that an employer is not allowed to ask questions about disability or health before an offer is made. He felt the fact that the respondent had now changed their form meant that they accepted they were in the wrong. He considered they had directly discriminated against him by asking him that question. He considered that the comparators were the other applicants who applied for the job. They had been invited for interview and he had not. With regard to his section 19 claim he said that the pcp was asking for details of disability. He considered this disadvantaged disabled people. It was not proportionate. He felt the inclusion of the question on the application form put him at a substantial

disadvantage compared to people who were not disabled. He believed that the respondent were under a duty not to include such a question as a reasonable adjustment. Finally he made it clear again that his claim was based on section 60. He also noted that s39 extends the protection of the act to potential employees.

33. The respondent lodged full and comprehensive written submissions where they dealt with the various claims in turn and set out their view of the applicable law. Given that the Tribunal agreed with their submissions as to the relevant law it is not necessary to repeat these at length but they are referred to in the discussion below.

Discussion and Decision

34. The claimant built his case to a large extent on section 60 of the Equality Act and his interpretation of what this meant. It is probably as well if section 60 is set out in full at this stage.

> "(1) A person (A) to whom an application for work is made must not ask about the health of the applicant (B)
>
> (a) before offering work to B, or
>
> (b) where A is not in a position to offer work to B, before including B in a pool of applicants from whom A intends (when in a position to do so) to select a person to whom to offer work.
>
> (2) A contravention of subsection (1) (or a contravention of section 111 or 112 that relates to a contravention of subsection (1)) is enforceable as an unlawful act under Part 1 of the Equality Act 2006 (and, by virtue of section 120(8), is enforceable only by the Commission under that Part).
>
> (3) A does not contravene a relevant disability provision merely by asking about B's health; but A's conduct in reliance on information given in response may be a contravention of a relevant disability provision.
>
> (4) Subsection (5) applies if B brings proceedings before an employment tribunal on a complaint that A's conduct in reliance on information given in response to a question about B's health is a contravention of a relevant disability provision.

(5) In the application of section 136 to the proceedings, the particulars of the complaint are to be treated for the purposes of subsection (2) of that section as facts from which the tribunal could decide that A contravened the provision.

(6) This section does not apply to a question that A asks in so far as asking the question is necessary for the purpose of—

(a) establishing whether B will be able to comply with a requirement to undergo an assessment or establishing whether a duty to make reasonable adjustments is or will be imposed on A in relation to B in connection with a requirement to undergo an assessment,

(b) establishing whether B will be able to carry out a function that is intrinsic to the work concerned,

(c) monitoring diversity in the range of persons applying to A for work,

(d) taking action to which section 158 would apply if references in that section to persons who share (or do not share) a protected characteristic were references to disabled persons (or persons who are not disabled) and the reference to the characteristic were a reference to disability, or

(e) if A applies in relation to the work a requirement to have a particular disability, establishing whether B has that disability."

35. The nub of the matter is that except in the rare circumstance where the claim is made by the Disability Rights Commission – section 60 does not provide a free-standing cause of action under the Equality Act. In terms of section 3 however A's conduct in reliance and information given in response to the question may be a contravention of a relevant disability provision and the asking of such a question is in terms of section 5 to be treated as facts from which the Tribunal could decide that A contravened the provision. What this means is that if the question has been asked and the circumstances are not as set out in section 6 then the burden of proof in a discrimination claim moves from the claimant to the respondent

36. This is essentially a specialty of the general rule in discrimination proceedings under the Equality Act in relation to the burden of proof which

is set out in section 136 and has been interpreted by the Higher Courts in various cases over the years such as ***Igen v Wong*** [2005] IRLR 258 CA. Generally speaking if there are facts from which the court could decide in the absence of any other explanation that discrimination has occurred then the burden of proof in showing a non-discriminatory reason moves to the respondent. In general terms it is up to the claimant to establish facts from which such an inference of discrimination can be drawn and if the claimant succeeds in doing this then it is up to the respondent to demonstrate a non-discriminatory reason for their behaviour. The effect of section 60 is that if such a question is asked and the circumstances are not as set out in section 60(6) then the claimant is taken to have proved facts from which an inference of discrimination can be drawn and the burden of proof then passes to the respondent in order to show a non-discriminatory reason.

37. In this case it was the respondent's position that the burden of proof should not transfer in terms of section 60(5) because the terms of section 60(6)(a) were relevant. It was the respondent's position that the question was asked in order to establish whether a duty to make reasonable adjustments is or will be imposed on the claimant in connection with a requirement to undergo an assessment. Both of the respondent's witnesses were quite clear that this was the only reason the question could be asked. The Tribunal accepted this evidence. The question under section 60(6) however was whether asking the question was necessary for the purpose of establishing whether a duty to make reasonable adjustments is or would be imposed on the respondent in relation to the claimant.

38. Given that, if successful, the claimant is going to be invited to an interview and given that the respondent, as can be shown from their policies, wish to be inclusive and afford disabled applicants various adjustments it appeared to the Tribunal that this was a question which it was necessary to ask. We did consider the claimant's point that it was probably not necessary to ask it at precisely that point as it could be something which was asked at the time of the invitation to interview. The Tribunal had regard to the EHRC Employment Practices Code and the EHRC Pre-employment Health Questions Guidance which were lodged by the

respondent. The Tribunal notes that at the first preliminary hearing the claimant was specifically referred to these sections. This states that

> "10.33
> It is also lawful for an employer to ask if a person is disabled so they can benefit from any measures aimed at improving disabled people's employment rates. This could include the guaranteed interview scheme whereby any disabled person who meets the essential requirements of the job is offered an interview. When asking questions about, for example, eligibility for a guaranteed interview scheme, an employer should make clear that this is the purpose of the question.

39. The Tribunal's view was that at the end of the day, whilst it would be better HR practice to ask this question separately, in the circumstances of this case the question was clearly asked for the purpose of making adjustments at the interview stage. It was necessary for this information to be given. The Tribunal's view was therefore that the balance of proof would not transfer. In any event, for the reasons given below the Tribunal's view was that all of the claimant's individual claims would fail whether or not the initial balance of proof transferred. We shall deal with each of the claims in turn.

Section 13

40. Section 13 of the Equality Act states

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

41. We agree with the respondent that the question split into two parts. (1) Was there less favourable treatment, and (2) was it on the grounds of the claimant's protected characteristic. With regard to the issue of whether or not there was less favourable treatment we would agree with the respondent that in order to show direct discrimination it is necessary for the Tribunal to come to the view that a person who does not possess the characteristic in question was or would be treated differently in similar circumstances. We agreed with the respondent's analysis that the

comparator in this case was not the other applicants. The claimant accepted in the agreed statement of facts that they met the essential criteria for the job. The Tribunal's clear view having heard the evidence is that the claimant did not meet the essential criteria for the job. The question which the Tribunal required to address was whether a hypothetical, non-disabled comparator who had the same housing experience as the claimant would have been called to interview or not. There was absolutely no evidence before us to suggest that such a comparator would have been treated more favourably than the claimant. We entirely accepted Ms Nicoll's evidence that she had gone through the applications and that the reason the claimant had not been eventually selected for interview was that on checking his application she decided that he, along with three others who had passed the initial sift, did not meet the essential criteria and should not be called to interview. The Tribunal observes that one of the individuals who was called to interview had ticked the box to indicate that they were disabled (page 82). The Tribunal's view was that the burden of proof did not shift in this case however even if the burden of proof did shift it was clear from Ms Nicoll's evidence that the reason the claimant was not invited to interview was a non-discriminatory one which was that Ms Nicoll believed on the basis of the information on his form that he did not meet the essential criteria for the job. The claim of direct discrimination must fail.

42. With regard to the claim of indirect discrimination the claimant had been requested to clarify the alleged pcp at the case management stage and in an email sent to the tribunal on 20 August 2020 he said that this was;

> "The alleged PCP I would wish to raise is in relation to the application form and the question on firstly whether I had a disability; and secondly, asked for details about the disability".

The respondent set out their view that there could be no group disadvantage to disabled persons by asking the questions set out in the form. Their view was that it is clear from the context and the words next to both boxes that this information was requested in connection with the application of positive treatment to the claimant and those with whom he shared his protected characteristic. They did not consider that the PCP

put the claimant or those who shared his disadvantage at any disadvantage.

43. The claimant did not give any evidence as to what the disadvantage which he had suffered was nor how the asking of the question would specifically disadvantage those with whom he shared his protected characteristic. We would agree with the respondent's representative that the question of disadvantage requires to be considered in two stages. Firstly, there must be some disparate adverse impact on the group which possesses the protected characteristic (in this case the claimant's disability). Secondly, the claimant has to have been put or would have been put to that disadvantage.

44. We would agree with the respondent that it is not at all clear what disadvantage is alleged by the claimant in this case either in relation to group disadvantage or individual disadvantage. We would stress that the claimant did not lead any evidence whatsoever as to what his specific disability was and the Tribunal did not have this information. He did not give any evidence to a specific disadvantage other than to assert that the asking of the question caused him upset.

45. The Tribunal agreed with the respondent that the questions about disability in fact created a group advantage for those with a disability including the claimant's disability and not a disadvantage. The questions were necessary to operate the respondent's guaranteed job interview scheme. This was an advantage. Furthermore, it is abundantly clear from the evidence that the decision not to offer the claimant an interview was not due to the PCP but was due to the fact that as we have previously found Shirley Nicoll genuinely believed that the claimant did not meet the essential criteria for the post.

46. Given that we have not found any disadvantage or group disadvantage whatsoever, it is not strictly necessary to move on to the next stage which is considering the issue of proportionality. For the sake of completeness the Tribunal wished to record that we considered the approach mentioned by the respondent as set out by Elias J in the case of ***MacCulloch v ICI*** [2008] IRLR 846 EAT would in our view have been the correct one. We

agreed with the four legal principles set out therein and the re-statement that the test in Bilka Kaufhaus is the correct one. Applying this approach to the present case the Tribunal would have found no difficulty whatsoever in finding that the respondent met the proportionality test. The asking of the questions was lawful and a proportionate aim of providing advantages in the interview process for disabled persons.

Failure to make reasonable adjustments

47. It was not entirely clear to us exactly how the claimant was stating this claim other than that it appeared to be his position that the asking of questions placed him at a particular disadvantage and the respondent was therefore under a duty to avoid that disadvantage presumably by not asking him the question. As noted above the claimant did not give any evidence as to how he was disadvantaged by asking the questions. To the contrary, the two questions which were clearly linked were clearly based on the respondent's wish to offer a guaranteed interview to people with disabilities and to ensure that they were in a position to make reasonable adjustments to the interview recruitment process should this be necessary. The claimant entirely failed to demonstrate that he was placed at a particular disadvantage by being asked these questions that related to his disability. Even if he had been then it was clear to us that even if contrary to what we have found, the disadvantage was to the claimant by the PCP in question it is clear that Schedule 8 Part 3 section 20 of the act would apply.

> "(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know
> (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;
> (b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to the first, second or third requirement."

For the duty to arise the employer must have either actual or constructive knowledge not only that the claimant is disabled but also that he would suffer a specific disadvantage as a result of his disability. In this case the

only information the respondent had about the claimant was that he was disabled. They did not know any details of his disability. They would not readily know that the claimant would suffer a disadvantage as a result of being asked for details of his disability. This would require some knowledge as to what his disability actually was and the respondent clearly did not have that from the information provided on the application form.

48. The Tribunal did not accept what appeared to be the claimant's position that the mere asking of the question was enough to trigger a liability. The mere asking of the question was not established as placing the claimant and those who shared his disability at a particular disadvantage. The claim of a failure to make reasonable adjustments must fail

49. For the above reasons all of the claims being made were not well-founded and should be dismissed. We should say that we are very aware that from an HR point of view we were in no doubt that it would have been better practice for the question on disability details to be asked at a later stage in the process. If this is not done then a potential employer leaves themselves open to all sorts of opportunistic claims even in circumstances where, as here, the question was asked with the best of intentions and there was absolutely no other evidence of unlawful discrimination. The fact that there is a good HR practice which would avoid the possibility of a claim being made does not give a claimant an independent cause of action if it is not followed. The question at all times is whether or not unlawful discrimination has taken place. In this case no such unlawful discrimination took place.

Employment Judge: **Ian Mcfatridge**
Date of Judgment: **26 November 2020**
Date sent to parties: **27 November 2020**