EMPLOYMENT TRIBUNALS

Claimant: **FT**

Respondents: **1) Mark Atkin**
2) Driver and Vehicle Standards Agency
3) Jayne Stone
4) Stephen Moore
5) Carwyn Huntley

Heard at: **Leeds** **On: 4,5,6,7 and 8 March 2024**

Deliberations in Chambers: 19 March 2024

Before: **Employment Judge Shepherd**
Members: **Ms Fawcett**
Mr Rhodes
Appearances
For the claimant: **In person**
For the respondents: **Ms Garner (Counsel)**

RESERVED JUDGMENT

The claims brought against the first, third, fourth and fifth respondents are dismissed upon withdrawal.

The unanimous judgment of the Tribunal is that the claims of disability and sexual orientation discrimination and victimisation are not well-founded and are dismissed.

REASONS

1. The claimant represented herself, and the respondent was represented by Ms Garner.

2. The Tribunal heard evidence from:

   FT, the claimant;

   Mark Atkin, the first respondent and Head of Frontline Recruitment;

Rowland Williams, Operations Manager and Head of Technical Quality;

Carwyn Huntley, Technical Quality Lead and the sixth respondent;

Jayne Stone, Head of People Partnering and he third respondent;

Stephen Moore, Head of Frontline Recruitment and the fourth respondent.

3. At the start of her submissions the claimant indicated that the claims against the named individual respondents were not pursued and could be dismissed upon withdrawal.

4. At an earlier Preliminary Hearing Employment Judge Bright identified the issues to be determined at this hearing. It was set out that The claimant was making the following complaints:

    1. Direct disability discrimination;

    2. Direct gender reassignment discrimination;

    3. Indirect disability discrimination;

    4. Failure to make reasonable adjustments;

    5. Harassment related to disability;

    6. Harassment related to gender reassignment;

    7. Victimisation.

5. An updated list of these issues to reflect the withdrawal of some claims and concessions by the respondent was provided. It was agreed that the issues for the Tribunal to determine at this hearing were as follows:

LIST OF ISSUES

(Updated to Reflect Withdrawal of Claims – 1 October 2023 [234]

1. **Disability**

~~1.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:~~

~~1.1.1 Did she have a physical or mental impairment: dyslexia?~~

~~1.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?~~

~~1.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?~~

~~1.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures.~~

~~1.1.5 Were the effects of the impairment long-term? The Tribunal will decide:~~

~~1.1.5.1 Did they last at least 12 months, or were they likely to last at least 12 months?~~

~~1.1.5.2 if not, were they likely to recur?~~

2. Factual issues

The claimant complains of the following treatment. The Tribunal will you in the state sector need to make findings of fact as to whether the following occurred:

~~2.1 Did the second respondent fail to make any adjustments for the video interview in June 2022 (previously Allegation 1)?~~

2.2 Did the second respondent move the claimant's first recruitment drive out of cluster on 30 June 2022 (previously Allegation 2, see 1st ET1 paragraphs 54 and 55)?

~~2.3 Did David Wedgewood (and the second respondent by virtue of section 109 EQA) indicate that he wanted to withdraw the claimant's application because the deed poll was 'homemade' and call her a 'problem' in test centre visits and emails on 15 July 2022 (previously Allegation 3, see 2nd ET1 paragraph 40)?~~

2.4 Did Mark Atkin (and the second respondent by virtue of section 109 EQA) do the following things during the first driving assessment on 21 July 2022 (previously identified as Allegation 4, see 1st ET1 paragraphs 20 - 33):

2.4.1 Refuse to put in place reasonable adjustments, i.e. pointing left and right and repeating directions, instead telling the claimant "Let's see how we go";

2.4.2 Give late directions such as "turn left/right" on the junction so there was insufficient time to turn without breaking harshly, which was then marked down;

2.4.3 Make matters up, such as speeding through traffic lights, the motorway issue and also the fact she did not reach the maximum speed

limit on a country road as it was wet and unsafe to do so and marked her down;

2.4.4 Tell the claimant the test will continue providing she doesn't crash the car;

2.4.5 Tell the claimant she should do what is best when she repeated requests for adjustments;

2.4.6 Tell the claimant she will be in role and then fail her?

2.5 Did the second respondent move the claimant's second assessment out of cluster in September 2022 (previously Allegation 5, see 1st ET1 paragraph 73)?

2.6 Did Carwyn Huntley (and the second respondent by virtue of section # 09 EQA) do the following things in the second driving assessment on 16 September 2022 (previously Allegation 6, see 1st ET1 paragraphs 74 - 107):

2.6.1 Allege poor planning, despite the claimant commentating;

2.6.2 Allege harsh braking (including touching the brake pedal several times in one episode)/acceleration;

2.6.3 Mark the claimant down for following the guidance given to her by Mr Williams on counter roads – by claiming she was braking while going around a country road bend and not going at maximum speed – the claimant complied with 125 of the Highway Code but was marked down;

2.6.4 Allege predominantly reactionary driving;

2.6.5 Allege incorrect block changing gears;

2.6.6 Allege that gears were rushed, snatched or incorrectly used and the engine lurched and/or laboured;

2.6.7 Allege ineffective use of mirrors;

2.6.8 Allege misleading direction signals and lack of signals when needed;

2.6.9 Allege poor reaction to street limit signs;

2.6.10 Allege incorrect use of lane when exiting roundabouts;

2.6.11 Allege encroachment;

2.6.12 Allege hesitation on two occasions;

2.6.13 Allege following vehicles too closely on M1 motorway;

2.6.14 Allege fast and slow application of speed;

2.6.15 Allege refuge behind a parked car on a meeting situation.

2.6.16 Allege the claimant sought guidance on which way to go at larger junctions;

2.6.17 Fail to discuss the report with the claimant;

2.6.18 Fail to take account of the fact the claimant was using modern driving techniques as suggested such as roll and emerge and following the video given to her by Mr Williams;

2.6.19 Mark her down despite her doing what was asked?

2.7 Did Jayne Stone and/or Stephen Moore (and the second respondent by virtue of section 109 EQA) do the following things in the course of the claimant's second complaint during September and October 2022 (previously Allegation 7, see 1st ET1 paragraph 108 and 2nd ET1 paragraphs 28 - 38):

2.7.1 Fail to investigate the second complaint;

2.7.2 Fail to interview the claimant or Carwyn Huntley;

2.7.3 Only ask Carwyn Huntley to provide limited information about the test location for the second test and (Stephen Moore only) tell Carwyn Huntley "there's nothing to worry about" when requesting that information;

2.7.4 Use Carwyn Huntley to help complete the reply to the claimant;

2.7.5 Stephen Moore saying "we need to get this resolved ASAP as impacting on time";

2.7.6 Following the dispute resolution policy for a complaint for the first complaint in the full knowledge of all concerned;

2.7.7 Fail to follow the DPP which was the right one for the first complaint, as confirmed by Mr Webb-Skinner;

2.7.8 Jayne Stone making claims in her letter that a full fact finding exercise took place;

2.7.9 Fail to offer a right of appeal;

2.7.10 Refuse to consider an appeal when presented;

2.7.11 Fail to provide reasons for the decision;

2.7.12 Fail to provide the notes from the interview with Carwyn Huntley, later confirming no interview took place?

2.8 Did the second respondent fail to offer the claimant a third assessment (previously Allegation 8, see 1st ET1 paragraph 111)?

2.9 Did Jayne Stone (and the second respondent by virtue of section 109 EQA) falsely claim she had investigated matters on 24 October 2022 and make the comments in bold at paragraphs 21 and 22 of the grounds of claim attached to the claimant's second ET1 (previously Allegation 9, see 2nd ET1 paragraphs 21 - 23):

2.9.1 "Less than an hour after sending our response we got the attached back [the claimant's appeal]. Is it worth responding and just re-iterate that we have investigated the matter thoroughly and the matter is now closed or just leave it?";

2.9.2 "This doesn't really fall within any process – our complaint process is specifically geared towards different customers (e.g. driving test candidates, driving instructors etc) and doesn't cover this scenario. The first complaint was investigated under the dispute resolution policy, which wasn't the right policy in my view as that complainant is not an employee or ex-employee. That process offers an appeal which is why that route was taken for the original complaint I don't think offering an appeal is going to get us anywhere but interested to hear your view"?

2.10 Did Jayne Stone (and the second respondent by virtue of section 109 EQA) falsely accuse the claimant of harassment and getting Paula Pitcher to email her in October 2022 (previously Allegation 10, see 2nd ET1 paragraph 26)?

3. **Direct disability discrimination (Equality Act 2010 section13)**

3.1 Was the treatment at paragraphs 2.4 to 2.10 above less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The claimant relies on a hypothetical comparator who does not have her learning disability of dyslexia.

3.2 If so, was it because of disability?

3.3 Did the respondents' treatment amount to a detriment?

4. **Direct gender reassignment discrimination (Equality Act 2010 section 13)**

4.1 The respondents accept that the claimant has the protected characteristic of gender reassignment.

4.2 Was the treatment at paragraphs 2.2, ~~2.3,~~ 2.5 – 2.10 less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

The claimant says she was treated worse than a hypothetical cisgender female or a male candidate.

4.3 If so, was it because of gender reassignment?

4.4 Did the respondents' treatment amount to a detriment?

5. **Indirect disability discrimination (Equality Act 2010 section 19)**

5.1 A "PCP" is a provision, criterion or practice. Did the second respondent have the following PCPs (and Mark Atkin in respect of 5.1.2):

~~5.1.1 In respect of paragraph 2.1 above, that in the video interview in June 2022, the applicant must give answers within in a set/limited period of time?~~

5.1.2 In respect of paragraph 2.4 above, that in the first driving assessment on 21 July 2022, the applicant must follow the examiner's brief oral directions?

5.2 Did the respondents apply the PCP(s) to the claimant?

5.3 Did the respondents apply the PCP(s) to persons with whom the claimant does not share the characteristic, i.e. applicants without a learning disability/dyslexia or would it have done so?

5.4 Did the PCP(s) put persons with whom the claimant shares the characteristic, i.e. applicants with a learning disability/dyslexia at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic, i.e. applicants without a learning disability/dyslexia, in that applicants with a learning disability/dyslexia would:

5.4.1 Be less likely to pass or do well on the assessment, due to short term memory problems?

5.4.2 Be more likely to forget directions and go the wrong way due to short term memory problems?

5.5 Did the PCP(s) put the claimant at that disadvantage?

5.6 Was/were the PCP(s) a proportionate means of achieving a legitimate aim? The respondents will clarify their legitimate aims. The Tribunal will decide in particular:

5.6.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;

5.6.2 could something less discriminatory have been done instead;

5.6.3 how should the needs of the claimant and the respondents be balanced?

6 **Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

6.1 Did the second respondent (in respect of the allegation at ~~paragraphs 2.1 and~~ 2.4 above) and Mark Atkin (in respect of the allegation at paragraph 2.4 above) know or could it reasonably have been expected to know that the claimant had the disability? From what date?

6.2 A "PCP" is a provision, criterion or practice. Did the second respondent have the PCPs set out at paragraph~~s 5.1.1 and~~ 5.1.2 above? Did Mark Atkin have the PCP set out a paragraph 5.1.2 above?

6.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, as set out at paragraph 5.4 above?

6.4 Did the second respondent and Mark Atkin know or could they reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

6.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

~~6.5.1 Giving her extra time to answer questions in the video interview;~~

6.5.2 Mark Atkin pointing left and right and repeating directions.

6.6 Was it reasonable for Mark Atkin and the second respondent to have to take those steps?

6.7 Did Mark Atkin and the second respondent fail to take those steps?

7. **Harassment related to disability (Equality Act 2010 section 26)**

7.1 If the respondents subjected the claimant to the treatment set out at paragraphs 2.4 and 2.10 above, was it unwanted conduct?

7.2 Did it relate to disability?

7.3 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

7.4 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

8. **Harassment related to gender reassignment (Equality Act 2010 section 26)**

8.1 If the respondents subjected the claimant to the treatment set out at paragraph~~s 2.3 and~~ 2.10 above, was that unwanted conduct?

8.2 Did it relate to gender reassignment?

8.3 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

9. **Victimisation (Equality Act 2010 section 27)**

9.1 Did the claimant do protected acts as follows:

9.1.1 Write a file note after the first test with Mark Atkin;

9.1.2 Make a formal complaint regarding the first test;

9.1.3 Give evidence as part of that process, including an interview with Ms Atwell, providing information;

9.1.4 Discuss the first upheld complaint with Mr Williams on the phone;

9.1.5 Ask the second respondent to move the second test within the cluster/provide travel costs for the second assessment;

9.1.6 Make a second complaint regarding the second test and the actions of Carwyn Huntley;

9.1.7 Appeal the outcome from the second complaint by way of letter;

9.1.8 Indicate she was contacting ACAS for early conciliation;

9.1.9 Present her first ET1?

9.2 If the respondents did the actions at paragraphs 2.5 – 2.10 above, did they subject the claimant to a detriment?

9.3 If so, was it because the claimant did a protected act? The claimant says the following detriments were because of the following protected acts:

9.3.1 Detriment at paragraph 2.5 because of protected acts at paragraphs 9.1.2, 9.1.3 and 9.1.4;

9.3.2 Detriment at paragraph 2.6 because of protected acts at paragraphs 9.1.1 – 9.1.5;

9.3.3 Detriment at paragraph 2.7 because of protected acts at paragraphs 9.1.1 – 9.1.7;

9.3.4 Detriment at paragraph 2.8 because of protected acts at paragraphs 9.1.1 – 9.1.7;

9.3.5 Detriment at paragraph 2.9 because of protected acts at paragraphs 9.1.1 – 9.1.7

9.3.6 Detriment at paragraph 2.10 because of protected acts at paragraphs 9.1.1 – 9.1.9.

6. Both parties agreed that these were the issues for this Tribunal to determine.It was made clear that there were no issues with regard to time limits. Ms Garner, on behalf of the respondents confirmed they accepted that the allegations were in respect of a continuing act.

7. The Tribunal had sight of a bundle of documents which, together with documents added during the course of the hearing, was numbered up to page 1087. The Tribunal considered those documents to which it was referred by the parties

Findings of fact

8. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that the Tribunal made from which it drew its conclusions.

9. Where the Tribunal heard evidence on matters for which it makes no finding, or does not make a finding to the same level of detail as the evidence presented, that reflects the extent to which the Tribunal considers that the particular matter assists in determining the issues. Some of the Tribunal's findings are also set out in its conclusions, to avoid unnecessary repetition and some of the conclusions are set out within the findings of fact.

10. The claimant made an online application for the post of Driving Examiner with the second respondent . The application process for the role consists of three stages. The first is an online test which is followed by an online video interview with pre-recorded questions and the third stage is an assessment drive with a Driving Examiner.

11. The claimant successfully completed the first stage of this application process. The claimant had disclosed that she had dyslexia in her application and the adjustments she required. The respondent operates a Disability Confident Scheme in which it offers

interviews to a fair and proportionate number of candidates who meet the minimum selection criteria for the role and who consider they have a disability.

12. The claimant was notified that she was through to stage 2 of the application process, the video interview stage.

13. On 21 June 2022 the claimant sent a number of emails to the respondent. She was informed that her emails had been passed to the recruitment services. The claimant completed the video assessment on the evening of 21 June 2022.

14. On 21 June 2022 The claimant was notified that she had been successful at stage 2 and that she would proceed to the final stage, the driving assessment.

15. On the morning of 22 June 2022 the claimant sent an email to the second respondent's recruitment department in Newcastle stating that she had completed the assessment by video and she asked:

> "Can I ask, given I am disabled due to a learning disability and also male to female transgender and suffering discrimination work place previously
>
> What can be done to support me if I am successful and provide adjustment…"

16. On 30 June 2022 first respondent sent an email to the claimant and invited her to attend a driving assessment on 20 July 2022 at Barnsley Driving Test Centre. This was rearranged due to the claimant's availability.

17. On 21 July 2022 the claimant attended a driving assessment with the first respondent. The claimant failed that driving assessment and in the comments on the record of that assessment (395) the first respondent stated:

> "Some knowledge of modern driving techniques, poorly executed. Block changing gear far apart (2nd to 5th) causing considerable loss of speed, and on occasion, impact to following vehicles. Braking harshly on bends and trying to change gears simultaneously. Slow progress when safe and clear to proceed, and on one occasion, drove at well in excess of 30 mph speed limit in roadworks. On motorway section made very slow progress and took up position in middle and right hand lane when unnecessary causing issues to other traffic. Advised early of exit to allow transition to left lane, which was poorly executed and at such slow speed that further issues developed for other road users. Stopped at every give way regardless of visibility and other vehicles, often completely clear and safe to proceed. Poor standard throughout"

18. On 25 July 2022 claimant was notified of the decision.

19. On 25 July 2022 (426) the claimant submitted a formal complaint to the second respondent. She complained that that no reasonable adjustments have been made at stage 2, the video test in respect of her dyslexia although she had passed that stage before anybody got back to her. She then stated, with regard to the driving assessment

> "… At the start of the driving assessment again I informed the examiner conducting this test the steps needed to assist me and did so in detail and was told " lets see how we go" nothing was put in place throughout the test and this had an impact moving forward such as forgetting where to go and taking wrong turnings – I had asked for directions as pointing left and right and repeating directions due to a short term memory problem to which nothing was put in place, which lead to mistakes which could have been avoided had reasonable adjustments being put in place. Reasonable adjustments was put in place for my learner driving test in 2017 and I am confused as to why this has not happened this time.
>
> … The DVSA in their recruitment adverts and processes have promised they want to have application from minority groups such as disabled and transgender and despite applying little has been done to assist me. I therefore have little faith in the way the test was conduct and ask this to be retake by myself and assessed by someone else in a different town / city and for that person to have no knowledge of this result and for adjustments to be put in place…."

20. Bethan Atwell, Head of Inclusion, Talent Acquisition and Resourcing was appointed to carry out an investigation. She met with the claimant and other witnesses and prepared an investigation report. The report was of the type used by the second respondent when dealing with a grievance.

21. The complaint was then passed to Rowland Williams, Operations Manager to consider the outcome. He wrote to the claimant on 23 August 2022 (551). He considered three points. With regard to the first point in respect of the driving assessment, the conclusion was that the evidence from the assessment showed that the claimant's driving was not at the advanced standard the second respondent required in the driving examiner recruitment.

> "… however, I accept that we did fall short on this occasion as the assessor had used his experience in assessing driving tests when considering adjustments rather than agreeing what adjustments would be reasonable and work for you. I have set out a proposal later in this letter to resolve this…"

22. Rowland Williams found that there was no evidence that supported the claimant's complaint that she had been treated unfairly or in any way differently due to her transgender status.

23. It was accepted that the claimant was not provided with adjustments for the video assessment section of the recruitment process. The claimant had successfully completed that part of the test. The claimant received phone calls from two people from the cabinet office asking what adjustments were needed. By that time the claimant had already completed the test.

24. Two recommendations were made, that the second respondent would review the internal assessor training to ensure assessors had clear guidance relating to working with applicants and agreeing adjustments. The second proposal was that the claimant

was offered the opportunity to retake the assessment with the adjustment suggested by the claimant of “left and right pointing and repeating directions.”

25. The opportunity to undertake a second driving assessment during the course of the driving examiner recruitment had never been offered to any other candidate before this and it has not been offered to any candidate since.

26. On 25 August 2022 (568) the claimant wrote to Rowland Williams. Within that letter she stated:

> “At the outset I wish to state that I have been impressed with the way the DVSA have handled this complaint, the care provided and support given. The investigation and report appear to be even balanced and non-bias and in that spirit the comments below are intended and if there are any areas of disagreement – this is not to diminish the above in any way.… I do not wish to have any formal disciplinary action taken against Mark Atkin, maybe he can be trained Equality and undertaken some supervision on these tests to avoid a repeat. In that regard I have been impressed with the DVSA in this regard. With regards to the people, I have spoken to, they have been human, caring and compassionate as well as helpful. I also found this to be the case on the visits to the test centres to which I will return. I also grateful your time on the phone and that of Amanda Howes…
>
> While there remains some areas of disagreement, these have been addressed and I have concluded again these are best left unresolved. I have no intention of bringing ACAS into this matter or escalating the matter to an employment tribunal. My rational behind this, is that the DVSA are stretched with a backlog of test, a public body using public funds, the fair way I have been treated and the fact I wish to work for you do not wish to cause this to be affected with any stressful legal proceedings, with the possible outcome a small award if the claim is successful. It appears sensible for all concerned that the recommendations offered as the best way of resolving this to ensure others get assistance and I am treated fairly. The way forward in the first recommendations are therefore formally accepted by myself.
>
> It therefore follows that I accept your kind offer to be retested to resolve this complaint and I can confirm that there will be no appeal against the complaint outcome in full or at all…”

27. The second respondent appointed Carwyn Huntley, Technical Quality Lead for Driver Services and the third respondent, to conduct the second driving assessment. Carwyn Huntley was not aware that the claimant had failed on previous assessment.

28. There was a substantial amount of correspondence and discussion between the claimant and Mr Huntley prior to the appointment for the second driving assessment.

29. The claimant was offered an appointment on 15 September 2022 at the Leeds Driving Test Centre. This was to take place outside the cluster at the request of the claimant. The claimant raise concerns in relation to the additional expense in getting to Leeds and her request to relocate the test to Sheffield was granted.

30. The claimant attended the assessment on 16 September 2022. Mr Huntley spoke to the claimant before the assessment about the adjustments required. The claimant informed Carwyn Huntley that she wanted to take two short interludes during the drive of approximately five minutes each and she asked that she was given left and right hand gestures when issuing route directions.

31. Carwyn Huntley assessed the claimant's driving as poor and she failed the driving assessment.

32. The claimant emailed Mr Huntley after the drive to thank him for his assistance with the adjustments.

33. On 22 September 2022 (665) the claimant sent an email to Recruitment Newcastle In which she stated:

> "Can I confirm that while I do not agree with all the comment and findings in the assessment
>
> All reasonable adjustments were put in place as requested and also due to the fact I was unwell on the day – with rest breaks so this fail will not be subject to a complaint
>
> Thank you for the opportunity to resit the test"

34. On 22 September 2022 the claimant contacted Carwyn Huntley after she had received a copy of the assessment report. She was informed that the second respondent does not give feedback following a recruitment assessment drive other than the report itself and if she had any further questions about the recruitment process she should contact Recruitment Newcastle.

35. On 23 September 2022 the claimant wrote to the second respondent indicating that a formal complaint about the outcome findings of the driving assessment would follow.

36. On 29 September 2022 the claimant submitted a formal complaint to the recruitment team. She stated:

> "While the assessment was conducted with reasonable adjustments and no complaint is made (save for the comments below really the issue with me being criticised for asking for directions), my concerns re the comments and findings (and also the lack of key areas) in this report, which are considered false, malicious and an act of victimisation due to the past protected act… "

37. The claimant's complaint went into detail with regard to alleged poor planning, control of the vehicle, block changing gears, mirrors, direction signals, reaction to street limit signs, guidance on several occasions re lanes, incorrect lane on exiting roundabouts, alleged encroachment, hesitation on two occasions, following vehicles to close on M1, speed fast and slow, alleged refuge behind parked cars on a meeting

situation, reverse park and role and emerge. She asked that the assessment be voided and that she should be given the opportunity to resit the driving assessment.

38. On 3 October 2022 the claimant's complaint was acknowledged by the recruitment team.

39. On 6 October 2022 Stephen Moore, Head of Frontline Recruitment wrote to the claimant indicating that they were looking into the matter as soon as possible. She was asked to ensure that she emailed any further correspondence to the recruitment inbox. The claimant continued to email Stephen Moore directly despite being told on a number of occasions that the second respondent would be in touch to respond to her complaint. Stephen Moore said that the amount of correspondence he received was excessive and stressful.

40. On 17 October 2022 Paula Pitcher wrote to the claimant indicating to her that her complaint was being taken seriously and managed within their normal process which meant the claimant could expect a response within 30 days of raising her complaint. It was indicated that the claimant was asked to refrain from chasing responses as it was neither appropriate or helpful and was having a detrimental impact which was not acceptable.

41. Stephen Moore carried out fact-finding exercise in respect of the claimant's second complaint. He did not believe he needed to interview the claimant about her second complaint as her letter was sufficiently detailed. He spoke to Mr Huntley in order to gather relevant information.

42. On 20 October 2022 Jayne Stone, Head of People Partnering wrote to the claimant providing a response to her second complaint. It was stated that Carwyn Huntley had no knowledge of the claimant's previous complaint. The written assessment simply set out why the claimant did not meet the required standard of driving. The second respondent was not prepared to agree to the claimant's request that her second test was "voided". It was stated that the Agency do not intend to correspond with the claimant further.

43. On 21 October 2021 the claimant submitted a letter purporting to be an appeal against the decision. Jayne Stone did not respond to the claimant's appeal letter as she had made it clear that her decision was final and wanted to close the communication with the claimant.

44. The claimant continued to contact the recruitment team on 27 October 2022, 28 October 2022 and four times on 31 October 2022. On 31 October 2022 Stephen Moore wrote to the claimant indicating that Jayne Stone's letter of 21 October 2022 set out the second respondent's final position and they were not intending to consider any appeal or investigate the matter further.

45. On 20 December 2022 the claimant presented a claim to the Employment Tribunal. She brought claims of gender reassignment discrimination and disability discrimination. On 2 March 2023 the claimant issued a further claim to the Employment Tribunal. On 15 March 2023 the claims were consolidated.

The Law

Direct discrimination

46. Section 13 of the Equality Act 2010 provides:

> (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.

47. In **Islington Borough Council v Ladele** [2009] ICR 387 Mr Justice Elias explained the essence of direct discrimination as follows:

> "The concept of direct discrimination is fundamentally a simple one. The claimant suffers some form of detriment (using that term very broadly) and the reason for that detriment or treatment is the prohibited ground. There is implicit in that analysis the fact that someone in a similar position to whom that ground did not apply (the comparator) would not have suffered the detriment. By establishing that the reason for the detrimental treatment is the prohibited reason, the claimant necessarily establishes at one and the same time that he or she is less favourably treated than the comparator who did not share the prohibited characteristic."

48. In **Glasgow City Council v Zafar** [1998] ICR Lord Browne-Wilkinson stated

> "Those who discriminate on the grounds of race or gender [disability] do not in general advertise their prejudices: indeed they may not even be aware of them"

49. It is sufficient for a claimant to establish direct discrimination if he or she can satisfy the Tribunal that the prohibited characteristic was one of the reasons for the treatment in question. It need not be the sole or even the main reason for that treatment; it is sufficient that it had a significant influence on the outcome, see Lord Nicholls in **Nagarajan v London Regional Transport** [1999] IRLA 572 in paragraph 17:

> " I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race [disability] was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn. Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of section 1(1)(*a*). The employer treated the

> complainant less favourably on racial grounds. Such conduct also falls within the purpose of the legislation. Members of racial groups need protection from conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination. Balcombe L.J. averred to an instance of this in *West Midlands Passenger Transport Executive v. Singh* [1988] I.R.L.R. 186, 188. He said that a high rate of failure to achieve promotion by members of a particular racial group may indicate that 'the real reason for refusal is a conscious or unconscious racial attitude which involves stereotyped assumptions' about members of the group."

50. Where an actual comparator is relied upon by the claimant to show that the claimant has suffered less favourable treatment it is necessary to compare like with like. Section 23(1) of the Act provides: "there must be no material difference between the circumstances in relation to each case." That does not mean to say that the comparison must be exactly the same, there can be a comparison where there are differences. The evidential value of the comparator is weakened the greater the differences, see **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** and **Carter v Ashan [2008] ICR 1054**. The Supreme Court in **Hewage v Grampian Health Board [2012] ICR 1054** confirmed that a Tribunal had not erred in relying on non-exact comparators in a finding of discrimination.

51.Evidence of direct discrimination is rare and the Tribunal often has to infer discrimination from the material facts that it finds applying the burden of proof provisions in section 136 of the Equality Act as interpreted by **Igen Ltd v Wong [2005] ICR 931** and subsequent judgments. In **Ladele** Mr Justice Elias, in the EAT said:

> "The first stage places a burden on the claimant to establish a prima facie case of the discrimination: where the applicant has proved fact from which inferences could be drawn that the employer treated the applicant less favourably [on a prohibited ground] then the burden moves to employer… then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the Tribunal must find that there is discrimination."

52. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of **Madarassy v Namora International PLC [2007] ICR 867** the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: "They are not, without more, sufficient material from which

a Tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

53. A claimant cannot rely on unreasonable treatment by the employer as that does not infer that there has been unlawful direct discrimination; see **Glasgow City Council v Zafar [1998] ICR 120**. Unreasonable treatment of itself does not shift the burden of proof. It may in certain circumstances be evidence of discrimination so as to engage stage 2 of the burden of proof provisions and required the employer to provide an explanation. If no such explanation is provided there can be an inference of discrimination **Bahl v Law Society** [2004] IRLR 799.

54. In the case of **Qureshi v Victoria University of Manchester and another [2001]** ICR 863 Mummery J said:

> "There is a tendency, however, where many evidentiary incidents or items are introduced, to be carried away by them and to treat each of the allegations, incidents or items as if they were themselves the subject of a complaint. In the present case it was necessary for the Tribunal to find the primary facts about those allegations. It was not, however, necessary for the Tribunal to ask itself, in relation to each such incident or item, whether it was itself explicable on "racial grounds" [disability] or on other grounds. That is a misapprehension about the nature and purpose of evidentiary facts. The function of the Tribunal is to find the primary facts from which they will be asked to draw inferences and then for the Tribunal to look at the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the acts or decisions complained of in the originating applications were on "racial grounds". The fragmented approach adopted by the Tribunal in this case would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have on the issue of racial grounds. The process of inference is itself a matter of applying common sense and judgment to the facts, and assessing the probabilities on the issue whether racial grounds were an effective cause of the acts complained of or were not. The assessment of the parties and their witnesses when they give evidence also form an important part of the process of inference. The Tribunal may find that the force of the primary facts is insufficient to justify an inference of racial grounds. It may find that any inference that it might have made is negated by a satisfactory explanation from the respondent of non-racial grounds of action or decision."

55. Since the House of Lords' Judgment in **Shamoon v Chief Constable Royal Ulster Constabulary [2003] IRLR 285** the guidance given was that a Tribunal should approach the question of whether there is direct discrimination by asking the single question of the reason why. That case has been expanded on by **Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830**, **Ladele, Amnesty International v Ahmed [2009] IRLR 884**, **Aylott v Stockton on Tees Borough Council [2010] IRLR 994**, **Martin v Devonshires Solicitors [2011] ICR 352, JP Morgan Europe Limited v Cheeidan [2011] EWCA Civ 648**, and **Cordell v Foreign and Commonwealth Office** [2012] ICR 280.

56. For a finding of direct discrimination it is not necessary for the discriminator to be consciously motivated in treating the complainant less favourably. It is sufficient if it can be inferred from the evidence that a significant cause of the discriminator to act in the way he has acted is because of the persons protected characteristic. As Lord Nicholls said in **Nagarajan v London Transport,**

> "Thus, in every case, it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on the grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question, will call for some consideration of the mental process of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision."

57. Therefore, in most cases the question to be asked by the Tribunal requires some consideration of the mental process of the discriminator. Once established that the reason for the act of the discriminator was on a prohibited ground the explanation for the discriminator doing that act is irrelevant. Liability has then been established.

58. In the case of **Qureshi v Victoria University of Manchester** Mummery J said, with regard to race discrimination:

> "As frequently observed in race discrimination cases, the applicant is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of racial grounds for the alleged discriminatory actions and decisions. The Applicant faces special difficulties in a case of alleged institutional discrimination which, if it exists, may be inadvertent and unintentional. The Tribunal …. must also consider what inferences may be drawn from all the primary facts. Those primary facts may include not only the acts which form the subject matter of the complaint but also other acts alleged by the applicant to constitute evidence pointing to a racial ground for the alleged discriminatory act or decision. It is this aspect of the evidence in race relations cases that seems to cause the greatest difficulties. Circumstantial evidence presents a serious practical problem for the Tribunal of fact. How can it be kept within reasonable limits?"

59. The Tribunal has considered the case of London Borough of **Ealing v Rihal [2004] EWCA Civ 623** in which Lord Justice Keane in the Court of Appeal stated at paragraph 38:

> "The Tribunal's reference to Mr Foxall being an "honest and honourable man" (paragraph 48) is not inconsistent with him being unwittingly influenced by racial considerations. As Neill LJ said in *King –v- Great Britain China Centre* at page 528:
>
> "Few employers will be prepared to admit such discrimination *even to themselves.* In some cases discrimination will not be ill-intentional but

merely based on an assumption that "he or she would not have fitted in"." (my emphasis)

Nor is Ealing assisted by the fact that the Tribunal accepted as genuine and true Mr Foxall's explanation of what he was seeking to do in the scoring. That was simply the Tribunal accepting that Mr Foxall was honestly describing what he was trying to do in that exercise. As it said a little later, he gave this evidence with great conviction *on his own part*. That in no way leads to a conclusion that he was not influenced by racial considerations, albeit without appreciating it. “

Failure to make reasonable adjustments

60. Section 20(3) of the Equality act 2010 provides:

> “…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, [there is a requirement] to take such steps as it is reasonable to have to take to avoid the disadvantage.”

61. Section 212(1) provides that “Substantial” is defined at to mean “more than minor or trivial”.

6 more aligned 2. Whilst there is no definition of ‘provision, criterion or practice’ found in the legislation, and it is left to the judgment of individual Tribunals to see whether conduct fits this description, not every act complained of is capable of amounting to a PCP. In **Ishola v Transport for London [2020] IRLR 368** Simler LJ stated:

> "In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.
>
> In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an

indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."

63. In **Environment Agency v Rowan [2008] IRLR 20**, the EAT provided guidance on how an Employment Tribunal should approach a reasonable adjustments claim The Tribunal must identify:

> "(a) the provision, criterion or practice applied by or on behalf of an employer, or;
> (b) the physical feature of premises occupied by the employer;
> (c) the identity of non-disabled comparators (where appropriate); and
> (d) the nature and extent of the substantial disadvantage suffered by the claimant."

64. In **Bank of Scotland v Ashton [2011] ICR 632**, Langstaff J held:

> " The Act demands an intense focus by an Employment Tribunal on the words of the statute. The focus is on what those words require. What must be avoided by a tribunal is a general discourse as to the way in which an employer has treated an employee generally or (save except in certain specific circumstances) as to the thought processes which that employer has gone through."

65. In **Chief Constable of Lincolnshire Police v Weaver UKEAT/0622/07/DM**, the EAT held that a Tribunal must also take into account wider implication of any proposed adjustment, not just focus on the claimant's position. This may include operational objectives of the employer, which may include the effect on other workers.

66. Schedule 8 of the Equality Act 2010 provides that an employer is not under a duty to make reasonable adjustments unless it knows or ought to know the employee has a disability and is likely to be placed at the substantial disadvantage in question.

67. The required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified in section 1(1). Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day activities; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1. The employer does not need to also know that, as a matter of law, the consequence of such facts is that the employee is a disabled person as defined in section 1(2) **Gallop v Newport City Council [2014] IRLR 211**.

Harassment

68. Section 26 of the Equality Act provides

(1) A person (A) harasses another (B) if--

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of--

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

69. The test is part objective and part subjective. It requires that the Tribunal takes an objective consideration of the claimant's subjective perception. was reasonable for the claimant to have considered her dignity to be violated or that it created an intimidating, hostile, degrading, humiliating or offensive environment.

70. In the case of **Grant v HM Land Registry [2011] IRLR 748** the Court of Appeal said that:

> "Tribunals must not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive environment". They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

71. In the case of **Richmond Pharmacology v Dhaliwal [2009] IRLR 336** the EAT stated:

> "We accept that not every racially [or related to disability] slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

Victimisation

72. Section 27 of the Equality Act provides as follows:-

(1) A person (A) victimises another person (B) if A subjects B to a detriment because--

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act--

(a) Bringing proceedings under this Act;

(b) Giving evidence or information in connection with proceedings under this Act;

(c) Doing any other thing for the purposes of or in connection with this Act;

(d) Making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

73. In a victimisation claim there is no need for a comparator. The Act requires the Tribunal to determine whether the claimant had been subject to a detriment because of doing a protected act. As Lord Nicholls said in **Chief Constable of the West Yorkshire Police v Khan [2001] IRLR 830**:-

> "The primary objective of the victimisation provisions ... is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory right or are intending to do so".

74. The Tribunal has to consider (1) the protected act being relied on; (2) the detriment suffered; (3) the reason for the detriment; (4) any defence; and (5) the burden of proof. To benefit from protection under the section the claimant must have done or intended to or be suspected of doing or intending to do one of the four kinds of protected acts set out in the section. The allegation relied on by the claimant must be made in good faith. It is not necessary for the claimant to show that he or she has a particular protected characteristic but the claimant must show that he or she has done a protected act. The question to be asked by the tribunal is whether the claimant has been subjected to a detriment. There is no definition of detriment except to a very limited extent in Section 212 of the Act which says, "Detriment does not ... include conduct which amounts to harassment". The judgment in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** is applicable.

75. The protected act must be the reason for the treatment which the claimant complains of, and the detriment must be because of the protected act. There must be a causative link between the protected act and the victimisation and accordingly the claimant must show that the respondent knew or suspected that the protected act had been carried out by the claimant, see **South London Healthcare NHS Trust v Al-Rubeyi** EAT0269/09. Once the Tribunal has been able to identify the existence of the protected act and the detriment the Tribunal has to examine the reason for the treatment of the claimant. This requires an examination of the respondent's state of mind. Guidance can be obtained from the cases of **Nagarajan v London Regional Transport** [1999] IRLR 572 and **Chief Constable of West Yorkshire Police v Khan** [2001] IRLR 830, and **St Helen's Metropolitan Borough Council v Derbyshire** [2007] IRLR 540. In this latter case the House of Lords said there must be a link in the mind of the respondent between the doing of the acts and the less favourable treatment. It is not necessary to examine the motive of the respondent see **R (on the application of E) v Governing Body of JFS and Others** [2010] IRLR 136. In **Martin v Devonshires Solicitors EAT0086/10** the EAT said that:

> "…The question in any claim of victimisation is what was the "reason" that the respondent did the act complained of: if it was, wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation; and, if not, not. In our view there will in principle be cases where an employer had dismissed an employee (or subjected him to some other detriment) in response to a protected act (say, a complaint of discrimination) but he can, as a matter of common sense and common justice, say that the reason for dismissal was not the act but some feature of it which could properly be treated as separable. The most straightforward example this were the reason relied on is the manner of the complaint.…
>
> We accept that the present case is not quite like that. What the Tribunal found to be the reason for the Appellant's dismissal was not the unreasonable manner in which her complaints were presented (except [in one relevant respect]). Rather, it identified as the reason the combination of interrelated features – the falseness of the allegations, the fact that the appellant was unable to accept that they were false, the fact that both those features were the result of mental illness and the risk of further disruptive and unmanageable conduct as a result of that illness. But it seems to us that the underlying principle is the same: the reason asserted and found constitutes a series of features and/or consequences of the complaint which were properly and genuinely separable from the making of the complaint itself. Again, no doubt in some circumstances such a line of argument may be abused; but employment tribunal's can be trusted to distinguish between features which should and should not be treated as properly separable from the making of the complaint."

76. In establishing the causative link between the protected act and the less favourable treatment the Tribunal must understand the motivation behind the act of the employer which is said to amount to the victimisation. It is not necessary for the claimant to show that the respondent was wholly motivated to act as he did because of the protected acts, **Nagarajan v Agnew [1994] IRLR 61**. In **Owen and Briggs v James [1982] IRLR 502** Knox J said:-

"Where an employment tribunal finds that there are mixed motives for the doing of an act, one or some but not all of which constitute unlawful discrimination, it is highly desirable for there to be an assessment of the importance from the causative point of view of the unlawful motive or motives. If the employment tribunal finds that the unlawful motive or motives were of sufficient weight in the decision making process to be treated as a cause, not the sole cause but as a cause, of the act thus motivated, there will be unlawful discrimination."

77. Ms Garner referred to **Villalba v Merrill Lynch and Co [2006] IRLR 437** in which it was provided that the protected act must be a significant factor, in the sense of being more than a trivial part of the reason for the action in question.

78. In **O' Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615** the Court of Appeal said that if there was more than one motive it is sufficient that there is a motive that there is a discriminatory reason, as long as this has sufficient weight.

Burden of Proof

79. Section 136 of the Equality Act 2010 states:

"(1) This Section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

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

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) An Employment Tribunal."

80. Guidance has been given to Tribunals in a number of cases. In **Igen v Wong [2005] IRLR 258** and approved again **in Madarassy v Normura International plc [2007] EWCA 33.**

81. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against her. If the claimant does

this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of **Madarassy** the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: "They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

82. In the case of **Strathclyde Regional Council v Zafar [1998] IRLR 36** the House of Lords held that mere unreasonable treatment by the employer "casts no light whatsoever" to the question of whether he has treated the employee "unfavourably".

83. In **Law Society and others v Bahl [2003] IRLR 640** the EAT agreed that mere unreasonableness is not enough. Elias J commented that

> "all unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory, and it is not shown to be so merely because the victim is either a woman or of a minority race or colour … Simply to say that the conduct was unreasonable tells nothing about the grounds for acting in that way … The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given for it than it would if the treatment were reasonable."

84. A Tribunal must also take into consideration all potentially relevant non-discriminatory factors that might realistically explain the conduct of the alleged discriminator.

85. The claimant referred to the case of **Ross v Ryanair [2004] EWCA Civ 1751** with regard to reasonable adjustments. **Finnegan v Chief Constable of Northumbria Police [2013]** in respect of the shifting burden of proof. **Attorney General v Taheri [2022] EAT 34** with regard to a claimant bringing multiple claims **Wells Cathedral School v Souter UKEAT – 2020 – 000801 – JOJ *(check reference – non-given by claimant)*** with regard to time limits. The Tribunal has considered and noted the contents of these cases.

86. The Tribunal had the benefit of oral and written submissions provided by the claimant and Ms Garner on behalf of the respondent. These were helpful. They are not set out in detail but both parties can be assured that the Tribunal has considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

87. The Tribunal has considered all the identified issues and these are set out as

follows:

88. Because of the way these issues have been set out, the conclusions are, of necessity, repetitious.
(The issues are set out in italics)

LIST OF ISSUES

(Updated to Reflect Withdrawal of Claims – 1 October 2023 [234]

1. ***Disability***

It was conceded by the respondent that the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010.

2. ***Factual issues***

The claimant complains of the following treatment. The Tribunal will need to make findings of fact as to whether the following occurred:

~~*2.1 Did the second respondent fail to make any adjustments for the video interview in June 2022 (previously Allegation 1)?*~~

2.2 Did the second respondent move the claimant's first recruitment drive out of cluster on 30 June 2022 (previously Allegation 2, see 1st ET1 paragraphs 54 and 55)?

89. The claimant was offered a test in Rotherham and Barnsley. The Claimant agreed to an appointment in Barnsley. This was arranged to fit in with the claimant's hospital appointment and the claimant did not object.

The Tribunal is not satisfied that this was less favourable treatment by reason of the claimant's gender reassignment

~~*2.3 Did David Wedgewood (and the second respondent by virtue of section 109 EQA) indicate that he wanted to withdraw the claimant's application because the deed poll was 'homemade' and call her a 'problem' in test centre visits and emails on 15 July 2022 (previously Allegation 3, see 2nd ET1 paragraph 40)?*~~

2.4 Did Mark Atkin (and the second respondent by virtue of section 109 EQA) do the following things during the first driving assessment on 21 July 2022 (previously identified as Allegation 4, see 1st ET1 paragraphs 20 - 33):

2.4.1 Refuse to put in place reasonable adjustments, i.e. pointing left and right and repeating directions, instead telling the claimant "Let's see how we go";

90. The claimant was asked about adjustments at the commencement of the first driving assessment. Mark Atkin explained to the claimant that the first five minutes of the assessment would be time for the claimant to familiarise herself with the vehicle and would not count towards the assessment scoring. He did say "let's see how we go". The claimant had been informed that any adjustments could be discussed with

the drive assessor. Mark Atkin was an experienced examiner the claimant agreed that she was happy to proceed on the same basis after the first five minutes of the assessment. The Tribunal is not satisfied that there was any refusal to provide the reasonable adjustments.

2.4.2 Give late directions such as "turn left/right" on the junction so there was insufficient time to turn without breaking harshly, which was then marked down;

91. Mark Atkin was a clear and reliable witness and there was no credible evidence that he gave late directions.

2.4.3 Make matters up, such as speeding through traffic lights, the motorway issue and also the fact she did not reach the maximum speed limit on a country road as it was wet and unsafe to do so and marked her down;

92. There was no credible evidence that Mr Atkin had made anything up about the claimant's driving performance. He was an experienced driving examiner and he was carrying out the job he was required to do. The Tribunal is not in a position to assess the claimant's driving performance. The evidence of Mr Atkin with regard to the claimant's driving and that of Mr Huntley on the second assessment was consistent.

2.4.4 Tell the claimant the test will continue providing she doesn't crash the car;

93. This was admitted to be a light-hearted remark which Mark Atkin agreed he would make to candidates in order to put them at ease.

2.4.5 Tell the claimant she should do what is best when she repeated requests for adjustments;

94 Mark Atkins evidence was that this was the standard advice given to candidates when the examiner or assessor could not give advice on the driving techniques. The claimant did not appear stressed or anxious and did not make any wrong turns during the assessment.

2.4.6 Tell the claimant she will be in role and then fail her?

95. The Tribunal found that Mark Atkins had a discussion with the claimant after this assessment and referred to events that could happen when in role. The claimant asked for feedback and Mark Atkins said that he could not give her feedback but they continued to have a discussion for around 10 minutes about hypothetical matters and how she would be treated as a transgender person if she succeeded in getting the role. The expression was on the basis of what would happen if 'one' or 'you' were in role. It was not a promise or an indication that the claimant would be appointed. It was unusual for any discussion to take place at this stage.

96. The Tribunal is not satisfied that it has been established that there were facts from which it could conclude that there had been discrimination, direct, indirect or harassment by reason of the claimant's protected characteristics**.**

2.5 Did the second respondent move the claimant's second assessment out of cluster in September 2022 (previously Allegation 5, see 1st ET1 paragraph 73)?

97. The second assessment was initially to take place in Leeds as that was Carwyn Huntley's region and he was not aware of the claimant's previous assessment or complaint. It was moved to Sheffield at the claimant request.

2.6 Did Carwyn Huntley (and the second respondent by virtue of section # 09 EQA) do the following things in the second driving assessment on 16 September 2022 (previously Allegation 6, see 1st ET1 paragraphs 74 - 107):

2.6.1 Allege poor planning, despite the claimant commentating;

2.6.2 Allege harsh breaking (including touching the break pedal several times in one episode)/acceleration;

2.6.3 Mark the claimant down for following the guidance given to her by Mr Williams on counter roads – by claiming she was breaking while going around a country road bend and not going at maximum speed – the claimant complied with 125 of the Highway Code but was marked down;

2.6.4 Allege predominantly reactionary driving;

2.6.5 Allege incorrect block changing gears;

2.6.6 Allege that gears were rushed, snatched or incorrectly used and the engine lurched and/or laboured;

2.6.7 Allege ineffective use of mirrors;

2.6.8 Allege misleading direction signals and lack of signals when needed;

2.6.9 Allege poor reaction to street limit signs;

2.6.10 Allege incorrect use of lane when exiting roundabouts;

2.6.11 Allege encroachment;

2.6.12 Allege hesitation on two occasions;

2.6.13 Allege following vehicles too closely on M1 motorway;

2.6.14 Allege fast and slow application of speed;

2.6.15 Allege refuge behind a parked car on a meeting situation.

2.6.16 Allege the claimant sought guidance on which way to go at larger junctions;

2.6.17 Fail to discuss the report with the claimant;

2.6.18 Fail to take account of the fact the claimant was using modern driving techniques as suggested such as roll and emerge and following the video given to her by Mr Williams;

2.6.19 Mark her down despite her doing what was asked?

98. All the allegations under 2.6 (save for 2.6.17) relate to the claimant's driving performance as assessed by Carwyn Huntley. The Tribunal does not accept that he was lying. He was doing the task that he had been asked to do.

99. The claimant's assessment of her driving ability did not accord with that of both the examiners Mark Atkin and Carwyn Huntley whose evidence was clear and credible. There were both cross-examined on these points and there was no credible evidence that either of them was lying.

100. The claimant relied on the marks from her driving test in 2017 in respect of her driving ability. It was made clear by the respondent's witnesses that the driving test is only the first step and it is a test of whether the candidate is safe to go on the road. However, the recruitment drive for the position of Driving Examiner is of a much higher standard.

101. The Tribunal is not satisfied that either of the examiners had any reason to not give a genuine assessment of the claimant's driving.

102. Carwyn Huntley was not aware of the claimant's previous test or that she had raised a complaint. There was no evidence that established he was aware of the first test or complaint and he gave clear and credible evidence of his assessment of the claimant's driving. The claimant in her closing submissions stated that he was clearly a nice man and very polite – he comes across as sincere. It was submitted by the claimant that he was brought into fail her as their yes-man.

103. There was no evidence to support this allegation. The Tribunal accepts that both Mark Atkin and Carwyn Huntley carried out their assessments of the claimant's driving performance on a professional and honest basis.

104. The Tribunal is not satisfied that the claimant has established facts from which it could conclude that there were acts of discrimination by reason of the claimant's protected characteristics or because of protected acts.

105. With regard to allegation 2.6.17, it is the respondent's policy is that no discussions about the test should take place after the assessment .

2.7 Did Jayne Stone and/or Stephen Moore (and the second respondent by virtue of section 109 EQA) do the following things in the course of the claimant's second complaint during September and October 2022 (previously Allegation 7, see 1st ET1 paragraph 108 and 2nd ET1 paragraphs 28 - 38):

2.7.1 Fail to investigate the second complaint;

2.7.1.Fail to interview the claimant or Carwyn Huntley;

2.7.3 Only ask Carwyn Huntley to provide limited information about the test location for the second test and (Stephen Moore only) tell Carwyn Huntley "there's nothing to worry about" when requesting that information;

2.7.4 Use Carwyn Huntley to hep complete the reply to the claimant;
2.7.5 Stephen Moore saying "we need to get this resolved ASAP as impacting on time";

2.7.6 Following the dispute resolution policy for a complaint for the first complaint in the full knowledge of all concerned;

2.7.7 Fail to follow the DPP which was the right one for the first complaint, as confirmed by Mr Webb-Skinner;

2.7.8 Jayne Stone making claims in her letter that a full fact finding exercise took place;

2.7.9 Fail to offer a right of appeal;

2.7.10 Refuse to consider an appeal when presented;

2.7.11 Fail to provide reasons for the decision;

2.7.12 Fail to provide the notes from the interview with Carwyn Huntley, later confirming no interview took place?

106. There was no applicable policy to deal with complaints of this nature. Jayne Stone chose what she considered to be a reasonable way to deal with it. She felt that Special Circumstances section within the Dispute Resolutions Policy in respect of disputes raised by former employees was the closest to the point. This provided a modified approach which contained two steps, the first being that the former employee sends a written dispute to their former manager or Department. Following any necessary investigation, the Department should normally write to the former employee and the Department's decision is final and there is no right of appeal.

107. This is clearly different to the Equal Opportunities policy which refers to working in the Department. The fact that the procedure applicable to employees was used in the first complaint was discretionary and the fact that the second complaint was not dealt with in the same way does not show facts from which it could be concluded that it was discriminatory or victimisation. The claimant could not show that a comparator would have been treated more favourably or that the effect was harassment.

108. By the time of the second complaint the claimant was bombarding employees with emails and the respondent decided to end what they considered was harassment

of staff. In addition, Stephen Moore gave evidence that he was under time pressure as, this was late October and it was blocking the recruitment process which had started in June.

109. The Tribunal was satisfied that this approach was reasonable in all the circumstances, there was no evidence that it was discriminatory or victimisation.

110. There was a limited investigation and questions were asked of Carwyn Huntley.

2.8 Did the second respondent fail to offer the claimant a third assessment (previously Allegation 8, see 1st ET1 paragraph 111)?

2.9 Did Jayne Stone (and the second respondent by virtue of section 109 EQA) falsely claim she had investigated matters on 24 October 2022 and make the comments in bold at paragraphs 21 and 22 of the grounds of claim attached to the claimant's second ET1 (previously Allegation 9, see 2nd ET1 paragraphs 21 - 23):

2.9.1 "Less than an hour after sending our response we got the attached back [the claimant's appeal]. Is it worth responding and just re-iterate that we have investigated the matter thoroughly and the matter is now closed or just leave it?";

2.9.2 "This doesn't really fall within any process – our complaint process is specifically geared towards different customers (e.g. driving test candidates, driving instructors etc) and doesn't cover this scenario. The first complaint was investigated under the dispute resolution policy, which wasn't the right policy in my view as that complainant is not an employee or ex-employee. That process offers an appeal which is why that route was taken for the original complaint I don't think offering an appeal is going to get us anywhere but interested to hear your view"?

111. The claimant was not offered a third assessment. She was informed that she was welcome to apply for any further recruitment exercise.

112. These comments were suggested responses to the claimant discussed internally between employees of the second respondent. They were obtained by the claimant the following a Data Protection Subject Access request. The comments showed that the respondent's were looking at options and taking advice. There was no detriment to the claimant and no harassment or victimisation.

2.10. *Did Jayne Stone (and the second respondent by virtue of section 109 EQA) falsely accuse the claimant of harassment and getting Paula Pitcher to email her in October 2022 (previously Allegation 10, see 2nd ET1 paragraph 26)?*

113. The Tribunal finds that this was not a false allegation. The claimant's conduct towards the respondent and its employees was seen as harassment. The individuals were feeling harassed and perceived by the respondent to be harassed. It was not discrimination or victimisation to ask the claimant to refrain from further communications.

3. ***Direct disability discrimination (Equality Act 2010 section13)***

3.1 Was the treatment at paragraphs 2.4 to 2.10 above less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The claimant relies on a hypothetical comparator who does not have her learning disability of dyslexia.

3.2 If so, was it because of disability?

3.3 Did the respondents' treatment amount to a detriment?

114. The Tribunal finds that there was no evidence that established facts from which the Tribunal could conclude that there was less favourable treatment. There was no credible evidence that the claimant was treated less favourably than a comparator, actual or hypothetical, in the same material circumstances as the claimant who does not have her disability.

4. ***Direct gender reassignment discrimination (Equality Act 2010 section 13)***

4.1 The respondents accept that the claimant has the protected characteristic of gender reassignment.

4.2 Was the treatment at paragraphs 2.2, ~~2.3,~~ 2.5 – 2.10 less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.
The claimant says she was treated worse than a hypothetical cisgender female or a male candidate.

4.3 If so, was it because of gender reassignment?

4.4 Did the respondents' treatment amount to a detriment?

115. There was no credible evidence of any less favourable treatment because of the claimant's transgender status. The claimant conceded that large parts of her case rested on speculation and it was submitted by Ms Garner that the claimant was requesting the Tribunal to draw inferences impermissibly.

5. ***Indirect disability discrimination (Equality Act 2010 section 19)***

5.1 A "PCP" is a provision, criterion or practice. Did the second respondent have the following PCPs (and Mark Atkin in respect of 5.1.2):

~~5.1.1 In respect of paragraph 2.1 above, that in the video interview in June 2022, the applicant must give answers within in a set/limited period of time?~~

5.1.2 In respect of paragraph 2.4 above, that in the first driving assessment on 21 July 2022, the applicant must follow the examiner's brief oral directions?

5.2 Did the respondents apply the PCP(s) to the claimant?

5.3 Did the respondents apply the PCP(s) to persons with whom the claimant does not share the characteristic, i.e. applicants without a learning disability/dyslexia or would it have done so?

5.4 Did the PCP(s) put persons with whom the claimant shares the characteristic, i.e. applicants with a learning disability/dyslexia at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic, i.e. applicants without a learning disability/dyslexia, in that applicants with a learning disability/dyslexia would:

5.4.1 Be less likely to pass or do well on the assessment, due to short term memory problems?

5.4.2 Be more likely to forget directions and go the wrong way due to short term memory problems?

5.5 Did the PCP(s) put the claimant at that disadvantage?

5.6 Was/were the PCP(s) a proportionate means of achieving a legitimate aim? The respondents will clarify their legitimate aims. The Tribunal will decide in particular:

5.6.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;

5.6.2 could something less discriminatory have been done instead;

5.6.3 how should the needs of the claimant and the respondents be balanced?

116. Those undertaking driving assessments must follow the examiners' directions but there was no evidence that there were any directions that put the claimant at a substantial disadvantage. She showed no signs of stress, she did not ask for a break. There was no credible evidence that candidates with a learning disability/dyslexia were placed at a particular disadvantage. The claimant did not fail either assessment for taking a wrong turning after they had paused, Mark Atkins was of the view that the claimant was driving adequately in terms of following the route.

6. ***Reasonable Adjustments (Equality Act 2010 sections 20 & 21)***

6.1 Did the second respondent (in respect of the allegation at ~~paragraphs 2.1 and~~ 2.4 above) and Mark Atkin (in respect of the allegation at paragraph 2.4 above) know or could it reasonably have been expected to know that the claimant had the disability? From what date?

6.2 A "PCP" is a provision, criterion or practice. Did the second respondent have the PCPs set out at paragraph~~s 5.1.1 and~~ 5.1.2 above? Did Mark Atkin have the PCP set out a paragraph 5.1.2 above?

6.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, as set out at paragraph 5.4 above?

6.4 Did the second respondent and Mark Atkin know or could they reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

6.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

~~6.5.1 Giving her extra time to answer questions in the video interview;~~

6.5.2 Mark Atkin pointing left and right and repeating directions.

6.6 Was it reasonable for Mark Atkin and the second respondent to have to take those steps?

6.7 Did Mark Atkin and the second respondent fail to take those steps?

117. The same PCP is relied upon as for indirect discrimination. As set out above there was no evidence that there was any PCP that placed the claimant at a substantial disadvantage. There was knowledge of the claimant's disability

118. The claimant did not exhibit any signs of a substantial disadvantage. She was not failed as a result of taking a wrong turning.

7. ***Harassment related to disability (Equality Act 2010 section 26)***

7.1 *If the respondents subjected the claimant to the treatment set out at paragraphs 2.4 and 2.10 above, was it unwanted conduct?*

7.2 Did it relate to disability?

7.3 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

7.4 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

119. There was no credible evidence that the claimant was subjected to any conduct that have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading humiliating or offensive environment for the claimant. Mark Atkin was willing to put in place any adjustments required by the claimant and there was no evidence that there was harassment on grounds of disability. This is set out in the conclusions of the factual allegations set out above.

8. ***Harassment related to gender reassignment (Equality Act 2010 section 26)***

8.1 *If the respondents subjected the claimant to the treatment set out at paragraph~~s 2.3 and~~ 2.10 above, was that unwanted conduct?*

8.2 Did it relate to gender reassignment?

8.3 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

120**.** There was no evidence that there was any unwanted conduct related to the claimant's gender reassignment. There was nothing that had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

121. Considering all the circumstances of this case, there is nothing the respondent did that could be reasonably seen as having been causative of the proscribed effect on the claimant.

122. It was submitted by Ms Garner that the respondent was highly solicitous to the claimant in all interactions with her and did so in the face of a significant amount of unwarranted correspondence including multiple threats of litigation. The Tribunal accepts that was the case. There was no evidence that the respondent harassed the claimant by reason related to her transgender status.

9. ***Victimisation (Equality Act 2010 section 27)***

9.1 Did the claimant do protected acts as follows:

9.1.1 Write a file note after the first test with Mark Atkin;

9.1.2 Make a formal complaint regarding the first test;

9.1.3 Give evidence as part of that process, including an interview with Ms Atwell, providing information;

9.1.4 Discuss the first upheld complaint with Mr Williams on the phone;

9.1.5 Ask the second respondent to move the second test within the cluster/provide travel costs for the second assessment;

9.1.6 Make a second complaint regarding the second test and the actions of Carwyn Huntley;

9.1.7 Appeal the outcome from the second complaint by way of letter;

9.1.8 Indicate she was contacting ACAS for early conciliation;

9.1.9 Present her first ET1?

9.2 If the respondents did the actions at paragraphs 2.5 – 2.10 above, did they subject the claimant to a detriment?

9.3 If so, was it because the claimant did a protected act? The claimant says the following detriments were because of the following protected acts:

9.3.1 Detriment at paragraph 2.5 because of protected acts at paragraphs 9.1.2, 9.1.3 and 9.1.4;

9.3.2 Detriment at paragraph 2.6 because of protected acts at paragraphs 9.1.1 – 9.1.5;

9.3.3 Detriment at paragraph 2.7 because of protected acts at paragraphs 9.1.1 – 9.1.7;

9.3.4 Detriment at paragraph 2.8 because of protected acts at paragraphs 9.1.1 – 9.1.7;

9.3.5 Detriment at paragraph 2.9 because of protected acts at paragraphs 9.1.1 – 9.1.7

9.3.6 Detriment at paragraph 2.10 because of protected acts at paragraphs 9.1.1 – 9.1.9.

123. It was conceded by the respondent that the claimant's first complaint on 25 July 2022 amounted to a protected act. However, there was no evidence that the claimant was subject to a detriment because of making a protected act.

124. In particular, in relation to factual allegation 2.5, the Tribunal accepts that Carwyn Huntley did not know about the claimant's complaints and the initial choice of the assessment being in Leeds was not because of any protected act. The second assessment was proposed to be carried out away from the original cluster at the claimant's request and was moved with her agreement.

125. In respect of allegations 2.6 that Carwyn Huntley was lying in respect of the claimant's driving performance. The Tribunal is not satisfied that there was any

evidence that the outcome of the assessment of the claimant's driving ability was fabricated or that Carwyn Huntley was aware of the protected act.

126. With regard to allegations 2.7 – 2.9 the treatment of the claimant's second complaint was a reasonable attempt to provide a response within a reasonable timeframe.

127. The fact that the second complaint was dealt with in a different way from the first complaint does not mean that it was victimisation. It was not unfavourable treatment because of the protected act.

128. Allegation 2.10. This is not a false accusation. The claimant's conduct towards the respondent and its employees was seen as harassment.The individuals were feeling harassed and were perceived by the respondent to be harassed. It was not discrimination or victimisation for the respondent to ask the claimant to refrain from further communications.

129. The claimant's communications with the second respondent's employees were causing concerns. There was no standard complaints policy for the circumstances and the respondent was entitled to take into account the manner in which the claimant conducted correspondence with the second respondent's employees.

130. The Tribunal has given very careful consideration to all the issues in this case and it is not satisfied that the claimant has established facts from which it could conclude that there was direct or indirect discrimination by reason of the claimant's disability or gender reassignment or harassment related to the claimant's disability or gender reassignment or victimisation because the claimant had done a protected act.

131. In all the circumstances, the unanimous judgment of the Tribunal is that the claims brought by the claimant are not well-founded and are dismissed in their entirety.

Employment Judge Shepherd

Date: 22 March 2024