EMPLOYMENT TRIBUNALS

Claimant: Mr A Schofield

Respondent: Manchester Airport Group Plc

HELD AT: Manchester **ON:** 16, 17 and 19 January 2017

BEFORE: Employment Judge Horne

REPRESENTATION:

Claimant: Ms L Farnell, claimant's partner
Respondents: Mr A Moore, solicitor

RESERVED JUDGMENT

1. The respondent did not breach the duty to make reasonable adjustments.

2. The respondent did not discriminate against the claimant arising from disability.

REASONS

Complaints and Issues

1. The claimant has four learning difficulties: dyslexia, dyspraxia, dyscalculia, and dysgraphia. As a result of the cumulative effects of these conditions, he is acknowledged to be disabled within the meaning of section 6 of the Equality Act 2010 (EqA). By a claim form presented on April 2016, the claimant raised complaints of failure to make adjustments, contrary to sections 20, 21 and 39 of EqA, and discrimination arising from disability, contrary to sections 15 and 39 of EqA.

2. The duty to make adjustments was said to have arisen because of a single provision, criterion or practice (PCP). This was the respondent's requirement that an Airport Security Officer (ASO) must take and pass a written examination, providing written answers. The claimant's case was that, because of his disability, he struggled to read written test papers and writing the answers by hand. By way of adjustment, the claimant contended that the respondents should have:

   2.1. allowed more time for the examination,

   2.2. provided an amanuensis (that is, a person to assist the claimant by reading out loud the questions and according answers dictated by the claimant) and

   2.3. made available a private room in which to take the examination.

3. As no point did the claimant allege as part of his claim that the respondent had breached the duty to make adjustments by failing to increase the font size of the course materials or by failing in any other way to make the taught information more accessible to him prior to the examination.

4. The issues for the Tribunal to decide were:

   4.1. Did the PCP put the claimant to the alleged disadvantage?

   4.2. Was it reasonable for the respondent to have to make the adjustments?

5. The respondent initially raised what can conveniently be called the "knowledge defence". The precise formulation of the defence is to be found in EqA, Schedule 8, paragraph 20. During final submissions, the respondent's solicitor indicated that that defence was no longer being pursued.

6. The claim of discrimination arising from disability was based on the agreed premise that the respondent had treated the claimant unfavourably by dismissing him. Both parties contended that the reason why the claimant was dismissed was because he had failed the written examination. Pausing there, a late-disclosed email (to which we refer in more detail below) suggests to us that a very significant reason behind the decision to dismiss the claimant was not his failure in the examination, but a perception that his dyspraxia made it difficult for him to conduct body searches. Neither party, however, invited us to depart from the common ground that the claimant had been dismissed because he had failed the examination. We did not think it would be fair to either party to re-open that question without hearing further submissions and possibly allowing further oral evidence. Rather than embark upon that course, we found it possible to reconcile the email with the agreed reason for dismissal by reminding ourselves of the correct interpretation of section 15 EqA. In particular, we directed ourselves that unfavourable treatment is "because of something" if the "something" significantly influenced the decision to treat the claimant unfavourably. It did not have to be the only reason.

7. The issues for the Tribunal to decide were as follows:

   7.1. Did the claimant's failure to pass the examination arise in consequence of his disability?

   7.2. Was the dismissal a proportionate means of achieving a legitimate aim? (The respondent relied on the aim of ensuring that the respondent had, and was

able to prove that it had, ASOs that were competent in all aspects of the role. That aim was plainly legitimate and the claimant did not suggest otherwise).

Evidence

8. We heard oral evidence from the claimant on his own behalf and from his partner Lisa Farnell. The respondent called Mrs Janine Leigh, Mr Ross Collins, and Mr Simon Brooks as witnesses. All these individuals confirmed the truth of their written statements and answered questions.

9. The documentary evidence was initially presented to us in a bundle running to two volumes. One of these volumes contained material that we agreed should only be considered in private.

10. Unfortunately, as the case progressed, the Tribunal was drip fed a number of additional documents. These we labelled C1 to C3, R1, R2, and (missing a number) R4 and R5.

11. Once the evidence and submissions had been completed, the Tribunal reserved its judgment. We met in the absence of the parties to deliberate. On the day before the scheduled deliberation day, the claimant sent an email to the Tribunal attaching a further document apparently consisting of notes prepared by the claimant on a computer. The Microsoft Word creation properties appeared to show that the document had been created on 9 July 2016 and last modified the following day. The respondent objected to the Tribunal taking account of this new piece of evidence. The Tribunal agreed with the respondent. This new evidence came at an extremely late stage in the case. The respondent had no opportunity of asking questions about it. If we were to place any weight on this new document, the respondent could be put at a considerable disadvantage. By contrast, we did not think it would significantly harm the claimant's case if we refused to consider it. This was because, at best, the document showed that the claimant addressed his mind to the matters contained in the document over six months after his employment with the respondent had terminated. The overriding objective clearly pointed in favour of the new document being excluded.

12. This is a convenient opportunity for us to record, briefly, our impressions of the witnesses who gave evidence to us:

    12.1. It was impossible not to admire the claimant for the way in which he had overcome his significant learning difficulties to obtain an undergraduate and post-graduate university degree. He was clearly intelligent and articulate. His recall of dates and numbers was extremely confused. We did not hold this confusion against the claimant; it appeared to us that the most likely explanation was the very disability which has given rise to this claim. More worryingly from a fact-finder's point of view was the claimant's apparently contradictory evidence about what had actually happened during the final examination. On the one hand, he told us that he did not have sufficient time to complete the examination and that he should have been given more time. On the other hand, he told us that he had been informed that there was no time limit for the examination and that he had completed the paper. When asked how the examination had come to an end, the claimant appeared stuck for an answer. Whether this discrepancy in the claimant's evidence was due to his disability or not, is beyond our

understanding of his particular learning difficulties. It did, however lead us to question whether there might be other parts of his evidence about which the claimant was similarly confused.

12.2. The evidence of Mrs Leigh appeared to us to be fairly straightforward. One factor we bore in mind when evaluating her evidence was that she appeared to have less of an axe to grind than the respondent's other two witnesses. Her conduct was not in question. In fact, on the claimant's case, Mrs Leigh had no involvement at all. Put bluntly, she had little to gain by lying to us.

12.3. Mr Collins gave evidence in a confident manner. His account appeared to be straightforward. We could not, however, take everything he said at face value. There appeared to be a contradiction between his accounts to us and the version contained in the respondent's ET3 response at paragraph 13. His contemporaneous email was largely consistent with his version of events, but omitted a very important detail, namely the way in which the re-test was carried out and who invigilated it.

12.4. Finally we heard from Mr Brooks. Again, we had to take a cautious approach in relation to his evidence. His witness statement at paragraph 17 was inconsistent with the late disclosed email. That said, it did not follow from the inconsistency that Mr Brooks was trying to mislead us. It was, after all, Mr Brooks himself who, to the respondent's solicitor's embarrassment, volunteered the existence of the email in the first place. What it did mean, however, was that we had to pay extra care to Mr Brooks' evidence as a whole. We were keen to test how Mr Brooks' evidence matched the contemporaneous documents and undisputed facts of the case.

Facts

13. The claimant was employed by the respondent from 1 July 2015 to 22 December 2015.

14. The respondent is the largest United Kingdom–owned airport group, responsible for four airports including Manchester Airport.

15. A critical aspect of the functioning of an airport is the security of passengers. At the time of the events with which this claim is concerned, the threat level for international terrorism in the United Kingdom was rated as Severe. The respondent is closely scrutinised and regulated by the Department for Transport (DfT) and audited by the Civil Aviation Authority (CAA) in respect of its security measures. At operational level, the security of the airport depends on a large number of aviation security officers (ASOs). Most passengers who travel by air will be broadly familiar with their day to day work. Amongst other things, they ensure that passengers proceeding to departure gates are not carrying prohibited or dangerous items. Their techniques for doing so include operation of X-ray equipment and conducting body searches. Lesser-trained ASOs assist with the process, for example by giving instructions to passengers to place their belongings in trays.

16. It goes almost without saying that the respondent must be able to demonstrate that its ASOs are properly trained. This is no mean feat. The respondent has a turnover of over 400 ASOs per year. To keep pace with the constant influx of new recruits, the respondent in 2016 had a programme of 48 induction courses,

each lasting fifteen days. The numbers in 2015 were similar. On each induction course the cohort of trainees could be anything up to 14 at a time.

17. The induction course meets requirements specified by the DfT. It combines elements of acquired knowledge and practical skill. It is a mandatory condition of the training course that they comprise a mix of theoretical, practical and supervised on the job training. Paragraph 5 of the DfT mandatory conditions states "the mandatory training in the syllabus may only be delivered by a trainer certified by the DfT to deliver training to ground security staff". Paragraph 11 states "at the end of any on the job training, the certified trainer must also assess the competence of trainees". At paragraph 30, certified trainers are encouraged to test learning as the course progresses using a method of assessment suitable for the competence being tested, by contrast to the requirement that certain tasks be assessed by means of a practical assessment "a written knowledge test would be more appropriate to testing the understanding of the objectives and organisation of aviation security". We are satisfied that the respondent understood the DfT guidance to mean that, where knowledge was tested using a written examination, the test must not only be set and marked by a certified trainer, but the invigilation of the examination must be carried out by a certified trainer, too.

18. The respondent had two written policies relating to equality and diversity. One of them was a diversity policy expressed in high level terms. The other was titled "avoiding discrimination". As one would expect, the policy addressed disability discrimination and, in particular, the need to make reasonable adjustments. Under this heading, the policy stated, amongst other things:

> "the key point is that an employer must show that they have considered what reasonable adjustments could be made for the disabled person and not simply dismissed the idea of employing a disabled person or continuing the person's employment, all considerations and decisions relating to reasonable adjustments must be fully recorded and managers be aware that such decisions may be challenged.
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> …
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> The employer must obtain a proper assessment of the colleague's condition and prognosis, the effects of the condition on the colleague's ability to perform his or her job duties, … and the steps that the employer could potentially take to reduce or remove the disadvantages that the colleague is experiencing. A proper assessment is therefore a necessary pre-condition to the fulfilment of the duty to make reasonable adjustments."

19. At the relevant time, the respondent's training team was overseen by Mr Simon Brooks, Security Training and Business Development Manager. Amongst his direct reports was Janine Leigh, a certified Trainer. Also co-opted on to the training team was Mr Ross Collins. He was also a certified Trainer, although a recent promotion had taken Mr Collins outside Mr Brooks' direct reporting line. In addition to the certified trainers, there were a number of training coaches. One of these was Mr Peter King.

20. Both Mr Brooks and Mr Collins had undergone mandatory online training in diversity. Mrs Leigh had not actually completed the training herself, but had delivered diversity training to others. None of these three individuals was at all familiar with the policy documents to which we have just referred. The lay members of this Tribunal in particular find this lack of awareness disappointing. The provision of training is an area in which equality and diversity issues are not only very important but also frequently encountered. Mr Brooks had the authority to dismiss ASOs who did not satisfactorily complete their training. To a lesser extent Mrs Leigh had delegated authority to dismiss ASOs in similar circumstances. It may be that their unfamiliarity with the policies was due to over reliance on Human Resources support.

21. Now to the claimant. We have already mentioned his learning difficulties. They were diagnosed in around 1998. Thanks in no small part to the support of his partner Ms Farnell, the claimant was able to overcome these difficulties and achieve academic success. Though he left school with no formal qualifications, he learned as an adult to read and write and eventually was accepted onto an undergraduate degree course. Before he started at university, the claimant obtained a report from an Educational Psychologist, Mr Peter Prebble. An addendum to Mr Prebble's report addressed the claimant's request for a Disability Support Allowance at university. Part of the addendum addressed the support that the claimant would need during the examinations. It read as follows:

> "Ashley will also require additional time for formal examinations, both internal and external. This will be specifically for the purpose of applying taught strategies to recall and check spellings, planning and organising his ideas for writing and proof reading his work".

22. On 20 July 1998, a further report was prepared with regard to the claimant's disability, this time from the Principal of the Learn Write Centre. The report mentioned that the claimant used a coloured overlay for reading which prevented "print swirl". He had good levels of spelling and written language. The author noted, however, "He is still left with allied tremor of the hand, which will prohibit writing at speed and at length. He will need to use a laptop for course work and he will need examination concessions for his physical disabilities. An amanuensis, twenty five percent extra time and one break will be needed to enable him to take a two to three hour examination".

23. Both parties seek to rely on the contents of these reports for different reasons. It is right, therefore that we should express our views as to what they mean. The starting point is that, the claimant obtained this report specifically to address the difficulties he might experience whilst at university. His degree was in Social Sciences. The sorts of examinations envisaged by this report would involve substantial amount of writing and would take between two and three hours. The report did not address what, if any, adjustments the claimant would need when carrying out shorter examinations with less writing.

24. On 24 June 2015, the claimant applied for the role of ASO with the respondent. Following an interview he was accepted for the role and started work on 1 July 2015. In accordance with the respondent's usual practice, the claimant was placed on low-risk duties (such as tray filling) whilst background checks were carried out.

25. On the claimant's first day, a New Starter form was compiled based on information provided by the claimant. It is not clear to us who actually entered the information onto the form. What is not in dispute, however, is that as part of this process, the claimant was asked whether or not he was disabled. He was supplied with no further information than that. It was not, for example, explained to him that the purpose of the question would be to enable the respondent to decide what adjustments needed to be made. Nor was it explained that learning disabilities would be particularly relevant as they might affect how the induction course was delivered to him. On being presented with these two choices, the claimant decided to tell the respondent that he was not disabled. This was partly because of the stark binary choice offered to him. It was also because he felt the need to be cautious as a new starter. Whilst we have some sympathy for the position in which the claimant found himself, we cannot help observing that, had the claimant declared his learning difficulties at this stage, his experience of the induction course may well have been different. We accept the evidence of Mr Collins that the usual practice of the respondent on discovering that a new starter had declared a disability was to obtain a report from Occupational Health. The report, amongst other things, would address what adjustments might need to be made to the induction course. This process usually meant that any adjustments were identified by the start of the course.

26. The claimant completed his general security awareness training on 26 August 2015. It took some time, however, for him to be enrolled on to the induction course. This is because it took longer than anticipated for the claimant's background checks to be completed.

27. On 24 November 2015, the claimant attended the training centre for the first day of his fifteen-day induction course. Thirteen other trainees also attended. They assembled in a waiting room which led on to a number of different training rooms. Separated from the waiting room by a glass screen was Mr Brooks' office. Most of the training took place in Training Room 3. The training was principally delivered by Mr Collins with assistance from Mr King.

28. On that first day, Mr Brooks spoke to the assembled training group. He explained the respondent's expectation that each candidate would be required to pass every single element of the course. He may not have spelled out that failure to complete the course would inevitably lead to dismissal. Nevertheless it was widely understood by the trainees, including the claimant himself, that passing the course was an essential requirement for their employment to continue. Mr Brooks went on to explain that part of the course would be assessed by means of a written examination proceeded by a number of mock tests. As part of his presentation, Mr Brooks stressed to the trainees that they should not be afraid to ask questions about any part of the course. These were no empty words. Mr Brooks and the whole of the training team wanted as many as possible of the candidates to pass. There was no competitive element to the assessment process. All candidates could, and usually did, emerge from the course having been assessed as being competent to the required standard. The trainees were given a large A5-sized booklet containing all the materials they would need for the course. We have read the booklet for ourselves. For our convenience it was blown up in to A4 size. We are able to deduce that the A5-sized version would have contained a considerable amount of fine print.

29. At some point on the first day, the claimant spoke to Mr Collins about his disability. There is a dispute as to whether this occurred at the beginning or end of the day. It is also a matter of contention as to whether the conversation was entirely in private or whether it happened in the waiting room in the presence of other trainees. Bearing in mind the magnitude of some of the later disputes of fact, we did not think it necessary to resolve this particular dispute. During the conversation, the claimant told Mr Collins that he suffered from a number of learning difficulties of which the best known was dyslexia. He did not mention any of his other conditions by name. He told Mr Collins that he had two psychologist reports which would explain his difficulties in more detail. Mr Collins replied that he would not need to see the reports. It is quite possible that there were crossed wires in communication here. We accept Mr Collins' evidence that, by declining to see the reports, all he meant to do was to re-assure the claimant that he was taking the claimant's own description of his learning difficulty at face value. He was not attempting to prevent the claimant from mentioning any particular adjustment that he would need. Unfortunately, the claimant perceived the conversation differently. He thought that Mr Collins was displaying a lack of interest in the way in which his learning difficulties affected him. Mr Collins asked the claimant what support he would need. The claimant told Mr Collins that, when he was at university, he had had more time for exams. There is a dispute as to whether the claimant also told Mr Collins that he had had the services of an amanuensis. On balance, we think it is more likely than not that the claimant did use the word "amanuensis" during the course of the conversation. It is quite possible that Mr Collins did not fully appreciate its significance at that time. We do not think it is likely that during this particular conversation the claimant went in to any detail about what an amanuensis did. It is common ground that, during this conversation, Mr Collins explained that he would be able to read any test papers to the claimant. Something was said to the effect that handwriting would not be a problem provided that there was an additional witness present during any test.

30. The second day of the course was Wednesday 25th November 2015. On this day, the trainees were required to complete an online fire safety test. Questions were displayed on a screen with limited time for each answer. The claimant struggled with the test and it took some time before Mr Collins realised that the claimant needed assistance. He began to read the questions to the claimant out loud from the screen. Eventually the test was completed. We accept the claimant's evidence that he probably mentioned at this time that he needed an amanuensis in test conditions. The context, however, is important. The difficulty that the claimant was experiencing during the fire safety test related to his ability to read from the screen under time pressure. There was no hand writing involved and it is unlikely that there was any significant discussion about this.

31. We pause here to observe that the events up to this point would not have struck Mr Collins as particularly remarkable. The situation was somewhat out of the ordinary in that the claimant had not given any advance warning of his difficulties, meaning that there had been no time to obtain an Occupational Health report. Nevertheless, Mr Collins personally felt comfortable with his ability to deal with the claimant appropriately. As far as he was concerned, the claimant's main difficulty was dyslexia. Mr Collins had previous experience of dyslexic students. One trainee in particular had needed daily assistance in reading and writing. Mr

Collins had sat beside him, reading out loud to him and taking the trainee's answers orally. He thought it would be sufficient to mention the possibility of similar kinds of assistance to the claimant and to let the claimant guide him as to what support he needed.

32. The remainder of the week passed by with a combination of class-based learning and practical coaching. The claimant found it difficult to read parts of the booklet. He did not, however, raise any concern in this regard. It is possible that the reason may be that he had the support of his partner at home.

33. During the second week of the course, the trainees were given mock written tests, followed by the written examination. It was explained to them that they would have to achieve a mark of 80% or higher in order to pass.

34. The claimant did not perform well in his mock tests. On Wednesday 2 December 2015, after the second mock test, Mr Collins took the claimant to one side. He mentioned that the claimant appeared to be struggling. We accept that, during this conversation, Mr Collins offered support to the claimant in preparing for the forthcoming examination. An example of the assistance that offered was to talk the claimant through a number of acronyms which would help him remember key parts of the syllabus. The claimant thought that Mr Collins' approach was insensitive. He thought that it ought to have been apparent to Mr Collins that the reason for the claimant's low marks was his difficulty in reading and writing during the mock tests. Unfortunately, neither the claimant nor Mr Collins specifically mentioned on this occasion what arrangements should be put in place for the examination itself.

35. The third mock test was taken on Thursday 3 December 2015. Again, the claimant did not do well. That evening, there was a further conversation between Mr Collins and the claimant. Here are some of its key features:

    35.1. It is common ground that during this conversation, at the latest, the claimant mentioned dyspraxia and dyscalculia. It may in fact be that the claimant mentioned those two conditions specifically on the previous day (following the second mock test) but to our minds little turns on that particular question.

    35.2. The claimant did not mention dysgraphia.

    35.3. The claimant complained that the course booklet contained text in a font size that was too small for him. Mr Collins replied that the examination paper would be copied for the claimant in a larger font size. This adjustment was welcome as far as it went, but the claimant felt that Mr Collins was not engaging with his complaint that the booklet was too small.

    35.4. Mr Collins informed the claimant that there would be no time limit for the exam the following day. There is some dispute as to the precise way in which this point was communicated to the claimant. It is possible, as Mr Collins suggests, that he may have indicated the normal time within which candidates were expected to complete the examination, and may have added that the claimant would be given additional time, for example two hours. It may have been simply expressed in terms that there simply would be no time limit. In our view nothing turns on these points of fine detail. The claimant understood that he had as much time as he needed. It may be that this facility was also extended to all the other students who were not disabled. If

that is what Mr Collins did, we cannot fault him for taking that approach. This was not a competition. If the claimant had unlimited time, he was no worse off for the other candidates also having unlimited time.

35.5. It is likely that, during this conversation, Mr Collins repeated his offer to help the claimant read the examination questions. We have not come to this conclusion lightly. The claimant makes the valid point that it seems strange that he would have refused such an offer had it been made to him. This was something that had assisted him while he was at university. Nevertheless, we think there are more powerful reasons for concluding that the offer was made. The first is that there is no dispute that Mr Collins made the suggestion on the first day of the course. Second, Mr Collins had already used this technique with a previous dyslexic student. Third, as will be seen from an email sent by Mr Brooks the following day, it is clear that least Mr Brooks had in mind the possibility of the examination being carried out "verbally". One possible explanation for the claimant declining the offer of having questions read out to him might be the lack of any suggestion by Mr Collins that this process could be done in a private room. Another explanation could be that the examination paper itself did not require a large amount of reading. Knowing that there was no time pressure, the claimant may have thought that he did not need the same assistance as he had required either on the fire safety test or during his more arduous examinations at university.

36. The written examination was held at 9.00 am on 4 December 2015. The claimant sat the examination in the training room alongside all the other students. He was given as much time as he needed. Unfortunately, he found the examination an uncomfortable experience. At times he had to sit back and stretch his hands because of his discomfort in writing the answers. There was not a great deal of writing to be done. Many of the questions were in multiple choice format, requiring the claimant merely to circle the correct answer. Others required one–word or short answers. Very few of the questions required a complete sentence. Despite this, the claimant felt physically uncomfortable. He did not, however, complain of suffering any pain.

37. Whilst the claimant was sitting the written examination, and before there was any opportunity to mark his paper, Mr Brooks sent an email timed at 10.06 am to Annie Palmer of Human Resources. This is the email to which we have referred at the beginning of our reasons and which was only disclosed at the conclusion of Mr Brooks' evidence. His email asked for advice. It began with by identifying the claimant's conditions of dyslexia, dyspraxia and dyscalculia. It continued,

> "we can work around the dyslexia (which was declared on day one) and dyscalculia by completing written tests verbally but the concern is the dyspraxia as this will/is affecting body search. However, I want to take care as I assume this will be covered by DDA if it's a diagnosed condition.
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> The options are:
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> 1. look for an alternative position (cust services)
> 2. exit now as he is struggling – risk is DDA regs

3. wait until final sign off. – risk is he is inconsistent but could pass final sign off.

My recommendation based on the feedback and concerns from Ross is to look to exit or find an alternative as this will minimise the risk – but could do with your input."

38. We find this email to be illuminating both of Mr Brooks' thinking and that of Mr Collins. By this time, Mr Collins had informed Mr Brooks about his discussion with the claimant the evening before. Mr Collins had not previously mentioned any problem with the claimant's ability to conduct body searches based on observation of the claimant's training sessions. It is quite possible (though we do not need to determine this) that Mr Brooks' concern about body searches was based on stereotypical assumptions about dyspraxia and not based on actual observation evidence. Relevantly for the purpose of ascertaining the reason for dismissal, it appears from this email that Mr Brooks had formed at least the provisional view that the claimant could not progress as an ASO before he had even completed his final written examination. This may well be because the claimant's performance in the mock tests did not bode well for his prospects of passing the written examination. It does, however, beg the question of what Mr Brooks had in mind for the claimant in the event that the claimant passed. We think it likely that Mr Brooks had already decided that, regardless of the outcome of the written examination, the claimant would need to be re-deployed into another role or be dismissed. Failing the examination would merely hasten the claimant's departure.

39. As it turned out, the claimant did fail the examination. He was informed of that fact in a one-to-one discussion just before the lunch break. Mr Collins, who broke the news to him, informed the claimant that he would need to take a re-test, scheduled to take place that afternoon. The claimant asked for a private room in which to recuperate and prepare. He was offered the main training room. The claimant found this unsatisfactory because of the risk that other trainees might use the room to eat their lunch. He therefore spent the lunch break outside the terminal building. This only heightened the claimant's stress and anxiety during this period.

40. There is a dispute about what happened when the claimant returned from his lunch break. It is the claimant's case that on his return he was taken on an immediate tour of a room described to us as the "Weapons Room". He had to ask permission to leave the tour in order to conduct the re-test. We prefer the evidence of Mr Collins that the Weapons Room tour took place after the claimant's second examination had been completed. Our reason for coming to this view is that it would not make sense for the respondent to allow the claimant to leave the weapons room tour prematurely. The Weapons Room was an essential element of the course programme. Allowing the claimant to leave would mean that he would at some future time have to be taken out of the training centre for an individual tour. The schedule did not allow for this to happen.

41. The claimant was taken into the room where he was to undertake his second written examination. There are three important disputes of evidence to be resolved at this point:

41.1. Who invigilated the re-test? Was it Mrs Leigh, as the respondent contends? Or was it, as the claimant recalls, Mr King?

41.2. Was the claimant the only trainee to sit the re-test that afternoon, as contended by the respondent? Or, as the claimant would have us find, was he accompanied by another trainee by the name of John?

41.3. Did the re-test happen in the main training room or in a smaller training room next to the coffee machine?

42. We would have found the first factual dispute much easier to resolve had the respondent kept the individual training files of all the trainees. It was Mrs Leigh's evidence that each student and the invigilator signed the files. The signatures would have been powerful evidence of who was present in the room. Their absence caused us to cast a sceptical eye over the respondent's witnesses' oral evidence. As it was, we still found the evidence of Mrs Leigh to be the most reliable. It was a rare event for a candidate to have to sit a second written examination. Mrs Leigh remembered it well. We were not prepared to accept that Mrs Leigh had completely made up her presence at this examination. We also accepted her evidence that Mr King was not authorised to invigilate examinations. We did not just have to take the respondent's word on this point: the DfT mandatory requirements clear that the assessment had to be carried out by a certified Trainer. The claimant did not contend that anybody beside the invigilator had marked his examination. It would have been quite wrong for Mr King to have both invigilated the test and marked it. Reluctant as we are to come to this conclusion, we think it more likely that the claimant has got the events of that day confused in his mind. Although he wrote a detailed appeal letter within a relatively short time of these events, he did not mention that his second examination had been invigilated by Mr King (or "Pete", as the claimant referred to him) until many months later.

43. We also accept Mrs Leigh's evidence that the claimant was the only person to take the re-test that afternoon. We were unable to accept the claimant's contention that the student known to him as John also took the re-test at that time. In his evidence the claimant mistook John's surname. Though it is only a relatively minor detail, it does help us to find that the claimant is less likely to have remembered this event accurately than Mrs Leigh.

44. We accept the evidence of Mrs Leigh and Mr Collins that this examination did not take place in the main training room. At that time the main training room was being used by Mr Collins and Mr King for the purpose of carrying out body search training.

45. During the second examination, Mrs Leigh offered to read out the questions for the claimant. She did not specifically offer to write down the answers for him. Nor did the claimant ask for this to be done. At times during the examination, the claimant asked Mrs Leigh to explain some technical terms that had been used in the examination paper. Mrs Leigh did this for him.

46. After about ninety minutes, the claimant handed his completed paper to Mrs Leigh. The claimant could have had more time had he wanted it. Ms Leigh then marked the paper. In the meantime, the claimant went to join the rest of the group. It was at this point that they embarked on the Weapons Room tour.

47. Mrs Leigh scored the claimant's examination paper well below the pass mark. Her recollection, which we accept, is that his mark was somewhere between 50% and 60%. She had no difficulty in reading the answers that he had written. It was just that too many of the answers were incorrect.

48. It fell to Mr Collins to break the news to the claimant that he had failed his second examination. He told the claimant to come back the following Monday when he would have to see Mr Brooks. When the claimant asked him exactly what would happen, Mr Collins replied that he did not know for sure. He did not tell the claimant that he would be dismissed. That was not Mr Collins' decision to make.

49. Mr Brooks was not available to meet the claimant on the Friday afternoon. He did, however, speak with Mr Collins. He found out that the claimant had failed the written examination. It was his intention at that point, subject to anything that human resources might say to change his mind, that the claimant should be dismissed.

50. On Monday 7 November 2015, the claimant attended and participated in the course for most of the day. In the meantime, Mr Brooks spoke on the telephone to Ms Kathryn Phillips of Human Resources. Ms Phillips told Mr Brooks that there were no alternative positions within the organisation, so that if the claimant was not competent as an ASO, he would have to be dismissed. That settled Mr Brooks' mind. Later that day the claimant was taken to see Mr Brooks in his office. He was not told in advance what the purpose of the meeting would be. Mr Brooks told the claimant that his employment would be terminated because he had failed the examination. The claimant started to explain the difficulties he had had. He mentioned again his learning difficulties. Mr Brooks asked the claimant to explain them in more detail. This was not with a view to changing his mind. Rather, it was a somewhat disingenuous attempt to appear empathetic. Mr Brooks by this time had researched dyspraxia, dyslexia and dyscalculia on the internet and had spoken in detail about them with Mr Collins.

51. The claimant was not required to come back to work and his employment terminated on 22 December 2015.

52. A letter was eventually sent to the claimant confirming his dismissal, the reasons for it, and his right of appeal. This letter, although bearing the date 7 December 2015, did not in fact reach the claimant until 22 December 2015. In the meantime the claimant emailed the respondent's human resources department asking for the letter of termination and for the respondents "disability policy". Mr Brooks chased up the claimant's request, resulting in the letter and policy documents ultimately being sent.

53. Around, or shortly before, 5 January 2016, Mr Brooks enquired of Human Resources whether the claimant had appealed. He received a reply saying that they had checked, but nothing had been received.

54. The claimant did in fact appeal by letter dated 11 January 2016. The letter was sent by "signed for" delivery to the respondent's human resources department. Whilst the letter itself was addressed to Ms Phillips, the envelope was marked "HR Business Advisor". It may be that the letter never reached Ms Phillips. It may be (although we think this unlikely) that it never reached the respondent's address at all. Whatever the reason, the respondent never determined the

claimant's appeal. We accept the claimant's evidence that he telephoned somebody within Human Resources and asked about the progress of his appeal. Still nothing happened. This is highly regrettable. What we cannot do, however is deduce from the respondents' failure to deal with the appeal any sinister motivation on the part of Mr Brooks or Mr Collins. It is clear from the email thread of 5 January 2016 that Mr Brooks was interested in the outcome of the claimant's appeal. He would not be checking on its progress if his intention was simply to ignore it.

55. We conclude our findings of fact by expressing, so far as we are able to do so, our view as to what caused the claimant to do so badly in his examination. Doing the best we can, we think there are likely to have been two ways in which the claimant's disability contributed to his poor performance:

    55.1. The claimant found it more difficult than his non-disabled colleagues to read and absorb the information in the booklet. This is not part of his claim. It is supported, however, by the fact that the claimant complained about the size of the font in the booklet on the evening after the third mock examination. It also explains why the claimant, an intelligent man with an undergraduate and post-graduate degree, had stated legible answers that were simply wrong.

    55.2. The claimant did not acquit himself in the exam as well as he might have been able to do had every question been read out loud to him. He described to us a vivid recollection of seeing the words "swirling in front of me" on the page. We think, on the balance of probabilities, that this visual disturbance made the experience stressful for him. Again we think this helps to explain why such an intelligent man would fail to pass a relatively simple written test.

56. We have considered whether the claimant's disability was the only cause of his failure to hit the pass mark. We have also considered the respondent's argument that the claimant's poor examination performance arose entirely independently of his disability. In our view, the reality was likely to have been somewhere in between. Disability was a material factor, but not the only factor. Here are our reasons:

    56.1. We have had regard to the adjustments that the respondent made. Despite being given unlimited time in both examinations, a large-print examination paper, and a private room and oral assistance during the re-test, the claimant's examination score was still considerably below the pass mark.

    56.2. Nevertheless, we thought it unlikely that the claimant's poor performance happened entirely independently of his disability. In the right learning environment, the claimant had demonstrated the ability to sit and pass examinations that, in all likelihood, were more academically demanding than this one.

    56.3. It is likely, as we have observed, that part of the problem was his difficulty in absorbing the course materials. Just how much of a contributing factor this was is difficult for us to say, but bearing in mind the extent of the claimant's shortfall, and the relatively late stage at which the claimant complained about the print size in the booklet, we are of the view it cannot

fully account for the claimant's failure in the exam. On balance, there are likely to have been contributing factors unrelated to the claimant's disability.

Relevant Law

Adjudicating on claims

57. A tribunal must not adjudicate on a claim that is not before it: *Chapman v. Simon* [1993] EWCA Civ 37.

58. In *Chandhok v. Tirkey* UKEAT0190/14, Langstaff P observed:

> 17. ….Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. ...
>
> 18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.

Duty to make adjustments

59. By section 20 of EqA, the duty to make adjustments comprises three requirements.

60. The first requirement, by section 20(3), incorporating the relevant provisions of Schedule 8, is a requirement, where a provision, criterion or practice of the employer's puts a disabled person at a substantial disadvantage in relation to the

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

61. A disadvantage is substantial if it is more than minor or trivial: section 212(1) of EqA.

62. Paragraph 6.28 of the Equality and Human Rights Commission's *Code of Practice on Employment* ("the Code") lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

    62.1. Whether taking any particular steps would be effective in preventing the substantial disadvantage;

    62.2. The practicability of the step;

    62.3. The financial and other costs of making the adjustment and the extent of any disruption caused;

    62.4. The extent of the employer's financial and other resources;

    62.5. The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

    62.6. the type and size of employer.

63. In *Tarbuck v. Sainsbury's Supermarkets Ltd* UKEAT 0136/06, the EAT (Elias P presiding) considered whether consultation was capable of amounting to a reasonable adjustment. They decided it was not:

> 71. … The only question is, objectively, whether the employer has complied with his obligations or not. That seems to us to be entirely in accordance with the decision of the House of Lords in *Archibald v Fife Council* [2004] ICR 954. If he does what is required of him, then the fact that he failed to consult about it or did not know that the obligation existed is irrelevant. It may be an entirely fortuitous and unconsidered compliance: but that is enough. Conversely, if he fails to do what is reasonably required, it avails him nothing that he has consulted the employee....
> 72. Accordingly whilst, as we have emphasised, it will always be good practice for the employer to consult and it will potentially jeopardise the employer's legal position if he does not do so- because the employer cannot use the lack of knowledge that would have resulted from consultation as a shield to defend a complaint that he has not made reasonable adjustments- there is no separate and distinct duty of this kind.

64. Claimants bringing complaints of failure to make adjustments must prove sufficient facts from which the tribunal could infer not just that there was a duty to make adjustments, but also that the duty has been breached. By the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made: *Project Management Institute v. Latif* UKEAT 0028/07.

Discrimination arising from disability

65. Section 15(1) of EqA provides:

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

66. Langstaff P in *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14 (19 May 2015, unreported) explained (with emphasis added):

> "The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages."

67. In Langstaff P's view, there was "considerable force" in the argument that the phrase, "because of…" in section 15 should carry the same meaning as the equivalent phrase in section 13. That is to say, the tribunal should focus on the conscious or subconscious thought processes of the alleged discriminator in order to establish the reason why the claimant was treated unfavourably. That reason is "something" which must arise in consequence of the disability. The question of whether "because of…" imported the same test as for direct discrimination did not arise directly for decision in *Weerasinghe* and Langstaff P was careful not to express a concluded view. The *ratio decidendi* (reason for the decision that is binding in future cases) is simply that the tribunal must adopt the two-stage approach to causation. But we are of the view that Langstaff P's analysis is right.

68. When considering the justification defence (now found in subsection (1)(b)), the tribunal must weigh the discriminatory effect of the treatment against the reasonable needs of the business: *Hardy and Hansons Plc v Lax* [2005] ICR 1565*,* applying *Allonby v. Accrington & Rossendale College* [2001] ICR 1189.

69. In *Hensman v Ministry of Defence* UKEAT/0067/14, Singh J held that, when assessing proportionality, while a tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

70. The Code provides guidance on the interplay between making reasonable adjustments and discrimination arising from disability:

> 5.20 Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments (see Chapter 6).
>
> 5.21 If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it

> will be very difficult for them to show that the treatment was objectively justified.
> 5.22 Even where an employer has complied with a duty to make reasonable adjustments in relation to the disabled person, they may still subject a disabled person to unlawful discrimination arising from disability. This is likely to apply where, for example, the adjustment is unrelated to the particular treatment complained of.
> **Example:**
> The employer… made a reasonable adjustment for the worker who has multiple sclerosis. They adjusted her working hours so that she started work at 9.30am instead of 9am. However, this adjustment is not relevant to the unfavourable treatment – namely, her dismissal for disability-related sickness absence – which her claim concerns. And so, despite the fact that reasonable adjustments were made, there will still be discrimination arising from disability unless the treatment is justified.

Burden of proof

71. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

72. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Conclusions – duty to make adjustments

73. We remind ourselves that it is undisputed that the respondent had a PCP of requiring an ASO to take and pass a written examination with written answers. In our view, that PCP put the claimant at three distinct disadvantages compared to persons who were not disabled:

    73.1. He found it difficult to read and memorise the course material on which he was tested.

    73.2. He suffered from visual disturbance when attempting to read the questions.

    73.3. He had some difficulty in writing down his answers.

74. This combination of disadvantages was, in our view, more than minor or trivial.

75. We now consider the adjustments for which the claimant contends.

76. Our starting point is that the respondent is a large organisation which can be expected to devote considerable resources to making adjustments for disabled employees. The steps in question were all practicable, provided the claimant agreed to them, and any consequent disruption could be relatively easily absorbed by the respondent. In our view, the most important considerations here are the extent to which the putative adjustment would have eliminated the

disadvantage and the extent to which the claimant appeared to have agreed or declined the adjustment in question.

77. It was not reasonable for the respondent to have to give the claimant any more time than he was actually given. It was made clear to the claimant by Mr Collins that he could have as much time as he wished. The claimant's case, as we understood it, was that he should have been the *only* candidate to be given additional time; the other candidates' examinations should have been time limited. To our minds, this argument is based on a misunderstanding of the duty to make adjustments. The employer must take such steps as it is reasonable to have to take in order to minimise or eliminate the disadvantage. The duty does not require an employer to place any obstacle in the way of a non-disabled person where placing that obstacle would not reduce the disadvantage suffered by the disabled person. The ASO examination was not a competition: the claimant's likelihood of passing was not in any way affected by the performance of his colleagues. If he reached the pass mark, he would have passed regardless of the other candidates' scores. Conversely, restricting their time allocation would not improve the claimant's chances of passing and would have no effect on his disadvantage.

78. It was reasonable for the respondent to have to *offer* somebody to read out the claimant's examination questions. It was not, however, reasonable for such a person to be *imposed* on the claimant if he appeared to have declined that offer. To our minds, it does not matter whether such a person was called an "amanuensis" or not. Nor, in our view, was there any reason why the person reading out the questions could not be the examiner or invigilator herself.

79. During the morning examination, nobody read out questions to the claimant. But he had been offered that facility after the second mock-examination. By telling Mr Collins what adjustments he wanted, and not mentioning having questions read out to him, the claimant appeared to have declined that particular form of help. The respondent could not be reasonably expected to press the point.

80. During the afternoon re-test, Mrs Leigh actually did help the claimant by clarifying questions orally. The fact that, at other times, the claimant chose to read the questions for himself does not mean that the facility was not provided. So far as reading questions out loud was concerned, the respondent did all it could reasonably have been expected to do.

81. It was not, in our view, reasonable for the respondent to have to provide a person to write down the claimant's answers. We have come to this view for the following reasons:

    81.1. The claimant did not ask for such a person following the second mock examination or during either of the real examinations.

    81.2. Giving the claimant unlimited time was a sufficient adjustment to enable the claimant to write down his answers in a way that did not put him at a disadvantage. His answers were legible. He completed the paper on both occasions.

    81.3. No amount of writing assistance would have enabled the claimant to pass. His main impediments were, we find, a combination of incorrectly recalling the taught course material and, possibly, misunderstanding the questions.

82. The claimant acknowledged at the outset that the private room adjustment stood or fell with the requirement to provide an amanuensis. In other words, the respondent could not be reasonably be expected to hold the examination in a private room unless it was already under a duty to provide somebody to read out questions or write down answers. In our view, during the morning examination, the respondent was reasonably entitled to treat the claimant as having declined the offer of oral assistance. So far as the afternoon re-test is concerned, our finding is that a private room was in fact provided.

83. Having examined all the adjustments for which the claimant contends, our conclusion is that the respondent did not breach its duty.

84. We would not want to leave this part of our judgment without recording some further observations:

    84.1. Our conclusions are inevitably shaped by the way the claimant formulated his claim and, in particular, the adjustments that he contended ought to have been made. It appeared to us that other adjustments, such as increasing the font size of the course booklet, may well have made the syllabus more accessible to the claimant so as to improve his ability to learn and recall the material on which he was being tested. Tempting as it might be for us to adjudicate on adjustments such as these, we must not do so. They do not form part of his claim. Adjustments to the way in which the course was taught are not, even taking a broad view, the same kinds of adjustment as those on which the claimant relied. Nevertheless, the respondent may wish to have regard to these observations in case future candidates experience similar difficulties on the course.

    84.2. It is regrettable that the respondent did not take a more structured approach to making adjustments. The forms provided at induction did not clearly seek out adjustments that might be needed during the training course. Trainers were unaware of the need to document assessments of potential adjustments. This led to opportunities being missed. For example, the respondent did not remind the claimant, either after the second mock examination, or on the examination day, of the possibility that somebody could write the claimant's answers down for him. Whilst we have found that the respondent did not have to go so far, because the adjustment of unlimited time corrected the disadvantage, it would have been preferable for the claimant to have been reminded explicitly of the help that was available to him.

Discrimination arising from disability

85. In our view, the claimant's disability contributed materially to his failure to pass the examination. We have described the two causal strands in our findings of fact.

86. The difficulty in writing did not in our view make a material difference for the reasons we have already given.

87. We therefore had to consider whether dismissing the claimant was a proportionate means of achieving the legitimate aim of ensuring that the respondent had, and was able to prove that it had, ASOs that were competent in all aspects of the role.

88. In our view, the dismissal was a proportionate step. Here is how we reasoned:

88.1. The aim was not just legitimate, but very important. There is a strong public interest in ensuring that airport security staff are properly trained and rigorously tested.

88.2. The dismissal had some discriminatory impact on the claimant. His disability contributed at least in part to his failure in the examination and his consequent dismissal. (Here we note that it is possible that he might have failed the course in any event due to practical difficulties with body searches. We cannot, however, assess the likelihood of his being dismissed on that ground, because there is insufficient evidence to enable us to do so.)

88.3. Whilst the discriminatory impact existed, it was not stark. For the reasons we have given, we did not find that the claimant's disability was the only cause of his failure in the examination. We took account of the adjustments the respondent made in coming to this conclusion.

88.4. Additional adjustments, which do not form part of the claimant's section 20 claim, such as increasing the font size in the booklet, might have enabled the claimant to pass the examination and thus avoided the need for dismissal. As recorded above, we cannot go as far as to say that he would have passed had this adjustment been made.

88.5. The way in which the claimant put his case was that, having failed the examination, he should have been offered an alternative role, such as tray-loading, and not simply dismissed. In our view, this was not a realistic possibility. The respondent did not have tray-loading roles. These were interim measures whilst ASOs waited to get on the training course. There were no alternative roles available.

88.6. We have considered whether, as an alternative to dismissal, the respondent should have allowed the claimant to have re-started the course. Taking this step would have enabled the respondent to obtain a report from occupational health and/or the claimant's own psychologists' reports. Unfortunately, these possibilities were not put to Mr Brooks in cross-examination. Had points such as these been framed into questions, we would have been interested to hear Mr Brooks' answers. It is not inconceivable that, depending on his answers, we might have found these steps sufficiently practicable to render the dismissal disproportionate. As it was, we did not think it would be fair to reach a conclusion adverse to the respondent without Mr Brooks having a fair opportunity to respond.

88.7. Overall, balancing the discriminatory impact against the importance of the aim and the limited alternatives, we have found the dismissal to be proportionate.

89. It follows that the respondent did not unlawfully discriminate against the claimant and his claim must therefore fail.

90. Again, we cannot help observing that, had the claim been formulated in a different way, it might have been decided differently. Mr. Brooks' e-mail of 4 December 2015 suggests to us that at least part of his reason for dismissing the claimant was his perception that the claimant's dyspraxia would make it difficult for the claimant to conduct body searches. He was contemplating dismissal even

before the claimant had finished his first examination. There is no evidence that the claimant was ever asked about body searches prior to his dismissal. Had this been a claim of direct discrimination, we would have been interested to know whether Mr Brooks' opinion was based on observation evidence or mere assumption. Because of the way he the claimant put his case, the witness statements were silent on the point. In the absence of such evidence it would be unfair for us to reach a concluded view.

Employment Judge Horne

6 March 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

08 March 2017

FOR THE SECRETARY OF THE TRIBUNALS