EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MRS O F RENOWDEN	**V**	**OFFICE FOR NATIONAL STATISTICS**

HELD AT: CARDIFF ON: 7, 8, 9 AND 10 JANUARY 2019 (HEARING)

11 JANUARY & 12 FEBRUARY 2019 (CHAMBERS)

EMPLOYMENT JUDGE W BEARD MEMBERS: MS C IZZARD

MR P CHARLES

REPRESENTATION:

FOR THE CLAIMANT - Mr Renton (Counsel)

FOR THE RESPONDENT - Mr Purchase (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:

(1) The claimant's claim of disability discrimination pursuant to section 13 of the Equality Act 2010 is not well founded and is dismissed.
(2) The claimant's claim of disability discrimination pursuant to section 15 of the Equality Act 2010 is not well founded and is dismissed.
(3) The claimant's claim of disability discrimination pursuant to section 19 of the Equality Act 2010 is not well founded and is dismissed.
(4) The claimant's claim of disability discrimination pursuant to sections 20 and 21 of the Equality Act 2010 is not well founded and is dismissed.
(5) The claimant's claim of sex discrimination pursuant to section 13 of the Equality Act 2010 is well founded.
(6) The claimant's claim of sex discrimination pursuant to section 19 of the Equality Act 2010 is well founded.
(7) The respondent is ordered to pay to the claimant the sum of £19,000 (nineteen thousand pounds) in compensation for injury to feelings.

REASONS

Preliminaries

1. The claimant, who complains of sex and disability discrimination was represented by Mr Renton of counsel the respondent by Mr Purchase of counsel.

2. The tribunal were provided with a bundle of documents in excess of 500 pages, we removed a previous restriction to permit this number of documents. The tribunal heard oral evidence from the claimant and the claimant asked us to take account of a written witness statement prepared by Mr Middleton.

3. The respondent called evidence from Mr Richard Heys and Mr Ed Palmer both of whom were involved in the assessment of the claimant's application for a Grade 6 role. The respondent also called evidence from Mr Paul Cudmore a HR professional, Mrs Sonia Jones who conducted an investigation into a grievance raised by the claimant and Mr Nick Vaughan who decided the claimant's grievance. The respondent also asked to take account witness statement prepared by Mr Iain Bell, the claimant having indicated that there was no need to cross-examine Mr Bell's evidence.

4. The parties provided an agreed list of issues of the tribunal to resolve. Dealing first with matters under the heading of disability discrimination:

4.1. Although raised as an issue Mr Purchase indicated that the respondent no longer argued that the claimant was not disabled within the meaning of the Act. However, Mr Purchase indicated that this was on the basis that the claimant's disability was modified by the fact that she was using medication.

4.2. By rejecting the claimant applications for the Grade 6 posts on 12 April, 2017 and 19 April, 2017 did the respondent treat her less favourably than it treated would have treated others because of the disability?

4.3. By rejecting the claimant applications for appointment to Grade 6 posts on 12 April 2017 and 19 April 2017 did the respondent treat the claimant unfavourably because of something arising in connection with her disability? The something on which the claimant relies is the alleged choice not to interview her on the basis either of her ADHD or symptoms thereof.

4.4. If so, was the treatment a proportionate means of achieving a legitimate aim?

4.5. Did the respondent apply provision criterion or practice (PCP) to the claimant?

4.5.1. The PCP on which the claimant relies is the alleged practice of applying the Cabinet office policy, guaranteed interview scheme, too narrowly, and in particular refusing to appoint a candidate unless that candidate met the minimum criteria for each and every competence.

4.5.2. If so, the respondent apply on but did have applied the PCP to non-disabled persons?

4.5.3. If so, did the PCP put or would it have put disabled persons at a particular disadvantage when compared with non-disabled person? The particular disadvantage on which the claimant relies is that the scheme is intended to be applied purposively and to enable disabled candidates to be interviewed and by being deprived of the opportunity to acquire equality in the distribution of roles.

4.5.4. If so, did the PCP put or would it have put the claimant at that disadvantage?

4.5.5. If so, was the PCP a proportionate means of achieving a legitimate aim?

4.6. Did a PCP of the respondent's place the claimant at a substantial disadvantage when compared with persons who are not disabled? PCP on which the claimant relies is the alleged practice of not granting interviews to disabled people qualify for the Guaranteed Interview Scheme. The substantial disadvantage on which she relies is the failure to be promoted.

4.6.1. If so, did the respondent take such steps as it was reasonable to have to take to avoid the disadvantage? The step which the claimant says the respondent should have taken is to have allowed her to have an interview.

5. Dealing now with matters under the heading of sex discrimination the parties set out the following issues:

5.1. By rejecting the claimant applications for appointment to G6 posts on 12th of April 2017 and 19 April, 2017, did the respondent treat her less favourably than it treated or would have treated others because of her sex?

5.2. Did the respondent apply a provision criterion or practice (PCP) to the claimant? The PCP on which the claimant relies is the alleged practice of marking internal candidates applications restrictively, in particular by failing to consider information held elsewhere on the application (i.e. in other answers and on the CV section) and by focusing only on information contained in the designated answer to each competency.

5.3. If so, did the respondent apply or would it have applied the PCP to men?

5.4. If so, did the PCP or would it have put women at a particular disadvantage when compared with men? The particular disadvantage on which the claimant relies is that there were a relatively large number of women at the lower paid G7 grade and fewer women employed in the higher paid DD or G6 grades. When the service limited the number of candidates being interviewed, this deprived women in particular of the opportunity to advance and therefore entrenched an unequal distribution of roles.

5.5. If so, did the PCP put or would it have put the claimant at that disadvantage?

5.6. If so, what is the PCP a proportionate means of achieving a legitimate aim?

6. Under the heading of remedy the issue is set out as what remedy, if any, is the claimant entitled? The claimant seeks a declaration, recommendations and compensation for injury to feelings.

The Facts

7. The claimant began employment with the respondent as a grade 7 economist in August 2016. The claimant had previously been a grade 6 economist whilst working in London. The history of the claimant's employment is that she has worked within the UK and internationally as a macro economist. Her education includes an undergraduate degree and a masters degree: she had started (but not completed) a PhD; each of these degrees is in economics. It is also of note that the claimant had taught economics to 3rd year undergraduates at Bristol University. It was accepted during the respondent's evidence that the claimant is a highly qualified, very experienced and also a proficient economist. The claimant had accepted a grade 7 post in Wales because she wished to move base, and had accepted when doing so that the availability of grade 6 posts was more limited in the regions than in London.

8. The claimant has been diagnosed with ADHD. She has described some of the symptoms of this in her witness statement such as: no recall of everyday events; being easily distracted; an inability to screen out background sound; memory loss; impulsive decision making; hyper-focusing and anxiety. However, the tribunal have not been given medical evidence beyond some of the claimant's medical records. In particular the tribunal are aware that the claimant has been prescribed medication but have no expert evidence on the specific effects of that medication on the claimant's symptoms.

9. It is accepted by the respondent that the gender balance in the office of National statistics, insofar as it relates to economists, is out of kilter. Mr Heys was keen to address that issue as we have seen from emails prior to the events with which we deal. The claimant accepted that in her experience Mr Heys was interested in diversity issues and seeking to improve matters. The claimant also said in respect of Mr Palmer that while she had no direct experience that she knew of no evidence to indicate that he was in any way adverse to dealing with these issues.

10. It would appear from the evidence that we have heard at university level the gender balance for economists is roughly 33% women and 67% men. This is to some extent reflected in the ONS figures which show that across the piece there are 125 economist posts where the balance is 33.6% female to 66.4% male. At grade 7 there were approximately 37% women, where this is based on relatively small numbers of 27 grade 7 employees in total. Statistically there is a significant change in balance at grade 6 level of 20% female to 80% male. Again, however these latter percent based on a small number of

individuals amounting to 10 in total. We should add for the purposes of the statistical analysis that the claimant's complaint is that when an exercise for the appointment of 2 grade 6 economists (one in London one in Newport) was carried out for the Newport post an equal number of 4 men and 4 women applied for the posts, that those put forward for interview amounted to 3 males and one female. As a final point told that the imbalance continues at DD level (the level above grade 6), but at the most senior level, director, there are 2 directors one male one female.

11. There was evidence before us, which was not disputed, that there were informal promotions on a temporary basis. The claimant contended that these promotions were generally of males. She argued that this gave an advantage, in experiential terms, to those given these appointments. They were not appointed following any process and, effectively, were appointed via "a tap on the shoulder". We were referred to evidence given by witnesses in the respondent's investigation into the claimant's grievance which supported the claimant's view of this practice. The claimant was not cross examined on this issue and there was no positive contrary evidence from the respondent. The tribunal consider that, on that evidence, the claimant has established that there was an informal process which led to temporary promotions of males in substantially greater numbers than females and which would lead to an advantage in permanent promotion appointments.

12. The method of application for the economists' posts at grade 6 was to complete an application form which included a CV of work history but also for the candidate to complete specific competency elements. The competency elements required an applicant to set out in a maximum of 250 words an example or examples of experience which demonstrated that they have the particular competency.

13. A sift panel was appointed to carry out marking. The respondent's policy requires that the panel should be gender balanced. The panel in this case was not and was made up of two males. We were told this was because there was no availability of a female to make up the panel which in turn was because of the high levels of recruitment being undertaken at that point in time. The tribunal do not accept that explanation. We consider that there was at least one senior female who might have been included on the panel. We cannot accept that in the civil service it would become too difficult to set up a panel with a gender balance. If the respondent relies on the limited number of men at senior levels to support such a proposition then the policy would be meaningless in practice.

14. The members of the panel appointed would, separately, carry out a grading of the competencies, marking them against a protocol with a score range of up to 5. This would be followed by a moderation meeting between the members

of the panel. At this meeting the individuals would "sense-check" their scores as against one another.

15. It was a requirement that before an interview could be granted that a candidate achieved a minimum mark of 4 in each competency. The respondent operates a policy which is headed "Guaranteed Interview Scheme". The scheme sets out the following "*we guarantee to interview anyone with a disability whose application meets the minimum criteria for the post*." The document further sets out this "*the Cabinet office is committed to the employment and career development of disabled people (the minimum criteria means the essential competencies as set out in the advertisement for the post)"* the parties disagree as to the meaning of the definition of minimum criteria provided within that definition is as follows "*by minimum criteria we mean that you must provide us with evidence in your application which demonstrates that you generally meet the level of competence required for each competence, as well as meeting any of the qualifications, skills or experience defined as essential"*. At page 517 of our bundle, in a document dealing with recruitment and disability, there is an explanation of the guaranteed interview scheme. That sets out that there are misconceptions about the scheme and explains that individuals with a disability will have an interview if they get past the sift stage terms of marking. An example is given where 10 candidates pass a sift but the intention is only to interview 4. The effect of the scheme is that where the disabled applicant would not be one of that 4 (because of lower marks overall) they will nonetheless be given an interview whereas if simply merit applied only the 4 highest scoring would have an interview.

16. The claimant began working for a new line manager. Within a week or so she had asked him to sign a completed application form for an internal scheme which was designed for those who were likely to have a high potential for promotion. The line manager, despite having known the claimant for less than 3 weeks as a subordinate, declined to sign the claimant's application. The reason he gave was that the scheme was only for those with high potential, and on the basis, we conclude, was indicating his view that the claimant did not have high potential. The claimant also applied for and did not get a grade 6 appointment in an earlier competition than the one we deal with below. However, the claimant told us that this competition was for role to which she was not particularly suited and she was not surprised at the outcome.

17. In February 2017 the respondent advertised for two grade 6 posts one based in London and the other in Newport. The claimant and another grade 7 female economist suggested to Mr Palmer that the two posts could be based in Newport with travel to London when necessary. Mr Palmer's response, made in an email on 9 February, 2017 was to say that he did not accept the suggestion. His reasons were because he wanted someone to be "hands on" in line management and to be out and about in London to deputise for him

when he was not there. The recruitment processes for London and Newport were treated as separate processes.

18. The claimant applied for the grade 6 role in Newport. Her application was considered by Mr Heys and Mr Palmer. Firstly, Mr Palmer and Mr Heys separately scored the claimant and then they later met to discuss matters in a moderation meeting. One particular element of the competency framework "application of economics" the claimant was scored at 3 after moderation. Mr Palmer's original score had been 3 and Mr Heys had been 4. The tribunal note however that in respect of other competencies Mr Palmer had marked the claimant at a higher level and Mr Heys had a lower mark but Mr Palmer's higher score had been adopted. Although the claimant had achieved the minimum requirement in the four other competencies she was not invited to an interview because she fell below the minimum requirement in the "application of economics" competency. The claimant's evidence was that the content of her answer should have achieved a mark of at least 4.

19. Mr Heys was aware of the claimant's disability and the fact that it had impacts on her concentration and ability to assimilate information. It would seem that Mr Palmer was not directly aware of this but understood that the claimant had a disability whilst it not clear that he understood specifics. Mr Heys understood that the claimant's disability had negative consequences on the claimant's ability in terms of communications. However, it is also the case that Mr Heys had marked the claimant sufficiently for her to attend interview and was persuaded by Mr Palmer to reduce that score. In addition to this he had a good working relationship with the claimant and had provided support to her when she worked in the trade team. He also supported the claimant when she requested a change in line management.

20. We are in a difficult position in considering the relative merits of the claimant's answer in the competency of "application of economics".
    20.1. The evidence we heard drew comparisons with the others interviewed. Despite being shown all of the scripts the tribunal were not provided with the protocols by which such competencies were to be marked.
    20.2. There was some indication given to us that the "application of economics" competency required the claimant to demonstrate (a) a particular situation where she had applied macroeconomic skill (b) to describe the economic theories or approaches which she adopted to deal with this situation (c) to explain the way in which those theories were applied (d) describe the impact of the steps she had taken.
    20.3. However, without the protocol we have no means of judging, ourselves, the weighting to be given to any of those particular elements or their status in a marking scheme.
    20.4. We have to recognise that Mr Heys, Mr Palmer and the claimant are experts in the field of economics, we are not. We had no independent

evidence of an expert nature at tribunal. Reference was made in the grievance process to an independent marker a senior economist, Mr Farrington, who had seen the competency box and marked it at 2.

20.5. However, the tribunal have no means of choosing between the expertise of these indviduals. Mr Farrington was never subject to cross examination and his analysis was prepared without proceedings in mind in the knowledge it related to a grievance. And the other witnesses with expertise have to a greater or lesser extent a vested interest in the proceedings.

20.6. We are also aware that the claimant has training and experience in marking competency-based applications. Taking all of this into account we feel unable to state, one way or the other, that the claimant's mark was correctly applied.

20.7. The tribunal notes that the marks originally given by Mr Heys, Mr Palmer's mark and Mr Farrington's mark range from 2 to 4. In our judgement given that the range is 1 to 5, and ostensibly each of these individuals was marking from a scoring system, it appears probable that there is a great deal of subjectivity within that scoring system to achieve that range.

21. Prior to the exercise the claimant had taken advice from a Mr Athow, a senior employee of the respondent, about her difficulty in dealing with the competency requirements. Mr Athow responded that the entire form would be looked at and the claimant could include many matters in the CV section of the form. Mr Cudmore also told us that his expectation was that the entirety of the form would be looked at in many exercises, but this was a matter for the panel. He contended that as long as the panel applied the same approach to each candidate this would be fair. His explanation for those occasions where might be appropriate to concentrate solely on the competency elements of the application form included examples such as where there were a large number of candidates for a number of roles. His explanation was that in such an exercise there would be high numbers of candidates with higher scores precluding the need to look at the entirety of the form.

22. The claimant contended that in dealing with the recruitment exercise in February 2017 Mr Heys and Mr Palmer only looked at the competency boxes to score competencies. In their evidence before us Mr Heys said this was not correct and Mr Palmer was more equivocal. The tribunal noted that during the grievance process Mr Palmer had indicated that only the competency boxes had been used in the marking procedure and that his witness statement seemed to indicate the same. Both witnesses initially indicated that, looking at the entirety of the form, there was nothing within the claimant's work history within the form that could properly add to what was in the competency box which the claimant had been marked at 3. In cross examination Mr Palmer and to some extent Mr Heys conceded that there were element in claimant's history of employment that had some relevance to the economics

competency. However, they were not prepared to concede that the history added to the competency to increase the mark. The tribunal gained the impression that this was a retrospective examination of the work history part of the form during cross examination. We do not accept that the entirety of the application form was taken account of at a time when marking was undertaken. We reject the evidence of Mr Palmer Mr Heys on this matter both because of the earlier indications in the grievance process and because it appears to us that answers in cross examination were seeking reasons to discount the information rather than recounting an earlier view of the information.

23. Initially there were eight candidates for the Newport post; four men and four women. Following the sift, the four candidates to be interviewed were three men and one woman. However, during the course of the process one of the male candidates withdrew. Additionally, there was a change after the process had begun in that the respondent made a decision to appoint two individuals to work in Newport. Both candidates selected were male and as we understand it, not disabled. We are aware that both Mr Palmer and Mr Heys could tell from the content of the application form who the internal candidates were and hence their genders.

24. The claimant's contention is that the second post was specifically created for the male candidate, because the respondent wished to use that specific individual (because of his particular skills) for a specific function. There is no specific evidence to support the claimant's contention. There is evidence that a business case was prepared for a second appointment and that this was approved. However, it seems reasonably clear that this was a decision taken after marking of the candidates at interview and where it would have been clear who would be appointed as a result of creating the second post (p.131).

25. The two male candidates selected had less experience, in terms of years spent professionally pursuing economics, in comparison to the claimant. In addition to this the experience of those candidates was more directly involved in micro-economics whereas the claimant had significant experience in macro-economics. On a broad examination of CV's the claimant appeared to be suitable to be called to interview and perhaps more suited that the two candidates eventually selected.

26. The claimant raised a grievance about these matters. The respondent conducted a significant investigation. In the course of the investigation other women employees indicated concerns about the gender imbalance, the relative length of service before promotion of men in comparison to women and with the informal temporary promotion system. In addition to this the grievance recognised that the recruitment process should not add to numbers to be appointed save in exceptional circumstances. However, despite this evidence Sonia Jones, who conducted the grievance, said in concluding that

there was no discrimination proven. However, she came to that conclusion whilst indicating that "*all the females I interviewed detailed some bad practices which has led to them feeling undervalued and demoralised*". Sonia Jones did not appear to understand that inferences might be drawn from circumstantial evidence. It is perhaps not surprising then that she also said this in her grievance conclusions "*the general feeling is that there is favouritism toward some male staff although it has been stated that this is subtle not overt*" whilst still concluding that no-one had witnessed or experienced discrimination. Given this and the approach to gender balance on selection panels the tribunal concluded that this pointed towards a general culture where discrimination and, in particular, sex discrimination, is not properly understood by those who are required to ensure its elimination.

27. The claimant appealed the grievance outcome. The appeal was not upheld.

28. The claimant indicated that because of the decisions that had been taken she did not consider that she had a future with the respondent. The claimant sought other employment and obtained it at salary level which extinguishes any monetary loss from leaving the respondent's employment.

The Law

29. The Equality Act 2010 relates to a both aspects of the claimant's claim. Section 4 of the Act provides:

> *The following characteristics are protected characteristics—*
> *----------*
> *Disability;*
> *sex;*

30. Section 13 of the Act 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.*

31. With regard to disability discrimination, disability being a protected characteristic under the Equality Act 2010 the relevant aspects of the legislation begins with section 15 which provides:

> *A person (A) discriminates against a disabled person (B) if—*
> *A treats B unfavourably because of something arising in consequence of B's disability, and*
> *A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
> *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.*

32. Section 19 of the Equality Act 2010 provides:

> *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—(a)A applies, or would apply, it to persons with whom B does not share the characteristic,*
> *(b)it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
> *(c)it puts, or would put, B at that disadvantage, and*
> *(d)A cannot show it to be a proportionate means of achieving a legitimate aim.*

33. Section 20 deals with the Duty to make adjustments and provides**:**

> *(1)Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
> *(2)The duty comprises the following three requirements.*
> *(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

Section 21 deals with the Failure to comply with the duty and provides

> *(1)A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*
> *(2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person.*
> *(3)A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is,*

accordingly, not actionable by virtue of another provision of this Act or otherwise.

34. The claimant contends that symptoms of her disability impacted on the respondent's decision not to interview the claimant. The tribunal have in mind ***Royal Bank of Scotland v Morris UKEAT/0436/10.***
    34.1. The tribunal consider that although that authority deals with the definition of disability, nonetheless it points the way as to the care which must be taken in deciding facts on aspects of mental impairments in the absence of medical reports which deal specifically with factual events.
    34.2. ***RBS*** demonstrates that the tribunal must be clear that it has sufficient evidence on issues relating to such matters as recurrence and long-term effects and that evidential basis must include expert evidence where the tribunal is unable to draw clear conclusions from medical notes. However, the reference there is to specific matters which are requirements under the Act to establish disability, here we deal with requirements to establish causation.
    34.3. In our judgment this approach must include circumstances where the claimant indicates that particular conduct is symptomatic of or caused by the disability. The specific problems of recurrence, long term effects are in effect seeking a prognosis require a conclusion based on opinion about the future course of the illness. The issue of deduced effects requires a professional opinion based on the known effects of medication and their application to the specific patient. However, what we are examining is not whether the conditions for a disability exist or would exist because of prognosis or the impacts of medication. Rather what we are considering is whether that disability has a specific characteristic, if the medical evidence establishes that characteristic on the balance of probabilities that will be sufficient for the first question as to whether this was a symptom of or caused by the claimant's condition.
    34.4. We must therefore consider whether the medical evidence in conjunction with other evidence is sufficient to establish that characteristic. Thereafter we must consider whether, if that element is a characteristic of the disability, whether the behaviour on this specific occasion arose from that disability.

35. Section 15 requires no comparator; we are concerned with unfavourable treatment, not less favourable treatment. The tribunal should first identify the relevant "treatment" to which s.15(1) applied, and then determine whether it was unfavourable. In most cases there was little to be gained by seeking to draw distinctions between "unfavourable" treatment and analogous concepts such as "disadvantage" and "detriment", nor between an objective and a "subjective/objective" approach see ***Williams v The Trustees of Swansea University Pension & Assurance Scheme & Anor*** **[2018] UKSC 65.** In that case the treatment was the award of a pension, and there was nothing unfavourable or disadvantageous as the only basis on which Mr Williams was

entitled to any award was by reason of his disabilities. The tribunal should also consider two causative elements. The first is the "something" that is caused by the disability, the second is that the respondent's treatment of the claimant is caused by that something see: ***Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] I.C.R. 305***.

36. In terms of disability discrimination relating to a failure to make reasonable adjustments, the Tribunal has in mind the decision of the ***Employment Appeal Tribunal in the Environment Agency v Rowan UK*** **EAT/0060/07/DM**, it is indicated that a Tribunal must identify the provision criterion or practice applied by or on behalf of an employer, the identity of non-disabled comparators where appropriate, and the nature and extent of the substantial disadvantage suffered by the Claimant, indicating that it is clear that the entire circumstances must be looked at, including the cumulative effect of the provision criterion or practice, before going on to judge whether an adjustment was reasonable. The Tribunal are aware that it is its duty in the light of the decision in ***Rowan***, to identify the actual provision criterion or practice on the facts of the case.

37. In respect of direct discrimination, the Tribunal has to consider whether the Claimant's treatment has arisen out of her disability or her gender. In other words, was she treated as she was because she has ADHD or because she was a woman? The tribunal is required to examine evidence in a broad way in dealing with issues of discrimination. We are not concerned with an overt motive (whilst such a finding would obviously be relevant) so much as examining the mental processes (conscious or subconscious) of those alleged to have unlawfully discriminated. We must consider the approach in ***Anya –v- University of Oxford & Anr. [2001] IRLR 377*** which demonstrates that it is necessary for the employment tribunal to look beyond any particular act or omission in question and to consider background to judge whether the protected characteristic has played a part in the conduct complained of. This is particularly important in establishing unconscious factors in discrimination. ***Shamoon -v- Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*** indicates that the tribunal in examining whether there has been less favourable treatment compared to a real or hypothetical comparator should note that a bare difference in treatment along with a difference in the protected characteristic is insufficient. It is always necessary to find that the protected characteristic is an operative cause of the treatment. In ***Zafar v Glasgow City Council [1998] IRLR 36*** it is made clear that unreasonable treatment should not necessarily lead the employment tribunal to a conclusion that the treatment was due to discrimination. Unfairness does not, even in an employment situation, establish discrimination of itself. Further a tribunal is not entitled to draw an inference from the mere fact that the employer has treated the employee unreasonably see ***Bahl v The Law Society and others [2004] IRLR 799***. The protected characteristic must be more than a trivial

cause of the treatment of the claimant but is not required to be the only cause see.

38. The distinction between the comparator to be used is made clear in **High *Quality Lifestyles Ltd V. Watts*** [2006] IRLR 850, HHJ McMullen QC said in respect of direct discrimination:

> *Treatment of a person 'on the ground' of his or her disability is more exact and narrower in scope than treatment 'for a reason which relates' to the disability. The treatment here is diagnosed as the dismissal. The first question is the identity of a comparator----------. The comparator may be, but need not be, the same comparator as is envisaged for the purpose of disability-related discrimination. For example, for direct discrimination, the comparator may be a person who does not have the claimant's disability, and may not have a disability at all. The comparator might have a condition which falls short of the kind of impairment required to satisfy s.1 of the Act. This is because s.3A(5) focuses upon a person who does not have 'that particular disability'.*

We consider that the change in wording in the Equality Act 2010 was not meant to alter the position in respect of direct disability discrimination. Section 15 EA 2010 has replaced the concept of disability related discrimination. However, there is still a distinction to be drawn between section 13 and 15 EA 2010 in respect of disability cases. Section 6 EA 2010, which defines disability, at 6(3)(a) indicates that "*a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability*" which maintains the sense of section 3A(5) Disability Discrimination Act 1995. In ***Watts*** where a person was HIV positive was dismissed because of a perceived danger to patients it was not direct discrimination as a comparator, someone with Hepatitis, would have been dismissed for the same reason. On that basis it must be the disability itself not some effect or symptom of the disability which leads to the treatment before discrimination is established.

39. In dealing with the section 19 claim for indirect discrimination, four requirements must be met: firstly the employer applies (or would apply) a provision, criterion or practice equally to everyone within the relevant group including the particular worker; secondly the provision, criterion or practice puts, or would put, people who share the worker's protected characteristic at a particular disadvantage when compared with people who do not have that characteristic; thirdly, the provision, criterion or practice puts, or would put, the worker at that disadvantage; and finally the employer cannot show that the

provision, criterion or practice is a proportionate means of achieving a legitimate aim. It is important therefore, in order to make a proper comparison between the claimant and others, to identify the correct group for comparison which will generally relate to the PCP and would be likely to be all the workers that the particular PCP impacts upon. The employer has a defence if it can justify the PCP: The legitimate aim of the PCP should not be itself discriminatory and must be real issue for the employer, although it cannot be a solely economic one. The aim must also be proportionate, if there is a way to achieve the aim without discrimination it is not proportionate. There is no express requirement in the Equality Act 2010 that a claimant show why a PCP puts one group sharing a particular protected characteristic at a particular disadvantage when compared with others.

40. In ***Essop v Home Office and Naeem v Secretary of State for Justice [2017] UKSC 27*** the following principles emerged in respect of section 19 EA 2010. Indirect discrimination does not expressly require a causal link between the less favourable treatment and the protected characteristic but between the PCP and the particular disadvantage suffered by the group and the individual. The reasons why one group may find it harder to comply with the PCP than others are many and various. Both the PCP and the reason for the disadvantage are ‘but for’ causes of the disadvantage, in the sense that removing either would solve the problem. There is no requirement for a PCP to put every member of the group at a disadvantage. The pool for considering the impact of the PCP should generally be all workers who are affected by that it, whether positively or negatively. Statistical correlation is not the same as a causal link.

41. We need to consider the issue of justification. Unfavourable treatment under section 15, less favourable treatment under section 19 or a failure to make a reasonable adjustment will not amount to discrimination if the employer can show that the treatment is a 'proportionate means of achieving a legitimate aim.

    41.1. When determining whether a discriminatory practice was objectively justified, we are required to make our own judgment as to whether, on a fair and detailed analysis of the working practices, and the business considerations involved, the practice (or the less or unfavourable treatment) was reasonably necessary; not whether it comes within a range of reasonable responses.

    41.2. “The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice (or unfavourable treatment) is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. The range of aims which can justify discrimination on any ground is not limited to social policy or other objectives derived from the Directive, but can encompass a real need on the part of the employer's business.

41.3. It is not enough that a reasonable employer might think the criterion justified. The tribunal itself must weigh the real needs of the undertaking, against the discriminatory effects of measure.

41.4. Although the statutory material refers only to a "proportionate means of achieving a legitimate aim", this should be read in the light of the Directive which it implements. To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so".

41.5. ***Bilka-Kaufhaus GmbH v Weber Von Hartz [1986] IRLR 317*** relates to a claim for equal pay and therefore makes reference to article 119, however it is instructive on the approach to be taken to justification generally. The head-note it reads:

> *"Under article 119 an employer may justify the adoption of a policy excluding part time workers irrespective of their sex from its occupational pension scheme on the ground that it seeks to employ as few part time workers as possible where it is found that the means chosen for achieving that objective serve a real need on the part of the undertaking, are appropriate with a view to achieving that objective in question and are necessary to that end. It is for the National Court to determine whether and to what extent the grounds put forward by an employer explain the adoption of a pay practice which applies independently of a workers sex but in fact effects more women than men, it may be regarded as objectively justified on economic grounds".*

42. The tribunal has in addition sought to remind itself of the statutory reversal of the burden of proof in discrimination cases, we need to consider the reasoning in the cases of ***Igen Ltd v Wong 2005 IRLR***, ***Barton v Investec Henderson Crosthwaite Securities Ltd 2003 IRLR*** *and* ***Madarassy v Nomura International Plc 2007 IRLR***. These cases demonstrate that the tribunal needs to consider (unless the reason why the treatment has occurred is clear) a two-stage process.

42.1. The first stage of which requires the claimant to prove facts which could establish that the respondent has committed an act of discrimination.

42.2. The word "could" on the basis of ***Johnson v South Wales Police [2014] EWCA Civ 73[2014] All ER (D) 79*** does not mean simply raising a possibility of establishing the fact but a *prima facie* case that fact was established.

42.3. It is only after a claimant has proved such facts that the respondent is required to establish, again on the balance of probabilities, that it did not commit the unlawful act of discrimination.

42.4. The ***Madarassy*** case makes it clear that the conclusion, once a *prima facie* case is established, requires an examination of all the evidence both from the respondent and the claimant, to decide whether there is a non-discriminatory explanation for the treatment. We must consider whether the respondent has established that the treatment was "in no way whatsoever" because of the discrimination

42.5. We therefore must examine the evidence as a whole for both stages of the test.

43. The decision in ***Vento v West Yorkshire Police [2003] IRLR 102 CA*** giving guidelines on awards for injury to feelings as increased by later authorities, and now by the Employment Tribunal President's guidance sets out bands of awards: they currently lower band of £900 to £8,600 (less serious cases); a middle band of £8,600 to £25,700 (cases that do not merit an award in the upper band); and an upper band of £25,700 to £42,900 (the most serious cases), with the most exceptional cases capable of exceeding £42,900 In **Vento** Mummery LJ, giving the judgment of the Court of Appeal said:

> *Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury*.

and later:

> *At the end of the day this Court must first ask itself whether the award by the Employment Tribunal in this case was so excessive as to constitute an error of law. ---------- It is also seriously out of line with the guidelines compiled for the Judicial Studies Board and with the cases reported in the personal injury field where general damages have been awarded for pain, suffering, disability and loss of amenity. The total award of £74,000 for non-pecuniary loss is, for example, in excess of the JSB Guidelines for the award of general damages for moderate brain damage, involving epilepsy, for severe post-traumatic stress disorder having permanent effects and badly affecting all aspects of the life of the injured person, for loss of sight in one eye, with reduced vision in the remaining eye, and for total deafness and loss of speech. No reasonable person would think that that excess was a sensible*

> *result. The patent extravagance of the global sum is unjustifiable as an award of compensation.*
> and finally:
> *Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.*
> *i) The top band ------ (s)ums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race.*
> *ii) The middle band ----------should be used for serious cases, which do not merit an award in the highest band.*
> *iii) --- (F)or less serious cases, such as where the act of discrimination is an isolated or one off occurrence.*

44. The remedies available in discrimination claims are set out at section 124 of the Equality Act 2010. This section permits the tribunal to make a declaration, order compensation or make a recommendation. In respect of a recommendation that must be made "*for the purpose of obviating or reducing the adverse effect on the complainant*" that provision having become more limited on the 1 October 2015.

Application

45. During the course of closing submissions counsel for the claimant made an application to amend pleadings. This was to change the PCP relied upon by the claimant in the disability discrimination claim. The application was prompted by the written closing submissions of counsel for the respondent that the PCP relied upon was not one generally applied and therefore could not amount to a PCP in law. This was apparently accepted by counsel for the claimant as being correct. The change was as follows: remove from the original pleaded PCP (page 24 paragraph 6.1) the words "applying the cabinet office policy, Guaranteed Interview Scheme (the scheme) too narrowly and, in particular". Then the claimant sought to replace the PCP (page 25 para 8.1) with an identical paragraph to the amended paragraph 6.1.

46. In **Selkent Bus Co Ltd v Moore [1996]** guidance was given by the Employment Appeal Tribunal as to the approach that Employment Tribunals should take to amendment applications. More recent authorities, compendiously, indicate that **Selkent** is good law but that the underlying test is that of the balance of hardship. Further those authorities point out that in dealing with "labelling" a tribunal should concentrate on the underlying facts and the impact on the areas of inquiry before and after amendment.

46.1. The guidance begins by accepting that the discretion of the Tribunal to regulate its procedure includes discretion to grant leave for amendment.

46.2. The judgment notes that this would usually be an application made to an Employment Judge alone prior to a substantive hearing. We note of course that that is not the case here.

46.3. The guidance continues that whenever the discretion to grant an amendment is evoked the Tribunal should take account of all the circumstances, balancing any injustice and/or hardship to both parties when deciding whether to allow or to refuse the amendment.

46.4. The guidance makes it clear that there were far too many circumstances for any judgment to delineate what amounts to the relevant circumstances, but that the following categories are part of that relevancy process.

46.5. The first is the nature of the amendment sought. The guidance indicating that applications are of many different kinds ranging from the minor correction of typing errors through to the addition of factual details on existing allegations. The addition and substitution of other labels for facts already pleaded to and the making of entirely new factual allegations which change the basis of an existing claim. On the far end of this spectrum is the substantial alteration pleading a new cause of action.

46.6. The guidance provides that the applicability of time limits is important when a new cause of action forms the proposed amendment; the hardship to a party may be greater if the new cause of action would be out of time if brought in a separate claim.

46.7. The guidance then makes it clear that the timing and manner of the application should be taken account of by the Tribunal although it is clear that an amendment should not be refused solely because there is a delay in making it.

46.8. Each of the above along with any other relevant circumstances are to be take account of as a part of the discretionary balancing exercise. The tribunal should discover why the amendment was not sought earlier. We should take any factors into account which affect that, but we are to consider that relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, adjournments, and any additional costs to a party, particularly if that party is unlikely to recover those costs are also part of that process.

47. The claimant had provided the PCP as part of a response to further information. The respondent amended its response (page 39 paragraph 18.2) setting out its legal objection to the PCP relied upon. No application to amend was made after the receipt of that. The respondent having maintained up to the start of the hearing that the claimant was not disabled had changed that stance at the commencement of the hearing.

48. This application was made at, possibly, the latest time in the proceedings it could be (i.e. at the end of the claimant's submissions). No good explanation was provided for that late application. The amendment sought would be likely to have a significant impact on the shape of the case. It is likely that the change, which would call into question the entirety of the respondent's interviewing process would have required additional evidence and disclosure. It would, without doubt, impact on the respondent's approach to the evidence it might call and, in particular, whether or not to abandon its stance on the issue of disability. Whilst the claimant, in effect, loses the opportunity to argue for these claims we consider the hardship to the respondent in all the circumstances is far greater. We refuse the claimant's application to amend.

Analysis

49. The claimant complains that by rejecting the claimant applications for the Grade 6 posts on 12 April 2017 and 19 April 2017 the respondent treated her less favourably than it treated would have treated others because of the disability?
    - 49.1. That the claimant had the disability is not in doubt nor is the fact that Mr Heys and Mr Palmer who were making the decisions as to whom should be interviewed at the relevant time knew of the claimant's disability.
    - 49.2. In addition to this the claimant was rejected on the basis of scoring which we cannot say is proven to be objective.
    - 49.3. However, Mr Palmer had no specific detailed knowledge of the claimant's symptoms. There is no evidence that Mr Palmer reacted negatively to the claimant's disability or symptoms. Mr Heys, who did have such knowledge, also did not appear to react negatively to those symptoms or the existence of ADHD as a disability.
    - 49.4. Mr Heys also had initially marked the claimant at the level where she would have been given an interview. In our judgment this tends to undermine any inference that he had a negative view of the claimant's disability itself or its symptoms.
    - 49.5. If we consider a comparator, who had completed the application form as the claimant had completed it, but who did not have the disability of ADHD the evidence does not point to that comparator being accepted for interview solely because the comparator did not have ADHD.
    - 49.6. We do not consider the burden of proof is reversed because although the claimant has shown a difference in treatment and has demonstrated that she is disabled, we consider that *prima facie*, even by inference, she has not sufficiently shown that those matters are linked to the particular disability of ADHD.
    - 49.7. The claimant's claim of direct discrimination pursuant to section 13 Equality Act 2010 because she is disabled is not well founded and is dismissed.

50. Did the respondent rejection of the claimant's applications for appointment to Grade 6 posts on 12 April 2017 and 19 April 2017 amount to unfavourable treatment.
    50.1. Rejecting an individual for interview in respect of a post for which they are qualified is unfavourable treatment.

51. Did the respondent treat the claimant unfavourably because of something arising in connection with her disability? The claimant argues that the ADHD or symptoms thereof arise out of her disability.
    51.1. Again, Mr Palmer and Mr Heys were aware of the disability and the claimant was rejected on the basis of scoring which has not been proved to objective in character.
    51.2. However, in our judgment the evidence did not support a view that either witness reacted negatively to the claimant's disability or the symptoms thereof and unconsciously rejected the claimant's application for that reason.
    51.3. In our judgment the reverse burden of proof does not come into effect because there is insufficient evidence to conclude that there was a causative link between the claimant's disability and/or symptoms and the unfavourable treatment.
    51.4. Therefore we conclude that the claimant's claim of disability discrimination pursuant to section 15 Equality 2010 is not well founded and is dismissed.

52. Did the respondent apply provision criterion or practice (PCP) to the claimant?
    52.1. The PCP on which the claimant relies is the alleged practice of applying the Cabinet office policy, guaranteed interview scheme, too narrowly, and in particular refusing to appoint a candidate unless that candidate met the minimum criteria for each and every competence.
    52.2. In our judgment this cannot amount to a PCP which would apply generally but is an advantage given to disabled applicants. The respondent would not have applied the alleged PCP to non-disabled persons. The PCP could not have put disabled persons at a particular disadvantage when compared with non-disabled persons.
    52.3. On that basis the claimant's claims pursuant to sections 19, 20 and 21 EA 2010 are not well founded and are dismissed.

53. In rejecting the claimant applications for appointment to G6 posts on 12 April 2017 and 19 April 2017, did the respondent treat her less favourably than it treated or would have treated others because of her sex?
    53.1. Although the numbers are small the tribunal consider that it is of some significance (taken along with other matters set out below that there is a gender imbalance in the respondent's workforce. The higher grades of economist in the respondent department are 80% male. There is a significant reduction in the percentage of females who hold posts at Grade 6 in comparison to those who hold posts at Grade 7. At Grade 7

the figures are, roughly, in line with the ratio of male to female leaving university with an economics degree. The tribunal consider that there is a culture where *ad hoc* promotions are made which favour male economists and which leads to an advantage to those so appointed who seek permanent promotion.

53.2. The policy of the respondent requires gender balanced panels for selection. The process by which the claimant was selected did not have such a panel. The tribunal have rejected the explanation that such a panel was difficult to put together.

53.3. Given the evidence presented in the grievance process which rejected discrimination on the grounds of sex, it is reasonable to infer that the culture of the respondent is one where advantage and favouritism to males is not recognised as potentially discriminatory.

53.4. The marking process is one which we consider cannot be said to be objective.

53.5. Mr Palmer and Mr Heys were aware of the gender of the candidates whose applications they were marking.

53.6. On the basis of the above we consider that it is possible to infer that there could be a linkage between the claimant's gender and the outcome of the selection process and that a male comparator who had completed the application form as the claimant had done and with her history would not have been rejected.

53.7. The respondent's explanation for the treatment of the claimant is that the process is an objective examination of the information provided by the claimant and unconnected with her gender. We cannot accept that evidence on the information before us as it is not established that the process is objective. It appears likely that there is significant subjectivity involved in the marking.

53.8. On that basis we consider that the respondent has not established that there was no unconscious discrimination against females by those carrying out the marking.

53.9. In our judgment the claimant's claim of direct sex discrimination is well founded.

54. The respondent applied a provision criterion or practice (PCP) to the claimant of marking internal candidates' applications on competencies and failing to consider information held elsewhere on the application.

54.1. This PCP was applied to men and women.

54.2. The result of this PCP, albeit with small numbers was to exclude the bulk of females who applied from the interview process. This was in the context of the gender imbalance we have described above in internal promotion. Women were at a particular disadvantage when compared with men in that fewer were selected for interview depriving those women in particular of the opportunity to advance. The claimant suffered this disadvantage.

54.3. Whilst we are concerned with causation and not simply correlation we cannot ignore the differential relationship between numbers of females at grade 7 and grade 6.

54.4. We also take account of the other matters referred to in respect of direct discrimination on the objectivity of the process and the culture in the organisation including the informal temporary promotion of men.

54.5. Further, the claimant is a very experienced and "good" economist with significant and long-term experience and educational achievements in macro-economics. The candidates that succeeded were individuals with much less experience in the field of macro-economics and a greater experience in micro-economic theory.

54.6. On the balance of probabilities, we consider that such circumstances are sufficient for us to conclude that stage one of the analysis required under ***Essop*** is met.

54.7. The respondent has not established a specific explanation for the claimant not being selected. The respondent relies on the process of selection as being objectively fair. In those circumstances the respondent has not established that the failure to select the claimant for interview was not a disadvantage caused by the PCP.

54.8. Is the PCP a proportionate means of achieving a legitimate aim? It is certainly a legitimate aim for the respondent to select those candidates best suited to the post it seeks to fill. However, on our findings we cannot say that the competency based interview system used by the respondent on this occasion is a proportionate approach; we are not able to conclude it is an objective system and cannot say that it was reasonably necessary to employ such a system.

55. Under the heading of remedy, the issue is set out as what remedy, if any, is the claimant entitled? The claimant seeks a declaration, recommendations and compensation for injury to feelings.

55.1. Upon our findings the claimant is entitled to the declaration. Further it is just and equitable to award her compensation. However, the claimant refers in generic terms to recommendations. We note that the claimant is no longer employed by the respondent. Any recommendation we make to the respondent must be for the benefit of the claimant (since 2015). Nothing we recommend could achieve that as she is no longer an employee.

55.2. The tribunal consider that the claimant having established direct sex discrimination is entitled to compensation we do not consider that it is necessary to award the claimant under section 19 EA 2010 separately. We consider that important in our conclusions as to the appropriate injury to feelings award is that this individual not only suffered the discrimination set out above but that it took place in an environment where the respondent recognised the problems and was leading the claimant and others to believe that these were issues that were being addressed. In our judgment the disappointment in the treatment to be felt in such

circumstances would be magnified. We also consider that the respondent's approach to the grievance, which could have rectified the situation, and the failure to recognise the evidence given as supporting the claimant's complaints would add to that feeling. In our judgement an award toward the upper end of the middle band is appropriate in the circumstances and we order the respondent to pay the claimant £19,000 (nineteen thousand pounds) in compensation for injury to feelings.

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Employment Judge Beard
14 February 2019

Order sent to Parties on

……16 February 2019……

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