

Reference No. HRRT 049/2017

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN GUY GREENSLADE

PLAINTIFF

AND COMMISSIONER OF POLICE

DEFENDANT

AT WELLINGTON

BEFORE:

Ms GJ Goodwin, Deputy Chairperson

Ms WV Gilchrist, Member

Ms ST Scott QSM, Member

REPRESENTATION:

Mr G Robins for plaintiff

Ms D Harris and Ms A Lawson for defendant

DATE OF HEARING: 10 to 14 August 2020

DATE OF DECISION: 10 December 2021

DECISION OF TRIBUNAL¹

INTRODUCTION

[1] Mr Greenslade applied to join the Royal New Zealand Police College (Police College) in 2014. In his application Mr Greenslade disclosed that he had dyslexia. To be admitted to Police College candidates had to sit a variety of tests. One of those was a typing test. Mr Greenslade passed all but the typing test. He failed that test three times. Mr Greenslade was declined entry to Police College.

¹ [This decision is to be cited as *Greenslade v Commissioner of Police (Human Rights Act)* [2021] NZHRRT 53.]

[2] Mr Greenslade claims that:

[2.1] He was qualified to be admitted to Police College, but he was declined entry by reason of his dyslexia (which is a disability) and because of an assumption by the Police that he had difficulty with processing and recording new information accurately, which would also be a disability.

[2.2] He has therefore been discriminated against by reason of a prohibited ground of discrimination, being a disability.

[3] In response, the Police say that:

[3.1] Mr Greenslade was not qualified to be admitted to Police College because he failed the typing test three times, which was one of the minimum competencies required to be admitted to Police College.

[3.2] As Mr Greenslade had not met one of the minimum competencies no issue of discrimination arises.

Police College

[4] Some further background is required. Police College is the gateway to becoming a Police Constable. Candidates who are accepted into Police College become Police employees. Acceptance into Police College is a pre-condition to employment.

[5] Ms Andrea Swan, the Police Acting Senior Human Resources Manager in 2014, gave evidence that:

[5.1] The Police receive around 7,000 applications for Police College each year. Around 23 per cent of applicants are successful in gaining entry to Police College. Of the 77 per cent who are unsuccessful approximately half of them opt out of the process and the remainder are declined either on a temporary or a permanent basis.

[5.2] The selection process involves a number of tests and up to two interviews. When Mr Greenslade applied, key stages in the selection process included an initial application, initial vetting, initial phone conversation, medical testing, an assessment day, physical appraisal testing, secondary vetting, a formal interview including the typing test, a physical competency test, reference checks, a final medical test, a commissioned officer interview (if required) and final approval by the Recruitment Manager.

[5.3] Candidates have to meet the requirements of each stage of the selection process before they are offered employment to begin their training at Police College.

[5.4] The tests are the same for everyone, except for the physical testing, where there are different standards for men and women.

[5.5] The typing test was introduced by the Police in 1994. The assessment is linked to key operational requirements, for example recording information in Police intelligence systems, completing reports and preparing documentation for court proceedings. Persons with dyslexia are afforded the opportunity to sit the test in a

one on one environment, while those without dyslexia typically sit the test in a group of about 15.

Mr Greenslade's application for Police College

[6] In June 2014 Mr Greenslade, then aged 18, applied to be admitted to Police College. In September 2014 he completed the first interview in the admission process.

[7] In June 2015 Mr Greenslade was invited to attend an assessment day. As part of the assessment, he completed a Police officer recruitment pre-assessment form, rating himself low on typing as a competency. Mr Greenslade did, however, sign a form acknowledging that he could type 25 words per minute.

[8] During the assessment day Mr Greenslade sat several tests, including a language test, a writing test, a reading test and a listening test. He passed all of these tests and, in July 2015, he was told that he had either met or exceeded the required standards, so that he would move to the formal interview stage.

[9] Mr Greenslade's interview took place with Ms Brittany Johnson, a former Police Selection Specialist, on 4 August 2015. At the conclusion of the interview Mr Greenslade was required to complete the typing test.

[10] The typing test involves the candidate being shown the hard copy of a text on community policing and it tests the replication of that block of text on a screen, under timed conditions.

[11] The applicant has ten minutes within which he or she has to reproduce the text on a screen. The test is marked by awarding one point for each correctly spelled word (this includes any associated punctuation, such as capital letters). Where a word is misspelt (which once again includes any incorrect punctuation) one mark is deleted. To pass the test an applicant is required to have correctly typed at least 25 words per minute. It was Ms Johnson's evidence that she always stated in her pre-test instructions to candidates that they should avoid going back to fix spelling mistakes, as this costs time.

[12] Mr Greenslade failed the typing test. Mr Greenslade's evidence was that he was not competent at touch typing. Ms Johnson's evidence was that she understood that over 90 per cent of the applicants she tested, who did pass the typing test, could not touch type.

[13] Mr Greenslade was not concerned at his failure. He understood that, in his words, it was "no big deal" and that he could re-sit the test. Ms Johnson discussed what he needed to do to improve and suggested that Mr Greenslade should perhaps focus on speed and accuracy and perhaps not go back to fix his mistakes.

[14] On 30 November 2015 Mr Greenslade was invited to re-sit the typing test. It was Ms Johnson's evidence that Mr Greenslade was very enthusiastic and said he had been practising.

[15] Mr Greenslade sat the test again twice on 30 November 2015 but failed on both occasions. Ms Johnson said when she reviewed the results, she had never seen so many red lines indicating mistakes. Ms Johnson recalled that on 30 November 2015 Mr Greenslade went "hell for leather" and typed as many words as possible, without going back to correct any errors. She said that Mr Greenslade's skills had not improved,

notwithstanding the time he had to practice and to improve and pass. Following the November tests Ms Johnson explained to Mr Greenslade the method by which the tests were scored. This method resulted in Mr Greenslade scoring a significant negative test result. Ms Johnson had recorded Mr Greenslade's score in the typing test as negative 62 words per minute. He had made 106 mistakes.

[16] It is Mr Greenslade's evidence that he did not seriously practice until after his third failure at the test on 30 November 2015. Mr Greenslade thought that he would have further chances to pass the typing test, however he was not given an opportunity to re-sit the test again. There is certain divergence between Mr Greenslade's recollection of the conversation he had with Ms Johnson about the potential to re-sit the typing test after November 2015, and Ms Johnson's recollection. This is understandable given the lapse of time since that conversation and the large number of Police College applicants. Mr Greenslade refers to a statement Ms Johnson made about one applicant re-sitting the typing test 17 or 18 times. In cross-examination, Ms Johnson said she did recall there was an "urban myth" that an applicant in a different area had sat the test 17 times, and that she may have mentioned this to Mr Greenslade, but only as a matter of banter.

The assessment of Mr Greenslade

[17] Ms Johnson was concerned at Mr Greenslade's negative score on the typing test. She viewed the result as "pretty shocking". On 7 December 2015 she sent an email to Ms Margaret Kennedy, the Police Recruitment Manager for the Lower North/South Islands, seeking advice about Mr Greenslade. Ms Johnson described Mr Greenslade as "my applicant with dyslexia who will not be able to pass his typing test". The following portions of Ms Johnson's email to Ms Kennedy are relevant:

Re our discussion about Guy GREENSLADE, my applicant with dyslexia who will not be able to pass the typing test and seeking advice from PNHQ – this is what I have so far:

Guy is a great applicant who has been up front with me about his dyslexia. He passed the PT1s on AD and received average marks, verbal and numerical stanine 4 and abstract stanine 5.

...

Guy has had two attempts at the typing test and has failed dramatically both times ...I have attached his most recent test. Guy has a good typing speed however due to his dyslexia he makes an enormous amount of spelling mistakes. Guy will never be able to achieve a pass mark in typing and he explained to me that when he looks at the copy to be typed it looks like a mass of nonsensical words. I think his test sheet demonstrates this well – he has typed what he sees.

It has been confirmed to me by an officer in Canterbury that they have a few dyslexic Police officers on staff that are accommodated and that all officers are encouraged to use Winscribe rather than type up their reports ect (sic).

[18] Ms Johnson asked how to proceed with Mr Greenslade. She asked Ms Kennedy whether to decline his application, whether there was another assessment he could undertake or whether they would make an exception for Mr Greenslade in connection with his typing test. It is to be noted here that it was Ms Kennedy's and Inspector Saunders' evidence that no exceptions to passing the typing test had ever been made.

[19] Mr Greenslade was unaware of the exchange of correspondence between Ms Johnson and Ms Kennedy. It is his evidence that he would never have said he would not be able to achieve a pass mark in the test nor that he typed what he saw. He said his errors weren't due to his dyslexia.

[20] On 7 January 2016 Ms Kennedy sent an email to Ms Fiona Johnston at Police Psychological Services. Ms Kennedy asked Ms Johnston for recommendations as to whether it was appropriate to make an exception for Mr Greenslade in connection with the typing test, so that he could be considered for a position with the Police.

[21] Ms Kennedy's email presents Brittany Johnson's opinion that Mr Greenslade would never be able to pass the typing test and that he typed "what he saw" as actually being Mr Greenslade's comments. Ms Kennedy agreed in cross-examination that her email reported what was told to her by Ms Johnson, not Mr Greenslade's comments.

[22] Ms Kennedy's email to Ms Johnson was referred to Inspector Ian Saunders, the then Senior Psychologist with Police Psychological Services.

[23] Inspector Saunders responded on Monday 11 January 2016. His advice was as follows:

The performance you described below is possibly indicative of highly relevant cognitive issues, related to his dyslexia, that could arise from coding and working memory issues or other challenges in recording information accurately (i.e. this reads to me as not just a typing issue – it's just that typing is where it is expressed) – this is highly relevant to Police work and a significant risk if it surfaces in frontline circumstances (e.g. recording documentary evidence and giving reliable evidence in court using his records, typing registrations, names, etc. into NIA, completing FVIR, completing IONs and TONs safely and accurately under time pressure). In my view, without further investigation of his performance on this test we would be adopting too greater (sic) risk than reasonable for Police and potentially setting up for significant challenges and stress both in the training and operational environment. We have HSE Act responsibilities to minimise this risk and so this weighs heavily against waiving the standards on this occasion.

My strong recommendation is that this candidate be provided detailed feedback on this and that we offer to refer him to a neuro psychologist (at his cost – circa \$1,600) for detailed review and assessment of his performance against the role requirements. Until we have such a detailed analysis of his performance we will not be in a position to advise on any way to advance his application.

It is true that candidates with Dyslexia are in the working population. They all however have passed Police entrance testing and the College program albeit in some instances with support, and no 2 cases are identical. I don't think that makes it a sound business decision to hire someone with the expectation they will require support to be minimally competent or pass the training requirements – it is simply unfair to the candidate, future colleagues/supervisors and the public.

[24] On 10 February 2016 Ms Johnson invited Mr Greenslade to attend a meeting between him and Inspector Saunders, scheduled for Tuesday 23 February 2016. Mr Greenslade was advised that the purpose of the meeting was to discuss his application to join the Police, the results of his typing assessment and his dyslexia. He was requested to bring to the meeting all reports and documentation with regard to his dyslexia.

[25] In the event, the meeting was cancelled by the Police, as Inspector Saunders could not attend. Instead, on 7 April 2016 Ms Johnson sent an email to Mr Greenslade stating that she would like to get a resolution for him with respect to his recruitment and asking him to send a copy of the documentation and reports that he had been requested to bring to the meeting.

[26] Mr Greenslade sent to Ms Johnson a Seabrook McKenzie assessment of his dyslexia which had been compiled almost five years previously, on 28 October 2011. Mr Greenslade advised that the skill level he was working at, as recorded in the Seabrook McKenzie report, was not relevant as it was almost five years ago, and the documentation was only relevant to how he learnt.

[27] On 3 May 2016 Ms Johnson provided Mr Greenslade’s Seabrook McKenzie report to Inspector Saunders. On 17 May 2016 Inspector Saunders replied, advising there was nothing in the report that mitigated the concern he had – fundamentally that, despite several opportunities, Mr Greenslade could not demonstrate an ability to pass the typing test. Inspector Saunders expressed his view on the continuing efficacy of the typing test to a Police role.

[28] On 24 May 2016 Mr Greenslade was advised that his application to join Police College had been declined. The decline was expressed in terms that Mr Greenslade could not re-apply. It was Ms Kennedy’s evidence that this wording was used to prevent candidates who were declined from repeatedly re-applying.

[29] The reason given for Mr Greenslade’s decline mirrors Inspector Saunders’ views, namely that the Police were of the opinion that Mr Greenslade would not be able to meet the typing standard due to his dyslexia and cognitive ability.

[30] On 11 May 2017, Mr Greenslade was assessed by Dr Barbara Adcock, an educational psychologist and registered teacher. Inter alia, she administered a PATOSS test, assessing Mr Greenslade’s handwriting speed, writing from dictation and typing speed. In terms of typing speed Mr Greenslade typed 46 words per minute and made two errors.

MATTERS TO BE DETERMINED BY THE TRIBUNAL

Unlawful discrimination in employment

[31] Against this factual background, the starting point is s 22 of the Human Rights Act 1993 (HRA) pursuant to which it is unlawful to refuse or omit to employ a work applicant, who is qualified for that work, by reason of any one of the prohibited grounds of discrimination:

22 Employment

- (1) Where an applicant for employment or an employee is qualified for work of any description, it shall be unlawful for an employer, or any person acting or purporting to act on behalf of an employer,—
 - (a) to refuse or omit to employ the applicant on work of that description which is available;
or
 - ...by reason of any of the prohibited grounds of discrimination.

[32] One of the prohibited grounds of discrimination is disability, which includes any intellectual or psychological disability or impairment; see HRA, s 21(1)(h)(iv). Dyslexia is a disability.

[33] Mr Greenslade says:

[33.1] He was an applicant for employment.

[33.2] He was “qualified for work of any description”, specifically, he was qualified to be employed at Police College.

[33.3] As he was so qualified, the Police unlawfully refused or omitted to employ him at Police College by reason of his dyslexia or other assumed disability.

[34] There is no dispute that Mr Greenslade was an applicant for Police College and as such, that he was an applicant for employment. However, as referred to in [3], the Police deny that Mr Greenslade was “qualified” for work at Police College. Mr Greenslade accepts that it is his obligation to prove, on the balance of probabilities, that he was “qualified”.

Whether Mr Greenslade was qualified for employment

[35] While HRA, s 22 makes it unlawful to refuse to employ an applicant by reason of a prohibited ground of discrimination, that prohibition is limited to any employee who is qualified for work. Accordingly, whether an employee is “qualified” for work is pivotal. Being qualified for work acts as a gateway to HRA, s 22. If an employee is not “qualified” the claim will not be within the HRA. Pursuant to the statutory scheme “qualified” for work must be addressed and satisfied before a claim for discrimination can be further considered.

[36] There is no definition of the word “qualified” in the HRA. The meaning of legislation must, however, be ascertained from its text and in light of its purposes; see s 5 of the Interpretation Act 1999, *Northern Regional Health Authority v Human Rights Commission* [1998] 2NZLR 218 (HC) at [234] and *Child Poverty Action Group v Attorney-General* [2005] NZHRRT 28 at [71].

[37] Mr Greenslade says “qualified” should refer to an approval or authorisation which is required by law or by an independent organisation, if any. He says that if a particular role does not require such a qualification, no issue as to qualification arises. Mr Greenslade is qualified for Police College because no formal qualifications are necessary to be admitted to Police College. He argues that this interpretation is warranted, as:

[37.1] Human rights legislation (like the HRA) must be interpreted beneficially with the intent of upholding human rights where it can and the Tribunal should adopt an interpretation of HRA, s 22 which affords the greatest protection to those seeking to rely on it and should not exclude claims at an artificially early stage.

[37.2] Reading down the word “qualified” in HRA, s 22 is consistent with the use of “genuine occupational qualification” (in HRA, s 31) and “qualifying bodies” (in HRA, s 38), which imply an official requirement authorisation. Further, that reading is consistent with the deliberate use of the term “capabilities” in HRA, s 22(1)(b). That section contemplates a difference between a person’s capabilities and when they are qualified.

[37.3] A narrower interpretation would rob HRA, s 22 of its force by artificially restricting its scope and, likewise, would rob the exceptions to HRA, s 22 of their force as they would have less scope for operation.

[38] The Tribunal does not accept Mr Greenslade’s submission that “qualified” should refer only to an approval or authorisation which is required by law or by an independent organisation. During the second reading of the Human Rights Bill in 1993 (Bill), the then Minister of Parliament, Graeme Reeves, noted that the Select Committee had removed an upper age limit for age-based discrimination in the Bill:

...because it felt very strongly that in terms of employment the attributes that are required are that one is qualified for the job, which is very well spelt out in the Bill, and that one is competent to do the job, which is part of the qualification. (3 March 1992) 532 NZPD 16911)

[39] The idea that the term “qualified” embraces necessary competencies as well as formal qualifications, if any, has been supported by the Complaints Review Tribunal (now this Tribunal) in *The Proceedings Commissioner v Reynolds* CRT Decision No 4/94, 4 November 1994, by the Employment Court in *Smith v Air New Zealand* [2000] 2 ERNZ 376 (EMP CT) (*Smith v Air New Zealand*) and again by the Tribunal in *The Director of Human Rights Proceedings v Goodrum* CRT 26/2001, 12 April 2002 at [16]. As a consequence, the term qualified means both competency to do the work and any formal qualifications required for the work.

[40] Mr Greenslade then says that should the Tribunal prefer a different approach than that advanced in [37], it must adopt an interpretation of “qualified” which allows Mr Greenslade to challenge discriminatory behaviour, including the actions of the Police in this case. He says the Tribunal should avoid an interpretation which allows the Police to say Mr Greenslade is not “qualified” simply because he failed to satisfy the typing test. That would render the circumstances around his typing test immune from challenge and the Tribunal could never investigate whether those circumstances were discriminatory.

[41] In any event, whether the interpretation of “qualified” at [37] or at [40] is adopted, Mr Greenslade says he meets it. He has subsequently proven that he can type at a sufficient speed through an on-line course and the independent assessment of Dr Adcock.

[42] In response to this the Police say:

[42.1] Mr Greenslade did not have the base qualifications. He was not qualified as he was unable to meet one of the minimum capabilities or competencies required by the Police in the recruitment process.

[42.2] It is for the employer to set the qualifications for a position. The recruitment process has been developed to select the persons who are best able to be Police constables. It is based on independent job analyses conducted by OPRA Consulting Group.

[42.3] Applicants must pass every stage in the process, including the typing test. The typing test is rationally connected to the requirements of the role of a probationary constable at Police College. It is a requirement all applicants must meet to be qualified for employment. It is a minimum capability.

[42.4] Mr Greenslade failed the Police typing test. It follows that, as Mr Greenslade did not pass the Police typing test, he was not qualified for the employment role he was seeking.

[42.5] The online course and the PATOSS typing assessment done by Dr Adcock were not comparable to the Police typing test.

[43] Turning then to try to resolve the obvious tension between Mr Greenslade’s position that “qualified” should be read down and the position of the Police that it must be for an employer, or potential employer, to settle the qualifications or capabilities for a position (which the Police say they had correctly done here) the decision of the Tribunal in *The Proceedings Commissioner v Canterbury Frozen Meat Co Ltd* CRT 14/98, 26 November 1998 (*Canterbury Frozen Meat*) is of note. In that case, the Tribunal approved, as an interpretation of the word qualified, the following academic commentary:

“To be qualified, an applicant with a disability must first possess the necessary academic, technical, or personal qualifications, or relevant experience or background for the position. It is

the employer's right to specify the mix of qualifications or qualities necessary to discharge the duties of the position satisfactorily. Secondly, the applicant must have the physical and intellectual ability to perform the duties of the position. **The employer can only specify "legitimate" physical or intellectual requirements of the particular position.** There is no single acceptable definition of "legitimate", physical or intellectual requirements of positions. Rather, it will depend on the nature of the job and the environment in which the job is to be performed." *Brookers Human Rights Law*, Adzoxornu 2-219. [Emphasis added]

[44] We, likewise, approve of that academic commentary. In the absence of industry or occupational regulation, the starting point must be that it is for the employer to determine the requirements or qualifications for a particular position. Those requirements will depend on the nature of the job and the environment in which the job is to be performed. However, an employer, in setting qualifications for a role, must limit itself to those qualifications which are "legitimate".

[45] What then is a legitimate qualification? In our view, some assistance can be garnered from the use of the words "genuine occupational qualification" in HRA, ss 27 and 30. Under those sections different treatment based on age or sex that arises out of a genuine occupational qualification is not in breach of the HRA. Similarly, pursuant to HRA, s 97 the Tribunal has power to declare that an act, omission, practice, requirement or condition that would otherwise be unlawful under HRA, Part 2, is not unlawful because it constitutes a genuine occupational qualification. In other words, it is consistent with the scheme of the HRA to read "qualified" consistently with the concept of genuine occupational qualifications.

[46] How then is a legitimate, or genuine occupational requirement to be determined? In *Canterbury Frozen Meat*, when considering the issue of how an assessment of an individual for an employment position was to be made, the Tribunal identified two tests; the rational basis test and the factual basis test.

[47] Under the rational basis test, it was for the employer to determine the required qualifications of any position, but there had to be material on which the employer could reasonably rely to show that an honest assessment of an applicant's suitability for a job was made out. The Tribunal in that case held that the evidence relied on by an employer must be "current, reliable and overwhelming". The factual basis test required the employer to show its decision was not only honest but was fact based in terms of the prospective employee's capabilities.

[48] Drawing the threads of those two tests together, we find that the determination of whether a particular qualification or capability specified by the Police for potential employees is a legitimate one requires an objective assessment. When considering the legitimacy of any qualification, latitude or deference must be given to the Police, who are best placed to assess the qualifications or competencies required of Police employees. A legitimate qualification or capability therefore is one that is reasonably necessary for the particular job, given the environment in which that job is to be performed.

[49] This logically means, however, that the requirements or capabilities set by an employer as qualifications are not immune from challenge. A qualification set without a proper objective basis is unlikely to be considered legitimate.

[50] For that reason, it is difficult to conceive of a qualification that is directly discriminatory as legitimate, unless a statutory exception from the HRA clearly applies. So, if the Police specified that an applicant for Police College had to be male, that would be a case of discrimination on the grounds of sex and would not be a legitimate

qualification for Police College. There is no objective basis for all Police officers to be men.

[51] Similarly, if the Police specified that an applicant for Police College had to be at least six feet two inches tall, that would be able to be challenged by an applicant for employment as not being a legitimate qualification on the basis that it constitutes indirect discrimination on the grounds of sex, women generally being shorter than men.

[52] For the sake of completeness, it is noted that this is not a case in which indirect discrimination is alleged. Mr Greenslade is not arguing that the typing test itself has the effect of treating dyslexic persons differently by reason of their disability, so that it is in breach of HRA, s 65. Indeed, it was Mr Greenslade's evidence that he did not fail the test by reason of his dyslexia. It was also the evidence of Ms Johnson, Inspector Saunders and Ms Kennedy that there were a number of persons with dyslexia in the Police, but they had all passed the copy typing test.

[53] It is also noted that this is not a case where Mr Greenslade said that his failure was by reason of his disability. Neither is it Mr Greenslade's case that he should have been reasonably accommodated due to his dyslexia, as part of the determination of whether he was "qualified". His position was that he could pass the typing test without accommodation. The Police, as the prospective employer, were not asked to provide any reasonable accommodation at the "qualification" level. Whether or not such accommodation should be given was not put to the Tribunal and does not form part of the decision in this case.

[54] Turning then to the typing test, it was the evidence of Ms Swan, Acting Senior Human Resources Manager for the Police, that typing is linked to key operational requirements, for example recording information in Police intelligence systems, completing reports, and preparing documentation for court proceedings. Inspector Saunders' evidence was that typing remains an essential skill for the role of a Police officer. Inspector Saunders said that the typing test is a simple work sample of a known component of a frontline Police officer's essential basic skills in that role.

[55] This case was not brought as challenge to the legitimacy of the Police admission criteria for, in neither the pleadings nor the plaintiff's opening submissions, is there reference to a challenge to the legitimacy of the Police tests for admission, or any of the component parts including the typing test. Likewise, there was no challenge to the setting of a "pass" of 25 words per minute in the typing test.

[56] Accordingly, it is the position of the Police, which is accepted given the pleadings, that the case before the Tribunal does not go to the sufficiency or reasonableness of the typing test. Police say this case is not a judicial review of the parameters the Police set for choosing their recruits. Having regard to the pleadings the Police did not prepare to meet such a case and in the hearing, during cross-examination of Inspector Saunders, the Police counsel objected to a line of questioning concerning the ongoing efficacy of the typing test on the basis that the case was not about whether the typing test was valid.

[57] In closing, however, Mr Greenslade’s counsel said:

[57.1] There was no evidence that Mr Greenslade would be required to copy type documents under time pressure at Police College, so that cannot be one of the qualifications for that type of work.

[57.2] The typing test was outdated, it did not account for the use of technology among Police and, according to an independent review, it was of “uncertain reliability and validity”. The result, if the Tribunal follows *Canterbury Frozen Meat*, is that the copy typing test is not a reliable measure or reasonable assessment of whether Mr Greenslade is “qualified” for Police College.

[58] Notwithstanding the limit on the pleadings referred to in [55], and the limit on the Police evidence to meet this point, the Police sought to respond to the arguments made in [57]. The submissions and evidence of the Police in relation to the efficacy of the typing test were:

[58.1] Following the 2007 Cerno Report, which was an independent consideration of the standards and assessment practices for Police recruits up to probationary constable level and which ranked the typing and computer skills test as of a low consistency, the Police conducted a body of work to implement the report’s recommendations and improve their testing. This included two independent job analyses confirming typing as a required capability. Following these analyses, the Police chose to retain the typing test.

[58.2] Ms Swan’s evidence was that typing, as evidenced by the typing test, was linked to key Police operational requirements. As referred to at [52] above, it was Inspector Saunders’ evidence that the typing test was a work sample of a known component of a frontline Police officer’s essential skills.

[58.3] In cross-examination Inspector Saunders said that it would be possible to develop a second block of text for the typing test, but this would require a business decision to examine whether or not the investment would be justified, given the very small number of applicants who failed the test.

[59] As referred to above, Ms Swan and Inspector Saunders gave evidence that being able to type accurately at a reasonable speed was logically connected to the Police constable role. As already stated, not only must latitude be given to employers who are best placed to assess the qualifications or competencies required of employees, but there was no challenge to the 25 words per minute specification. The test adopted by the Police was designed to identify the required skill of typing in Police recruits. That test had been retained by the Police following two independent job analyses.

[60] Accordingly, on the evidence before the Tribunal it is clear that being able to accurately type 25 words a minute was reasonably necessary for the work of a Police officer. Based on that evidence we find the Police did have reasonable grounds to consider that typing, as evidenced by the Police typing test, was a legitimate qualification for entry to Police College. Given the legitimacy of typing as a qualification for employment at Police College, and as Mr Greenslade failed that test three times on two separate occasions, we find he was not “qualified” for employment at Police College.

[61] Logically, Mr Greenslade's lack of qualification is determinative of this case. He was not qualified, so no issue of discrimination arises. We nevertheless proceed to consider some additional submissions made by Mr Greenslade.

Whether qualified can be future looking

[62] Mr Greenslade said that even if the typing test is legitimate his failure to meet that test is not an end to the "qualification" issue. Mr Greenslade said that, following his practising typing after his third failure, he would have been able to pass the test had he been given another opportunity to try.

[63] He referred to *Smith v Air New Zealand* as authority for the proposition that "qualified" assesses potential capability for work. In particular, Mr Greenslade referred to the following passage of the decision, where at [120] Colgan J said:

[120] The "work of any description" referred to in s 22(1) was the piloting of Air NZ aircraft. Mr Smith was qualified to do so as either a pilot in command or as a first officer and, for the B733 type in particular, **could without difficulty have so qualified**. The plaintiff was suspended (that is, not rostered for duties and not paid) because he turned 60 years of age, that is, by reason of his age.[Emphasis added]

[64] Mr Greenslade says that following *Smith v Air New Zealand* "qualified" assesses potential capability for work. Police say *Smith v Air New Zealand* is distinguishable, as in that case Mr Smith was already qualified for employment and disputed the imposition of additional barriers for his ongoing employment. Police say that Mr Smith had the base qualifications, while Mr Greenslade does not.

[65] Mr Greenslade based his claim that he was qualified for entry to Police College because, after failing the Police typing test three times, he sat and passed other online typing courses. In addition, he was assessed by Dr Adcock under the PATOSS test as having a typing speed of 46 words per minute, with only 2 mistakes, while the Police typing test only required 25 correct words per minute.

[66] The Police submitted that Dr Adcock's testing of Mr Greenslade was not equivalent to the typing test. By her own admission, Dr Adcock had no knowledge or experience of the capabilities required of a Police officer and it is far from clear that the tests were comparable. The Police also submitted that other online typing courses were not equivalent to the Police typing test. In this case, we have already accepted the legitimacy of the typing test.

[67] The Police subsequently made enquiries for Mr Greenslade's benefit to see if an exception could be made to the typing test. The advice from Psychological Services was that it could not. Any exception would have compromised the integrity of the testing, which is for the minimum competencies required for entry into Police College.

[68] These enquiries do not detract from the decision of the Police to decline Mr Greenslade. We accept the distinction made by the Police between the position of Mr Smith and that of Mr Greenslade.

[69] We also note that HRA, s 22(1) refers to an employee who "is" qualified for work. The requirement is a present tense one. An applicant must meet the qualification at the time the assessment of that qualification is made.

Challenging the circumstances of the administration of the typing test

[70] Mr Greenslade also says that the Tribunal should avoid an interpretation which allows the Police to say Mr Greenslade is not “qualified” simply because he failed to satisfy the typing test, as that would render the circumstances around his typing test immune from challenge and the Tribunal could never investigate whether those circumstances were discriminatory. This is essentially revisiting the administration of the test.

[71] Turning then to the circumstances around Mr Greenslade’s tests, there was no evidence that Mr Greenslade sat those tests in other than usual conditions. There was no evidence that candidates were routinely afforded more than three attempts at the test. The evidence of Ms Kennedy was that normally people passed the test the first time. If they failed, they were given another opportunity, so that they could go and practice. Rarely, where there had been a marked improvement between the first test and the second test, candidates were given a third opportunity. While Ms Kennedy could not rule out a fourth test, she said she was not aware of any fourth attempt having been given.

[72] While Mr Greenslade said that he understood multiple attempts at the test could be given, it is his evidence that he did not practice for the test until after his third failure. Also, as previously referred to, by his own evidence his failure was not due to his dyslexia.

[73] There is nothing to suggest that the circumstances of the administration of his tests were discriminatory.

Whether the assumption of the Police about the reason for Mr Greenslade’s lack of qualification is discriminatory

[74] Finally, the Tribunal will deal with a further issue raised by Mr Greenslade, namely where a prospective employee fails to establish they are qualified for a role, can that person nevertheless claim to have been discriminated against on the basis that the employer has assumed, incorrectly, that the employee is not able to meet the qualifications required by reason of a disability.

[75] Mr Greenslade refers to the erroneous assumption made by the Police that his inability to pass the typing test was due to his dyslexia. Mr Greenslade claims:

[75.1] First, that he could have passed the typing test but that he was not given a further opportunity to do so because of the assumptions made about the impact of his dyslexia on his ability to pass the test; and

[75.2] Secondly, that irrespective of whether he was qualified the reason his application was rejected was because of his disability, which is a breach of HRA, s 22.

[76] For the reasons discussed below, neither argument can succeed.

[77] The first argument raises the issue of causation. Mr Greenslade’s argument is essentially that, but for his dyslexia, he would have been given another opportunity to re-sit and, once given that opportunity, he would have passed.

[78] The test for causation, as expressed by Tipping J in *Air New Zealand Ltd v McAlister* [2009] NZSC 78; [2010] 1 NZLR 153 at [48] to [50] is whether the prohibited ground of discrimination was a material ingredient in the making of the decision. This test

has been followed by the Tribunal; see for example *Meulenbroek v Vision Antenna Systems Ltd* [2014] NZHRRT 51 at [115].

[79] There can be no doubt that the Police were cognisant of Mr Greenslade's dyslexia. As previously referred to, following his third failure of the typing test the Police made enquiries for Mr Greenslade's benefit to see if an exception could be made to the typing test. This does not, however, indicate that if Mr Greenslade did not have dyslexia, he would have been afforded another opportunity to re-sit the test.

[80] Ms Kennedy said most candidates passed the typing test on their first attempt. The decision to offer a further opportunity to re-sit was discretionary and determined on a case by case basis. If a candidate narrowly missed achieving the minimum requirement, they would be likely to be afforded the opportunity to re-sit. If, on a second attempt, there had been a marked improvement, a third attempt could be considered. Ms Kennedy and Ms Johnson said this was the process for all candidates, irrespective of issues relating to dyslexia.

[81] The issue of whether dyslexia was a material ingredient in the making of the decision to treat Mr Greenslade in the way he was treated should be addressed by looking at Mr Greenslade's typing test results. It was Ms Johnson's evidence that Mr Greenslade's first attempt at the test in August 2015 was "pretty awful". By November 2015 Mr Greenslade's skills had definitely not improved, notwithstanding the time he had to practice and to improve and pass. Rather, Ms Johnson said that she had never seen so many red lines, indicating mistakes, and that the test was unmarkable. His score was the lowest she had ever seen.

[82] Given these results, it was reasonable for the Police to "call a halt". Mr Greenslade was not given the opportunity to re-sit, as the evidence before the Police was that his results were so far from meeting the requisite standard that the Police could reasonably conclude that another attempt would not change the position, namely that he could not pass the typing test. This would have been the case whether or not Mr Greenslade was dyslexic. The material factors in not allowing Mr Greenslade to re-sit were his very poor results and a lack of any improvement in his typing tests. The Police would not have afforded any candidate, dyslexic or not, who had such test results a further opportunity. The Police's mistaken belief as to why Mr Greenslade failed the test is, accordingly, not material.

[83] An employer cannot be required to grant further attempts to any candidate to meet a legitimate criterion or qualification for employment where it is clear (as here) that the employee has fallen far short of demonstrating he or she is capable of meeting criterion or qualification.

[84] On Mr Greenslade's own evidence he did not practice enough; his failure was not by reason of his disability. Mr Greenslade was not precluded from being qualified due to his disability but rather because of his test results. What Mr Greenslade is, in effect, asking for is to be treated more advantageously than someone without dyslexia, even though his lack of preparation and not his disability was the reason he did not pass the typing test. The HRA does not extend that far. Finally, we note that Mr Greenslade has not established that someone without his disability, who failed the typing test as poorly as he did, would have been treated differently. Without such a showing his claim must fail.

[85] Mr Greenslade's second point in [75.2] above does not fit with the statutory scheme of the HRA. Under HRA, s 22, once an employer has established the legitimacy of a

required qualification, it is for the employee to establish, on the balance of probabilities, that he or she had that qualification and so was qualified. Mr Greenslade accepted in this case he was required to do this. His argument therefore urges on the Tribunal an interpretation of HRA s 22(1) that renders the word “qualified” in the preamble to that section of no effect.

[86] In this context, it is of note that HRA, s 29, which sets out the exceptions that apply to HRA, s 22 in cases of disability, also supports the notion of qualification being a condition precedent to issues of discrimination arising. That section provides:

29 Further exceptions in relation to disability

- (1) Nothing in section 22 shall prevent different treatment based on disability where—
 - (a) the position is such that the person could perform the duties of the position satisfactorily only with the aid of special services or facilities and it is not reasonable to expect the employer to provide those services or facilities; or
 - (b) the environment in which the duties of the position are to be performed or the nature of those duties, or of some of them, is such that the person could perform those duties only with a risk of harm to that person or to others, including the risk of infecting others with an illness, and it is not reasonable to take that risk.
- (2) Nothing in subsection (1)(b) shall apply if the employer could, without unreasonable disruption, take reasonable measures to reduce the risk to a normal level.

[87] The section is predicated on an employee, or applicant for employment, being able to perform the duties of the position satisfactorily, albeit with special services or facilities. Different treatment is not, however, unlawful on grounds of disability if it would be unreasonable to expect an employer to provide special services or facilities to enable the employee to perform the duties of the position satisfactorily. It must follow that to decline to employ someone who, even with special services or facilities would not be able to perform the role or was not capable of being “qualified”, is not discriminatory. That is the case, even if the reason for the lack of competency or qualification is disability related.

[88] Where an employer, in declining to employ an applicant on the basis of a lack of qualification, reaches the view in the course of that decision that the reason why the applicant lacks a necessary competence or qualification is due to the applicant’s disability, that does not turn the employer’s lawful decision to decline into an unlawful one. This can be illustrated by the hypothetical case of Ms A who is profoundly deaf. Ms A applies for a job as a piano tuner, a role that requires someone to be able to tune by listening. No special services or facilities are available that could assist her to hear sounds. Clearly, Ms A is not qualified for the job and to decline to employ her as a piano tuner is not unlawful. The legitimacy or lawfulness of that decision does not alter because the employer advises her that she did not get the job because she is deaf.

[89] Mr Greenslade’s case is not any different. The Police reasonably took the view that Mr Greenslade was not qualified based on his failed typing tests. The legitimacy of this decision is not affected by the fact that Police mistakenly considered this was caused by his dyslexia.

Conclusion

[90] To conclude, this case is a relatively narrow one, revolving around how the word “qualified” is to be interpreted and whether Mr Greenslade was qualified for Police College.

[91] We have found that the typing test was a legitimate qualification for entry into Police College. Mr Greenslade failed that typing test three times. As noted in [53], this is not a case where Mr Greenslade said that his failure was by reason of his disability. His application for Police College was declined as Mr Greenslade was not qualified for the role, in that he had not met a required qualification for entry. As Mr Greenslade was not qualified for recruitment HRA, s 22 is not further engaged.

[92] Mr Greenslade’s claim is dismissed.

COSTS

[93] Costs are reserved. Unless the parties are able to reach agreement on the question of costs, the following procedure is to apply:

[93.1] The Commissioner of Police is to file his submissions within 14 days after the date of this decision. The submissions for Mr Greenslade are to be filed within a further 14 days with a right of reply by the Commissioner of Police within seven days after that.

[93.2] The Tribunal will then determine the issue of costs on the basis of the written submissions without any further oral hearing.

[93.3] In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

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Ms GJ Goodwin
Deputy Chairperson

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Ms WV Gilchrist
Member

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Ms ST Scott QSM
Member