Case Number: 1600344/2015

EMPLOYMENT TRIBUNALS

Mr Keith Crossland **Chamberlains Security (Cardiff) Limited**

Claimant **Respondent**

v

Heard at: **Bristol** **On: 8, 9 and 10 May 2017**

Before: **Employment Judge Pirani**

Members:
Mr CD Harris
Mrs E Burlow

Appearances
For the Claimant: Miss Zeitler, counsel, and the claimant in person
For the Respondent: Mr N Smith, counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is:

1. The claimant succeeds in his section 20 and 21 Equality Act 2010 claim for failure to make reasonable adjustments.

2. The claimant succeeds in his section 15 Equality Act 2010 claim for discrimination because of something arising in consequence of his disability.

3. The claimant succeeds in his section 27 Equality Act 2010 claim for victimisation.

RESERVED REASONS

Background and issues

1. By a claim form received at the tribunal on 13 February 2015 the claimant, who was born on 8 March 1959, issued a claim against his former employer for disability discrimination and holiday pay. The claimant says he was employed from 29 July 2014 until 26 October 2014. The dates on the Acas certificate are 7-15 January 2015.

2. The matter came before Employment Judge Clarke at a case management preliminary hearing on 7 April 2015. At that hearing the claimant withdrew the claim for holiday pay.

3. It has been clarified that the disability relied on for the purposes of section 6 Equality Act 2010 ("EqA") is type I diabetes. The respondent concedes that the claimant was disabled at the material times by reason of type I diabetes.

4. The matter was originally heard at the Cardiff Employment Tribunal in July 2015. The claimant subsequently successfully appealed and the matter was remitted to the Bristol Employment Tribunal. Although this case has been remitted from the EAT the issues were clarified and agreed at the start of this hearing. They were also read out after the evidence and were again agreed by the parties.

5. The claimant's first complaint of disability discrimination is brought under section 15 EqA: discrimination arising from disability.

6. The respondent accepts that, in deciding that the claimant could no longer work at the Llandegfedd Reservoir in Pontypool and not offering him other work, it did subject him, for the purposes of section 15(1)(a), to unfavourable treatment because of something arising in consequence of his disability. The claimant also alleges that he was dismissed by the respondent is alleged to be unfavourable treatment.

7. There is a dispute as to whether the respondent dismissed the claimant or whether he resigned. The claimant says the dismissal was something arising in consequence of his disability. The respondent says that claimant resigned because he wanted his P45 so he was able to sign on.

8. The respondent contends it pursued a legitimate aim for the purposes of the section 15 claim, namely to ensure the claimant's health and safety.

9. The issue is therefore whether the respondent is able to show any unfavourable treatment was a proportionate means of achieving a legitimate aim.

10. The claimant's second complaint of disability discrimination is brought under sections 20 and 21 EqA: a failure to comply with the duty to make reasonable adjustments. It was agreed that the PCP relied on is a requirement that employees, and in this case the claimant, work on a relatively isolated site alone and patrol that site on foot or by car. It is agreed that the respondent applied this PCP. It is also agreed that the claimant suffered substantial disadvantage by reason of his disability about which the respondent had knowledge.

11. The nature of the substantial disadvantage was explained by the claimant in evidence as: if he collapses after a hypoglycemic attack he will have no-one around to administer lucozade which would alleviate symptoms of the attack.

12. The reasonable adjustments the claimant says should have been put in place by the respondent are:

i. the respondent should have installed a telephone booster to improve telephone signal reception at the reservoir
ii. the respondent should have recognised that security officers did not need to use their car as part of the job when at the reservoir
iii. the respondent should have ensured that the gate on the site was able to be unlocked from the outside so that the site was able to be accessed in case of emergency

13. The respondent says these adjustments would not alleviate the substantial disadvantage alleged by the claimant.

14. In addition, the claimant pursues a victimisation by way of amendment which was permitted at the hearing in July 2015. The protected acts he relies on are:

i. the grievance dated 5 November 2014
ii. the ET1 which was presented on 13 February 2015

15. The claimant also relies on section 27(1)(b) EqA, in other words, that the respondent believed that the claimant had done, or may do, a protected act.

16. The detriment he alleges is the respondent's failure to re-engage him as a security officer and/or offer him work at another site.

17. The respondent's case is that it did offer other jobs to the claimant initially since it was willing to re-engage but once it was aware the claimant was going to litigate against it, it determined not to re-engage further. This was how the case was put at the case management hearing on 6 December 2016. We were reminded however that the full defence was set out in a response submitted during the July 2015 hearing.

18. The withdrawal of the offer of work is said by the respondent to have occurred in late December 2014 although was not set out in any written document.

19. The response to the victimisation claim is at divider 2a. Although it is now said that bad faith is relied on it is agreed that it is not pleaded. There was no amendment request by the respondent. Nonetheless, we were told that the bad faith alleged is that the claimant was seeking to set up claims against the respondent in order to obtain a pecuniary advantage.

20. A point is also taken on causation. It is said that the respondent withdrew its offer of looking for alternative work when it determined that re-engaging the claimant would result in future litigation against it over and above that identified by the claimant at the grievance meeting on 16 December 2014.

21. An issue also arises as to whether the parties complied with the Acas code on disciplinary and grievance procedures, and, if not, whether the failure(s) was unreasonable.

22. At the last case management hearing it was ordered that this hearing deal with liability only.

23. Application to amend: On 28 March 2015 the claimant made an application to the tribunal to amend his complaint of disability discrimination by adding Mr Richard Trevivian (the respondent's managing director) as a second respondent. He subsequently made a further application to join Mrs Trevivian. At the case management preliminary hearing on 7 April 2015 it was said to be agreed between the parties that it would be more cost-effective to deal with the claimant's application to amend at the full merits hearing rather than at a discreet preliminary hearing.

24. At the start of this hearing it was agreed that the application to join would only be pursued if and when the need arises, i.e. if the claimant is successful in his claims but does not receive payment of monies from the respondent.

25. Documents: There were a number of without prejudice documents contained in the bundle. It was agreed that no reference would be made to them in evidence and the tribunal would ignore them. We had a main bundle which ended at page 260 although it contained more than 260 pages.

26. Prior to those pages in the same bundle were some 21 dividers each containing numerous documents, some of which were witness statements. In addition we were provided with a partly un-paginated second bundle with divider headings labelled part C, part D and part E. Among other things, the second bundle included what was said to be the previous litigation history of the claimant.

27. The first case management hearing on 7 April 2015 limited the bundle to 100 pages and also provided that it should not include any correspondence marked without prejudice or between the parties and Acas unless agreed between the parties or ordered to be included by the tribunal. After remission from the Employment Appeal Tribunal there was a further telephone case management preliminary hearing on 6 December 2016 at which the orders were varied such that the revised bundle be limited without further direction to 250 pages. No application was made by either party to vary this order. It was not complied with.

28. Open offer: Before we started hearing evidence the respondent made an open offer to the claimant of £27,000 without admission of liability.

29. Representation: Part way through the cross-examination of Mr Trevivian the claimant elected to dispense with the services of his counsel and to represent himself. He was offered further time to collect his thoughts and prepare for the continued cross-examination. However, the claimant declined and elected to continue without a break. Nonetheless, the tribunal decided it would be in the interests of justice to alter the timetable such that the claimant was not required to close his case at the end of day two. Closing submissions were accordingly heard on day three. Of course, we do not know the reason for the disinstruction. However, we record our gratitude to Miss Zeitler who ably

assisted the tribunal and also provided a very useful opening note. We were also greatly assisted by Mr Smith and the claimant.

30. **Witness evidence**: For the claimant, we heard from the claimant himself who provided two witness statements. For the respondent, we heard from Richard Trevivian and Laura Trevivian. The respondent also provided statements from Adam Stout, a mobile site manager, Darren Shepherd, a company director of About Training Ltd, Dean Powell, the managing director of 365 Security and Guarding Ltd and Louise Llewellyn, the office manager for the respondent. Although each of these witnesses provided signed statements none of them attended the tribunal to give evidence. Although we read their statements we took into account the fact that they were not present to be cross-examined or challenged on the evidence.

Findings of fact

31. After hearing the evidence, reading relevant documents and considering the written and oral submissions of the parties, we unanimously found the following relevant findings of fact. Some of our findings on disputed facts are dealt with in the conclusions section.

32. The respondent is a family run security company employing approximately 50 people across 10 to 12 sites in the South Wales area. It has two directors, Richard Trevivian and Laura Trevivian. Mr Trevivian also acted as operations manager. The respondent company has an employee turnover of about 30% annually.

33. On 23 July 2014 the respondent started providing security services at the Llandegfedd Reservoir in Pontypool via a contract with Dwr Cymru Welsh Water. The reservoir is a large body of open water where a new water sports centre was being built. The purpose of the respondent's contract with Welsh Water was to deter and report incidents of unauthorised swimming, boating and other water related activities.

34. There were no security cameras on site and so the work involved the guarding and regular patrolling of the reservoir boundary both by car and on foot (193-194). Although there was a 6 foot high gate blocking access to the site there was no provision to gain access to the site from the outside. Hourly check calls were used to monitor the safety of site officers. In the event of a call being missed the respondent's control room would initially try to contact the officer directly. If an officer could not be contacted the respondent's duty manager would then attempt to make personal call and would also attend the site in the event of a non-response. Because the reservoir was remotely situated many parts of the site had poor or non-existent phone signal.

35. The claimant was diagnosed with type I diabetes in 1990 (1a). Type I diabetes is a lifelong condition. Without regular injections of insulin the condition would result in premature death within a very short time. The claimant's diabetes requires him to maintain a good diabetic diet, take regular exercise, maintain a healthy lifestyle and attend hospital or surgery for regular surveillance of his condition and its complications. He needs to test his blood about eight times each day. From 1990 to 2014 his diabetes manifested itself as a progressive condition with a cumulative increase in relevant complications (1a).

36. As of June 2014 the claimant had no record of hypoglycaemic attacks within the previous year. However, sometime in 2013 the claimant crashed his car after a dip in his blood sugar caused him to blank out.

37. Untreated hypoglycaemia can result in coma, and very rarely in death. In June 2014 the claimant obtained a medical report from his GP for the purposes of employment tribunal proceedings with a previous employer (1a). The GP noted that the claimant had good hypoglycaemic awareness, and was aware of what to do should he experience any of the warning symptoms. The GP also noted that the claimant carried a quantity of dextrose or equivalent with him at all times to manage symptoms of hypoglycaemia should they occur.

38. The claimant has previous experience of Employment Tribunal and High Court litigation. He also has a law degree and has completed the bar vocational course.

39. In November 2003 the claimant made an application to the Employment Tribunal for breach of contract and unfair dismissal relating to his employment as a store manager. Although that claim was struck out he later issued a claim against the same defendant in March 2004 in the High Court. Summary judgment in High Court claim was given in favour of the defendant after a hearing in February 2005.

40. The claimant was successful in a claim for holiday pay against a different respondent after hearings at the employment tribunal in September 2009 and at the Employment Appeal Tribunal in August 2010.

41. The claimant also commenced litigation in 2011 against another company for whom he worked as a security guard. Relevant facts of that case included that the claimant refused to undertake outside patrols and was disciplined. His case related to the risk that as a diabetic he may suffer unpredictable hypoglycaemic episodes that may lead to serious injury or in an extreme case death, if he could not obtain assistance. The claimant argued in that case that the respondent should have taken steps to reduce the risk of injury occurring as a result of him suffering such an episode. An Employment Judge imposed a deposit order and the claimant appealed to the Employment Appeal Tribunal and to the Court of Appeal. The Employment Judge was upheld on both occasions.

42. In February 2015 the claimant attended a tribunal hearing in Cardiff Employment Tribunal relating to, among other things, a claim for victimisation and failure to make reasonable adjustments. That claim concerned work as a security guard on a zero hours contract for the period from 9 August 2013 until 27 December 2013. He complained about inadequate provision of facilities at the respondent's premises which he said put him at a substantial disadvantage. The claimant was successful, although prior to the hearing the response had been struck out.

43. The claimant was previously declared bankrupt because of a cost award made against him by the University of Glamorgan after a failed libel claim.

44. The claimant was recommended to the respondent after one of its security officers was unable to attend a nightshift due to a family emergency on 29 July 2014. After satisfactory completion of the shifts Mr Trevivian offered the claimant more work and employed him

as a seasonal security guard. The claimant was not asked to fill in a medical questionnaire by the respondent.

45. Adam Stout, a mobile security site manager, inducted the claimant onto the reservoir site on 4 August 2014. The claimant did not mention at this time that he was a diabetic.

46. Originally the contract at the reservoir was due to finish by Christmas 2014. It was later extended and the respondent is still contracted to provide security at the same site. The respondent provided loan guard security cover from 7 PM to 7 AM during the week and 24 hour cover at the weekend. The shifts were covered by a pool of 3 to 4 guards.

47. The claimant was provided with a written contract of employment which indicated that his hours of work may vary week to week and that it was based on zero working hours per week with basic pay of £6.31 per hour (21-22). Lone worker monitoring was in place to ensure the safety of officers. An automated system provided that hourly check calls would be made (55). The respondent also employed other employees who had minimum numbers of hours stipulated in their contract, some of whom had TUPE transferred to it.

48. On 21 August 2014 the claimant emailed the information email account at the respondent's office. The email was addressed to Mrs Trevivian and attached copies of various documents including his passport. The last document attached was a picture of a letter indicating that he had an outpatient appointment at a diabetic centre on 25 September 2014 (10-13). No mention was made in the text of the email of diabetes or any other medical condition. During cross-examination the claimant accepted that he attached the outpatient letter as evidence of his address for the purposes of identification rather than to inform the respondent that he had type I diabetes.

49. Mrs Trevivian did not see the email as it was sent to a "catch all" email address which she did not look at. She explained that the email would have been seen by the person in the office who dealt with the vetting of security officers. It is likely that such person would only have checked the document for proof of address.

50. Accordingly, prior to 10 October 2014 Mr and Mrs Trevivian were not aware that the claimant was a type 1 diabetic. However, the respondent did previously employ Adrian Grant as a Security Supervisor who was also a type I insulin dependent diabetic. Mr Grant made the respondent aware of his condition at interview and had since worked with the respondent to manage his condition.

51. The claimant worked approximately 53 hours each week at the reservoir site which was a 50 minute drive from his home. Shifts varied between 12 and 15 hours during which time the claimant worked alone. In the course of his working week the claimant would drive on site for approximately 30 minutes.

52. At the commencement of his employment the claimant took pictures to evidence what he regarded as unsafe working practices. He did not forward the pictures to the respondent prior to the end of his engagement (see at 7). During cross-examination the claimant explained that he did not want to complain about working practices because he was on a zero hours contract and was therefore vulnerable to termination.

53. On the morning of 10 October 2014 the claimant had a hypoglycaemic episode on account of low blood sugar. It occurred towards the end of his shift while sitting stationary in his car waiting for the site contractor to relieve him from duty. He fell into a sleep and was woken by a knock on the window of his car. The claimant then jumped out of the car and says he appeared to be wobbling or drunk as he moved towards the gate. He realised that he needed to unlock the gate but in his "reduced intellectual state" the claimant says he was incapable of much in the way of logical thought. On the claimant's own account he started "dancing" when patting his pockets looking for the key. At this time he was somewhere between 12 and 30 m from the bank of the reservoir.

54. Mr Trevivian then received a telephone call from Adam Stout who reported that the contractors had indicated they were unable to gain access to the site as the security officer on duty appeared, among other things, disorientated and they were unable to attract his attention. Mr Trevivian advised Mr Stout to call an ambulance and said he would drive straight to the site to check on the claimant's welfare.

55. By the time Mr Trevivian arrived on site he was advised that an ambulance had already been and the claimant had since left in his own vehicle. The contractor explained to Mr Trevivian that the claimant was "completely out of it" and wandering around. Later the same day Mr Trevivian called and spoke to the claimant who advised him that he had had a hypoglycaemic attack. This was the first time Mr Trevivian became aware that the claimant was diabetic.

56. When Mr Trevivian asked the claimant why he had never told the respondent he was a diabetic the claimant replied that he had not wanted it to affect his chances of employment. Mr Trevivian told the claimant that he would cover his shifts over the weekend but the claimant would nonetheless be paid for the Saturday and Sunday night.

57. A report of the incident was provided to Welsh Water which was not shown to the respondent until sometime later (49). The report noted that on arrival the overnight security guard was demonstrating unusual behaviours, refused to provide access and was unable to communicate verbally. Listed under "immediate actions taken for the short term" was "discussion with Chamberlain Security to replace existing guard". Under the heading underlying causes was, "security guard had not managed his condition but also not informed Chamberlain Security of his medical condition".

58. In fact, and unknown to the respondent at the material times, the way the claimant managed his condition meant that such episodes would, on occasion, occur. This increased the likelihood of a longer life span. His doctor explained in 2011 that "a consequence of his attempts to obtain good control of his diabetes is that on occasions the level of blood sugar can fall to a level that we would consider to be hyperglycaemia" (1).

59. Mr Trevivian attended to conduct a risk assessment on Saturday, 11 October 2014. He concluded that reasonable adjustments were not feasible and the site could not be made reasonably safe for the claimant. He completed both a general and specific risk assessment (see at 51, 54 and at 62).

60. Although Mr Trevivian had many years of completing risk assessments covering a multitude of different scenarios he had not undertaken a specific assessment dealing with diabetes previously. In the site specific risk assessment for the claimant he mistakenly referred to type II diabetes (62). Prior to completing the risk assessment Mr Trevivian did not obtain any medical information concerning the claimant's condition and did not contact the claimant's GP. Nor did Mr Trevivian consult with the claimant about the potential for reasonable adjustments. During cross examination Mr Trevivian explained that he obtained information about diabetes from a *Google* search.

61. Because Mr Trevivian concluded that adjustments would not work and the site could not be made reasonably safe for the claimant he noted that a front of house position or employment on a multi-office site would be preferable (63).

62. Mr Trevivian then called the claimant on the afternoon of Monday, 13 October 2014 advising him that following the risk assessment the respondent would not offer him further work at the reservoir site. He told the claimant that he was looking for suitable alternative work and that he considered a front of house position or a multi-officer site to be more suitable. An upcoming position in Cardiff City centre was discussed but ruled out as this would require the claimant going in and out of Cardiff twice a day. Subsequently, some efforts were made by Mr Trevivian to seek out alternative engagements both with the respondent and other security companies.

63. According to the respondent on Tuesday, 21 October 2014 Mr Trevivian spoke to the claimant and updated him on efforts to find additional work. Mr Trevivian says the claimant asked if he could be sent his P45 as he wanted to sign on as there was no work currently available at the respondent. This was not regarded as an unusual request from a seasonal officer. In the event, the P45 was completed online and sent directly to the job centre on 26 October 2014 (see at 67).

64. The claimant's case is that during phone calls Mr Trevivian made the suggestion that in order for him to claim jobseekers allowance or benefits he would essentially have to dismiss the claimant which meant sending a P45 which he received on 26 October 2014 (see C statement at para 162).

65. The claimant's P45 was not fully completed by the respondent (67). Part 4, the section dealing with leaving voluntarily, was left incomplete as was part 6, which dealt with and the reasons for dismissal. Accordingly, there was nothing on the P45 itself to indicate whether or not the claimant had resigned or had been dismissed or simply requested a copy of his P45 by way of mutual termination. We return to this factual dispute in our conclusions section.

66. On 5 November 2014 the claimant issued a grievance (68a). He said he had received his P45 a couple of days ago and now believed he needed a meeting which should be designated as a grievance to discuss, among other things, why he was dismissed and his future prospects. No mention of discrimination was made in the grievance letter.

67. Mr Trevivian then called Acas for advice on how to deal with the grievance. The Acas officer explained to Mr Trevivian that because the claimant no longer worked for the

respondent there was no need to classify the complaint as a grievance. It was implied that there was no need to comply with the ACAS code on disciplinary and grievance procedures. Nonetheless, Mr Trevivian was also advised to treat the grievance "formally" and so he made preparations for a meeting. The respondent's own grievance procedure provides that it would make every effort to hear an employee's grievance within five working days (19Ai).

68. After some delay, the grievance meeting took place on 16 December 2014. Some of the delay was caused by Mrs Trevivian working part time which meant it took her longer to respond to emails from the claimant. The claimant also objected to draft wording of a letter to be sent to his chosen representative which added to the delay (see at 85-89).

69. Present at the grievance meeting were Mr and Mrs Trevivian together with the claimant, who, in the event, was unrepresented. The claimant covertly recorded the meeting and did not alert the respondent to this until he exchanged his first witness statement for the purposes of these proceedings (see at 101).

70. We pause there to note that this was despite the fact that the claimant is legally trained and has previously been involved in litigation and so would have been well aware of relevant duties of disclosure. The claim form was also drafted in a way which suggested that he had not recorded the meeting (see para 17 where he makes reference to Mr Trevivian having "said something like").

71. During the meeting Mr Trevivian asked why the claimant did not inform the respondent of his diabetes so as to allow the respondent to manage the situation (111). Mr Trevivian explained that he was concerned about, among other things, having a large body of water just feet away from where they received a report that the claimant was wandering around the site. The claimant replied by asking whether it had been risk assessed and whether Mr Trevivian sought an occupational health report or asked his doctor anything about his hypoglycaemia. Mr Trevivian responded that he had not (111).

72. The claimant discussed potential reasonable adjustments which could be made and made reference to employment legislation (112).

73. It was also put by the claimant that he could have been moved to one of the respondent's other sites. Mr Trevivian replied "No, because that's moving someone else, isn't it. So, why should this situation impact on, and cause hardship to someone else in the company" (see at 112). The claimant replied that this would amount to a "reasonable adjustment". Mr Trevivian went on to say that although he had been looking at other sites "there's nothing coming up at the moment".

74. Mr Trevivian denied dismissing the claimant on a number of occasions and said the P45 was issued at the claimant's request (113). The claimant denied requesting the P45 and replied that the respondent was trying to be nice by issuing it so the claimant could sign on (113). During a subsequent Employment Tribunal hearing against a previous employer the claimant confirmed that he was in receipt of benefits for the period 15 January 2014 to 14 July 2014 and also for a period of 1 week from 27 October 2014.

75. At one stage, during the grievance meeting, when it was put to the claimant that he said he wanted his P45 the claimant replied, "yes, right, but, was I having work? Or, was I taken off that site because I had hypoglycemia?" (114).

76. Mr Trevivian went on to say that they never had any issue with the claimant's timekeeping, attendance or appearance and everything was "spot on" (114).

77. The claimant mentioned litigation and tribunal awards of injury to feelings of up to £30,000 (115). However, this was not, as the respondent originally suggested, "from the very outset of the meeting", but rather more than 30 minutes after the meeting started (see para 23 of ET3).

78. Mr Trevivian wrote to the claimant on 22 December 2014 with the outcome of the grievance (131). He commented that he would employ the claimant again should a position become available and noted that in turn the claimant said he would work for the company again if he were offered a position. At the end of the letter Mr Trevivian referred to a deadline of 25 January 2015 set by the claimant as the last day he could put in a tribunal claim against the company. It was also noted that if the respondent was able to offer work prior to this time then the claimant would perhaps not need to consider the tribunal route. Mr Trevivian then added "I have further advised you that we will continue to look for work for you and consider you for any positions that arise but I have made you no guarantee of meeting your deadline as January is historically a quiet month for us" (133).

79. A copy of the respondent's meeting notes were enclosed with the letter. The claimant was not offered a right of appeal.

80. Subsequently, after doing some research on the internet, Mr Trevivian became aware that the claimant was, in Mr Trevivian's words, a "seasoned and serial litigator". According to the respondent, Mr Trevivian then determined that re-engaging the claimant would result in in future litigation against it over and above that identified by the claimant in the meeting on 16 December 2015. Accordingly, in effect the offer to re-engage was withdrawn without informing the claimant. Again, we will return to the facts surrounding this issue below.

81. An ET1 was then issued on 13 February 2015 in which allegations of disability discrimination were made.

Outline of Relevant Law

(i) **Duty to make reasonable adjustments**

82. Section 20 of the EqA 2010 provides that the duty to make reasonable adjustments includes the requirement: where a provision, criterion ("PCP") or practice or a physical feature 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.

83. The Statutory Code of Practice on Employment written by the EHRC to be read alongside the Equality Act sets out, at chapter 6, principles and application of the duty to make

reasonable adjustments for disabled people in employment. It describes the duty to make reasonable adjustments at para 6.2 as "a cornerstone of the Act which requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled".

84. Duty on employer: Although it is good practice to consult with a disabled person over what adjustments might be suitable, the duty to make reasonable adjustments is on the employer, and the fact that a disabled employee and his or her medical advisers cannot postulate a potential adjustment will not, without more, discharge that duty (**Cosgrove v Caesar 2001 IRLR 653**).

85. Burden of proof: It is insufficient for a claimant simply to point to a substantial disadvantage caused by a PCP and then place the onus on the employer to think of what parcel of adjustments could be in place to ameliorate that disadvantage: **Project Management Institute v Latiff 2007 IRLR 579**. The claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached.

86. PCP: It is only when the 'provision, criterion or practice' has been identified that it is possible to define the 'pool' of comparators for the purpose of seeing whether there has been the requisite substantial disadvantage of the disabled person in comparison to the non-disabled.

87. Substantial disadvantage: The duty to make reasonable adjustments only arises when the disabled person in question is put at a "substantial disadvantage" in relation to a relevant matter in comparison to persons who are not disabled. Section 212(1) EqA states that "substantial disadvantage" means more than minor or trivial.

88. Comparators: The duty to make reasonable adjustments arises where a disabled person is placed at a substantial disadvantage "in comparison with persons who are not disabled" section 20(3)-(5) **EqA**. However, the comparison is not to be made with the population at large. Paragraph 6.16 of the EHRC employment code provides: "The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly – and unlike direct or indirect discrimination – under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's".

89. Knowledge: **EqA** Sch 8, Pt 3, at para 20 provides that 'A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) that an interested disabled person has a disability and is likely to be placed at the substantial disadvantage referred to in the first, second or third requirement'.

90. Reasonableness of adjustments: The duty to make adjustments arises only in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person. Paragraph 6.23 of the EHRC code lists examples of matters that a tribunal might take into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case. The test of "reasonableness", imports an objective standard and it is not necessarily met by an employer showing that he personally believed that the making of the adjustment would be too disruptive or costly.

91. As was noted by the House of Lords in its decision in **Archibald v Fife Council [2004] IRLR 651**, (per Baroness Hale at para 47), the duty necessarily requires the disabled person to be treated more favourably in recognition of their special needs. It is thus not just a matter of introducing a "level playing field" for disabled and non-disabled alike, because that approach ignores the fact that disabled persons will sometimes need special assistance if they are to be able to compete on equal terms with those who are not disabled.

(ii) Discrimination Arising From Disability

92. The proper approach to section 15 claims was considered by Simler P in the recent case of **Pnaiser v NHS England [2016] IRLR 170** at paragraph 31

> (a) Having identified the unfavourable treatment by A, the ET must determine what caused it, i.e. what the "something" was. The focus is on the reason in the mind of A; it involves an examination of the conscious or unconscious thought processes of A. It does not have to be the sole or main cause of the unfavourable treatment but it must have a significant influence on it.
> (b) The ET must then consider whether it was something "arising in consequence of B's disability". That expression could describe "a range of causal links" and "may include more than one link" but the more links in the chain between the "something" and the disability the harder it is likely to be to establish the requisite connection as a matter of fact. The question is one of objective fact to be robustly assessed by the ET in each case.
> (c) It does not matter in precisely what order the two questions are addressed but, it is clear, each of the two questions must be addressed.

93. Unfavourable treatment will not amount to discrimination arising from disability if the employer can show that the treatment is a 'proportionate means of achieving a legitimate aim'.

94. The EHRC Code suggests the question of whether something is a proportionate means of achieving a legitimate aim should be approached in two stages:

i. Is the aim legitimate?
ii. If the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

95. It is for the employer to justify the provision, criterion or practice. In **Hardys & Hansons Plc v Lax** [2005] IRLR 726 the CA held that the principle of proportionality involves a balancing exercise - the reasonable needs of the business are to be weighed against the question of whether the PCP is reasonably necessary. The fact that *"necessary"* is

qualified by *"reasonably"* thus reflects the applicability of proportionality and thus does not permit a margin of discretion or a range of responses. But 'necessary' does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.

96. The fact that section 15 poses an *objective* justification test also means that it is open to a tribunal to take into account matters which were unknown to the employer at the time it treated the employee unfavourably.

97. In the very recent case of **Pulman v Merthyr Tydfil College Ltd UKEAT/0309/16/JOJ** Kerr J noted that it is necessary for Tribunals to apply the statutory provisions to each claim separately. Section 15 includes a justification defence by reference to a concept of proportionality. Section 20 uses a concept of reasonableness instead. They are not necessarily always the same thing.

(iii) Victimisation

98. The definition of victimisation is set out in in S.27 EqA. It provides that: 'A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.'

99. The three-stage test is:

- did the alleged victimisation arise in any of the prohibited circumstances covered by the EqA?
- if so, did the employer subject the claimant to a detriment?
- if so, was the claimant subjected to that detriment because he had done a protected act, or because the employer believed that he or she had done, or might do, a protected act?

100. Section 27(3) provides that a worker cannot claim victimisation where they have acted in bad faith, such as maliciously giving false evidence or information or making a false allegation of discrimination. Any such action would not be a protected act. However, if a worker gives evidence, provides information or makes an allegation in good faith but it turns out that it is factually wrong, or provides information in relation to proceedings which are unsuccessful, they will still be protected from victimisation.

101. The essential question in determining the reason for the claimant's treatment is always the same: what consciously or subconsciously motivated the employer to subject the claimant to the detriment? In the majority of cases, this will require an inquiry into the mental processes of the employer. If the necessary link between the detriment suffered and the protected act can be established, the claim of victimisation will succeed.

102. Victimisation claims under the EqA are subject to the "shifting burden of proof", which is set out in section 136 of the Act. This section provides that the initial burden is on the claimant to prove facts from which the tribunal could decide, in the absence of any other explanation, that the respondent has contravened a provision of the Act (a '*prima facie* case'). The burden then passes or 'shifts' to the respondent to prove that discrimination did not occur. If the respondent is unable to do so, the tribunal is *obliged* to uphold the discrimination claim.

Conclusions

103. Irrespective of the legal merits of this case we regard it as reckless in the extreme for the claimant not to have informed his employer that he was a type 1 diabetic on being posted to guard a remote location alone. We do not know what would have happened had the claimant not been woken by the contractor. Not only was he putting his own health at risk but also the health and safety of others. Welsh Water had engaged the respondent to provide security at the reservoir site to deter unauthorised use of a large body of open water. If, for any reason, guards patrolling the site become physically or mentally impaired this could lead to a failure to report what could be an emergency.

104. Turning to the issues in the case. We deal first with the claim for failure to make reasonable adjustments. As was agreed at the commencement of the hearing, the respondent concedes that it applied a PCP which put the claimant at a substantial disadvantage of which it had knowledge in relation to a relevant matter in comparison with persons who are not disabled.

105. The remaining question therefore, pursuant to section 20 EqA, is whether the duty to make reasonable adjustments is engaged. In other words, did the respondent fail to take such steps as were reasonable to have to take to avoid the substantial disadvantage?

106. The substantial disadvantage was not previously clearly set out in either the pleadings or witness statements. Nonetheless, as set out above, it was explained by the claimant in the following terms: if he collapses after a hypoglycemic attack he will have no-one around to administer Lucozade which would alleviate the symptoms of such an attack.

107. We turn first to the adjustments suggested by the claimant. The first of those is that the respondent should have installed a telephone booster to improve telephone signal reception at the reservoir. It is said by the claimant that were this to be implemented then, taking into account the security calls and the remote location of the reservoir, an ambulance or emergency help should arrive within approximately 1 ½ hours of a hypoglycaemic attack occurring. This is suggested on the basis that check calls are made hourly and it would take an ambulance approximately 30 minutes to reach the site without factoring in initial response time. Of course, the frequency of check calls could be increased to every 30 minutes as was postulated by Mr Trevivian in his risk assessment (see at 63).

108. The claimant said in his evidence that this would alleviate the substantial disadvantage because if he were unconscious for 1 ½ hours this would not lead to his death. His actual words were, “I will not be dead in 1 ½ hours”. He later conceded that if it were a cold winter this would exacerbate the risks of any such attack.

109. We agree with the respondent that the timeframe for such a response would still be unacceptable not only for it but also for Welsh Water as any visitors to the site who might require an emergency response. Because such an adjustment would not alleviate the substantial disadvantage we conclude there was no breach of section 21 in this regard.

110. The second adjustment contended for is that the respondent should have recognised that security officers did not need to use their car as part of the job when at the reservoir. This was conceded by Mr Trevivian. There was no need for the claimant to use a car on the site. As the claimant points out, it is noteworthy that in the general risk assessment an existing control was listed as making officers aware that it is not a necessity to drive whilst on patrol (60). This contrasts with the individual assessment undertaken in relation to the claimant which includes vehicle-related incidents of being a concern (63).

111. However, even on the claimant's case, removing the requirement of patrolling the site by car would not alleviate the substantial disadvantage set out by the claimant. Accordingly, we conclude there is no breach of section 21 in failing to make this adjustment.

112. The final express adjustment contended for is that the respondent should have ensured that the gate on the site was able to be unlocked from the outside so that the site was able to be accessed in case of emergency. Again, even on the claimant's case, were he to suffer a hypoglycaemic attack he would be left alone at a remote location for upwards of an hour as a best case scenario. Accordingly, we conclude there is no breach of section 21 in failing to make minor adjustments to the gate.

113. The claimant himself expressly rules out multi-manning as a potential reasonable adjustment. In these circumstances, we conclude that it was reasonable to relieve the claimant from his duties at the reservoir. We have, of course, reminded ourselves that that what is a reasonable step for an employer to take will depend on all the circumstances of each individual case. The test of "reasonableness", imports an objective standard and it is not necessarily met by an employer showing that he personally believed that the making of the adjustment would be too disruptive or costly.

114. Having made reference to all the medical and other evidence presented to us during the case we conclude that it was reasonable to remove the claimant from the site in question. The adjustments thus far suggested would not have been effective in ameliorating the express disadvantage relied on by the claimant.

115. However, as we have already set out, the duty to make reasonable adjustments is on the employer, and the fact that a disabled employee and his or her medical advisers cannot postulate a potential adjustment will not, without more, discharge that duty. In any event at the grievance hearing the claimant expressly said that he could have been moved to another site (see at 112). Where an employee is unable to continue in his current job as a result of a disability, the duty to make reasonable adjustments will often extend to taking positive steps to facilitate the employee's redeployment. We remind ourselves that the duty is, of course, only to make such adjustments as are reasonable. However, in the context of redeployment, what is reasonable can include treating the disabled person more favourably than other, non-disabled employees who are vying for a post. The case law indicates that it is not always the case that an employer must redeploy rather than dismiss, everything will depend on the circumstances and the question of reasonableness.

116. Although in this case the respondent had some employees who had TUPE'd over it had others who were on similar zero hours contracts as the claimant. We accept that Mr

Trevivian did look at other potential sites. However, he adopted a narrow approach to his search which excluded swapping the claimant with another employee as articulated by him during the grievance hearing. Mr Trevivian told the claimant that he could not have moved him to another site because "that's moving someone else, isn't it". He went on to say "why should this situation impact on, and cause hardship to someone else in the company" (see at 112).

117. Although it was said in the response to the victimisation claim (submitted on during the first substantive hearing in July 2015) that the job at the reservoir finished on 9 October 2014 and it was a quiet time of year, in fact emails disclosed show the respondent undertook work at the site during Christmas time (see at 104) and then into the new year (106). In May 2017 the respondent still holds the contract for the reservoir site. The claimant also says in his statement at paragraph 181 (which he was not challenged) that he spoke to one of his former colleagues who told him that he was having to work every week-end as they had no one to replace the claimant. Although the same individual left the respondent's employment at a later date the claimant has set out an explanation for that event in his second statement at paragraph 13.

118. The respondent employed about 50 guards and had a turnover of approximately 15 employees per year. We conclude that even in the immediate aftermath of the incident it would not have been difficult to swap the claimant's job with someone else's. For these reasons we conclude that the respondent failed to make a reasonable adjustment by moving the claimant to another site.

119. We move on to consider the claim for discrimination arising from disability. As set out above, the respondent accepts that, in deciding that the claimant could no longer work at the Llandegfedd Reservoir in Pontypool and not offering him other work, it did subject him, for the purposes of section 15(1)(a) to unfavourable treatment because of something arising in consequence of his disability. It contends that it has a legitimate aim in doing so, namely to ensure the claimant's health and safety.

120. The issue will be therefore whether the respondent is able to show that this is a proportionate means of achieving a legitimate aim. It was confirmed in closing submissions that the legitimate aim advanced by the respondent is not disputed by the claimant.

121. As has been stressed in the case law it is necessary for tribunals to apply the statutory provisions to each claim separately. Section 15 includes a justification defence by reference to a concept of proportionality whereas section 20 uses a concept of reasonableness instead. They are not necessarily always the same thing.

122. We note that it is for the employer to produce evidence to support their assertion the unfavourable treatment is justified. Generalisations will not be sufficient to provide justification (paragraph 4.26 of the Code). The fact that section 15 poses an *objective* justification test also means that it is open to a tribunal to take into account matters which were unknown to the employer at the time it treated the employee unfavourably.

123. In this case when removing the claimant from the reservoir site the employer failed to ascertain the precise cause of the hypoglycaemic attack. There was also no recourse to

medical evidence from the claimant's GP or any occupational physician. Research undertaken on diabetes was confined to the internet. Although the claimant has presented evidence that at the material times his condition was under control and he knew how to respond if he felt a hypoglycaemic episode was coming on, no further medical assessment or evidence has been presented by the respondent.

124. In any event, we have already concluded that there was a failure to make a reasonable adjustment in this case. A more proportionate response would have been to relocate the claimant to another site or swap the claimant's job with that of another security guard. Accordingly, we also conclude that the claimant's section 15 claim succeeds.

125. Before turning to the issue of victimisation we will consider the issue of whether the claimant resigned or was dismissed. If he was dismissed it would seem to arise in consequence of the claimant's disability. In addition, the relevance of the alleged dismissal goes to whether the respondent unreasonably failed to comply with the Acas code on discipline. As it turns out, whether the claimant was dismissed is a complex legal and factual issue, not least because the claimant was on a zero hours contract.

126. There is factual dispute about whether the claimant asked for his P45 or whether this was proffered by the respondent. There is no factual dispute that prior to the issuing of the P45 Mr Trevivian told that claimant that although he was looking for suitable alternative work none was available prior to 26 October which is the date of the P45 and the date the claimant says he was dismissed.

127. Dismissal is defined in section 95 ERA 1996 as including termination of the contract by the employer with or without notice. A resignation is termination of the contract of employment by the employee. The general rule is that unambiguous words of dismissal or resignation may be taken at their face value without the need for any analysis of the surrounding circumstances. Warning that dismissal is on the cards or is inevitable by a certain date will not amount to a dismissal. Termination by agreement between employer and the employee does not count as a dismissal in law.

128. The claimant argues that in fact he was dismissed irrespective of the P45 issue because he was told there was nothing available and, in effect, that nothing was likely to be.

129. We remind ourselves that the claimant was employed on a zero hours contract (see at 21). It actually provided that "this contract is based on zero working hours per week". One interpretation therefore is once the claimant stops working and is told there was no other work available at present the contract came to an end by dismissal. At that stage it could be said there was no obligation on the claimant to do work and no obligation on the respondent to provide work. Of course, the House of Lords in **Carmichael v National Power PLC [2000] IRLR 43** held that the irreducible minimum in a contract of employment is mutuality of obligation; an obligation on the part of the Claimant to do work and an obligation on the part of the Respondent to provide work.

130. The mutuality of obligation test is highly relevant where an individual has carried out work on a casual, irregular or sporadic basis over a period of time. Such work may be variable but fairly constant; or it may be periodic with long gaps between each "stint", as in

the case of seasonal workers. The question is whether mutuality of obligation subsists during those periods when the individual is not working, giving rise to a continuous "global" contract of employment spanning the separate engagements. The required obligation is generally seen to consist in an exchange of mutual promises of future performance.

131. In order to determine whether such mutuality of obligation exists, it is necessary to look at the working periods themselves, taking into account their frequency and duration. Where there has been a regular pattern of work over a period of time, a court or tribunal is more likely to infer from the parties' conduct the existence of a continuing overriding arrangement, itself amounting to a contract of employment, governing the relationship, despite the absence of any express agreement.

132. In this case the claimant worked continually for long hours from 29 July 2014 until 10 October 2014. The nature of employment envisaged by the contract was that the security guards could be moved around and also that there may be breaks in assignments. We do not think it can be sensibly said on the facts of this case that in between assignments there was no contract of employment. In other words, it could not be said that each time an assignment ended there was a dismissal prior to being offered another assignment. In reality, on the facts of this case there was an obligation to provide and perform any work which becomes available. That obligation continued after 10 October 2016 and also after the claimant was told that the respondent was still looking to place him in a suitable post. In effect, mutual promises as to future performance were made. We also note that the respondent had a lay-off policy which provides that in the event of a lay-off (which in this case lasted less than the statutorily relevant four weeks) "employees will be offered work wherever possible" (see at 196i).

133. Accordingly, we conclude that there was no dismissal prior to issuing the P45. Hence, who requested the P45 is relevant. This is not an easy factual dispute to resolve. Both sides have made arguments which go to credibility.

134. Among other things, the claimant points to exaggerations in the ET3 about him making reference to a tribunal claim "at the very outset" of the grievance meeting which was corroborated by what turned out to be inaccurate meeting minutes (see at 124). He also says that during the covertly recorded grievance hearing Mr Trevivian does not say that the claimant resigned but the claimant does say that he was dismissed. The claimant also says that handing out P45s would be usual to the respondent in such situations when no work was available.

135. The respondent, in turn, seeks to undermine the claimant's credibility. We were reminded of the claimant's failure to disclose his diabetes and also not only his covert recording of the grievance meeting but also the failure to disclose the fact of recording until the point of exchange of statements. We accept that someone with the claimant's training and experience of tribunals must have known that this was inappropriate conduct.

136. We factor in that there was no real need for the respondent to send the claimant the P45 when they did, whereas there was a potential need for the claimant to obtain benefits. A point had already been reached whereby it was agreed that the respondent would spend 6

weeks from the date of the grievance looking for alternative work to avoid the prospect of litigation (see at 125). Both Mr and Mrs Trevivian were consistent in their recollection of the claimant's request for his P45. Despite the covert recording and the claimant's extensive questioning, Mr Trevivian did not depart from his stated position that it was the claimant who requested the P45. At one stage, however, the claimant seemed to waiver even though he knew he was recording the proceedings and replied "yes, right" in response to "you said you wanted your P45" from Mr Trevivian. On balance, we conclude that the claimant did resign by requesting his P45 and was not dismissed.

137. However, even if we are wrong about that we would not have concluded that the respondent's failure to comply with the Acas code on disciplinary procedures was unreasonable pursuant to section 207A TURCA or that it would be just and equitable to increase any award for the failure to comply.

138. The Acas code on disciplinary indicates that: "Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted". On these facts, if there was a dismissal it was for capability rather misconduct.

139. Section 207A(2) TULRCA provides that: 'If, in any proceedings to which this section applies, it appears to the employment tribunal that - (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) the failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent.' An identical provision in respect of any failure to comply by an employee is set out in section 207A(3). This reflects the fact that the Code is aimed at encouraging compliance by both employers and employees.

140. Accordingly, the potential for adjustment to the compensatory award under S.207A only applies if the employer's or employee's failure to comply with the provisions of the Code is 'unreasonable'. In addition, where there has been an unreasonable failure to comply with the Code, the tribunal may increase or reduce the award if it 'considers it just and equitable in all the circumstances to do so'.

141. If there was any such failure to follow the Acas code on disciplinary we conclude that the respondent has not acted unreasonably because Mr Trevivian believed, irrespective of the P45 issue, that he had not dismissed the claimant. Any such failure was not deliberate. It was inadvertent. The combination of the zero hours contract and the issuing of the P45 made this a difficult legal and factual issue. Mr Trevivian had already explained the employment situation to the claimant and no issue was taken by the claimant until his grievance letter sent on 8 November 2015 (see at 68a). Subsequently the claimant was afforded a grievance meeting and was able to set out his case. This was also a capability rather than a disciplinary issue. For the same reasons we would have concluded that it would not have been just and equitable to increase any award.

142. An issue also arises as to whether the respondent nonetheless breached the Acas code on grievances after the claimant issued his grievance on 5 November 2014. Issues arise as to delay and the failure to offer an appeal (these were the only ones raised at the start of the hearing). We conclude that the Acas code applies only to employees and not ex-employees. The whole point of the code is to help employees and employers resolve grievances effectively in the workplace so their relationship could continue. The code is silent on post-termination grievances.

143. In any event, if we are wrong about this and the code did apply we do not consider the delay unreasonable. The grievance was being dealt with by Mrs Trevivian who worked part time. A portion of the delay was caused by the claimant asking for a letter to be reworded. Further, Mr Trevivian took advice from Acas themselves who, in effect, advised him that the code did not apply. In these circumstances we conclude that if there was a failure to comply, such failure was not unreasonable and it would not have been just and equitable to increase any award.

144. Finally, we consider the claim for victimisation. The first issue for us to determine is whether or not the claimant did protected acts. No issue arises that the claimant made complaints of discrimination during the grievance hearing and in his claim form. No complaint of discrimination was however made in the written grievance itself (see at 68a).

145. It is said that these do not amount to protected acts in accordance with section 27 EqA because they were done in bad faith. As we have already set out above, a claimant cannot claim victimisation where they have acted in bad faith, such as maliciously giving false evidence or information or making a false allegation of discrimination. Any such action would not be a protected act.

146. It was conceded at the start of the case that bad faith was not pleaded. However, it was contended that the claimant acted in bad faith because the claimant was seeking to set up claims against the respondent in order to obtain a pecuniary advantage. In the closing submissions it was said that the claimant acted at all material times with a view to setting up further claims and enhancing his prospects of successful litigation.

147. During the grievance the claimant made reference to tribunal litigation and also potential levels of awards for injury to feelings (see at 115). However, this was after he queried why he could not have been moved to another site (112) and asked about reasonable adjustments (112). Both parties agreed that litigation could be avoided if the claimant came back to work before 25 January 2015 (see at 125). The claimant did not make malicious or false allegations of discrimination either during the grievance hearing or in the claim form when he asked about reasonable adjustments and if he could be moved to another job. We conclude that he claimant did not act in bad faith or in a way which prevents him from making protected acts.

148. Nonetheless, the respondent argues that the reason why work was withdrawn was because of Mr Trevivian's discovery after the grievance meeting of the "very significant body of litigation the claimant had been involved in hitherto". It is said that the withdrawal of the offer of looking for future work had nothing to do with threats made in the grievance hearing itself. In particular, the respondent points out that in the outcome letter Mr

Trevivian commits himself to continuing to look for work for the claimant (133). It is also said that re-engaging a person who is highly litigious is a legitimate concern for a small family run business. It is contended that the realisation that the claimant was a serial litigant made future employment untenable.

149. Mr Trevivian said in evidence that he withdrew the offer of looking for further work for the claimant after he did a *Google* search and found that the claimant had been involved in "extensive litigation". Contrary to what was set out at the beginning of the case he explained that this occurred "around the time that the ET1 claim form came in". The respondent's case also shifted somewhat as Mr Smith sought to distance himself from the way it was set out at the case management hearing on 6 December 2016 before Regional Employment Judge Parkin. In answer to a question from the claimant's counsel, Mr Trevivian said the claimant has brought proceedings "against every employer he had for the previous 12 years". This assertion was quickly withdrawn after relevant evidence was put to him. Mr Trevivian went on to say that he considered the claimant an "unsustainable risk due to his litigious nature" and that he formed the view that if he re-employed the claimant it would "lead to litigation". We also note that the offer was withdrawn without informing the claimant or setting down in writing the reasons for the withdrawal. In summary, the respondent's case on this point kept shifting and was a little opaque.

150. The EHRC Employment Code points out at para 9.10 that detrimental treatment amounts to victimisation if a "protected act" is *one* of the reasons for the treatment, but it need not be the only reason. We also note that claimants need only show that they have experienced a detriment because they have done a protected act or because the employer believes (rightly or wrongly) that they have done or intend to do a protected act.

151. In our view, irrespective of any arguments about shifting of the burden of proof, it is clear that Mr Trevivian withdrew the offer of re-engagement and of continuing to search for future employment because he thought that re-engaging the claimant could lead to a claim for discrimination. It could not be said that the offer was withdrawn for fear of prejudicing his position in pending litigation. No doubt, Mr Trevivian was influenced by what he saw on the internet. We have a great deal of sympathy for Mr Trevivian in this regard. However, we nonetheless conclude that one of the reasons why Mr Trevivian withdrew the offer was because he believed the claimant would bring a claim for discrimination against the respondent were he to employ him again. There is no justification defence to a claim for victimisation.

152. **Remedy directions**: If the parties are unable to agree remedy they are to write to the tribunal within 14 days from the date this judgment was set out with joint proposed directions.

Employment Judge Pirani
18 May 2017

Judgment and reasons sent to the parties on: