Appeal No. UKEAT/0320/13/SM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 15 November 2013

Before

MR RECORDER LUBA QC

MR C EDWARDS

MR G LEWIS

MR M McCARTHY — APPELLANT

JAGUAR CARS LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANDREW SMITH (of Counsel) Bar Pro Bono Unit
For the Respondent	MS KATIE NOWELL (of Counsel) Instructed by: Lewis Silkin LLP Solicitors Southgate House Wood Street Cardiff CF10 1EW

SUMMARY

DISABILITY DISCRIMINATION – Reasonable adjustments

Claimant disabled employee on long term absence with depression. Redundancy situation. Selection for redundancy based on scores from assessment against detailed criteria. Claimant selected and dismissed. Claims unfair dismissal, direct disability discrimination and failure to make reasonable adjustments. Employment Tribunal finds fair process and procedure applied in genuine redundancy situation. Employer conceded scoring criteria would put Claimant at a substantial disadvantage. Made reasonable adjustment by applying criteria only to his pre-disablement employment record.
All claims dismissed.

Appeal on basis of failure to identify and strictly apply the approach to reasonable adjustment cases set out in **Rowan v Environment Agency**.
Appeal DISMISSED.

ET had expressly identified the PCP as the scoring criteria. Pool of comparators was obvious (others facing redundancy to whom same PCP applied but not disabled by depression). All parties knew of the concession that the PCP would put Claimant at substantial disadvantage. ET dealt fully with the real question in the case – did the adjustment remove the disadvantage – and gave sound reasons for finding that it did.

MR RECORDER LUBA QC

Introduction

1. This is an appeal by Mr McCarthy from the judgment of the Employment Tribunal, sitting at Liverpool (Employment Judge KE Robinson and members) by which claims he had brought to the Employment Tribunal for direct discrimination on the grounds of disability, a failure to make reasonable adjustments in respect of that disability and unfair dismissal were all dismissed.

2. The Respondent to the appeal is Mr McCarthy's former employer, Jaguar Cars Limited. We shall refer to the parties before us as the Claimant and Respondent, as they were referred to by the Employment Tribunal.

3. As will be shortly seen, the appeal turns on two points; the first as to the treatment of the claim for reasonable adjustments and the second, in relation to the claim for direct discrimination on grounds of disability.

Factual background

4. The Claimant had been employed by the Respondent since 1986. From 2006 that had been in the role of process engineering manager. Sadly, in 2007 Mr McCarthy began to suffer from a disabling mental illness. As a result of that condition, he was on leave of absence by reason of his disability from October 2007. In early 2009, while he was still away from work, a redundancy situation arose at the workplace. A pool of some 33 employees were at risk of being made redundant. The task for the Respondent was to select which of them would in fact be made redundant. The Respondent applied a points-scoring criteria. The Claimant was assessed against that criteria, but he was amongst the lowest scores. He was one of those selected for redundancy. He appealed, and as part of his appeal he was re-marked against the

criteria by a member of staff whom he had identified as acceptable for that purpose. That re-marking produced no significant difference in his scoring. The appeal was dismissed and he was eventually dismissed, the ostensible reason given for the dismissal being 'redundancy'.

5. Against that background, he brought his three claims to the Employment Tribunal: of unfair dismissal; of direct discrimination on the grounds of disability; and of discrimination arising from the failure to make reasonable adjustments.

The Tribunal's findings

6. The Employment Tribunal heard from the Claimant. He was not legally represented. He presented his own case and gave written and oral evidence. It heard also from the Respondent and in particular from two officials of the Respondent, those two being the persons who had carried out the marking assessments: first, a Mr Nugent, who had been the Claimant's line manager immediately before his leave of absence, and second a Mr Volkaerts, who had been the person undertaking the second marking exercise as part of the appeal.

7. After a hearing conducted over several days, the Tribunal reached the following broad conclusions, which we summarise by reference to the relevant passages in their judgment and reasons. First, they considered that the selection procedure to select those from within the pool who were to be made redundant was impressive, thorough and well set up (see paragraph 34). It regarded the criteria which the Respondent applied to those at risk as being fair and appropriate criteria (see paragraph 50). It decided that the process of scoring had been a robust process in respect of the application of the criteria (see paragraph 70). It was satisfied that the scoring had been checked by a selection committee so that it was not a one-off scoring by simply one member of staff (see paragraph 80). The Tribunal noted that there had been an appeal, and the Tribunal determined (see paragraph 21) that the appeal had been dealt with

fairly and appropriately. As to disability, the Tribunal found that the Claimant had a disability. They found that the Respondent had known of the disability since at least August 2007. The Tribunal determined that the Respondent had made reasonable adjustments in the circumstances of the case (see paragraph 34) and it decided that those adjustments had "expunged any disadvantage to the Claimant" (see paragraph 36). It is from the judgment based on those findings that the Claimant appeals.

The relevant law

8. The focus of this appeal has been on the two disability-related aspects of the Claimant's original claim: that is to say, discrimination by failure to make reasonable adjustments and direct discrimination in relation to disability. Those matters are now dealt with in the **Equality Act 2010** but the relevant law for the purposes of these proceedings is that as set out in sections 3A and 4A of the **Disability Discrimination Act 1995**:

> **"3A Meaning of discrimination**
>
> **(1) For the purposes of this Part, a person discriminates against a disabled person if –**
>
> > **(a) for a reason which related to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and**
> >
> > **(b) he cannot show that the treatment in question is justified**
>
> **(2) For the purposes of this Part, a person also discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments imposed on him in relation to the disabled person.**
>
> **(3) Treatment is justified for the purposes of subsection (1)(b) if, but only if, the reason for it is both material to the circumstances of the particular case and substantial.**
>
> **(4) But treatment of a disabled person cannot be justified under subsection (3) if it amounts to direct discrimination falling within subsection (5).**
>
> **(5) A person directly discriminates against a disabled person if, on the grounds of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the relevant disabled person.**
>
> **(6) If, in a case falling within subsection (1), a person is under a duty to make reasonable adjustments in relation to a disabled person but fails to comply with that duty, his treatment of that person cannot be justified under subsection (30 unless it would have been justified even if he had complied with that duty.**
>
> **...**

4A Employers: duty to make adjustments

(1) Where –

(a) a provision, criterion or practice applied by or on behalf of the employer, or

(b) any physical feature of premises occupied by the employer

places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, having that effect

(2) In subsection (1), 'the disabled person concerned' means –

(a) in the case of a provision, criterion or practice for determining to whom employment should be offered, any disabled person who is, or has notified the employer that he may be, an applicant for that employment;

(b) in any other case, a disabled person who is –

(i) an applicant for the employment concerned,

(ii) or an employee of the employer concerned

(3) Nothing in this section imposes any duty on an employer in relation to a disabled person if the employer does not know, and could not reasonably be expected to know –

(a) in the case of an applicant or potential applicant, that the disabled person concerned is, or may be, an applicant for the employment; or

(b) in any case, that that person who has a disability and is likely to be affected in the way mentioned in subsection (1)."

9. Those provisions, and in particular the application of them in a 'reasonable adjustments' case, were considered in detail by this Employment Appeal Tribunal in **Environment Agency v Rowan** [2008] IRLR 20. The Appeal Tribunal on that occasion was presided over by HHJ Serota QC, who gave the judgment for the Tribunal.

10. At paragraph 27 this Appeal Tribunal sets out a particular approach to be taken by Employment Tribunals in relation to this jurisdiction:

"It is helpful, therefore, if we restate that guidance to have regard to the amendments to the act:

In our opinion an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with the Section 4A duty must identify:

(a) the provision, criterion or practice applied by or on behalf of an employer, or

(b) the physical feature of premises occupied by the employer,

(c) the identity of non-disabled comparators (where appropriate) and

> **(d) the nature and extent of the substantial disadvantage suffered by the Claimant. It should be borne in mind that identification of the substantial disadvantage suffered by the Claimant may involve a consideration of the cumulative effect of both the 'provision, criterion or practice applied by or on behalf of an employer' and the, 'physical feature of premises' so it would be necessary to look at the overall picture.**
>
> **In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under Sections 3A(2) and 4A(1)without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.**

11. The issue of the appropriate approach to be taken in a reasonable adjustments case was further considered, this time by a division of this Employment Appeal Tribunal presided over by the President, Langstaff J, in **Royal Bank of Scotland v Ashton** [2011] ICR 632. The Employment Appeal Tribunal set out again the terms of paragraph 27 of the **Rowan** judgment and it then said this at paragraph 16:

> **"The fact that this requires in particular the identification of the provision, criterion or practice concerned and the precise nature of the disadvantage which it creates by comparison with those who are non-disabled, was set out clearly by this Tribunal in Environment Agency v Rowan."**

The EAT continued:

> **"We interpose to say that of course it is not in every case that all four matters need to be identified but certainly what must be identified is (a) and (d)."**

12. As will be apparent from the passages we have already extracted, sub-paragraph (a) requires that the Employment Tribunal seized of a 'reasonable adjustments' case identifies the provision, criterion or practice (PCP) in the particular case and (d) requires an identification by that Tribunal of the nature and extent of the substantial disadvantage suffered by the Claimant.

13. Against the background of those facts and that legal material, we turn to the two grounds of appeal.

Ground 1

14. This ground asserts that the Tribunal failed to properly direct itself on the correct approach to a case turning on an assertion of neglect to make reasonable adjustments. The ground of appeal is set out in an Amended Notice of Appeal. It contends that the Employment Tribunal in the instant case dangerously truncated the steps set out in the extract from **Rowan**, which we have reproduced above. The ground of appeal continues:

> **"The consequence of the** [Employment Tribunal's] **error was that it failed to properly consider the true nature and extent of the PCP at issue here – namely the selection criteria in their entirety – or to undertake any enquiry as to how, if at all, these impacted on a disabled employee in the Claimant's position."**

Put shortly, the assertion is that the Tribunal failed to comply with the instruction contained in **Rowan** as explained in **Ashton**, that is to say to address in particular the factors identified as (a) and (d).

15. This ground of appeal was eloquently developed by Mr Smith, appearing for the Appellant, in conspicuously clear and comprehensive argument. That oral argument supplemented his already helpful skeleton. He took us to the Employment Tribunal's reasons. As was evident, they had not precisely followed the structured approach set out in **Rowan**. His submission was that the approach in **Rowan** should have been applied in terms. Moreover, as he observed, the Employment Tribunal does not refer to **Rowan** or to the structure it recommends.

16. He adopted, in support of this ground of appeal, the summary of his contentions, indeed the contentions of counsel earlier instructed, that were recorded by Langstaff J at an earlier consideration of this appeal, namely:

> **"...the consequence was the Employment Tribunal failed to properly consider the true nature and extent of the PCP, namely the selection criteria in their entirety or to undertake an inquiry as to how, if at all, they impacted on a disabled employee in the Claimant's position. It**

> **erroneously confined its assessment to the issue of the Claimant's absence and in the Claimant's case went much further than that. In particular, the assessment of his potential contribution to the business, an umbrella heading which covered approximately 20 criteria, including resilience, agility and self-motivation, all of which might be thought to be somewhat subjective and in respect of which being disabled as he was might have meant that he would inevitably score badly unless some adjustments were made."**

Langstaff J described those submissions as arguable, and, as we have already indicated, they were very ably pursued by Mr Smith.

17. His submission was that there was a real danger in the instant case, given the nature of the criteria adopted in the scoring process, that there would be substantial disadvantage to a person with the Claimant's disability and that significant reasonable adjustments would be required. As he demonstrated, this appeared to be particularly true in relation to that part of the scoring process which engaged with "potential contribution". That contained some of what Langstaff J had described as the "subjective" criteria. The submissions of Mr Smith were, furthermore, that the Tribunal had not addressed specific measures that might have been taken by way of reasonable adjustment including those suggested by Mr McCarthy (such as that he be given a mean scoring under the criterion just mentioned rather than some other approach taken to the assessment).

18. The Respondent was represented before us by Ms Nowell, who had also appeared below. We are also grateful for her submissions. She reminded us of the reason why this Employment Appeal Tribunal had taken the trouble to set out a structured approach in the **Rowan** case. It was to ensure that Employment Tribunals address themselves to the relevant elements of the statutory provisions relating to disability and reasonable adjustments and that they deliver reasons which satisfy and discharge the obligation to give reasons in the Employment Tribunal Rules of Procedure, as explained in the well known cases of **Meek v City of Birmingham District Council** [1987] IRLR 250 and **English v Emery Reimbold and Strick** [2003] IRLR

710. Her submissions were to the effect that the structure suggested in paragraph 27 of **Rowan** should not be treated as though it were a statute or a straitjacket. An Employment Tribunal only needed to deliver a judgment which addressed and made findings on the matters in the **Rowan** list insofar as it was relevant and appropriate to do so in that way, in the circumstances of a particular judgment on a particular case. Obviously, paragraph 27 of **Rowan** contained, she submitted, a structured approach, which should be adopted in most cases and closely followed, but some cases, she submitted, might justify a different course, as **Ashton** itself had demonstrated.

19. In this case, she submitted, the Tribunal had done all that was necessary. Its reasons did set out the PCP. Although it did not expressly identify a pool, it did not do so because the pool was obvious to both the parties before it and the Tribunal. Although it did not set out the nature and extent of the substantial disadvantage the Claimant would suffer from the application of the PCP, that was because it was obvious and indeed had been conceded. In those circumstances, and against that background, the Employment Tribunal had been entitled to take a collapsed or truncated approach to the guidance in **Rowan**. It had gone, as it was entitled to do, straight to the central issue on that part of the case, which was whether reasonable adjustments had been made to accommodate the conceded disadvantage. The Tribunal had upheld the Respondent's contention that it had done enough by way of reasonable adjustment by applying the relevant scoring criteria only to the Claimant in respect of the position before he became disabled. Those, then, were the competing submissions.

20. In our judgment, it is right to underscore that **Rowan** injuncts Employment Tribunals to ensure that they address the four matters set out there. But that is only to the extent necessary to reach a decision on the facts of, and determine the issues raised in, particular individual cases, as **Ashton** shows. For example, if there is no issue in the particular case about criterion

(b) (that is to say the physical feature of the premises occupied by the employer), then there is no need to address that point. Similarly, if much else covered by the four matters is obvious or agreed, it may be acceptable for the Tribunal to deal with the matter shortly and to proceed on that basis, focussing on what is in fact the real issue between the parties. It may deliver its reasons in a structure that best suits the circumstances of the case. Of course, if a Tribunal elects to depart from the strictures of paragraph 27 of **Rowan**, there is an obvious danger. But in our judgment departure from the strict rubric of paragraph 27 of **Rowan** does not of itself amount to an error of law unless it has the consequences that the EAT was seeking to guard against in the **Rowan** case, that is to say a Tribunal fails to deal with the vital issues in the case or it fails to explain, by way of adequate reasons, how they have been addressed.

21. Against that background, we look to the Reasons given in this case, to see what the Employment Tribunal has done.

22. First, as it was required to do by paragraph 27 of **Rowan**, it identified the particular PCP. At paragraph 37 of its reasons it says:

> **"The provision, criterion or practice in place was the implementation by the Respondent of a scoring exercise based on [the] assessment criteria."**

Although the Tribunal does not make an express statement of the "identity of non-disabled comparators" it is important to indicate that in **Rowan** that requirement is followed by the words in parentheses "where appropriate". In this case, in our judgment, the Employment Tribunal were entitled to treat the pool as obvious, that is to say a pool of comparators who were persons in the same situation as the Claimant, that is to say facing redundancy in the redundancy exercise, but who did not have a disability. Indeed, it is illuminating that, in his closing submissions to us, Mr McCarthy, the Claimant, expressly

referred to "the pool of 33". Likewise, in this case, it was not necessary for the Employment Tribunal to set out "the nature and extent of the substantial disadvantage" suffered by the Claimant, because it had been expressly conceded that the application of the criteria would put a person of his disability and more importantly him at a substantial disadvantage. In closing submissions, Ms Nowell had put to the Employment Tribunal:

> **"The Claimant's case is that the assessment criteria used for the redundancy process put him at a substantial disadvantage at a disabled employee suffering from a depressive disorder in comparison with persons who were not disabled. The Respondent concedes that fact."**

23. The very feature that the application of the criteria would produce a substantial disadvantage to the Claimant was not only a matter of concession but it was at the heart of the written evidence that the Tribunal received from the witnesses for the Respondent.

24. Against that background, it was essential, in our judgment, for the Tribunal to focus on what was really at issue between the parties, that is to say *what* reasonable adjustments were needed in the circumstances of such an obvious significant disadvantage to the Claimant.

25. We turn again, then, to the Tribunal's judgment in respect of that matter. At paragraph 34 of their reasons they say this:

> **"The Claimant was disabled from August 2007 as we have already ruled. That is when the Respondents had imputed knowledge and from then they had to comply with their duty to make reasonable adjustments. Mr Nugent did just that. He removed the year 2008 from the scoring process and the latter part of 2007 because he had an inkling that the Claimant was disabled. The reason he removed those periods from the scoring process was that he felt that the Claimant was not quite himself from September 2007 until he went off permanently sick as it transpired on 1 October 2007. It was appropriate for Mr Nugent to do that. He could not score Mr McCarthy for part of 2007, 2008, or early 2009. He consequently did what was needed to be done in order to be fair and appropriate to the claimant and to prevent the provision, criterion or practice (the need for employers to go through the scoring exercise) having a disadvantageous effect on the Claimant."**

26. On the same point they say this at paragraph 36:

> **"We accept that the criteria that were implemented, in themselves, may have put an absent employee at a disadvantage but by doing what he did Mr Nugent expunged any disadvantage to the claimant and gave him marks for the period when he had been in work and actually performing well. That was an appropriate way forward."**

27. No one can have been misled or misunderstood what the Tribunal in this case were finding or why they were finding it. It is quite plain that the Tribunal were accepting the concession made, that the application of the criterion would ordinarily lead to a substantial disadvantage to the Claimant, and they were satisfied, for the reasons we have just reproduced, why it was that the steps taken by the employer removed the relevant disadvantage. Against that background, we reject the proposition that it was necessary to deal, for example, with Mr McCarthy's contention that there were different ways of making reasonable adjustments (for example by averaging his points). The Tribunal found that what was done was the making of reasonable adjustments and that they eliminated the disadvantage.

28. As a subsidiary point, in his oral submissions, Mr Smith sought to develop an argument that the Tribunal's judgment was unreliable because it had failed to identify precisely when the Claimant's disability had commenced. If the Respondent's assessment exercise had taken into account any findings for a period during which the Claimant was in fact a disabled person, then there had not been the adjustment that the Tribunal believed it had found. Ms Nowell objected to the point being taken in this way. She submitted that it was not open to the Claimant to take this point on appeal, as it formed no discrete part of the Notice of Appeal. We were taken to passages in the judgment which, if not explicitly, indicated acceptance that the Claimant became disabled in August 2007, or at least very close to that date. In particular, as we have already read, part of paragraph 34 contains the words "The claimant was disabled from August 2007."

29. Even had we permitted this aspect of this ground of appeal to be introduced, we would have rejected it on its merits. It seems to us that it is tolerably clear that the Tribunal were satisfied that there had been a disapplication from the scoring process of any period during which the Claimant might have been treated as a disabled person in the sense of meeting the legal definition of disability. Even if we are wrong as to that subsidiary point, it is quite clear that the Employment Tribunal found, and were entitled to find, that if Mr Nugent had included a period during which Mr McCarthy, the Claimant, was disabled, that had certainly not been the case on the re-marking exercise, and the re-marking exercise had produced virtually the same score.

30. We have next to consider the possibility that our analysis of **Rowan** and **Ashton** and its application in the instant case might be wrong. We go on, then, to consider Ms Nowell's fall-back position, that this is a case in which, even if the Tribunal misdirected themselves, this Employment Tribunal should not interfere, because it is plain and obvious what the outcome would have been had the Tribunal applied, as strictly as paragraph 27 of **Rowan** would seem to require, the approach therein prescribed. We have no hesitation in indicating that we unanimously accept that proposition, applying **Dobie v Burns International Security Services (UK) Ltd** [1984] ICR 812. This is, in our judgment, plainly a case where, even if there was a misdirection by the Tribunal, its ultimate conclusion on reasonable adjustments was "plainly and unarguably right".

Ground 3

31. We turn then to the second ground argued before us, which is ground 3 of the Amended Notice of Appeal and which turns on direct discrimination. As put to us, perhaps more concisely than was put to the Tribunal below, the argument on direct discrimination is that, in the course of the redundancy scenario, the opportunity for secondment to another

employer arose, and the Claimant was not put forward for that opportunity for a reason related to his disability. Because the position was not put as crisply as that before them, it is perhaps understandable that the Employment Tribunal dealt with this issue in the course of the passages of their reasoning which deal with reasonable adjustment. The relevant paragraphs dealing with the secondment position are paragraphs 25 and 39 of the Employment Tribunal's judgment:

> **"25. There was clear interest from those two companies in the employees of the respondent. But these potential employers needed employees with LEAN experience and expertise and the claimant's qualifications in that respect were not as good as other employees who were better trained and better qualified than he was. If he had taken up any other post with Astra Zeneca or TMI he would have had to be trained up to meet their requirements. Those employees who were placed with Astra Zeneca and TMI moved into three jobs. They did not need the training the claimant would have needed. The respondents had to move fast. There was a fleeting moment in time from the end of March to the beginning of April when those other employees took up their post at Astra Zeneca and TMI.**
>
> **...**
>
> **39.Finally in relation to the issue as to who and why certain individuals slotted into the posts available at Astra Zeneca and TMI Mrs Booth's evidence was compelling. She may well have been criticised if she had not taken the opportunity which fell into the respondent's lap late in the day to place some of their employees elsewhere. By acting decisively the respondents actually saved three jobs which otherwise might have been lost."**

32. The asserted error of law is that the Tribunal have here misunderstood the evidence given to them and have conflated evidence about training and evidence about the other skills of the Claimant, Mr McCarthy. Put shortly, Mr McCarthy submits that the references in paragraph 25 to his not being as well trained as those who got the secondment opportunities were based on a misunderstanding of some evidence about a completely different point. Moreover, he submitted that there was compelling evidence to demonstrate that on the other aspect of the matters dealt with in paragraph 25, that is to say holding qualifications for the secondment posts, he was at least as well qualified as those who got the positions. Mr McCarthy addressed submissions to us himself on this aspect of the case, although he had had the assistance of Mr Smith in dealing with these matters in a skeleton argument.

33. Having heard Ms Nowell, we are satisfied that there was enough material in what was put to us by Mr McCarthy to allow us to consider this ground of appeal on its merits. It therefore follows that the application to admit the ground pursuant to rule 3(10) of the Employment Appeal Tribunal Rules succeeds.

34. We come then to the Respondent's submission of ground 3 as developed by Ms Nowell. She took us to the precise terms of paragraph 25 and in particular the second sentence thereof, which can be seen from the passages we have already reproduced. The finding of the Tribunal was that it was satisfied by the Respondent's evidence that the persons who IT seconded were *better trained* and *better qualified* than he was. In our judgment, Mr McCarthy could not meet that point by developing evidence, as he did develop it before us, of his own expertise. The question was whether there was material before the Tribunal which could demonstrate that those who had been selected for the secondment positions had been selected because they were better trained or better qualified. To put it another way, Ms Nowell only needed to show us that there was evidential material before the Tribunal to that effect in order to defeat this asserted error of law. She took us to passages in the evidence given in writing to the Tribunal and no doubt developed in oral evidence on this question. We were taken, in particular, to paragraph 57 of Mr Nugent's witness statement, where he explained in particular why, first, a secondee identified as Julie Gledhill was seconded. That was because, as his evidence recounts, the other employers were:

> **"...looking for a specialism in LEAN manufacturing techniques and the ability to coach and train others in those techniques. At the time Julie Gledhill was leading the LEAN manufacturing initiatives within the plant and also managed our LEAN Learning Academy. This made her an ideal choice..."**

Mr McCarthy was not able to demonstrate that his experience or expertise in LEAN learning could match the circumstance of someone who was leading the LEAN manufacturing initiatives

and managing the relevant academy. The same might be said of the evidence in relation to the other two secondees contained in paragraph 58 of the witness statement of Mr Nugent. We were also taken to paragraph 67 of Mr Nugent's statement at which he identified that a particular individual was selected as secondee "because of his extensive LEAN knowledge and experience".

35. It is not for us, sitting as an Appeal Tribunal concerned with errors of law, to review the factual material before the Employment Tribunal. What needs to be done on an appeal such as this is to examine whether the Tribunal had material before it which it could have taken into account in reaching the conclusion that it did. From the extracts just mentioned, we are satisfied that there was material before the Tribunal sufficient to sustain its conclusion that the persons who were actually seconded were both "better trained and better qualified" than the Claimant.

36. Even if we had formed a different conclusion on that aspect of this ground, we would have accepted Ms Nowell's alternative submission, that is to say that, even if that finding had not been capable of being sustained by the evidence, there was in any event an overwhelming explanation as to why the secondees selected <u>were</u> selected, which had nothing whatsoever to do with the disability of the Claimant. That is made clear in the parts of the judgment which explain the urgent circumstance which arose in relation to the secondment, and we have in mind there particularly paragraph 39 of the judgment. Accordingly, this alternative ground of appeal does not succeed.

<u>Conclusions</u>

37. For the reasons that we have given, we will allow the Claimant's application under rule 3(10) and we will entertain the ground which is ground 3 of the amended grounds of

appeal. However, having done so, we will dismiss both the grounds. It follows that the appeal is itself dismissed.