EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Lockyer	**v**	**London Borough of Haringey**

Heard at: Watford **On**: 16 to 18 October 2018

Before: Employment Judge Lang
Members: Mrs J Smith
Mrs C Brodie

Appearances
For the Claimant: Ms Sleeman, Counsel
For the Respondent: Ms S Beecham**,** Counsel

RESERVED JUDGMENT

The complaints of unfair dismissal and disability discrimination are not well founded and are dismissed.

REASONS

1. By a claim form dated 1 November 2017 the claimant brings complaints of unfair dismissal and disability discrimination arising out of the termination of his employment on 31 October 2017.

The issues

2. An agreed list of issues was prepared by the parties and reads as follows (there was some clarification at the start of the hearing):

Unfair Dismissal

3. What was the reason for the dismissal and was that reason potentially fair? The respondent relies upon redundancy as the potentially fair reason.

4. Whether the respondent acted reasonably in all the circumstances in reaching the decision to dismiss the claimant in particular:

4.1 Whether the respondent acted reasonably in considering the claimant for suitable alternative employment.

4.2 Whether the respondent acted reasonably in not allowing the claimant to participate in the management assessment for the Business Support Manager role.

4.3 Whether the respondent provided the claimant with adequate feedback on his rejection for the Business Support Manager role.

4.4 Whether the respondent acted reasonably in setting the deadlines in which to respond in order for the claimant to secure alternative employment.

4.5 Whether the respondent acted reasonably when advised by the claimant that he would be unable to participate in their redeployment process by not extending the timescale or making any adjustment that would enable the claimant to participate in the redeployment process.

4.6 Whether the respondent acted reasonably by initially agreeing to hold the post of Business Support Manager open for the claimant to apply for upon his return to work, but subsequently changing their approach and not holding that post open for the claimant to apply for.

4.7 Whether the claimant should have been assimilated into the post of Business Support Team Leader.

4.8 Whether the respondent acted reasonably by initially not permitting the claimant online access to his work account during his period of sickness absence.

<u>Indirect disability discrimination</u>

5. Whether the respondent applied to the claimant a provision, criterion or practice of requiring employees at risk of redundancy to indicate, within a fixed period of time, whether they wished to accept assimilation or redundancy.

6. Whether the respondent applied or would have applied this PCP to persons who had not been diagnosed with cancer.

7. Whether this PCP put or would put persons diagnosed with cancer at a particular disadvantage of being dismissed when compared with persons who had not been diagnosed with cancer.

8. What was the appropriate pool for the tribunal to use to determine the issue in paragraph 6? In this regard the claimant confirmed that the pool relied upon was employees who were at risk of redundancy.

9. Whether this PCP put or would put the claimant at the particular disadvantage of being dismissed.

10. Whether the respondent can show this PCP was a proportionate means of achieving a legitimate aim and in this regard the respondent confirmed that it relied upon the legitimate aim of meeting operational needs and also organisational efficiency.

Discrimination arising from the claimant's disability

11. Whether in consequence of the claimant being diagnosed with cancer he was unable to make decisions quickly regarding assimilation and redundancy.

12. If so, did this inability lead to him being dismissed?

13. If so, whether the claimant can show that the claimant's dismissal to be a proportionate means of achieving a legitimate aim and the respondent confirmed that it relied upon the same legitimate aims as set out above.

Failure to comply with the duty to make reasonable adjustments.

14. Whether the respondent had a PCP of requiring employees at risk of redundancy to indicate within a fixed period of time whether they wished to accept assimilation or redundancy.

15. Whether that PCP put the claimant at a substantial disadvantage because of his disability of being diagnosed with Cancer in comparison with persons who were not disabled.

16. Whether allowing the claimant more time to decide whether to accept assimilation into the post of Business Support Team Leader or redundancy was a step that it was reasonable for the Respondent to have to take to avoid the disadvantage.

17. This hearing was to determine the issue of liability only.

The hearing

18. The tribunal heard oral evidence from the claimant and oral evidence on behalf of the respondent from Carla Segel (Head of Programme Management), Rita Tanda (Interim Senior HR Business Manager) and Maxine Sobers (Workforce Resource Manager).

19. We had an agreed bundle of documents of 617 pages.

20. Both parties were represented by Counsel who provided us with written submissions and referred us to relevant case law.

Findings of fact

21. The claimant was employed by the respondent from 3 January 2008. His substantive post at the relevant time was Technical Support Team Leader with a PO3 grade.

22. He was seconded to a Business Support Manager role from September 2016 for six months with a higher PO5 grade and reported to Caroline Humphrey who was the Head of Shared Business Support until January 2017.

23. The claimant had been previously been seconded into the post of Service Improvement Officer on Grade PO5 from September 2015 to July 2016.

24. The claimant was diagnosed with a form of leukaemia in the summer of 2016.

25. On 9 January 2017 a restructure of the claimant's division was announced. The claimant and two other interim PO5 grade Business Support Managers had been engaged in creating a centrally managed business support service.

26. The proposal was that the new service would go live from May 2017 but with only two PO5 grade Business Support Managers in place and, in addition, there would be six PO2 Team Leaders but no PO3 grade personnel. The claimant's substantive post would therefore cease to exist. There would be a new operating model with a move away from Business Support being reactive to work being planned and scheduled. It also involved service level agreements being developed with Council business units. The claimant was provided with job descriptions for the proposed new roles.

27. The respondent's restructure policy provided that roles would be ring-fenced for existing post holders where a new job was either one grade up or one grade down from a substantive grade. An employee like the claimant who was acting up in a higher graded post would be entered into a ring-fence based on his substantive grade unless exceptional circumstances applied. There was no automatic right for a PO3 grade employee to be considered for a PO5 vacancy.

28. The claimant consulted his Union (UNISON) the following day (10 January 2017). He was about to start chemotherapy treatment and was concerned that interviews for the grade 5 role, if he chose to apply for it, would come in the middle of his treatment.

29. The claimant's line manager was Carla Segel who took over from Caroline Humphrey in January 2017. He had a "my conversation" meeting with her on 18 January 2017 and a further meeting with her on 30 January 2017.

30. The claimant was to start an 18 week period of absence from February 2017 for cancer treatment. His diagnosis had changed to mantle cell lymphoma during January 2017 and the treatment for this condition would require six cycles of chemotherapy followed by stem cell harvesting and transplants. The claimant was formally signed off sick for three months from 2 February 2017.

31. On 14 March 2017 Mrs Segel, after discussion with the Union, proposed by e-mail to the claimant that although he could be assimilated into the PO2 role, one of the two PO5 roles would not be filled permanently and the claimant could apply for this position on his return to work. At that stage Mrs Segel thought that conducting a management assessment to assess the claimant's suitability for the PO5 role in his absence would be unfair as she had not spent enough time managing him. A management assessment is one of the selection methods provided for in the Respondent's restructure policy to appoint to roles within a ring fence. The PO5 role was not within the ring fence in the claimants' case.

32. The proposal therefore was to recruit one PO5 grade Manager permanently and the other on a six month secondment due to the claimant's circumstances.

33. The claimant saw this as an agreement between him and Mrs Segel that was not subject to any time limit. However, the e-mail did clearly state "We are still in the consultation stage so some of this may change depending on feedback, however, I am proposing……". It also went on to say that "These proposals are based on discussions we had before your absence and the opportunity of taking redundancy is still available. However, you stated at the time it is not something that you wish to consider". The tribunal finds that this was simply a proposal by the respondent that might change and did not constitute a binding agreement between the parties.

34. On 22 March 2017 the claimant had an attendance review with Mrs Segel by telephone and during that discussion the claimant agreed that he would assimilate into the PO2 role, but he would like the opportunity to apply for the PO5 role on his return to work. There was no suggestion by the claimant that he wanted to be interviewed for the PO5 role at this stage or indeed at any subsequent stage.

35. The claimant's secondment to the Business Support Manager PO5 role ended on 31 March 2017 after six months and the claimant reverted to his PO3 role and was paid accordingly.

36. In early May the respondent's position changed. Mrs Segel obtained HR advice that she should conduct a management assessment regarding the claimant's suitability for the vacant PO5 role. The other PO5 role had been filled by an employee called Tony Panaye and Mrs Segel and Mr Panaye were managing a team of 40 employees between them and were struggling.

37. A decision was made to proceed with the management assessment

notwithstanding what had been discussed with the claimant previously. The team was under pressure and needed to make an appointment. Mrs Segel explained "it was more challenging now as we were asking employees to work in new ways, with new services and systems ".

38. She invited the claimant's previous line manager, Caroline Humphrey, to provide input to the assessment. Caroline Humphrey's initial e-mail response was to confirm her view that the claimant should be matched into the PO5 role. Mrs Segal's response was that she had not seen enough evidence that he was meeting the PO5 role criteria. She invited Caroline Humphrey to complete a management assessment form providing evidence of the claimant's work in relation to various aspects of the PO5 job description. Once Caroline Humphrey had submitted this, Mrs Segel said that the examples provided by her were comprehensive and covered his substantive PO3 role but she was not sure that they met the PO5 level required.

39. The claimant submitted a new sick note on 16 May 2017 to cover the period up to 28 July 2017.

40. Mrs Segel conducted a formal sickness review by telephone on 24 May 2017 and the claimant was referred to occupational health for a report. The claimant was told in the call with Mrs Segel that following discussion with the Union, it had been agreed that the management assessment would be carried out in the claimant's absence.

41. Mrs Segel followed up this conversation with an e-mail on 25 May 2017. The e-mail recorded that the claimant had agreed to respond about the proposed management assessment by 2 June 2017 to take this forward. This was disputed by the claimant.

42. Her e-mail was copied to the Union and Mrs Segel referred to 'a brief chat' earlier with the Union. The response from the Union representative was "This is helpful". The Union's approach throughout was one of acquiescence with the respondent's approach. There is no evidence whatsoever of the Union disagreeing with any proposed steps.

43. The claimant e-mailed on 2 June. He said that his stem cell treatment had been brought forward and he was to be treated in hospital in June. He said he wasn't in a position to make a decision regarding the management assessment due to his illness. He said he had some outstanding questions and said that, in particular, he wanted more details about the proposed management assessment process.

44. The claimant e-mailed his Union on 5 June 2017. He said he expected to recover sufficiently to return to work and that the options of redundancy and the PO2 role did not appeal to him. He asked the Union if there were other options.

45. The emails sent by the claimant on 2 and 5 June were well drafted, detailed

and cogent. This is true also of further emails send during the process (e.g 15 June, 28 July) The tribunal finds that the claimant was functioning at a high level and was clearly able to make decisions. We find that the 5 June 2018 email shows that the claimant was not in a position where he could not decide between options. He simply did not like the options available to him.

46. On 9 June Mrs Segel outlined the management assessment process to the claimant. It was to be conducted by her and HR with input from Caroline Humphrey. The claimant was told that there was no appeal. The respondent needed to proceed with the PO5 assessment and the claimant was asked to confirm his position by 16 June. The claimant was sent an outline of the assessment form. This was the same form that had been sent to Caroline Humphrey to complete and he was also sent a model response showing examples of the scoring.

47. The claimant e-mailed his Union for advice on 15 June and later that day he agreed by e-mail to Mrs Segel to the assessment. He asked if he would see the scoring and Mrs Segel responded that HR advice was that the scoring breakdown would not be provided.

48. The management assessment was carried out on 29 June by Mrs Segel and Rita Tanda, an Interim Senior HR Business Partner. They took into account Caroline Humphrey's comments. The form they actually used for the assessment was different from the one provided to Caroline Humphrey for her input and the one sent to the claimant and it more closely followed the job description. Scores were allocated and certain responsibilities were weighted. This resulted in a score of 65 out of 140 or 46%. Mrs Segel had set a pass mark of 60%. This was entirely her decision. She was not guided by any policy of the respondent's in relation to the proposed pass mark.

49. On 3 July the claimant was told that the management assessment had arrived at the conclusion that he could not be appointed to the PO5 role. His only two remaining options were the PO2 role or redundancy. He was asked to confirm his decision by 10 July 2017.

50. The claimant responded by e-mail on 5 July 2017 complaining that the deadline was too short having regard to his condition and he wanted to get advice about the outcome of the assessment.

51. Mrs Segel responded on 6 July to say that she was happy to give feedback regarding the assessment by telephone.

52. An occupational health report was sent to HR on 10 July 2017. It said that the claimant was very stressed and recorded that the claimant had said that he didn't feel that he was in a position make impactful decisions about his employment due to his health.

53. On 12 July Rita Tanda spoke to the claimant by telephone. She told him that he could provide evidence to challenge the assessment in 10 working

days. The evidence would then be reviewed by a senior independent manager. The claimant said that he did not feel able to agree to this timescale. He was told that the respondent wanted a decision on the two other options within 10 working days. The claimant asked for the job specification for the PO5 role and his interim PO5 role and the job specification used for the management assessment but Rita Tanda refused to provide this as the claimant had said that he was too unwell to challenge the assessment within 10 working days.

54. The claimant did ask five questions of Rita Tanda in relation to redundancy pay, his pension and when he would go on half pay as a result of his absence and the respondent provided responses to these questions on 20 July.

55. On 20 July the claimant was advised by Rita Tanda that he could complain about the assessment decision in writing, but that once a recruitment decision had been made it could not be reversed. The claimant was asked to confirm by 4 August 2017 if he wanted the PO2 role otherwise the respondent would have no option but to go down the compulsory redundancy route.

56. Rita Tanda had spoken to the Union about this and contends that it was agreed by the Union that it would be reasonable to set a deadline for the claimant to respond. We consider it likely that a deadline was discussed with and agreed to by the Union and accept her evidence The 4 August deadline was referred to in subsequent emails sent on 28 July 2017 and copied to the Union. There was no suggestion that the Union objected to the deadline.

57. On 26 July the claimant was given feedback on his assessment by Mrs Segel. The advice that Mrs Segel received from HR was just to read through the assessment and not provide the claimant with his scores.

58. The claimant sent a lengthy e-mail to his Union on 28 July. He complained that the feedback he had received from Mrs Segel was useless and he was no further forward in knowing why it was felt that he didn't meet the minimum criteria for the job. He asked for advice about whether to follow the complaints process.

59. The claimant sent an e-mail to Rita Tanda asking for access to his personal drive to get his one to one records. His e-mail account had been disabled during his absence. This was the respondent's practice with long term sick employees. He said that he couldn't understand why the process couldn't be put on hold until he was fit enough to make a decision.

60. Notice of termination was issued to the claimant by the respondent on 15 August 2017. He was given nine weeks' notice which terminated on 31 October 2017.

61. During the notice period, Maxine Sobers who was the respondent's

Workforce Resource Manager corresponded in a sympathetic way with the claimant about alternative work. She sent him details of vacancies but none were of interest to the claimant. The claimant had had his e-mail account reinstated and his laptop rebuilt during the notice period. He was also given access to his digital files by HR.

62. The vacant PO5 role was filled by an external candidate on 5 September 2017. The PO2 role was filled by an internal candidate on 1 December 2017.

63. The claimant, through his Union, started the process of ACAS early conciliation on 22 August 2017. This ran though until 6 October 2017 and the claimant issued Employment Tribunal proceedings the day after termination of his employment on 1 November 2017. The claimant started looking for work in December 2017 and by January 2018 he was working as a mystery shopper and eater and by June 2018 was applying for voluntary jobs.

The Law

64. Unfair dismissal

64.1 The relevant statutory provision is Section 98 of the Employment Rights Act 1996. The relevant parts read as follows:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it:

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

65. Disability discrimination

65.1 The relevant statutory provisions from the Equality Act 2010 are set out below.

Section 15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if:

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Section 19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Section 20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

Section 21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

Conclusions

Dealing with each of the issues in question:

Unfair Dismissal

66. *What was the* reason *for dismissal and was that reason potentially fair?*

66.1 The tribunal is satisfied that the reason for the dismissal was

redundancy which is a potentially fair reason. This was not contested by the claimant.

67. *Whether the respondent acted reasonably in all the circumstances in reaching the decision to dismiss the claimant in particular whether the respondent acted reasonably in considering the claimant for suitable employment.*

67.1 The question for the tribunal is whether the respondent's actions fell within the band of reasonable responses.

67.2 The respondent did consider the claimant for the PO5 position which went beyond what was required by its restructure policy. The tribunal consider that the management assessment carried out by Mrs Segel and Rita Tanda was conducted in a manner which fell within the band of reasonable responses. The tribunal had regard to the fact that this was a new position within the respondent's organisation. In such a situation there is less need for an employer to adopt the objectivity required in a redundancy selection. The assessment process that an employer can use is a matter for an employer's discretion and it is understandable that the employer chose to select for the role on a forward looking basis. The employer did not use a selection process which was plainly inappropriate. We are satisfied that careful consideration was given to the claimant's ability to perform the important aspects of the new PO5 role. Mrs Segel considered that the evidence provided by Caroline Humphrey did not demonstrate PO5 level skills and we agree with the Respondent's decision that it was not necessary for the respondent to go back to Mrs Humphrey to ask for further examples.

68. *Whether the respondent acted reasonably in not allowing the claimant to participate in the management assessment for the Business Support Manager role.*

68.1 The claimant contends that the respondent's conduct of the assessment was unfair and was undertaken without any input by him.

68.2 We consider that the respondent acted within the band of reasonable decisions. As previously stated, the claimant had no right, under the restructure policy, to be considered for the PO5 role. The claimant made no suggestion that he wished to be interviewed and agreed to the adoption of the management assessment route. He was given feedback about the management assessment and also given the right to supply a supporting statement by way of a challenge to the outcome of the assessment.

69. *Whether the respondent provided the claimant with adequate feedback on his rejection for the Business Support Manager role.*

69.1 The claimant contends that the feedback was inadequate both in

substance and form. Without knowing the scores allocated to him he could have no understanding as to why he didn't pass the assessment or challenge the decision. HR advice provided throughout was that the claimant was not to see his scores.

69.2 We agree with the respondent's position that there was no right to a management assessment under the restructure policy and the form of any such feedback was not prescribed. The claimant was given feedback by Mrs Segel for more than an hour. He was given the opportunity to challenge the decision by supplying a supporting statement setting out how he was able to satisfy the job description. The job description had been provided to him at the outset of the process in January 2017.

69.3 We do not consider that the way in which the feedback was provided - with the availability of a challenge - falls outside of the band of reasonable responses.

70. *Whether the respondent acted reasonably in setting the deadlines in which to respond in order for the claimant to secure alternative employment.*

70.1 The claimant contends that the deadlines were imposed when the respondent was well aware that the claimant was undergoing treatment and coming to terms with his diagnosis and that the respondent continued to impose deadlines when the claimant was neither physically nor psychologically well enough to be making decisions. The respondent didn't seek medical advice as to what the claimant was saying was likely to be correct.

70.2 We agree with the respondent's position that there was no hard deadline. An initial deadline of 2 June 2017 was not enforced. The claimant vitally in an e-mail to his Union on 5 June 2017 indicated that the problem was not that the claimant could not make a decision but rather that he didn't like the two options available to him. The deadline was in any event extended to 16 June. The claimant then agreed to a management assessment. The next deadline imposed was 10 July 2017 for the claimant to make a decision regarding the two remaining options and this again was extended to 22 July and then ultimately to 4 August. The Union agreed that it was reasonable to impose a deadline. The claimant did not at any stage impose a suggested alternative deadline. We do not consider that the respondent's actions fell outside of the band of reasonable decisions

71. *Whether the respondent acted reasonably when advised by the claimant that he would be unable to participate in any redeployment process by not extending the timescale or making any adjustment that would enable the claimant to participate in the redeployment process.*

71.1 This was the redeployment process which took place during the notice period. The claimant's criticism is that he was dealt with under the

respondent's standard policy with no specific consideration or adjustment. The respondent took no steps to identify additional measures to take advice as to whether anything more should be done to assist the claimant.

71.2 We agree with the respondent's position that the claimant didn't ask for any extension to the redeployment process and was able to participate in it fully. We agree that the respondent was sympathetic towards the claimant during the redeployment period.

72. *Whether the respondent acted reasonably by initially agreeing to hold the post of BSM open for the claimant to apply for upon his return to work but subsequently changing their approach and not holding that post open for the claimant to apply for.*

72.1 The claimant's criticism is that the change of position is unsupported by any evidence of difficulties arising from the post being unfilled. There is no evidence as to why the role could not have been filled temporarily internally by secondment or acting up or by an external temporary recruit.

72.2 We agree with the respondent's position here. There was no agreement to keep the post open and it was clear that this proposal might change. The claimant's absence was clearly going to continue for a significant period. The Union didn't disagree with the proposed course of a management assessment and we are satisfied that there were genuine and pressing operational reasons to permanently appoint someone to the PO5 role.

73. *Whether the claimant could have been assimilated into the PO2 post of Business Support Team Leader.*

73.1 The respondent's position, which we agree with, was that it was not possible to unilaterally move the claimant into a lower pay grade without his consent. The claimant was given a number of opportunities to consent to assimilation and indeed he could also have done so during his notice period as the role had not been filled.

74. *Whether the respondent acted reasonably by initially not permitting the claimant online access to his work account during his period of sickness absence.*

74.1 Online access was not permitted to the claimant initially because of the application of the respondent's long-term sickness policy. However, the claimant was subsequently provided with access to his work account during the notice period. We are satisfied that the claimant was kept up to date with developments and was able to participate fully in the redeployment process. There was no unfairness.

75. We consider that the respondent acted reasonably and that the dismissal

was fair. The complaint is not well founded.

Indirect Disability Discrimination

76. The respondent accepts that it applied to the claimant a provision criteria or practice of requiring him, as someone at risk of redundancy, to choose between assimilation to a lower pay grade or redundancy by a deadline imposed by the respondent. It further accepts that such a PCP would have been applied to those similarly displaced in a restructure who were not diagnosed with cancer. What is not accepted by the respondent is that there was a group or individual disadvantage.

77. The respondent says that there is no evidence that such a PCP puts persons diagnosed with cancer at a particular disadvantage of being dismissed compared to persons not diagnosed with cancer. It is denied that the claimant was individually disadvantaged because he was given a lengthy period of time to make a decision and that it was not a question of him being unable to make a decision but he simply did not like the two options open to him.

78. The claimant's position is that employees with a diagnosis of cancer and other progressive and/or incurable conditions are given special treatment under the Equality Act by virtue of the deeming provisions. This acknowledges that such conditions have special effects on those in whom they are diagnosed. The impact of the diagnosis is not confined to the physical effects or limitations of the condition and the approach recognises there is a significant psychological effect including the anticipation of progression. The claimant says that any person with such a condition who is given a short deadline by which to respond to options affecting his or her future career at a time when also coming to terms with the life changing consequences of such a diagnosis must be less able to consider the options and make an informed decision within that timescale.

79. We are not satisfied that it is self-evident that cancer sufferers as a group face the disadvantage complained of when compared to non-disabled people. The claimant has not produced any statistical evidence and we do not accept that the PCP is intrinsically liable to disadvantage a group with this particular condition.

80. We do not consider therefore that this PCP put or would put persons diagnosed with cancer at a particular disadvantage of being dismissed when compared with persons who had not been diagnosed with cancer.

81. We also do not agree that the PCP put the claimant at a particular disadvantage of being dismissed. We accept the respondent's position that the claimant was not disadvantaged. The claimant simply did not like the two options that were open to him. He wanted to take the PO5 job and did not like the other options made available to him of the PO2 role or dismissal.

82. Further, if we were wrong about the group and individual disadvantage

points, the tribunal considers that the PCP was justified in any event. The claimant accepts that the respondent is likely to have a legitimate aim in applying the PCP but submits that the PCP was not proportionate in the light of less discriminatory measures available to the respondent. We are satisfied that there was a real need to fill the PO5 position on a permanent basis. We accept that employees cannot be expected to have an indefinite or indeterminate period to decide on whether to accept assimilation or redundancy. This would cause severe difficulties with an employer's operational needs. We are required to balance the respondent's need to impose a PCP against the PCP's discriminatory effect. We do not consider that the PCP had any significant discriminatory effect and find that the respondent's need outweighed any such effect. Accordingly, we find that this complaint is not well founded.

Discrimination arising out of disability

83. The respondent's position is that the claimant cannot establish that he was unable to make decisions quickly regarding assimilation and redundancy in consequence of being diagnosed with cancer. The Tribunal agree with this position. It is clear from the claimant's e-mail to Unison on 5 June 2017 that the claimant refused to make a decision or confirm a decision he had already indicated. This was because he was not happy with the two choices put to him. A number of detailed, carefully drafted and comprehensive and cogent e-mails were received from the claimant and his mental function was at a high level.

84. We do not consider that in consequence of the claimant being diagnosed with cancer he was unable to make decisions quickly regarding assimilation and redundancy. This was not "something arising in consequence of the claimant's disability".

85. If we are wrong about this we also consider that the claimant's dismissal was a proportionate means of achieving a legitimate aim having regard to the respondent's operational needs going forward with a new organisational structure. The claimant had not given any indication of when he might be able to make a decision.

86. We must carry out a balancing of the claimant's interests against the respondent's legitimate aim. The claimant says it was inconvenient for the respondents not to fill the PO5 post on a permanent basis but inconvenience is insufficient to outweigh the significant detriment to the claimant of losing his livelihood. We do not consider that this was the choice faced by the claimant at the time. He could have taken the PO2 role and continued with his career but chose not to do so. We find that this complaint is not well founded.

Reasonable Adjustments

87. The respondent accepts that a PCP of requiring employees at risk of redundancy to indicate within a fixed period of time whether they wish to accept assimilation or redundancy was applied. However, they say that the claimant cannot show that the PCP put the claimant at a substantial disadvantage because of his disability of being diagnosed with cancer in comparison with persons who are not disabled. We accept this submission for the reasons set out above in paragraphs 79 and 81.

88. If we are wrong about that and the claimant was put to a significant disadvantage, we do not consider that allowing the claimant more time to make a decision was a step that it was reasonable for the respondent to have to take to avoid the disadvantage. We agree that neither the claimant nor his Union had taken the step of suggesting an alternative deadline. The claimant said that by December 2017 he had completed much of the most invasive and debilitating aspects of his treatment and felt able to search for a new job. By January 2018 he had started work and had the option of assimilating into the PO2 role being available he might have wished to take it up around that time.

89. We do not consider that extending time for a decision would have been effective in preventing any disadvantage. We do not think that this would have been of any benefit to the claimant. We note that the claimant's new position was a mystery shopper role. This is far removed from the demanding nature of the PO2 role. We do not consider that there was any prospect of the claimant being capable of carrying out the PO2 role within a reasonable period of time. We find that this complaint is not well founded.

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Employment Judge Lang

Date: ……8/11/18……………………..

Sent to the parties on: ....

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For the Tribunal Office