EMPLOYMENT TRIBUNALS

Claimant: Mr A Arif

Respondent: Manpower Uk Ltd (1)
Jaguar Land Rover Ltd (2)

Heard at: **Birmingham** **On: 16, 17, 18, 19 & 20 September 2019**

Before: **Employment Judge Miller**
Mr G Bagnall
Mr J Wagstaffe

Representation
Claimant: In person
Respondent: Mr Sutherland (solicitor) R1
Mr Barker (solicitor) R2

JUDGMENT

1. The Claimant's claims of unfavourable treatment because of something arising in consequence of disability pursuant to section 15 Equality Act 2010 and failure to make reasonable adjustments for disability pursuant to sections 20 & 21 Equality Act 2010 against the first respondent are in time and may proceed.

2. The Claimant's claims of unfavourable treatment because of something arising in consequence of disability pursuant to section 15 Equality Act 2010 and failure to make reasonable adjustments for disability pursuant to sections 20 & 21 Equality Act 2010 against the second respondent are not in time. It is just and equitable to extend time for the claimant to bring his claims and they may proceed.

3. The Claimant's claim of unfavourable treatment because of something arising in consequence of disability pursuant to section 15 Equality Act 2010 relating to the decision to end his assignment with the second respondent is well-founded and succeeds against the first respondent.

4. The Claimant's claims of unfavourable treatment because of something arising in consequence of disability pursuant to section 15 Equality Act 2010 relating to

1. the requirement to undertake allocated tasks; and

2. the instruction to the first respondent to terminate his assignment

is well-founded and succeeds against the second respondent.

5. The Claimant's claim of failure to make reasonable adjustments for disability pursuant to sections 20 & 21 Equality Act 2010 is not well-founded and is dismissed against the first respondent

6. The Claimant's claim of failure to make reasonable adjustments for disability pursuant to sections 20 & 21 Equality Act 2010 is well-founded and succeeds against the second respondent.

7. Remedy will be determined at a further hearing.

REASONS

Introduction

1. This claim was bought by Mr Mohammed Atif Arif originally against the first respondent, Manpower UK Ltd, on 28 May 2018 following a period of early conciliation from 4 April 2018 to 4 May 2018.The second respondent was added as a party by Employment Judge Broughton on 5 December 2018.

2. In summary the claim is a claim for disability discrimination in respect of his placement by the first respondent, Manpower UK Ltd (an employment agency) with the second respondent, Jaguar Land Rover Ltd. The uncontentious chronology is as follows.

   a. In November 2015 the claimant applied for a role of production operative through the first respondent at the second respondent's factory. The claimant commenced working with the second respondent on 2 February 2016. The second respondent manufactures cars and the claimant was initially assigned to a part of the second respondent's factory known as "final assembly 1 area" (FA1).

   b. On or around 13 November 2017 the claimant moved to the "final assembly 2 area" (FA2).

   c. On 4 January 2018 the claimant was "released from assignment". This means, to put it in neutral terms, he stopped working at the second respondent's factory. The circumstances in which he left the factory are not agreed. It is, however, agreed that the first respondent made the decision to "release the claimant from his assignment" with the second respondent.

   d. It is agreed that at all times the claimant was an employee of the first respondent, not the second respondent.

   e. It is also agreed that the claimant is a disabled person for the purposes of section 6 of the Equality Act 2010 although we will return to the exact nature of the disability later.

3. The claimant says that, as a result of his disability, he was unable to perform any of the roles in FA2 to which he was assigned and consequently he was no longer able to work for the second respondent. These issues are put as claims pursuant to section 15 of the Equality Act 2010 and sections 20 and 21 of the Equality Act 2010. We will deal with the precise issues to be determined and the respondent's responses in detail shortly as, by the end of the hearing, it was submitted that the claimant had sought to expand on the list of issues that had been agreed before Employment Judge Broughton at the preliminary hearing on 5 December 2018.

The hearing

4. The case was listed to be heard over five days. We heard evidence from the claimant and each of the respondents brought two witnesses. They were
    a. for the first respondent
        i. Amy Kelly, contract consultant;
        ii. Lisa Casey, case management coordinator;
    b. for the second respondent
        i. Steven Marshall, production leader; and
        ii. Paul Gardiner, Manpower planning manager.
5. All the witnesses produced witness statements which we read and there was an agreed bundle of documents comprising of 200 numbered pages but also including a number of sub-numbered pages. We read the documents referred to in the various witness statements and we have been taken to the majority of the documents in the course of cross-examination.
6. We were mindful of the fact that the claimant, who was unrepresented, had said in his claim form and witness statements, and referred to on a number of occasions in the hearing, that he had suffered a head injury in 2015. We therefore sought to accommodate any additional breaks that the claimant needed. No additional adjustments were required, and we note that the claimant was able to present his case in a clear and competent manner.

Preliminary issues

Time point

7. As identified at the preliminary hearing of 5 December 2018, the claim against the first respondent appeared to be out of time. The claimant was "released from the assignment" on 4 January 2018 and at the preliminary hearing it was agreed that that was the final alleged discriminatory act on which the claimant relied. As the claimant did not contact ACAS for early conciliation until 4 April 2018, and thereafter submitted his claim on 28 May 2018, the claim against the first respondent appeared to be out of time.
8. It was agreed that this would be considered at the outset of the hearing and that decision – namely that the claim against the first respondent was

able to continue – was made, and reasons given, on the first day of the hearing.

9. The tribunal also considered, at the same time, an application by the claimant to amend his claim and the tribunal's decision with reasons on that application were also given on the first day of the hearing. The reasons for the decisions that were given on the first day of the hearing in those two applications are as follows.

Reasons for the decisions in the claimant's application to amend his claim and in relation to whether his claims are out of time

10. At the outset of the hearing, the following matters arose for our determination:

    a. Whether the claimant's claims of disability discrimination are out of time;

    b. If so, whether it would be just and equitable to extend time; and

    c. Whether the claimant's application to amend his claim to the effect that the second discriminatory act complained of – namely his removal from the JLR contract – was completed on 11 January 2018, rather than at the point of making the decision on 4 January 2018.

11. We deal with those applications in reverse order.

12. The claimant's application to amend his claim is allowed in respect of his claim against Manpower, but not against JLR for the following reasons.

13. The claimant first raised this matter before us today. His argument is, effectively, that he was on 4 January 2018, given notice that his assignment with the second respondent would terminate on 11 January 2018. This was not disputed by the parties, but the claimant did agree that he did no actual work for second respondent after 4 January 2018.

14. The claimant did not raise this point in his claim, and he confirmed that, although the question of whether the claimant's claim was in time was discussed at the preliminary hearing with Employment Judge Broughton on 5 December 2018, he did not raise it then either.

15. The claimant was not able to give any satisfactory explanation as to why he had not raised this important point previously.

16. However, the test for the tribunal when deciding whether to allow an amendment is that set out in *Selkent Bus Co Ltd v Moore* [1996] IRLR 661. A tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Relevant factors include:

    a. **The nature of the amendment,** ie whether the amendment sought is a minor matter such as the correction of clerical and typing errors, the addition of factual details to existing allegations or the addition or substitution of other labels for facts already pleaded to, or, on the other hand, whether it is a substantial alteration making

entirely new factual allegations which change the basis of the existing claim.

b. **The applicability of statutory time limits.** If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions. For these purposes, the date to consider for time limits is the date that the application was made.

c. **The timing and manner of the application.** An application should not be refused solely because there has been a delay in making it, but it is relevant to consider why the application was not made earlier.

17. In Abercrombie v Aga Rangemaster Ltd [2013] IRLR 953 it was held that "the approach of both the EAT and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted".

18. In one sense, this amendment is merely the bringing of additional information – that the effect of the decision to remove the claimant form the contract did not in fact take effect until 11 January, not 4 January. However, the amendment in this case will have a substantial impact on the case – it would have the effect of bringing the claim in time. It does not, however, raise any new points of law and does not require any additional evidence. Even if it is the case that the consequences of the act of 4 January did not finally bite until 11 January, the evidence required to determine the merits of the matter is no different from that which has already been brought.

19. Although the application was made very late, that is not a reason of itself to refuse it.

20. The balance of injustice and hardship falls very much against the claimant in refusing the application – all parties were present and ready to proceed. We acknowledge the cost implications, but there is no prejudice to the respondents in being able to have a fair hearing.

21. Finally, we consider that the principles set out *in Lupetti v Wrens Old House Ltd*. [1984] I.C.R. 348 in respect of when time starts to run in a discriminatory unfair dismissal case apply. In our view, the principles, by analogy, are the same. It was the removal from the contract by which the claimant was aggrieved and, as accepted, that was on notice and therefore took effect on 11 January.

22. This, however, only applies in respect of the first respondent. It appears that the relationship with the second respondent and the claimant was over by 4 January. They were not, it appears, party to the decision to

remove the claimant from the contract by notice. This amendment does not change the date of the alleged discriminatory act by the second respondent. Therefore, the balance of injustice, in respect of whether to amend the claim against the second respondent falls in favour of the second respondent.

23. For these reasons, the amendment is allowed in respect of the claim against the first respondent, but not against the second respondent.

24. The impact of this is that the claim against the first respondent is in time. The last discriminatory act was completed on 11 January 2018. The claimant commenced Early Conciliation on 4 April 2018. The Early Conciliation Certificate was issued on 4 May 2018 and the claim was brought on 28 May 2018.

25. Conversely, the claim against the second respondent is out of time. The last date for bringing a claim to the tribunal (or, in reality, starting Early Conciliation) was 3 April 2018. The claimant provided no compelling reason why his claim was late.

26. He confirmed that he had sought advice from a Trade Union and ACAS and they had both advised him to complete the internal appeal process before issuing proceedings. However, the claimant was already clearly aware of some provisions of the Equality Act 2010 – in his appeal letter of 9 January 2018 he referred to “reasonable adjustments” and “unfavourable treatment” and the claimant has a law degree. He confirmed that he was aware of it.

27. However, the test is whether in all the circumstances it would be just and equitable to extend time. In light of our previous decision, it is just and equitable to extend time for the claimant to present his claim.

28. In *British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT* it was held that we are required to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

29. Although the factors are a useful checklist, we remind ourselves that we are required to consider the prejudice each party would suffer as a result of our decision. The claimant would be very significantly prejudiced if the second respondent was not now required to answer the allegations. It appears that the second respondent was at least in large part responsible for the treatment the claimant says he received. The second respondent has been able to produce evidence and witnesses to answer these claims and, while we note the additional costs this would expose the second respondent to, this is not sufficient to outweigh the prejudice to the claimant in not being able to have his case heard against both respondents.

30. For these reasons we extend the time for the claimant to bring his claim to 28 May 208 and the claims may proceed.

The subsequent time point

31. The second respondent was not originally included in the claimant's claim. At the preliminary hearing on 5 December 2018, Employment Judge Broughton allowed the claimant's application to add the second respondent as a respondent, subject to any application by the second respondent. The claim form was served on the second respondent under cover of a letter from the employment tribunal dated 8 February 2019. The second respondent submitted its response on 4 March 2019.

32. The tribunal considered on the first day of the hearing (as set out above) whether the claimant's claim against the second respondent was in time or not and, if not, whether it would pursuant to section 123 of the Equality Act 2010, be just and equitable to extend time for the claimant to make a claim against the second respondent. The tribunal decided, on the first day of this hearing, that it was just and equitable to extend time for the claimant to submit his claim to 28 May 2018 for the reasons given above.

33. In closing submissions, however, Mr Barker for the second respondent said, effectively, that in fact the claim against the second respondent was not brought until his application to join in the second respondent on 5 December 2018. To that extent, he argued, the claimant's claim was in fact 11 months out of time.

34. Mr Barker did not make those submissions in respect of the original consideration of the time point on the first day of the hearing. The tribunal determined that, following the claimant's application to amend his claim, his claim against the first respondent was in time. Prior to that decision, arguments had been put by both respondent's representatives that the fact that the claim appeared to be potentially only one day out of time ought not to necessarily mean that the claimant's claim should be allowed. They said that, although the just and equitable test is not as strict as the reasonable practicability test in other provisions, it is still required to be applied strictly.

35. Further, when the claimant was giving evidence on this point, he said that he was advised by ACAS approximately two weeks after 4 January 2018 that he might have a case, but he can only bring it against his legal employer. Mr Barker did cross examine the claimant about the advice he received from ACAS and also from the claimant's trade union at the time (Unite), but it was clear that the advice he was questioning the claimant about referred to whether or not the claimant should exhaust internal appeals before submitting a claim. Mr Barker said "you say ACAS and the trade union advised you to wait for the outcome of the appeal before submitting a claim" to which the claimant replied yes. Mr Barker asked which trade union and the claimant said the second respondent's trade union, Unite. Then Mr Barker put it to the claimant that it was unlikely that both large organisations would get the law wrong on that point to which the claimant responded that both organisations had given advice based on some sort of conciliation happening and that the disability evidence suggested his appeal would be successful and he would go back to work.

36. The claimant was not directly addressed in questioning by Mr Barker about the additional delay in bringing the claim against the second

respondent, although it is correct to say that Mr Barker did refer in his submissions to the difficulty the second respondent had been put to in having to deal with this claim having received the claim form a year later. He said that the second respondent had been on the back foot throughout.

37. We therefore exercise our own discretion under rule 70 to reconsider the decision made in respect of the second respondent that it was just and equitable to extend time on the basis that the second respondent has now raised matters that we did not consider. We note that the claimant and first respondent were given copies of the second respondent's written submissions in advance of oral submissions which included Mr Barker's arguments about delay and neither party made any representations about this point.

38. Employment Judge Broughton had already decided to allow the addition of the second respondent subject to any applications (and no relevant applications were made by the second respondent). In doing so, he clearly found that it was in the interests of justice to add the second respondent and he knew of the delay at the time.

39. In *Cocking v Sandhurst (Stationers) Ltd* [1974] ICR 650, Sir John Donaldson said that the protection which respondents obtain from time and jurisdictional issues does not depend on when they first become parties to the proceedings, but on when the applicant's complaint is first presented to the industrial tribunal.

40. This means that, as originally submitted by Mr Barker, the relevant date to consider in respect of whether the claim against the second respondent is in time is the date when the original claim was presented – namely 28 May 2018.

41. We note Mr Barker's further submissions that the second respondent did not benefit from potential early conciliation and in fact the claim form was presented on 28 May 2018 – proceedings did not – effectively – start on 4 April 2018. However, as discussed above, the claimant's evidence that he received advice from ACAS *particularly* to the effect that he could only bring a claim against his employer was unchallenged by the second respondent. In those circumstances, and for the reasons already provided in respect of the time point, we do find that it is just and equitable to extend time to 28 May 2018 for the claimant to bring his claim against the second respondent.

42. In the event that we are wrong as to the date, we find also that it is just and equitable to extend time, if necessary, to 5 December 2018 for the claimant to bring his claim against the second respondent. The understanding the claimant had from the specific advice the claimant said he received from ACAS about claiming against his employers was not apparently then corrected until the preliminary hearing on 5 December 2018. Although Mr Barker said that the claimant has a remedy against the first respondent, it is clearly arguable (and was argued) that the second respondent was the decision maker in respect of the allocation of tasks and instructed the first respondent to remove the claimant from the assignment. The second respondent is necessarily involved in this matter. We have now heard and seen evidence from the respondent's

witnesses and the second respondent's witnesses were able to give useful evidence about the claim.

43. In all the circumstances, including the findings of fact we made on the first day of the hearing about this matter, it is just and equitable to extend time for the claimant to bring his claim against the second respondent.

List of issues

44. The next preliminary point was the list of issues to be determined. It was confirmed at the start of the hearing that the matters set out in the annex to the case management order of 5 December 2018 were those matters that fell to be considered except that the claimant confirmed that he was no longer alleging that the first respondent was responsible for the decision to transfer him from FA1 to FA2.

45. Specifically, the alleged unfavourable treatment referred to at paragraph 2.1.1 of the annex to the case management order – namely that of "Moving the claimant to Final Assembly 2 roles which he was unable to do from November 2017" – was agreed as only alleged against the second respondent.

46. Both respondents submitted that the tribunal was bound by the list of issues as identified by Employment Judge Broughton, and Mr Sutherland referred to the case of *Chandhok and another v Tirkey* UKEAT/0190/14/KN. We were urged to accept that as authority for the proposition that we should not consider any matters not referred to in the list of issues.

47. We do not agree. In *Chandhok,* Mr Justice Langstaff was referring to the ET1 and said that it must be read as a whole. Then, at paragraph 17, he said:

> *Care must be taken to avoid such undue formalism as prevents a tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits.*

48. A list of issues is a case management device designed to assist the tribunal at the final hearing. In *Price v Surrey County Council* UKEAT/0450/10/SM, Lord Justice Carnwarth said

> *"Even where lists of issues have been agreed between the parties, they should not be accepted uncritically by employment judges at the case management stage. They have their own duty to ensure that the case is clearly and efficiently presented. Equally the tribunal which hears the case is not required slavishly to follow the list presented to it. (See the President's comments in Wilcox v Birmingham CAB Services Ltd [2011] UKEAT/0293/10 2306 para 21.)"*

49. Therefore, while we have followed the guidance of the list of issues helpfully agreed, we have also had regard to the pleadings in the form of the ET1 and the ET3s and the issues we have to decide are those set out in the parties' pleadings subject only to the amendment we allowed at the start of the hearing (namely, that the effect of the decision by the first respondent to terminate the assignment was complete on 11 January 2018) and the withdrawal of the allegation against the first respondent in respect of the move from FA1 to FA2 as referred to above.

50. However, before setting out that list of issues and the relevant legal provisions, we turn first to the question of disability.

Disability

51. Both parties had, by the time of the hearing, accepted that the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010. However, it appeared that an issue arose in the submissions of the second respondent as to the nature of the claimant's disability. Specifically, Mr Barker submitted that the disability recorded is "nerve damage in wrist – nothing more general". This, we assume, was a reference to the record of disability in the list of issues at the annex to the case management order. To the extent that this submission was intended to exclude the effects of that disability on the claimant from our considerations in terms of pain and physical difficulties, we do not accept that submission.

52. We refer to the ET1 – the claimant explains his disability in paragraph 1 briefly but clearly and succinctly. He says, "I currently have nerve damage (loss of strength/grip with numbness to the right hand/wrist)". (He also refers to a head injury but that was not part of his claim).

53. The claimant had produced a disability impact statement which was included in the agreed bundle of documents. We were not taken to that and, despite Mr Barker's submissions, the extent of pain and difficulty that the claimant said he experienced in carrying out tasks was not challenged in cross examination. We therefore find, to the extent that it is necessary, that the claimant's *accepted* disability of nerve damage includes loss of strength and grip in right hand, some pain and the difficulties with manual tasks that would be associated with those issues.

The law

54. We are concerned with the following provisions of the Equality Act 2010:

55. Section 15 – Discrimination arising from disability which says

> (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.

56. Sections 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.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part of this Act	**Applicable Schedule**
Part 3 (services and public functions)	Schedule 2
Part 4 (premises)	Schedule 4
Part 5 (work)	Schedule 8
Part 6 (education)	Schedule 13
Part 7 (associations)	Schedule 15
Each of the Parts mentioned above	Schedule 21

57. 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.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

58. Part 2 of schedule 8 provides, as far as is relevant

Part 2 Interested Disabled Person

Preliminary

4

An interested disabled person is a disabled person who, in relation to a relevant matter, is of a description specified in the second column of the applicable table in this Part of this Schedule.

Employers (see section 39)

5

(1) This paragraph applies where A is an employer.

Relevant matter	*Description of disabled person*
Deciding to whom to offer	A person who is, or has notified

employment.	A that the person may be, an applicant for the employment.
Employment by A.	An applicant for employment by A. An employee of A's.

(2) Where A is the employer of a disabled contract worker (B), A must comply with the first, second and third requirements on each occasion when B is supplied to a principal to do contract work.

(3) In relation to the first requirement (as it applies for the purposes of sub-paragraph (2))—

(a) the reference in section 20(3) to a provision, criterion or practice is a reference to a provision, criterion or practice applied by or on behalf of all or most of the principals to whom B is or might be supplied,

(b) the reference to being put at a substantial disadvantage is a reference to being likely to be put at a substantial disadvantage that is the same or similar in the case of each of the principals referred to in paragraph (a), and

(c) the requirement imposed on A is a requirement to take such steps as it would be reasonable for A to have to take if the provision, criterion or practice were applied by or on behalf of A.

(4) In relation to the second requirement (as it applies for the purposes of sub-paragraph (2))—

(a) the reference in section 20(4) to a physical feature is a reference to a physical feature of premises occupied by each of the principals referred to in sub-paragraph (3)(a),

(b) the reference to being put at a substantial disadvantage is a reference to being likely to be put at a substantial disadvantage that is the same or similar in the case of each of those principals, and

(c) the requirement imposed on A is a requirement to take such steps as it would be reasonable for A to have to take if the premises were occupied by A.

(5) In relation to the third requirement (as it applies for the purposes of sub-paragraph (2))—

(a) the reference in section 20(5) to being put at a substantial disadvantage is a reference to being likely to be put at a substantial disadvantage that is the same or similar in the case of each of the principals referred to in sub-paragraph (3)(a), and

(b) the requirement imposed on A is a requirement to take such steps as it would be reasonable for A to have to take if A were the person to whom B was supplied.

Principals in contract work (see section 41)

6

(1) This paragraph applies where A is a principal.

Relevant matter	*Description of disabled person*
Contract work that A may make available.	A person who is, or has notified A that the person may be, an applicant to do the work.
Contract work that A makes available.	A person who is supplied to do the work.

(2) A is not required to do anything that a disabled person's employer is required to do by virtue of paragraph 5.

59. Paragraph 20 of Schedule 8 – Lack of knowledge of disability, etc

(1) 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) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

(2) …

(3) If the duty to make reasonable adjustments is imposed on A by section 55, this paragraph applies only in so far as the employment service which A provides is vocational training within the meaning given by section 56(6)(b).

60. Section 39 which imposes these duties on the first respondent as employer:

Employees and applicants

(1) An employer (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer.

(6) Subsection (1)(b), so far as relating to sex or pregnancy and maternity, does not apply to a term that relates to pay—

(a) unless, were B to accept the offer, an equality clause or rule would have effect in relation to the term, or

(b) if paragraph (a) does not apply, except in so far as making an offer on terms including that term amounts to a contravention of subsection (1)(b) by virtue of section 13, 14 or 18.

(7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

(a) by the expiry of a period (including a period expiring by reference to an event or circumstance);

(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

(8) Subsection (7)(a) does not apply if, immediately after the termination, the employment is renewed on the same terms.

61. Section 41 which imposes the potential liability on the second respondent as the principal where the claimant is a contract worker

41 Contract workers

(1) A principal must not discriminate against a contract worker—

(a) as to the terms on which the principal allows the worker to do the work;

(b) by not allowing the worker to do, or to continue to do, the work;

(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;

(d) by subjecting the worker to any other detriment.

(2) A principal must not, in relation to contract work, harass a contract worker.

(3) A principal must not victimise a contract worker—

(a) as to the terms on which the principal allows the worker to do the work;

(b) by not allowing the worker to do, or to continue to do, the work;

(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;

(d) by subjecting the worker to any other detriment.

(4) A duty to make reasonable adjustments applies to a principal (as well as to the employer of a contract worker).

(5) A "principal" is a person who makes work available for an individual who is—

(a) employed by another person, and

(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

(6) "Contract work" is work such as is mentioned in subsection (5).

(7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

62. Following submissions, we also considered the impact of S110 which deal with liability between agents and principals. It does not apply here on the basis that there appears to be no agency relationship between the first and second respondents. It is clear that in order for s110 to apply, there must be a common law agency relationship (KEMEH (appellant) v. MINISTRY OF DEFENCE (respondent) - [2014] IRLR 377)- namely that the agent has the authority to bind the principal to a contractual obligation. We heard no evidence to suggest such a relationship – it was common ground that there was no contractual relationship between the claimant and the second respondent.

63. The case to which we were referred in relation to the substantive issues was *Donelien v Liberata UK Ltd* [2018] IRLR 535, (but no particular passages), which also referred to *Gallop* in respect of the issue of constructive knowledge. The ratio appears to be set out at paragraph 32 where Lord Justice Underhill (referring to *Gallop v Newport City Council* [2013] EWCA Civ 1583, [2014]IRLR 211 CA) says.

> *In my view it is plain that Rimer LJ did not intend generally to discount the value of such [occupational health] advice. The basis on which the employee's appeal was allowed was that the ET had found that the employer was entitled to rely, and rely exclusively, on the opinion of the occupational health advisers in circumstances where that opinion was worthless because it was unreasoned. That is perhaps most clear from para [42] of Rimer LJ's judgment ('relying simply on its unquestioning adoption of OH's unreasoned*

opinion') but equally from paras [40] and [43] ('he cannot simply rubber-stamp the adviser's opinion').That is very far from saying that an employer may not attach great weight to the informed and reasoned opinion of an occupational health consultant. That was the view of the EAT, and in particular of the lay members, in the present case. Having expressed at para [30] of his judgment essentially the same view as me about the ratio of Gallop, Langstaff J went on to say, at para [31], that while an ET will 'look for evidence that the employer has taken its own decision ... the lay members sitting with me in this case would wish to emphasise that in general great respect must be shown to the views of an Occupational Health doctor', though such views should not be followed uncritically.

Issues for the tribunal to determine

64. The issues for the tribunal to determine are those set out at the Annex to the Case Management Order but subject, as I mentioned, to the detail in the ET1 and ET3s (and disability having been conceded).

65. They are:

66. Section 15: discrimination arising from disability

    a. the allegations of unfavourable treatment are

        i. moving the claimant to final assembly 2 roles which he was unable to do from November 2017. (We refer here to paragraphs 9 to 11 of the claimant's particulars of claim. They say

        "9). My condition of permanent nerve damage means I would take longer to break into a job role as compared to a normal employee as my body has to get used to the job role.

        10). I was unable to take on the job roles offered to me in final assembly 2, line 4 as they were too painful for my condition and will cause swelling around my hand/wrist numbness and a loss of strength in my hand. Also, I would get dizzy and light-headedness from working in engine bay.

        11)I did not get a reasonable amount of time to break into the job roles offered to me in FA2, I believe 2 to 6 hours of the job considering my conditions is not reasonable and no consideration was given to my conditions when placing me in them roles. However, I understand station 17 on the engine line and engine bay on line 4 sufficient time was provided but management knew I didn't have a favourable or reasonable chance in those positions considering my injuries.").

        It is therefore, in our view, clear, that the pleaded issue of moving the claimant on to final assembly 2 roles which he was unable to do necessarily includes the unfavourable treatment of failing to allow sufficient time for the claimant to "break into" the roles.

        ii. Terminating his assignment with JLR on 4 January 2018

b. Can the claimant prove that the respondent treated him as set out above

c. Is the claimant's difficulty with hand grip, strength and twisting and hence is less difficult to the roles offered to him "something arising in consequence since of the claimant's disability"?

d. Did the respondent treat the claimant as aforesaid because of the "something arising" in consequence of the disability?

e. Has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had a disability at the relevant time?

f. Alternatively, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim? Respondents must fully plead a justification defence (legitimate aim, business deed, proportionality et cetera if one is to be relied on).

g. We note that the first respondent relies on the "justification" defence that the legitimate aim was ensuring that the respondent complies with its contractual obligations to its clients in paragraph 44 of its amended response and that the termination of the claimant's assignment was a proportionate means of achieving that aim. The second respondent sets out its defence in paragraph 21 of its response namely that the legitimate aim is maintaining an appropriate and acceptable level of capability within the manufacturing part of its business to ensure that manufacturing personnel are able to satisfy the requirements of the necessary tasks such that the business is able to meet the expectations and demands of its customers. It says that it is proportionate to apply the required level of physical capability to manufacturing personnel to meet that legitimate aim.

67. Reasonable adjustments: section 20 and section 21

a. did the respondent apply the following provision, criterion and/or practice "the provision" generally, namely

   i. the requirements of the following roles on final assembly 2 - sub assembly, label fit, engine bay, booster pipes and flex takt

b. did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:

   i. he was unable to perform those roles and

   ii. ultimately his assignment was terminated

c. did the respondent know, or could the respondent be reasonably expected to know that the claimant

   i. had a disability and

   ii. was likely to be placed at the disadvantage set out above?

d. If so, did the respondent take such steps as are reasonable to avoid the disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know the adjustments asserted as

reasonably required and they are identified as returning him to any of the roles he had previously been able to do on final assembly one or any other role that would accommodate his disability.

68. The case management order then records that the respondent's case in respect of the adjustments that were made were to be provided subsequently.

69. It was not been pleaded on behalf of either respondent in their respective responses that either they made adjustments that were sufficient to meet the duties on them and/or that any proposed adjustments would not have removed the disadvantage or unreasonable for any reason.

70. This is because the first respondent's pleaded case is that it did not operate any provision criterion or practice in respect of the day-to-day tasks undertaken by the claimant in his placement with the second respondent.

71. The second respondent's pleaded case is that it did not have such a duty as it did not know and could not reasonably have been expected to know about the claimant's disability; or alternatively, that the PCPs did not substantially disadvantage the claimant compared to persons who are not disabled because it's occupational health Department had advised that the claimant was sufficiently able to undertake a full upstanding role. Particularly, it says, that the claimant could not be certain that he was unable to undertake the roles referred to without trialing them. Effectively, we take this to mean that the claimant is unable to show that he was subject to disadvantage as a result of PCPs because he did not in fact undertake any of the roles. In his final submissions, however, Mr Barker did seek to assert that the second respondent did in fact make reasonable adjustments for the claimant (whether he was disabled or not) insofar as it moved him every time he complained about the impact of a role on his wrist injury. He says that the second respondent referred the claimant to its occupational health team.

72. In reality, however, the second respondent's primary argument was that it did not know and could not reasonably have been expected to know that the claimant was disabled. The first respondent's primary argument is that, in respect of the actual work undertaken at the second respondent's factory the first respondent had no control over what was done. To that extent it could not be held liable, it says, for any alleged acts of discrimination arising from the requirements to undertake particular roles in the factory. In respect of the termination of the claimant's assignment, the first respondent is saying that **in reality**, it had no control over that as it was compelled to follow the second respondent's instructions.

Findings

73. We will deal with each of the issues in turn and make only such findings of fact as are necessary to deal with those issues. Where we have made findings about disputed facts, we have made those decisions on the balance of probabilities. We have heard a great deal of evidence, but it is not necessary for the purposes of coming to a decision on this claim to make a decision about every matter.

Section 15

Unfavourable treatment

Moving roles

74. this unfavorable treatment comprises of two elements: moving roles from FA1 to FA2 and being required to undertake roles he was unable to do.

75. We find that the decision to move the claimant from FA1 to FA2 was not of itself necessarily unfavourable treatment. The decision was taken, it was said, for business reasons. There was a greater need for staff in FA2 at that point and Mr Marshall's evidence on this point was unchallenged. The point at which it became potentially unfavourable treatment was when the claimant was required to undertake specific roles in FA2 which he says he was unable to do.

76. A requirement to undertake roles that a person cannot do is unfavourable treatment. We accept the claimant's evidence that he could not do the roles. Although Mr Marshall and Mr Gardiner both sought to rely on the occupational health advice as evidence that the claimant could do all the roles required of him, the claimant's disability is accepted by both respondents and the extent of the difficulties the claimant faced was not challenged by either respondent. Therefore, we find that the claimant was subjected to unfavourable treatment by the second respondent by being required to undertake roles he couldn't do.

77. The claimant said that it was also unfavourable treatment to not give him a chance to try the jobs for long enough – he was only given a few hours, rather than two weeks. We do not agree with this. Of itself, removing a person from a job that they say they cannot do because of their disability is not unfavourable treatment and we accept the respondents' argument that removing the claimant from a job if he complains of pain or difficulty was a reasonable decision to make.

Terminating contract

78. It is clear that ending someone's work by terminating their contract is unfavourable treatment. It was not disputed that the first respondent actually made the decision to end the claimant's assignment. This was unfavourable treatment by the first respondent.

79. The second respondent disputed that it had in reality terminated the claimant's role. It said that the claimant asked to be released. We were referred to the email at page 68 from Mark Amos to Paul Gardiner and Mark Trappett where it is said that the claimant said "If not then I will have to be released". The claimant disputed that he said these words. We find that on the balance of probabilities there was a conversation between the claimant and Mark Amos about his continuing work, but it was clearly in the context of the claimant having asked for alternative roles because he struggled with engine bay. He was acknowledging, we find, that if the second respondent would not trial him on another role, they would in all likelihood end his assignment, and that is what they did.

80. We therefore find that the second respondent subjected the claimant to the unfavourable treatment of requiring his placement to be terminated. We accept the first respondent' s evidence that they were contractually obliged to comply with the second respondent's instructions in this

respect. It is obvious that they could not send the claimant where he was not wanted. Effectively, therefore, the second respondent terminated the claimant's assignment.

81. Was the unfavourable treatment (moving and not being given enough time to trial roles; and being terminated) because of something arising in consequence of disability - i.e. nerve damage to the claimant's wrist and associated symptoms?

82. In respect of the requirement to undertake roles he could not perform, we find that this was unfavourable treatment in consequence of something arising from the claimant's disability. The claimant could not do the roles because of the pain and weakness in his wrists. Again, the effect of his disability was not disputed. Mr Gardiner said, in evidence, that the claimant did not have the "will or want" meaning that he was not motivated to work. Mr Marshall referred to the claimant's "effort rating" and said that he thought the claimant was looking for an easier job. The clear implication was that the claimant was looking for an easy life.

83. We heard about one of the processes in detail and the claimant said that he could do all but one of the ten actions required in one 90 second process. Mr Marshall disputed that that task would cause difficulty for the claimant. We did not hear about any of the other processes in detail. When asked about the difference between roles in FA1 and FA2, Mr Gardiner's view was that FA1 and FA2 both consisted of manual work so that if the claimant cold do something in FA1, he could do something in FA2. There was a distinct lack of detail.

84. We prefer the claimant's evidence on this point. The claimant had worked for 18 months without complaint and his evidence was consistent. In light of the accepted disability it seems highly likely that fast manual tasks would cause problems for someone with the claimant's disability. Conversely, Mr Marshall disputed that easier jobs were preferred by staff in cross examination despite suggesting that the claimant was looking for an easier job and Mr Gardiner was unable to give any detailed evidence about the depth of task.

85. In respect of the termination of the contract, therefore, we find that the claimant's contract was terminated because he could not do the roles allocated to him in FA2 and, for the reasons expressed above, this was in consequence of his disability. The claimant's contract was therefore terminated because of something arising in consequence of his disability.

Actual or constructive knowledge of disability

Actual knowledge

86. We consider the second respondent's knowledge of disability first. There are two questions – did the second respondent actually know at any point that the claimant was disabled and, if not, could they reasonably have been expected to have known.

87. We find that the second respondent did not, at the relevant time – being from 13 November 2017 to 4 January 2018 – actually know that the claimant was disabled for the following reasons.

88. The claimant completed two sets of forms when starting his employment. The first a Manpower form in which he said on 18 November 2015 that he had an injury but would be fit for work by that December. The second is a Jaguar Landrover form at page 58 dated 2 February 2018 in which the claimant ticked "no" to the question "do you have a physical or mental health condition which substantially affects your ability to carry out day-to-day activities"? The claimant accepted that he understood this to be the definition of disability.

89. Then, throughout 2016 and until November 2017 the claimant worked without apparent issue having one day off sick in FA1. He said that his then manager (Wayne Neville) had accommodated his difficulties which allowed him to work without problems but he had been prevented from providing a sick note. The second respondent was therefore, we find, during this period unaware of the claimant's impairment and, despite accommodating his difficulties, had no basis on which to know he was disabled.

90. The claimant put to Paul Gardiner in cross examination that he had told him about his conditions when moving from FA1 to FA2. Paul Gardiner was unclear about that - he couldn't remember. However, the claimant had produced no evidence in his witness statement to support this. We therefore do not make any findings as to whether such a conversation did or did not happen.

91. When the claimant moved to FA2 under Steven Marshall he said that he was having difficulties with the tasks assigned to him and he was referred to occupational health. The claimant produced no medical evidence and the first occupational health adviser on 16 November 2017 said "Based on this assessment following restrictions in pace: Limited use of right arm, no sustained or heavy grip with right until physio appointment on 20/11/2017 at a11.30 with Paul Grenell". It is apparent that this assessment was based on the claimant's report of his difficulties and there was no medical evidence before the occupational health adviser on 16 November.

92. Then, at the appointment on 20/11/17, Paul Grenell said "In the absence of any form of communication from the patient's GP or the patient being registered with a recognised disability, it is the opinion of the assessing occupational health physiotherapist and based on the outcome of today's assessment, that Mr Arif be deemed fit for work. The extent at which (sic) level of capacity can only be determined by Mr Arif who has reported and presented with some self-limiting factors that are currently affecting his placement in a full upstanding role. Mr Arif has been directed back to his GP for further management and has also been requested to bring and present all GP notes at future occupational health appointments".

93. Mr Marshall relied on that report as conclusive evidence that the claimant was fit for work and, by implication, not disabled in respect of any of the tasks he was required to do.

94. It is apparent that Paul Grennell made that assessment in the absence of medical information about any impairment Mr Arif was suffering at the time and solely on the basis of what was reported to him.

95. We find, therefore, that neither Paul Grennell nor Steve Marshall – and therefore the second respondent - had **actual** knowledge that the claimant was disabled at that time. This continued throughout the remainder of his employment with the second respondent. This is because there was no medical evidence in the hands of the second respondent from which the second respondent could conclude that the claimant had an impairment.

96. We note here that both respondents disclaimed any responsibility for considering the pre placement-health questionnaire. It is not at all apparent that even had the claimant indicated on the form that he had a disability that this would have come to the actual attention of the second respondent. However, our findings are based on the fact that even had the forms made their way to the correct place, they disclosed no impairments or disabilities.

97. In respect of the first respondent's actual knowledge of disability, the same findings apply in respect of the completion of the forms. There was no disclosure by the claimant to the first respondent of any disability. The findings of the occupational health advisers were communicated to Amy Kelly in November 2017, but these were to the effect that there was no evidence of the claimant being disabled. In fact, the claimant accepted that he did not produce any medical evidence to the first respondent until the reconvened appeal hearing on 21 February 2018. This was outside the period in question - long after the last act relied on by the claimant on 4 or 11 January 2018. For these reasons we find that the first respondent did not have actual knowledge of the claimant's disability at the time of the alleged acts.

Constructive knowledge

98. Turning now to the question of whether the second respondent could reasonably have been expected to know that the claimant was disabled. We find that the second respondent could, within a few days of the claimant being moved to FA2, have been reasonably expected to know that the claimant was disabled.

99. We accept that the claimant told his former line manager, Wayne Neville, in FA1 that he struggled to undertake certain duties because of the ongoing problems with his wrist. This was not disputed. At that point the second respondent was put on notice that the claimant might be disabled

but in fact did not need to take any further steps to investigate this as his difficulties were able to be accommodated within the business. This is referred to in the minutes of the second appeal meeting by Mark Trappett (trade union representative and employee – referred to as "JLR's union representative).

100. When the claimant was moved to FA2, however, it was again clear to the respondent that the claimant had difficulty undertaking some of the tasks associated with the processes he was assigned to. The claimant says in his witness statement that a manager called Garry confirmed that his new manager in FA2 had been made aware of his issues. However, Steve Marshall said in his witness statement that he did not know the claimant had a wrist injury at the time; and it was clear from cross examination that Mr Marshall only found out about the claimant's wrist injury when the claimant told him. Mr Marshall's evidence is that "After a couple of days Mohammed came to me and told me that flex takt was aggravating his wrist injury and he was in too much discomfort to continue".

101. It is not clear when this happened, but the claimant was referred to the first occupational health appointment on 16 November, so it was clear to the second respondent almost as soon as the claimant started in FA2 that he was having problems.

102. We find that this was the point at which the second respondent was put on notice that the claimant had a potential disability, if not in FA1.

103. We have referred to the findings of the occupational health advisers above. Mr Marshall was of the clear view in cross examination that the report of Paul Grenell was unequivocal – the claimant was fit for work. He said that he "Follows facts not opinions. If the occupational health says fit or not fit he would follow that recommendation. He said that it was not open to interpretation. If he was unsure, Mr Marshall said, he would seek guidance and clarity.

104. We find that the report of Paul Grenell was not an unequivocal fact. It was a guarded opinion based on the self-reported symptoms of the claimant. It says, at the end, that the claimant has been requested to bring GP notes to future OH meetings. This should have been enough for Mr Marshall to seek guidance as he said.

105. It was put to the claimant by the respondents that the onus was on him to provide medical evidence. We do not agree. The Occupational Health appointment on 20 November 2017 was the first time the respondent had mentioned medical evidence. In fact, Wayne Neville had said he did not need medical evidence. It was also reasonable for the claimant to expect that he would be referred for another Occupational Health appointment where he could present this evidence. For the avoidance of doubt, we resolutely reject the second respondent's submissions that the claimant

deliberately concealed medical evidence for the purposes of constructing a claim.

106. Thereafter, the respondent gave no further consideration to whether the claimant was disabled, instead adopting its interpretations of the occupation health report as fact. In fact, when the claimant continued to raise further issues about his difficulties after this report, the respondent ought to have made further enquiries at that point, re-referring the claimant to occupational health if necessary. It did not do so.

107. We refer again to the failure by the second respondent to acknowledge its knowledge of the pre-placement health questionnaire. We infer from this that at that time, prior to the introduction of the agency restricted worker process, the second respondent did not give as much consideration to the requirements of disabled agency workers as it said it did to its core employees. It referred, by way of example, to ringfenced roles for core employees and Mr Gardiner said that it was not the second respondent's practice to send agency workers to its Occupational Health department unless they had an accident at work. This also persuades us to give greater weight to the claimant's evidence on these matters.

108. We refer to the case of *Donelien*. It is clear that while the employer is entitled to attach great weight to the view of its occupational health advisers, it must not simply rubber stamp their opinions. In this case, the second respondent give no independent consideration to the question of whether the claimant was disabled. In fact, no such question was asked of the occupational health adviser. Instead, it unthinkingly accepted the caveated opinion that the claimant was fit for work and, by implication, not disabled. We note the point made in submissions that disabled people can, of course, be fit for work but the context in the case of the occupational health reports is that those reports said that the claimant was not, contrary to the claimant's representations, prevented from carrying out any tasks.

109. Had the second respondent addressed its mind to the question of disability at the point of the first Occupational Health referral, and asked the specific questions, it may well have received a different answer. Particularly if it had instructed the claimant to take medical evidence to the appointment on 20 November. In light of this and the position of the second respondent in accepting the claimant's disability we find that the second respondent could reasonably have been expected to know that the claimant was disabled by 20 November 2018.

110. We also find that the first respondent could reasonably have been expected to know that the claimant was disabled. The occupational health assessment of 20 November was sent to Amy Kelly at the first respondent and she refers to in in her email of 20 November 2017. She further says "If he cannot hold a process we will readdress this with him". In evidence, Ms Kelly said that if manpower employees had restrictions this would result in a conversation with Jaguar Landrover. The first

respondent was therefore aware by 20 November that the claimant had issues that could amount to a disability.

111. In any event, certainly by 7 December, the first respondent was aware that the claimant was not able to work on the engine line because of wrist pain (see the email of that date at page 74). The first respondent did not give any evidence of any steps they took to assess whether the claimant was disabled, relying it appears on the second respondent. For these reasons, the first respondent could reasonably have been expected to know, by 7 December 2017 at the very latest, that the claimant was disabled.

Proportionate means of achieving a legitimate aim

112. Although the defence was pleaded on behalf of the second respondent, we heard no evidence directly in support of a legitimate aim – there was nothing explicit in either of the second respondent's witnesses statements to evidence the assertion that any of the treatment directed at the claimant was to maintain an acceptable level of capability in the business.

113. However, even if that evidence can be gleaned from the statement of Paul Gardiner, we do not accept that requiring the claimant to undertake roles that he was physically incapable of doing without pain without properly making reasonable adjustments (see below) is a proportionate means of achieving that aim. We refer to *Carranza v General Dynamics Information Technology Ltd* [2015] IRLR 43, [2015] ICR 169 in which it was noted that the duty to make reasonable adjustments and the prohibition from discrimination arising from disability may be closely related. 'An employer who is in breach of a duty to make reasonable adjustments and dismisses the employee in consequence is likely to have committed both forms of prohibited conduct.'

114. This applies, self-evidently, to the unfavourable treatment of terminating the claimant's assignment.

115. The legitimate aim pleaded on behalf of the first respondent was that of complying with its contractual obligations to the second respondent. Although we did not see that contract, we accept Amy Kelly's evidence on this point and we agree that this is a legitimate aim.

116. We do not, however, accept that immediately removing the claimant from the contract was a proportionate means of achieving that aim. We acknowledge that to an extent the decision as to whether a worker may return was out of the first respondent's hands - the first respondent could not, as mentioned above, send workers where they were not wanted. However, it is clear that, since 16 January 2018, there has been a process in place between the first and second respondents called "Manpower agency restricted worker process". We were referred to this a number of times. This sets out a much more detailed process of discussion, consideration and negotiation between first and second respondent in respect of the placement of disabled agency workers. For example, it says that there would be a meeting with first respondent and the employee with the trade union representative followed by a detailed assessment and then a negotiated attempt at appropriately placing worker.

117. This process was not in place at the time that the claimant was taken off the assignment. However, it does indicate that there were clearly steps that could have been taken as between the first and second respondent before terminating the claimant's assignment. The steps, it appears, are now fully formalised. Although there was a further request much later around July 2018 from the first respondent to the second respondent to take the claimant back, this was too little, too late. This should have happened much earlier.

118. Therefore, immediately terminating the claimant's assignment on instruction from the second respondent without a further process such as that set out in the new restricted worker process was not a proportionate means of the first respondent achieving the legitimate aim of complying with its contractual obligations.

Reasonable adjustments

119. We consider now the reasonable adjustments claims.

PCP

120. The PCP relied on by the claimant is that of "the requirements of the following roles on final assembly two-subassembly, label fit, engine bay, booster pipes and flex takt".

121. This was a PCP of the second respondent as is agreed at paragraph 24 of the respondent's response. Amy Kelly says in her witness statement that first respondent is not told where any worker would work, and they have little control over the actual work that they do on site. This was not challenged by the claimant and we find that the first respondent did not have the PCP of the requirements of any of the roles as referred to previously.

Substantial disadvantage

122. The two disadvantages relied on are that firstly, the claimant was unable to complete the roles assigned to him because of the problems with his wrist; and secondly that his assignment was terminated. We were invited to find that as the roles the claimant was undertaking were agreed by the claimant as being difficult for non-disabled people that he was not thereby subjected to a substantial disadvantage compared to nondisabled people. We do not accept this. Although, as referred to above, Steve Marshall said that he felt the claimant's issues were more to do with his level of effort, the claimant's disability is, as mentioned previously, accepted. We have no hesitation, therefore, in finding that the claimant did experience pain, discomfort and difficulty in carrying out these roles.

123. We refer to the case of *Fareham College Corporation v Walters* 2009 IRLR 991, EAT in which it was observed that it will not always be necessary to identify a comparator. This is such a case. It is obvious that if a job is difficult for a person without a disability, the job will be more difficult for a person with a disability that impacts directly on their ability to do the job.

124. Further, we find that the disadvantage the claimant was put to was substantial. Clearly the disadvantage of having his contract terminated was substantial. We accept that the claimant's difficulties were genuine.

As mentioned previously, the claimant had worked without issue for 18 months doing work which respondents said was similar. We note also that this was a well-paid role paying, according to the claimant's statement of loss, over £600 a week net. We accept the claimant's submissions that it would be highly unlikely that he would give up such a well-paid job without a genuine reason.

Knowledge of disadvantage

125. We have considered the issue of knowledge of disability above, and the same findings apply in respect of section 20. In respect of the additional question of whether the second respondent knew or could reasonably have been expected to know that the claimant was likely to be placed at the disadvantage, we find that the second respondent either knew or ought to have known.

126. It is not disputed that the claimant told the second respondent on a number of occasions that he could not do the job. He said this was because of his wrist, and the fact is that the second respondent effectively did not believe him. Had they actually known of the claimant's disability, they would have known that his difficulties arose from that disability.

Reasonable steps

127. Finally, did the second respondent take such steps as were reasonable to avoid the disadvantage. The claimant's position was that respondent should have moved him to the role that he was capable of doing. It was common ground that the claimant did trial a number of roles. There was a disagreement as to that number but the contemporaneous email evidence lists four roles namely engine bay, flex tact, right-hand label fit and booster pipes.

128. We accept the claimant's evidence that none of those roles were suitable. We refer again to the agency restricted worker process which was not in place at the relevant time but was shortly afterwards. This is a good example of what steps might reasonably have been taken. Specifically, that process requires the relevant employee to complete self-assessment prior to an occupational health assessment. After those two assessments the first and second respondent effectively work together to identify a suitable role. That is manifestly what did not happen in this case. What happened was that the claimant was moved to roles that were available and when he said they caused him pain he was taken off them. There is no suggestion whatsoever that the second respondent took any steps to consider what roles might be suitable in light of the claimant's particular difficulties. There was no investigation as to the claimant's condition and no attempt to understand the claimant's disability.

129. Consequently, it follows that the second respondent did not take such steps as were reasonable to alleviate the substantial disadvantage.

130. The alternative option of adjusting the jobs to remove the particular processes that caused the claimant's difficulties was explored in the course of the hearing. The respondent said that the task of "rebalancing" processes would be an onerous task. We note the respondent's evidence that there were 2500 employees in FA2. We also note the nature of the

environment in which the second respondent operated. To the extent that is necessary, therefore, we accept the respondent's evidence that it would not be reasonable to adjust the individual processes for the claimant. Particularly, we have regard to the fact that notwithstanding the respondent's apparent attitude at the time towards agency workers, it did employ a number of core employees with disabilities which it was accommodating. A requirement to rebalance each process to accommodate a wide degree of varying disabilities of a large number of people would, we accept, be unreasonable.

Conclusion

131. For the foregoing reasons, therefore, the claimant's claim of discrimination arising from disability pursuant to section 15 Equality Act 2010 succeeds in all respects against the second respondent

132. The claimant's claim of discrimination arising from disability pursuant to section 15 of the Equality Act 2010 succeeds against the first respondent only in respect of the decision to remove him from the assignment with second respondent.

133. The claimant's claim of failure to make reasonable adjustments pursuant to sections 20 and 21 of the Equality Act 2010 does not exclude against the first respondent

134. The claimant's claim of failure to make reasonable adjustments pursuant to sections 20 and 21 of the Equality Act 2010 succeeds in every respect against the second respondent.

Employment Judge **Miller**

Date 18 October 2019