EMPLOYMENT TRIBUNALS

Claimant: Mr B Killeen

Respondent: P J Services (Bolton) Limited

Heard at: Manchester **On:** 10, 11 and 12 December 2019

Before: Employment Judge Ross
Dr Vahramian
Mrs Ramsden

REPRESENTATION:

Claimant: In person
Respondent: Miss R Kight, Counsel

JUDGMENT

1. The claimant does not have jurisdiction to bring a claim for unfair dismissal pursuant to Section 95 and Section 98 of the Employment Rights Act 1996 because he was not an employee within the meaning of Section 230 Employment Rights Act 1996.

2. The claimant's claim that he was unfavourably treated by the respondent pursuant to Section 15 Equality Act 2010 when he was dismissed as a labour only sub-contractor is well founded and succeeds.

3. The claimant's claim that the respondent failed to make reasonable adjustments pursuant to Section 20 to 21 Equality Act 2010 when they required him to work alone on building sites at various times during the course of his employment is not well founded and fails.

4. The claimant's claim he was treated less favourably than a real or hypothetical comparator when he was dismissed by the respondent as a

labour only sub contractor pursuant to Section 13 Equality Act 2010 is not well founded and fails.

5. The claimant's claim that he suffered disability related harassment pursuant to Section 26 Equality Act 2010 when Mr Maher told him "I'm not going back on my word" on 1 February 2019 is not well founded and fails.

REASONS

1. The claimant worked for the respondent from 27 July 2016 until 31 January 2019. The respondent says the reason for the termination of the relationship was a reduction in work. The claimant is not satisfied that a reduction in work was the real reason for his dismissal.

2. The claimant brings claims to this Tribunal for unfair dismissal and for disability discrimination. The respondent disputes the claimant is eligible to bring a claim under the Employment Rights Act 1996 for unfair dismissal because it alleges he was not an employee within the meaning of Section 230 Employment Rights Act 1996.

3. For the disability discrimination claim the impairments relied upon by the claimant are Type 1 diabetes and depression. By the date of the hearing the respondent agreed that the claimant was a disabled person within the meaning of Section 6 Equality Act 2010 by reason of those impairments. The respondent accepts it had knowledge of the claimant's impairment of diabetes but does not accept it had knowledge of depression. It does not accept it had knowledge of the substantial disadvantage in relation to the reasonable adjustments claim.

4. The claimant also brings a claim that the termination of his working relationship with the respondent (dismissal) was unfavourable treatment pursuant to Section 15 Equality Act 2010. He brings a claim for direct discrimination pursuant to Section 13 Equality Act 2010 in relation to the termination of his employment. He also brings a claim for harassment pursuant to Section 26 Equality Act 2010 in relation to the remarks made by Mr Maher "I'm not going back on my word" the day after he dismissed the claimant.

5. We heard from the claimant. For the respondent we heard from Mr Maher, the Managing Director of the respondent and the person who terminated the claimant's engagement, Mr Poole the Contracts Manager and Mr Law, Site Foreman for the respondent.

6. The claimant produced witness statements from his daughter and from his sister. The respondent produced a witness statement from another employee who has diabetes. None of these 3 witnesses attended the Tribunal and accordingly the Tribunal did not attach any weight to their evidence.

7. At the outset of the hearing a number of documents were produced late which were included in the bundle.

8. At the outset of the hearing and during the hearing the claimant expressed his concern that the respondent had not disclosed all relevant documentation. Employment Judge Ross invited the claimant to make an application for a specific discovery if there were particular documents which he believed had not been disclosed but which should have been. The claimant decided not to pursue this option.

9. The claimant who suffers from Type 1 diabetes was granted regular breaks. Lunch was taken early on the second day as the claimant was feeling unwell.

FACTS

10. We find the following facts. The claimant is a joiner. The respondent is a small building contractor business. Their main clients are local authorities. The respondent works on the refurbishment and maintenance of local authority properties such as schools, council houses and public buildings. They also refurbish and maintain some properties for commercial clients but this is only a small part of their business.

11. It is agreed that in July 2016 the claimant was hired by Mr Poole, the respondent's contract manager. Mr Poole explained that he was not usually responsible for hiring (Mr Maher was on leave) but at that time the business had a contract for refurbishment of a school which needed to be done over the summer holidays and they urgently needed joiners. Mr Poole said the claimant was initially engaged on a temporary basis over the summer. The claimant worked continuously for the respondent until January 2019.

12. The claimant's working relationship with the respondent was ended by Mr Maher, the owner of the business, on 31 Jan 2019 by telephone call, whilst the claimant was attending a diabetic clinic. Mr Maher says the reason for the termination of the working relationship was a reduction in work.

13. Mr Poole said the claimant was recommended to him by a foreman. Both the claimant and Mr Poole agreed that in July 2016 the claimant attended the respondent's office and was offered a position. Mr Poole says he offered the position on a subcontractor basis.

14. Mr Poole says he gave the claimant the occupational health form at page 51-52 of the bundle to complete together with the next-of-kin paperwork and bank details form to return to the office. The claimant declared on the OH form he had type 1 diabetes but required no adjustments.

15. There is no dispute that nothing at all was provided by the respondent to the claimant, or the claimant to the respondent, in writing about the nature of the working relationship.

16. The parties agree that the claimant started work on 27 July 2016.During the time he worked for the respondent the claimant was employed to work on various sites from care centres to schools. He worked on some sites such as tenant properties where he worked alone but also on much bigger sites with many other workers.

17. When the job on the school site in the summer of 2016 was completed the respondent continued to provide the claimant with work and he continued to work for them. Both Mr Maher and Mr Poole agreed that there was no end date given for the claimant's working relationship. Mr Maher said: "it was not a fixed engagement" and he agreed the claimant "didn't know how long the engagement would be for."

18. The respondent said the claimant was a labour only subcontractor. Mr Maher said at the time the claimant worked for them, they retained 20 employees and three labour only subcontractors. He said they also retained other contractors which he described as limited company subcontractors.

19. The claimant wore uniform for work. The respondent said that was a requirement of the local authorities for whom they worked. The claimant provided his own vehicle but occasionally drove the company vehicle. The claimant provided his own tools but it was agreed he used the company's tools when more expensive or specialised equipment was required. He also used the company's transformers and leads.

20. The claimant said it was agreed he would be paid £15 per hour and would work five days a week, eight hours a day. He supplied the respondent with subcontractor invoices of the type shown at page 78 and 79 of the bundle. The respondent produced subcontractor pay statements see page 72 to 73 of the bundle for examples.

21. The claimant said he sometimes received overtime and on occasion double time for Sundays.

22. The claimant produced statements from his bank showing regular payments into his bank account from 4 Jan 2018-18 Oct 2018 p92 usually in the sum of £480 weekly after deductions. The respondent explained it deducted 20% of his wages in respect of tax under the Construction Industry Scheme. This was described as an HMRC scheme available to contractors and subcontractors as a means of making advance payments towards tax and national insurance contributions which ultimately the claimant was responsible for, rather than paying one big tax bill at the end of the financial year when it came self-assessment. The claimant agreed he submitted a self-assessment for tax. He did not dispute that he was registered under the CIS scheme for tax as a sole trader.

23. There was a lack of clarity about how the amount the claimant was paid each week was decided. In answer to questions Mr Maher said that labour only subcontractors produced invoices, He said it was assumed they were working those hours and were therefore paid the amount on the invoice. He said no deductions were made if the claimant left site early. However he also said that the invoices were checked against timesheets which were completed on site by the site foreman. We find that evidence contradictory and unclear. No time sheets were produced to the Tribunal.

24. The respondent did not pay the claimant sick pay when he was absent for two weeks in hospital for an operation. The claimant was not asked to produce a fit

note and did not do so. It was agreed respondent did not pay the claimant holiday pay. The claimant said he was absent from work on leave for six days only in 2018, four days around his birthday. He was not paid for his absence.

25. The claimant says he was usually told from week to week by the site manager where he would be working the following week. The respondent agreed this was the case. Sometimes the claimant worked on a project for a number of weeks.

26. The claimant did not work for any other organisation between July 2016 and 31 January 2019.

27. Although the respondent said the claimant was responsible for his own hours as a labour only subcontractor both Mr Maher and Mr Poole were critical of the claimant for his timekeeping. Mr Maher said: "the claimant regularly left early and came in late or not at all for a variety of reasons for instance to pick up his daughter or have a haircut."

28. When asked if the claimant was informed that his alleged poor timekeeping was a problem, Mr Maher said it wasn't raised.

29. Mr Poole agreed that the claimant was a skilled worker able to work without detailed instruction.

30. The claimant stated that he was unaware of any power to substitute another worker for himself if he was ill or on leave and never did so.

31. It was agreed the claimant received a Christmas bonus. The respondent said it was awarded to employees and labour only subcontractors but not to limited company contractors. It was agreed the claimant was invited to attend the Xmas party but chose not to attend.

32. Mr Maher said the there was a reduction in work in January 2019. His evidence on this was not always clear. In the response the respondent stated "in January 2019 the respondent lost a building contract which the claimant was assigned to be working on. As a result, there was a downturn in the requirement for joiners in the respondent's business." In his statement Mr Maher put it slightly differently. He said I realised in around December 2018 that we didn't have enough work in the pipeline to justify the number of staff we were engaging/employing at the time". He said that towards the end of January he was informed a contract would be delayed-the Mosscare St Vincent contract. He referred to page 77 of the bundle. However, the evidence in the bundle from January 2019 is a page 74. It is an email dated 10 January 2019 and suggests the properties-five bungalows-have a possession date of 18 February 2019 and a completion date 25 January 2020. There is no documentary evidence until much later in May 2019, p77, that the possession date has been put back to 28 May 2019.

33. When questioned Mr Maher was vague about precisely how the work reduced in January 2019. The claimant said he had work on 3 sites at the time his contract terminated. Mr Maher did not dispute that but suggested the work

remaining was short term. He agreed he was the person responsible for securing contracts. The tribunal finds no documentary evidence in the bundle of loss of contract or reduction in work.

34. Mr Poole said in cross examination that he had a discussion with Mr Maher in December 2018 that they had lost work from Bolton Council. This was not referred to specifically by Mr Maher in his statement and there were no documents in the bundle about it.

35. Mr Poole stated that labour only subcontractors were often aware when a project was coming to an end. The claimant said he was unaware of a reduction in work and believes there were 3 other sites where work was available.

36. The respondent said they let go another joiner the following week and another joiner was absent, sick.

37. It was agreed the claimant was required to report to the site foreman on attending a site. We find that on 31 Jan 2019 the site foreman was Stuart Ferguson. We find on 31 Jan the claimant had a follow up diabetic health appointment at Bolton Diabetes centre at 15.30. p86. We find he had informed Stuart Ferguson site manager that morning that he would be attending the appointment. We find he informed the foreman, he did not seek permission.

38. We find the previous day at 1615 the claimant asked Mr Law site supervisor on that day for the cabin key to check his blood sugar levels and showed Mr Law his glucose machine which stated he had dangerously low blood sugar levels. We find the claimant informed Mr law he was leaving site. The claimant says he told Mr Law it was to treat his blood sugar levels. Mr Law said the claimant just said he was leaving. The claimant says Mr Law said: “you are not finishing the job?” and the claimant said that he was not.

39. There is a dispute of fact but we find we prefer the claimant’s version of events as set out into his claim form. It chimes with some elements of Mr Law’s recollection. The claimant’s recollection is much closer in time to the events as it was presented on 26 Feb whereas witness statement of Mr Law is Oct 2019. We find because it is closer in time the claimant’s written recollection is more likely to be accurate.

40. We find the following day, 31st January, Mr Maher went to the site where the claimant was working at around 3 PM. The claimant was working on a house extension for Bolton Council at 19 Pimlott. The claimant was not there because he had left to attend his diabetic appointment.

41. We find the house extension job was not a large site job and so this site manager/ foreman, Stuart Ferguson, was responsible for up to 4 other sites. Therefore, he was not present on site when Mr Maher arrived. Mr Maher did not contact Mr Ferguson to ask where the claimant was. Both the claimant and Mr Maher agree that Mr Maher telephoned the claimant. They dispute the precise content of the conversation. They agree Mr Maher terminated the working arrangement in that conversation.

42. The claimant says Mr Maher rang him and asked where he was. The claimant says he told him he was at the Diabetic Clinic for a routine appointment and blood test about which he had informed the foreman at 8 AM that morning. He says Mr Maher was irate stating that the claimant had left site early the previous day. The claimant says he explained how the previous day he asked Mr Law site supervisor for the cabin key to check his blood sugar level and showed him his glucose machine with low blood reading and told him he would be leaving early. The claimant says Mr Maher had told him he had had enough of him and he could not come and go as he pleased because he was working for him. He said claimant was on his notice and would give him his next day's pay.

43. Mr Maher says he went to the site on 31 Jan to terminate the claimant's engagement due to a downturn in work and because he had a poor attitude and because he often had non medical excuses as to why he could not keep to sites times which often caused disruption and or delays. When the claimant was not there he telephoned him. He admits he was frustrated as" he had no idea as to why the claimant was not on site when he had been assigned to that job". He agrees that during a telephone conversation "I ended up informing the claimant of my decision to let him go." He admits the claimant informed him during the call that he had left to attend a diabetes appointment. He said that was the first he had heard of it and it was only after the call he was able to verify that the claimant had told his foreman he needed to leave early for a diabetes appointment.

44. The Tribunal finds it likely Mr Law told Mr Maher that the claimant had left work early on 30 January because he had told Mr Maher the claimant had not arrived on 15 January. See Mr Maher's statement para 36.

45. The Tribunal finds Mr Maher went up to site to speak to the claimant about his timekeeping and attendance. Mr Maher says in his statement the claimant "regularly came in late and left early". He also said that when the claimant had not attended on 15 Jan the respondent "put his failure to turn up down to his drinking or personal issues".

46. It is not disputed Mr Maher rang the claimant and asked where he was. The claimant said he was at the diabetic clinic. We find that Mr Maher did not immediately believe the claimant. In his statement he said "this was the first I had heard of it and it was only after the call that I was able to verify that he had left early to attend the appointment"

47. Mr Maher provides no other detail of the conversation other than he was frustrated and "ended up informing the claimant of my decision to let him go". The Tribunal prefers the claimant's recollection of the conversation set out in his claim form. It was completed closer in time to the conversation.

48. Although Mr Maher says the real reason was the downturn in work he could not explain why he would communicate that decision over the telephone after the claimant had told him he was at a diabetic clinic when the claimant had worked for him for over 2 years.

49. The reason for the urgency of the communication is not clear, there is no documentary evidence of a reduction in business and the other joiner who was also let go had only worked for the respondent for a few weeks and was terminated after the claimant, despite Mr Poole suggesting termination of contractors' engagement was on a "last in first out" basis.

50. Accordingly, the Tribunal finds it implausible that Mr Maher dismissed the claimant due to a downturn of work. The Tribunal finds the claimant had his contract terminated because of his absences from work-in particular his absence from site on 31 Jan 19.

51. The claimant says he tried to ring Mr Maher back but there was no reply. It is not disputed claimant went to the office to speak to Mr Maher. Mr Maher says he told the claimant that his decision to let him go still stood.

52. The claimant says he was upset and in tears and and showed Mr Maher his diabetic appointment email on his phone and explained why he had left early the previous day.

53. There is no dispute that the claimant text him around 11 PM that evening and asked for a meeting the following day with a representative. The claimant received a reply from Mr Maher saying he would call at 3 PM. He rang and said that his decision still stood. He agrees that the claimant seemed upset.

54. Previously on 15 Jan claimant says told Mr Poole real reason for absence ie suicidal ad stress. We find and it is not disputed that the claimant told Mr Poole his head was "done in" and he took some tablets. We find the claimant was referring to his mental health but he did not expressly say he was suffering from depression.

THE ISSUES

Unfair Dismissal pursuant to section 95 and section 98 Employment Rights Act 1996

55. Is the claimant eligible to bring a claim? The respondent states he was a self-employed contractor. The claimant states he was an employee.

56. If the claimant was an employee, what was the reason for dismissal? The respondent suggests a reason for dismissal was redundancy.

57. Can the respondent show redundancy was the reason for dismissal?

58. If so, was the dismissal procedurally fair?

59. In particular the respondent consult with the claimant and consider alternative work?

Disability Discrimination

60. Is the claimant a disabled person within the meaning of section 6 Equality Act 2010 by reason of the impairments of (1) Type 1 Diabetes, and/or (2) depression?

61. Did the respondent have actual or constructive knowledge at the relevant time of the impairments of (1) Type 1 Diabetes, and/or (2) depression?

Unfavourable treatment pursuant to section 15 Equality Act 2010

62. Did the respondent dismiss the claimant?

63. Was it because of "something" arising in consequence of disability?

64. What is the "something"? The claimant says it was attendance at Bolton Diabetes Centre for an appointment and blood test for which he had permission from his site foreman.

65. Did the "something" arise in consequence of the claimant's disability of Type 1 Diabetes?

66. If yes was dismissal a proportionate means of achieving a legitimate aim.

Failure to make reasonable adjustments pursuant to sections 20-21 Equality Act 2010

67. What was the provision, criterion or practice "PCP"? The claimant relies upon working alone on building sites at various times during the course of his employment with the respondent.

68. Did the PCP put the claimant at a substantial disadvantage in relation to a relevant matter? The claimant states that if he had a hypoglycaemic attack or a fit as a result of his diabetes he would be put at a substantial disadvantage because he could have fallen or been put at risk. The reasonable adjustments contended for by the claimant are:

69. A first aider on site;

70. Having a second worker with him;

71. Not putting the claimant on a site where he had to work alone.

72. The claimant relies on the same PCP and reasonable adjustments in relation to the impairment of depression.

Direct disability discrimination pursuant to section 13 Equality Act 2010

73. Was the claimant treated less favourably than a real or hypothetical comparator when he was dismissed by the respondent?

Harassment pursuant to section 26 Equality Act 2010

74. What is the unwanted conduct? The claimant relies on Mr Paul Maher telling him "I'm not going back on my word" the day after he sacked the claimant on Friday 1 February 2019.

75. Did the conduct relate to disability?

76. If so, did it have the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile or degrading environment for the claimant?

77. In considering whether the conduct had that effect, the Tribunal will take into account:

78. The perception of the claimant;

79. The other circumstances of the case; and

80. Whether it was reasonable for the conduct to have that effect.

The Law

81. The relevant law in relation to whether or not the claimant was an employee found at Section 230(1) and (2) Employment Rights Act 1996. We had regard to the case law including Ready Mixed Concrete (South East) Limited -v- Ministry of Pensions and National Insurance 1968 1 ALL ER 433 and Cotswold Development Construction Limited -v- Williams 2006 IRLR 881. Counsel also referred us to Pimlico Plumbers Limited & Mullins -v- Mr Smith UKEAT 04 95/12. We also had regard to the Supreme Court's decision in that case 2018 UKSC 29.

82. For the discrimination claim the relevant law is Section 13, Section 15, Section 20 and 21 and Section 26 Equality Act 2010 together with Section 136 Equality Act 2010 (burden of proof). There was no dispute the claimant was in employment within the meaning of s83(2) Equality Act 2010, which is a wider definition than s230(1) and (2) ERA 1996.

83. For the Section 15 Equality Act 2010 claim we reminded ourselves of the guidance in Secretary of State for Justice and Another -v- Dunne EAT 0234/16, Basildon and Thurrock NHS Foundation Trust -v- Weerasinghe 2016 ICR 30, and Pnaiser -v- NHS England and Another 2016 IRLR 170 EAT. We had regard to the EHRC Employment Code of Practice.

84. For the harrassment claim we had regard to Land Registry -v- Grant 2011 EWCA Civ 769 and for the reasonable adjustments claim we had regard to Environment Agency -v- Rowan 2008 ICR 218 and Royal Bank of Scotland -v- Ashton 2011 ICR 632. We also considered Chief Constable of West Midlands Police -v- Gardner 2011 EAT 0174 of 11 and Wilcox -v- Birmingham CAB Services Limited 2010 EAT 0293 10.

Applying the law to the facts

Claim for unfair dismissal-eligibility to bring claim.

85. We turn to the first claim, unfair dismissal, and whether the claimant was an employee within the meaning of Section 230(1) and (2) Employment Rights Act 1996. We reminded ourselves that the key elements in a contract of employment are an "irreducible minimum" of (a) control; (b) personal performance and (c) mutuality of obligation.

86. We remind ourselves it is not the label the parties attach to the agreement they have reached but the reality of the situation. We also reminded ourselves it is not for us on this occasion to define the nature of the relationship between the parties i.e. was the claimant a worker, was he genuinely self-employed? All we need to determine is whether or not the claimant was an employee within the meaning of 230(1) and (2) ERA 1996. Unless he is an employee he has no entitlement to bring a claim for unfair dismissal under the Employment Rights Act of 1996.

87. Unfortunately, in this case there was very little documentary evidence of what had been agreed between the parties. There was no documentation at all about the working relationship between them other than some invoices submitted by the claimant.

88. The Tribunal turns to consider mutuality of obligation.

89. The Tribunal relies on its finding of fact. It finds that the respondent had agreed to provide the claimant with work as a Joiner on building sites and the claimant agreed to provide that work. The claimant was expected to attend and the respondent's frustration with the claimant when he did not attend as regularly as they wanted is clear from the statements and oral evidence in this case. It is also clear that the obligation by the respondent to provide the claimant with work was open ended. There was no fixed term to the agreement. We find there was mutuality of obligation.

90. We turn to the second element - personal performance. There is no dispute that the respondent expected the claimant to perform the joinery work personally. There was no suggestion that there was any power for him to send somebody else to do the job for him and indeed that never happened. We find there was personal performance.

91. However, it is on the third element of control where the claimant's claim for employee status fails. We find the respondent did not have control over the claimant. The claimant agreed that he did not need to seek permission from anyone if he was leaving site. For example, on the day his employment ended 31 January he informed the Site Manager he was leaving. He did not ask for permission to do so. We find if he had been an employee he would have had to seek permission.

92. We turn to look at other aspects of the working relationship. Some of the factors point to employee status and some point to a looser arrangement such as a worker relationship or a self-employed relationship. The facts which are potentially consistent with employee status we find as follows: he worked continuously without breaks for the respondent between July 2016 and January 2019, he wore a uniform, he did not work for anyone else in that period of time, the arrangement was open ended without a fixed term, he used some of his employer's tools, he worked at a site as directed by the Site Foreman, he was required to complete an occupational health form at the start of his employment, he was paid weekly by bank transfer and received a Christmas Bonus and an invitation to the Christmas Party, he occasionally drove the company vehicle and that he was not engaged in any financial risk because he was paid a fixed sum and was paid overtime.

93. However we find the following factors suggest the claimant was not an employee: he did not pay tax or national insurance as PAYE, he was responsible for his own tax, he did not receive any sick pay when he was absent from work unwell or any holiday pay, he submitted invoices to be paid, he did not seek permission for holidays in the way that employees did, he provided his own tools, he used his own vehicle and could choose his own hours and did not require permission to go off site.

94. As the case law directs we must step back from the individual factors and consider the picture as a whole. At the time the claimant did not regard himself as an employee. In fact, we heard evidence that he specifically requested on an occasion to be made an employee which shows he was clearly aware of the difference between labour only sub-contractors and employees. In his claim form to the Employment Tribunal he described himself as a "labour only sub-contractor". The respondent also described him as a "labour only sub-contractor."

95. When stepping back and looking at the entire picture the Tribunal is persuaded that the key issue here is that of control. Although the claimant performed the work personally and was obliged to attend we find the respondent did not have control over him in the way they would have done with an employee. We find this is reflected in his ability to leave site without permission. Accordingly when balancing all the factors we are not satisfied the claimant was an employee within the meaning of s230(1) and (2) ERA 1996.

96. Having found the claimant was not an employee he is not eligible to bring a claim for unfair dismissal and that claim must fail.

Disability Discrimination

97. The respondent concedes that the claimant was a disabled person within the meaning of Section 6 of the Equality Act by reason of the impairments of Type 1 diabetes and of depression. The respondent accepts knowledge at the relevant time of the impairment of diabetes.

98. The Tribunal finds the respondent did not have knowledge of the impairment of depression.

99. The only evidence that the respondent knew or should have known of the claimant's impairment of depression was the claimant suggested that he informed Mr Poole at a meeting on 15 January (following his non-attendance on 14 January) that he was suffering from depression and had been suicidal.

100. Mr Poole denied that the claimant told him this although he accepted that the claimant told him "his head was done in" and he took some pills and didn't get up until late in the afternoon. We find that the claimant informed Mr Poole that he was suffering from problems with his mental health. However, we are not satisfied he explained clearly to Mr Poole that he was suffering from depression. The claimant explained he had not been honest with Mr Law as to the reason of his absence because he did not want Mr Law to know about his mental health issues.

101. We are not satisfied that telling Mr Poole on 15 January that "his head was done in" was sufficient to fix the respondent with knowledge of his depression.

102. There was no other evidence that the respondent was informed of the claimant suffering from depression.

Unfavourable Treatment pursuant to Section 15 Equality Act 2010

103. The Tribunal reminds itself that in such a claim the Tribunal must first identify the unfavourable treatment. We must then identify the "something" that arises in consequence of the claimant's disability. We must identify whether it arises in consequence of disability. We must decide whether the unfavourable treatment was because of the "something" that arises in consequence of the disability and finally (and this is missing from the list of issues identified at the case management hearing) we must consider whether the alleged discriminator can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

104. In this case the unfavourable treatment was the dismissal or termination of the claimant's engagement with the respondent. There is no dispute that that occurred when Mr Maher ended the claimant's working relationship with the respondent on 31 January 2019.

105. The next question is what is the "something" arising in consequence of disability. That "something" is the claimant's attendance at Bolton Diabetes Centre for an appointment and blood tests for which he had permission from his Site Foreman.

106. The next question is whether that "something" arose in consequence of the claimant's disability of Type 1 diabetes. There is no dispute that the claimant's attendance at the Diabetes Centre was in consequence of the claimant's disability of diabetes.

107. Therefore, the key question in this claim is was there a causative link between Mr Maher terminating the claimant's engagement and his attendance at Bolton Diabetes Centre. We remind ourselves of guidance in the case of T Systems Limited -v- Lewis EAT 0042/15 which reminds us that we must consider

whether the "something arising in consequence of disability operated on the mind of the alleged discriminator consciously or unconsciously, to a significant extent".

108. We must therefore scrutinise the reason why Mr Maher had terminated the claimant's working relationship with the respondent over the telephone on 31 January 2019 whilst the claimant was at the Bolton Clinic for Diabetes.

109. We must remind ourselves of the burden of proof. We remind ourselves that there is rarely direct evidence of discrimination. We must consider whether or not the claimant can adduce facts which could suggest that there was a discriminatory reason for the termination of his engagement with the respondent.

110. We rely on our findings of fact that when Mr Maher had telephoned the claimant he did not know where the claimant was and was calling him to find out his whereabouts. We rely on our finding of fact that we consider Mr Maher did not believe the claimant initially when he said he was at the Diabetic Clinic (We rely on his statement where he said it was only afterwards that he verified the claimant was where he said he was, namely at the Clinic).

111. We rely on our findings of fact that Mr Maher was annoyed that the claimant had left the site early the previous day and we find the reason the claimant left early was his diabetes.

112. In considering the mindset of Mr Maher at the relevant time we have taken into account that his statement has an inconsistency running through it. On the one hand he states that the claimant was "free to set his own hours and there was little we could do about it even when it caused disruption for the business" and on the other hand he is critical of the claimant's "lateness and/or non-attendance on site". We find that paragraph 21 of Mr Maher's statemen is disingenuous. In that paragraph he refers to the fact that he has been informed by the claimant's previous manager at his former work place that the claimant was dismissed due to poor attendance/punctuality record. He says, "a senior manager there told me that the claimant tried to blame his diabetes for his poor time keeping and attendance etc but they found that they were completely unrelated reasons for his absences". When he was asked about this in cross examination Mr Maher stated that he was simply explaining what he had been told by the claimant's previous employer.

113. However, his statement goes on to state "this is similar to our experience with the claimant". This appears to suggest that Mr Maher says the claimant tried to blame his diabetes for his poor timekeeping and attendance.

114. Therefore, although Mr Maher maintained that the respondent was supportive of the claimant in relation to his diabetes because they allowed him to leave work early to attend appointments, this is inconsistent with the claimant's suggested status as a self-employed contractor (he would be allowed anyway to set his own hours). It is also inconsistent with Mr Maher's own evidence that he found the claimant's timekeeping a problem.

115. The Tribunal also finds it implausible that Mr Maher needed to terminate the claimant's employment immediately over the telephone after he had worked for the business for over two years when on Mr Maher's own evidence there was still work ongoing at the relevant time for the claimant to do. There is no explanation as to why Mr Maher could not have given the claimant notice if there was a downturn in the work.

116. We find that Mr Maher's real motivation is illustrated in his statement at paragraph 39 where he states, "I felt frustrated as I had no idea as to why the claimant was not on site when he had been assigned to the job".

117. From the information above we are satisfied that the claimant has adduced facts which could suggest that the claimant's non-attendance at the workplace, namely that he was at the Bolton Diabetic Clinic was the reason why the claimant was dismissed from his engagement as a self-employed sub-contractor.

118. We must therefore turn to consider the respondent's explanation for the treatment. Mr Maher said the real reason the claimant's arrangement as a self-employed contractor was terminated was because of the downturn in work. The Tribunal is not satisfied by this explanation. Firstly, both the response form and Mr Poole suggested a contract had been lost. There was no evidence in the bundle of any contract being lost. Mr Maher had suggested there had been a reduction in work but again there was no clear documentary evidence of any reduction in work.

119. Mr Maher had suggested it was a generalised short fall in work and the other joiner was also "let go". However, on his own evidence that joiner had only some weeks of service and was let go "the following week" i.e. after the claimant. This does not fit with the evidence of Mr Poole that where there was a reduction in work it was "last in first out". Finally, there was no clear explanation as to why, if the real reason was a downturn in work, Mr Maher, having had the claimant working for him for a period of over two years did not invite him to a meeting to discuss the matter or provide him with anything in writing about the matter as is common courtesy.

120. Accordingly, we find Mr Maher dismissed the claimant because of his absence from work on 31 January 2019 (his attendance at Bolton Diabetes Centre) and we find that that "something" arose in consequence of the claimant's Type 1 Diabetes.

121. We turn to the last issue which is whether the respondent's treatment was a proportionate means of achieving a legitimate aim. There is no legitimate aim identified in the response. Where an employee has a working arrangement terminated, the legitimate aim might be assumed to be the effective running of the business. However, the Tribunal heard no evidence on this.

122. Furthermore, there was no explanation as to why it was necessary to dismiss the claimant over the telephone when he was at a medical appointment. Accordingly, the Tribunal is not satisfied the respondent has shown that the

termination of the engagement was a proportionate means of achieving a legitimate aim. Therefore, this claim succeeds.

Failure to make reasonable adjustments pursuant to Section 20 to 21 Equality Act 2010

123. What was the provision, criteria or practice (PCP)? The claimant relied on working alone on building sites at various times during the course of his employment with the respondent. There was no dispute that from time to time the claimant was required to work alone, particularly on smaller sites.

124. The second question is: did the PCP put the claimant at a substantial disadvantage in relation to a relevant matter? The claimant stated that if he had a Hypoglycaemic attack or a fit as a result of his diabetes he would have been put at substantial disadvantage because he could have fallen or been put at risk.

125. We must ask ourselves whether the respondent had knowledge of any substantial disadvantage. We find they did not. The claimant never raised any concerns in relation to his diabetes with the respondent. The claimant completed an occupational health questionnaire. The claimant stated at Tribunal that he considered this was in breach of Section 60 of the Equality Act. It is not for the Tribunal to determine whether or not it was although the Tribunal finds it is likely that the form was completed after the claimant had been offered employment as was suggested by Mr Poole and accordingly it is not unlawful. In that document the claimant said “no” to the question “do you have any health issues that you think may affect your ability to perform safely in the designated role” and he gave no information in response to the request “if you have any medical conditions that would require consideration of reasonable adjustments to be made to your workplace or working practices for the job role please give further information below”.

126. Accordingly, we are satisfied the respondent had no knowledge of any substantial disadvantage. The claimant’s claim therefore fails at this point.

127. The claimant relied on the same PCP in relation to his depression. The Tribunal has found the respondent did not have knowledge of his depression and accordingly the claim fails at that stage. However, if we are wrong about that and the respondent did have knowledge of depression, the respondent did not have knowledge of any substantial disadvantage caused by the depression because the claimant never identified any to them. Furthermore, the claimant did not identify at the Case Management Hearing or at the Tribunal any substantial disadvantage in lone working by reason of depression.

128. For these reasons the claim for failure to make reasonable adjustment fails.

Direct Disability Discrimination pursuant to Section 13 Equality Act 2010

129. The Tribunal has already found that the claimant’s claim for unfavourable treatment arising from disability in relation to the termination of his working arrangement has succeeded so arguably there is no purpose in dealing with the

claim for direct discrimination also based on the termination of the working arrangement.

130. However, for the sake of completeness we will do so.

131. The Tribunal reminds itself that in a disability discrimination claim the comparator must be a real or hypothetical comparator in the same set of circumstances as the claimant with the same limitations on ability. (s23 Equality Act 2010). The Tribunal must therefore ask itself if Mr Maher would have treated any differently a person who was off site due to a medical condition following an alleged history of poor timekeeping. We find he would not. Accordingly, that claim must fail.

Harassment pursuant to Section 26 Equality Act 2010

132. The first issue is: what is the unwanted conduct? The claimant relies on Mr Maher telling him "I'm not going back on my word" on Friday 1 February 2019. There was no dispute the words were spoken. The next question is: did the conduct relate to disability? It is difficult to understand how the conduct related to disability. The conduct was related to the decision of Mr Maher to terminate the claimant's engagement.

133. We find the reason the claimant was upset was because of the termination of his engagement, not because of the words used by Mr Maher. However, in case we are wrong about that and it could be argued that the conduct was related to disability (given that we have found the dismissal was unfavourable treatment arising in consequence of disability) we must go on to the next issue which is whether the conduct had the purpose or effect of violating the claimant's dignity, or of creating an intimidating, hostile or degrading environment for the claimant.

134. We find Mr Maher did not have the purpose of harassing the claimant when he said those words.

135. We must therefore consider this as "an effect" case the dismissal and take into account the perception of the claimant, the other circumstances of the case and whether it was reasonable for the conduct to have that effect.

136. We find that the remark: "I'm not going back on my word" is not an offensive remark. Taking into account the claimant's perception, he was understandably upset at losing his job. However, we must also consider the circumstances of the case and whether it was reasonable for the conduct to have that effect. We are not satisfied that these words uttered by Mr Maher reasonably had the effect of violating the claimant's dignity or of creating an intimidating, hostile or degrading environment for the claimant. The words were a simple communication of what had already been decided, namely that the claimant's working relationship with the respondent had been ended.

Remedy

137. Given the claimant has succeeded in his claim that he was unfavourably treated because of something arising in consequence of disability when his working arrangement with the respondent was terminated, pursuant to s 15 Equality Act 2010, this case will proceed to a Remedy Hearing on 29 April 2019.

Employment Judge Ross

Date: 8 January 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

10 January 2020

FOR THE TRIBUNAL OFFICE

[JE]