



EMPLOYMENT TRIBUNALS

Claimant: Mr M Clark
Respondent: JLT Benefit Solutions Limited

Heard at: Ashford **On:** 9-11 September 2019

Before: EMPLOYMENT JUDGE CORRIGAN
Members: Ms R Downer
Mr N Phillips

Representation

Claimant: In Person
Respondent: Ms E Hodgetts, Counsel

REASONS

Judgment dated 11 September 2019, sent to the parties on 5 October 2019.

Reasons provided at the Claimant's request dated 17 October 2019.

Claims and issues

1. The Claimant, by his claim dated 18 February 2018, brought complaints of unfair dismissal and disability discrimination (discrimination arising from disability). The substantive issues were set out by Employment Judge Pritchard in the Case Management Order dated 10 May 2018 as follows.

Unfair dismissal

2. Can the Respondent show the reason for the Claimant's dismissal and whether it was the potentially fair reason of redundancy? The Claimant disputes that it was a genuine redundancy situation.

3. Was the dismissal fair? In particular, was the Claimant pooled and /or dismissed alongside other employees on long-term sickness absence? Was the Claimant part of the NOW Pensions team from which the redundancy selection was made?
4. By telling the Claimant he had to be fit for alternative duties were they therefore not in reality available to him?
5. Should any award be reduced on the basis there is a chance the Claimant would have been dismissed fairly in any event?

Discrimination arising from disability

6. Disability remained in dispute at the outset, although the Respondent's Representative confirmed that, if the Claimant was found to be disabled, there was no dispute that the Respondent had the requisite knowledge in respect of the disability discrimination claim. The Respondent conceded the Claimant was disabled at the outset of submissions. The disability relied upon is POTS.
7. Did the Respondent dismiss the Claimant because of something arising in consequence of the disability?
8. Was the treatment a proportionate means of achieving a legitimate aim?

Hearing

9. The Tribunal heard evidence from Mr Michael Reid (Director), Mr Steven Ross (Senior Manager) and Mr Kenneth Tindall (Director) on behalf of the Respondent. The Tribunal heard evidence from the Claimant on his own behalf.
9. There was an agreed bundle of 383 pages, to which further pages were added during the hearing with the agreement of the parties.
10. There was also a supplementary bundle of medical evidence in respect of the Claimant's health.
11. The Respondent's representative provided written submissions and both parties also made oral submissions.

Application to amend

12. Within the Claimant's witness statement there was reference to the Claimant not having received contractual sick pay. Clarity was sought by the Tribunal as to whether this was pursued as a separate claim. The Claimant did then apply to amend his claim to pursue it. The Tribunal heard from both parties in respect of this and then decided to refuse the application. The Claimant had clearly only contemplated adding the claim as a result of being prompted by the Tribunal's question. He was not going to raise the claim otherwise. At the Preliminary Hearing there was a discussion about all the claims he intended to bring and he did not raise it then. There was also discussion as to what he

should do if there was any other claim he wanted to raise (in the context of failure to make reasonable adjustments). That was 18 months ago and the Claimant had made no application to amend until it was raised by the Tribunal. We agreed with the Respondent's points that the issue requires interpretation of the contract and surrounding evidence may be required which the Respondent had not prepared to bring to the Tribunal, which was prejudicial to the Respondent. Whereas for the Claimant there is another forum should he wish to pursue the matter. We felt there was therefore greater prejudice to the Respondent and the amendment should not be allowed.

13. Based on the evidence we heard and the documents before us we made the following findings of fact.

Facts

14. The Respondent is part of the JLT Group which is a global provider of insurance and employee benefits related advice, brokerage and associated services. On 12 September 2011 the Claimant began working for the Respondent as a Pensions Support Executive in the Pension Support Contact Centre in Orpington. The Claimant was in the "Business as Usual" team.
15. The Claimant commenced long term sickness absence on 1 March 2013. He was eventually paid permanent health insurance income protection (PHI) backdated to 30 August 2013.
16. The Employee Handbook mentions PHI at paragraph 3.11 (page 108). It states:

"...the Group reserves the right to discontinue this benefit at any time including but not limited to ceasing PHI cover if your employment terminates for a reason which is not connected to your absence e.g. redundancy...

The Group's liability is strictly limited to the amount and the duration of the benefit paid by the insurer. Acceptance of claims under the PHI scheme is subject to approval by the insurer. For this reason no assurance can be given that any claim made on your behalf will be accepted by the insurer or, once accepted, will be continued.

If your claim for PHI is declined by the Group's insurers your Employer will review your continued absence and if there is no prospect of your return to work in the near future and there are no reasonable adjustments that can be made, then your employer will consider terminating your employment. Your Employer is not obliged to challenge further (either by litigation or otherwise) the insurer's decision to decline cover following an appeal by you. Any implied duty on your Employer connected to providing PHI will be discharged if the Group's insurer declines cover following an appeal."

17. The Claimant had sleep apnoea which was diagnosed as being associated with his weight and he had gastric bypass surgery on 30 August 2014. He continued to have a number of symptoms including dizziness and nausea.
18. During his absence in 2014 the team was reorganised into two teams, NOW Pensions and BAU, which was renamed Pension Support Team. In 2015 the Respondent also created an Edinburgh team doing Pension Support Team work.
19. In February 2017 the Claimant was diagnosed with POTS.
20. On 13 April 2017 following a routine review of his medical claim and a further medical examination Friends Life (the Claimant's income protection provider) wrote to the Respondent saying the Claimant was fit to return on a part time basis, building to full time in 3 months (page 194-196). A package was offered to settle the income protection on the basis of a full time return over that timescale. The Claimant however continued to be signed off by his GP and HR supported him in challenging the decision. HR wrote to the Claimant on 12 May 2017 that they were not expecting him to return to work but if he changed his mind and wanted to consider any alternative plans of working he was to let them know (p197).
21. In May 2017 as part of the client's requirement the Respondent needed to create a dedicated support team dealing with Santander calls. The team was selected from the Pension Support Team. Those selected were in post by the end of May. There were 8 positions. The criteria for selection was based on recent experience of Santander products. The criteria are set out on page 365 of the bundle – the agents had to have passed 10 quality assessed calls, be trained and then score 75% on a test. The Respondent had to act quickly to meet the client's demands and chose those who were already working on the Santander calls. The selection was part desktop based and there were also interviews. The Respondent did not view the Claimant as a possibility as he was on longterm sickness absence. He would not have had the 10 relevant calls and he was not in work to do the training. At the point this occurred the Respondent had not yet conceived of the idea to move the NOW pensions team exclusively to Edinburgh. There was no sense at the time that the 8 who moved to Santander team were avoiding the redundancy which soon followed.
22. Those not selected went into the NOW pensions team. There was no longer to be any other general pension support team in Orpington. As the Claimant did not meet the requirements for the Santander team he moved to the NOW Pensions team. Although the Claimant was not informed and is sceptical that he was placed on the team at that time, he has appeared on internal planning documents as part of that team and we accept that he was. The only alternative would have been that his post was redundant then.
23. The Respondent accepts there was a failure to discuss any of this with the Claimant and this was not ideal. We find it was not handled well. The

Claimant was not kept abreast of changes to his team as he should have been.

24. On 18 July 2017 the Claimant was informed that his appeal of the Friends Life decision was unsuccessful. He was told by HR he could still refer his complaint to the Financial Ombudsman. He asked for further information which HR assisted him to obtain and he also asked if he could go back onto Group Sick Pay. HR provided the answers to his request by way of the email of 27 July 2017 (page 209), including informing him that he had exhausted Group Sick Pay and had already raised a grievance about that in 2013 which was not upheld.
25. HR also arranged for accrued leave over 18 months to be paid so that the Claimant did continue to have an income until mid-October, although the permanent health income protection payments had ended. Page 209 also records the Claimant was to let HR know if he intended to raise a complaint to the Financial Ombudsman.
26. The Claimant continued to discuss these issues with HR leading to the email on page 212 in which HR wrote to the Claimant saying they needed to determine the likelihood of the Claimant returning to work. It records that the Claimant's position was that he was not well enough to return and he had submitted a further fit note until 2 October 2017. The suggestion from HR was to refer the Claimant for an Occupational Health assessment.
27. The Claimant wanted the Respondent to help him see a specialist by funding the cost, as he was already on a lengthy NHS waiting list. He thought this would be better than seeing Occupational Health. He says that he emailed on 24 August 2017 expressing concerns about seeing Occupational Health. His reasons were that he knew another report would say he was not fit for work and then the Respondent would look to end his employment.
28. Meanwhile during July and August 2017 discussions were taking place at management level regarding a proposal to have the NOW pensions team located in Edinburgh only. By this time that was the much larger team and where support work was located. There were concerns about the quality of work in Orpington, despite a lot of support being offered, and there were also difficulties retaining and recruiting agents due to the proximity to London. The proposed move was authorised by senior management in late August 2017.
29. The Claimant was contacted by the same HR Business Partner who had been dealing with his sickness issues who said there had been an announcement in respect of the NOW Pension team. The Claimant having not been kept abreast of developments had never heard of that team and did not consider it his team.
30. The Claimant was then advised by phone of the proposed redundancy situation, coinciding with a meeting with all the other affected employees on 7 September 2017. The Claimant as he was on long term sickness absence was given a call instead.

31. The Claimant has argued that this is a sham. He says this was not his team, the numbers do not add up and he has been selected for redundancy due to his absence. He hypothesizes that others selected may also have been off sick.
32. We do not find it a sham. The documents support the fact that there was a genuine proposal to move the team. Initially it was thought 14 staff would be affected. In fact, one member of staff resigned prior to the process and another member of staff successfully argued during the process that his work was across more teams and he should be out of scope. There has been a genuine expansion of the team in Edinburgh with about 20 additional posts as a result of the move. We have found that the Claimant was not kept well informed but this was genuinely the team to which he was assigned at this stage. None of the others selected for redundancy were also off sick.
33. The Claimant then received a letter inviting him to a first consultation with accompanying FAQs. He raised at that point whether it was the right team. Mr Reid checked with HR that the Claimant was indeed on the Now Pension Team.
34. The Respondent had a template for the first consultation meetings. The Claimant's meeting took place on 11 September 2017 with Mr Ross. He chose for it to be by phone and not to be accompanied.
35. The Claimant made the point he would be ringfenced if he had still been getting permanent health income protection payments. The Respondent's position was that this was not necessarily the case. No other suggestions were made regarding avoiding redundancy. The Claimant also queried the team again. Mr Ross checked again with Mr Reid as to whether it was the right team and was satisfied it was.
36. The Claimant received a letter following the first consultation dated 15 September 2017. This addressed the points the Claimant had raised but stated the Respondent believed the Claimant should remain in scope and that his previous team had evolved into the NOW Pensions Team.
37. The Claimant was provided with a list of current vacancies, whilst it was acknowledged he said he remained unfit for work. The vacancy list is at page 290 and at that stage there were no suitable vacancies in Orpington.
38. The Claimant corresponded with the CEO on 19 September 2017. In that letter he made clear his concern was that he was to be made redundant before he could see a specialist and challenge the Friends Life decision via the Ombudsman. He asked the CEO to make sure that did not happen by placing him on "another equal department or the department in Scotland as [he needed] to be employed" to get his insurance back in place (page 325). This led to further correspondence on behalf of the CEO and the Claimant's email on 22 September 2017 in which he said he was not in the same position as others being considered for redundancy "because if they are made redundant they can find alternative employment however I cannot and I will be destroyed....my only chance is to get my insurance back". Again he asked to be transferred to a different department or to the Scotland office to take him out of the redundancy

process. He also asked if the income protection policy was indeed dependent on remaining an employee.

39. Meanwhile the Claimant's second consultation with Mr Ross was on 20 September 2017. The Claimant asked if the Respondent had considered volunteers. It was explained that it was the entire team that was affected. He said it was hard to comment on the proposal as he was not familiar with the department. The Claimant explained the importance to him of keeping his job for the appeal of his PHI claim. That was Claimant's main concern. He was informed about employee assistance programme.
40. There was an updated vacancy list which includes a customer service post. It is likely this was sent to the Claimant as it is recorded in the letter dated 25 September 2017 which followed the second meeting.
41. On 26 September 2017 Anita Walters in HR picked up the Claimant's query in his email dated 22 September 2017 (at paragraph 37 above). She said in her response at page 319: "With regards to your point about whether consideration can be given to placing you on a different department or transferring you to the Edinburgh office, I'm aware that you have received details of all the current vacancies that exist....However you would need to show that you are capable of returning to work and performing that role. We understand ...that you have indicated that you are not fit to return to work". She then said he would not be moved to another role purely for the purpose of continuing his employment with a view to his submitting an appeal to the Financial Ombudsman.
42. In evidence Mr Reid justified the position set out on page 319 further. He said the vacancies were live roles that they needed filling. He considered it was not unreasonable to require the Claimant to be fit for a vacancy for which he applied as he had at the time been assessed as fit.
43. She answered some other questions about the redundancy but declined to say how many of the other affected employees had succeeded in getting alternative roles.
44. Revised FAQ were produced on 26 September 2017. The FAQs deal with the rationale for the Santander team not being pooled because of their meeting the minimum training and experience requirements that Santander specified (p311).
45. No proposals to avoid the redundancy situation were offered by anyone. The Claimant's final redundancy meeting took place on 27 September 2017. The Claimant was told it was his final opportunity to ask questions or put forward alternatives. He had neither so was informed the decision had been made to proceed and the role was therefore redundant. He was entitled to 6 weeks' notice. The Claimant said the Respondent had withheld information on the other roles/people being made redundant. He was informed there were 11 others. The Claimant queried if they were also on long-term sickness. He was told he could not be given this sensitive information. He was told that there

were no other matched roles and so all 11 served with notice. They were still able to apply for other roles during their notice period.

46. The Claimant said he felt he had not been treated fairly as he was off sick and not able to apply for alternatives due to his condition. It was reiterated that all affected staff were being treated consistently as part of the process. Mr Ross sought to reassure the Claimant about that the process was not just a way of getting rid of those who were sick. Although he was not informed of this, the Claimant was the only affected employee on long-term sickness.
47. Mr Reid wrote to the Claimant giving notice of termination. 11 other employees were also made redundant. Notice was given to all on the same date.
48. The Claimant appealed on 2 October 2017. His concerns included whether he was on the relevant team and whether there really were 11 others affected. He said "I feel discriminated against my disability as... I have been told that I am in the same situation as the so called other people and encouraged to look at the current vacancies, however as you are fully aware I am unable to work in that role at this moment in time as I am ill and signed off and that to me is insensitive and discriminating, and I am not in the same position as the other 11 as they can work unless they are all long term sick too?" He challenged whether there was a real reason for the redundancies.
49. He also said "I was on permanent health insurance and I had every faith I would get this insurance back once I have seen my specialist and raised this with the Financial Ombudsman so regardless of the [company's] decision I wouldn't be on any department any way ...and the [company's] decision to make me redundant has further repercussions once I win my case with the financial ombudsman ...as the company are responsible for my insurance to cease."
50. The appeal was dealt with by Mr Tindall. Prior to speaking to the Claimant he explored with Mr Reid the history of the Claimant's employment and his inclusion in the redundancies and the NOW Pension team (p358).
51. The appeal was held by phone on 13 October 2017 (pp371-374). The Claimant said he was told to look at other vacancies but they knew that as he cannot work he would not be able to, which was very upsetting. He described it as a pointless exercise. The Claimant said that once he has seen his specialist he will have the report for the Financial Ombudsman and his insurance should be reinstated from July to November. He said the redundancy was going to have a drastic effect on his life. He said there was a strong possibility he would have been on PHI until he dies.
52. Mr Tindall spoke again to Mike Reid to explore the points the Claimant raised (pp376-378). The outcome was sent to the Claimant on 26 October 2017. He addressed the question of whether the Claimant was in the NOW Pensions team in some detail and decided it was only team the Claimant could have been on at the time of the redundancy. He considered the sending of the vacancy list and that it was appropriate not to exclude the Claimant from that information. He said the Claimant was still able to apply for vacancies and said should he

wish to receive the updated list or guidance the Claimant should let him know. He confirmed there were 11 others whose roles were at risk and none were on sick leave.

53. In the event 9 employees were made redundant. None were on sick leave. The dismissal took effect 8 November 2017. Two employees of the 11 ultimately successfully avoided redundancy during their notice period. They successfully applied for two Orpington vacancies. We had little detail of these as they were outside of Mr Reid's line of management. He said they were in another contact management centre. A number of those made redundant applied for the positions and two were successful. Other roles on the vacancy list in the bundle were not suitable.
54. The Claimant continued to be signed off as sick until he left his employment.

Relevant law

Unfair dismissal

55. The test in relation to ordinary unfair dismissal is contained in section 98 of the Employment Rights Act 1996. Section 98 provides:

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

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and**
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**

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

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
- (b) relates to the conduct of the employee,**
- (c) is that the employee was redundant, or**
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**

(3). . .

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair

(having regard to the reason shown by the employer)-

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

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

56. The definition of redundancy is in section 139 Employment Rights Act 1996:

"....an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to_

...

(b) the fact that the requirements of that business _

...

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished....

57. In applying section 98(4) the Tribunal are not to substitute their own view for that of the employer. The question is whether the employer's decision to dismiss fell within the range of reasonable responses open to the employer, or whether it was a decision that no reasonable employer could have made in the circumstances.

58. The EAT has laid out the broad principles usually to be followed by the reasonable employer when considering a dismissal for redundancy in *Williams & others v Compair Maxam Ltd* 1982 ICR 156 EAT. These are:

58.1 to give sufficient warning and consult the affected employee;

58.2 to establish objective selection criteria and apply these fairly;

58.3 to consider alternative employment.

60. The Respondent's representative referred us to the principle that where an employee has permanent sickness benefit there is an implied term that the employer will not terminate the employment if the effect is to deprive the employee of that benefit, save with good cause, including redundancy. This is a very relevant consideration to the question of whether a dismissal in such circumstances is fair (*ICTS (UK) Limited v Mr A Visram* UKEAT/0344/15/LA; *Awan v ICTS UK Ltd* [2019] IRLR 212, EAT).

Discrimination arising from disability

61. Section 15 Equality Act provides:

“(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”.

62. The Tribunal must first identify unfavourable treatment and by whom [person A].... The Tribunal must then determine what caused the treatment or the reason for it. “The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required....there may be more than one reason...The “something” that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it...Motives are irrelevant. (*Pnaiser v NHS England and anor* UKEAT/0137/15).

Conclusions

Unfair dismissal

Can the Respondent show the reason for the Claimant's dismissal and whether it was the potentially fair reason of redundancy? The Claimant disputes that it was a genuine redundancy situation.

63. We are satisfied it was a genuine redundancy situation. The Respondent had two NOW Pensions teams in Orpington and Edinburgh. By July 2017 Edinburgh had become the dominant team with more staff. It was also the location of the support staff. The Respondent had issues retaining and recruiting staff in Orpington and there were quality issues. The solution decided upon was to move the NOW Pensions team exclusively to Edinburgh, making the Orpington team redundant.

Was the dismissal fair? In particular, was the Claimant pooled and /or dismissed alongside other employees on long-term sickness absence? Was the Claimant part of the NOW Pensions team from which the redundancy selection was made?

64. The Respondent accepts that it can be criticised for the lack of communication with the Claimant to keep him abreast of changes in the Orpington team. At the time the Claimant went on sick leave he was part of the BAU team. By May 2017 this had become the Pension Support team. Then in May 2017 a separate Santander team was created. Those who were not assigned to that team

became part of the Now Pensions team and certainly the Claimant was included in this team in internal planning documents. There was no other team to be part of. We accept the Claimant did not have the requisite requirements to be part of the Santander team due to his absence. He was part of the Now Pensions team. All of the agents and the team leader were at risk. None of the others were on sick leave at the time.

- 65. The Claimant was part of the redundant team. He was therefore appropriately in the pool. This is not affected by his PHI. The Handbook expressly provides that an employee in receipt of PHI will cease to be covered if dismissed for redundancy (p108). In any event he was no longer receiving PHI at the time.
- 66. We find the Respondent applied their mind to the appropriate pool and it was reasonable.

By telling the Claimant he had to be fit for alternative duties were they therefore not in reality available to him?

- 67. This is in reality a question of whether there was reasonable consideration of alternatives, given the statement made on page 319, quoted at paragraph 40 above, that to be considered for another role the Claimant would need to show that he was capable of returning to work and performing that role.
- 68. There were no matched alternative roles. The Claimant was provided with vacancy lists. He was provided with two lists before he received the email on page 319. All affected staff had the opportunity to apply for other vacancies. Others did apply and two affected colleagues were successful, so they were genuine. The Claimant did not apply for any alternative roles prior to receiving the email on page 319. The Claimant's main concern was clearly to be in employment for his appeal to the Financial Ombudsman in relation to the PHI decision. His interest in alternative roles was to pursue that aim. He was not interested in an alternative post, with a view to returning within the near future. Indeed when the Respondent suggested referring him to OH with a view to his return, he was not in favour.
- 69. The statement in the email on page 319 came after the first two consultation meetings. It is right that in the context of responding to his request for special treatment so he could pursue the PHI the email did say he had to show he was fit for alternative vacancies. However, the next day he had a further consultation at which his ability to apply for further vacancies was also discussed.
- 70. At the appeal the Claimant's concern was that it was insensitive to send him the vacancy list when he was not fit to work. The appeal officer reiterated that he could still apply for posts and offered assistance if he chose to do so.
- 71. The Claimant was repeatedly saying he was not fit for work. He did not raise issues with the comment in the email on page 319 at the time.
- 72. Page 319 is one statement out of many others in the consultation that emphasized that he could apply for alternative roles.

73. The comment is badly phrased but in the context of the overall process and the position adopted by the Claimant in the process, it does not render the process unreasonable. We do not find it prevented the Claimant from applying for vacancies that he otherwise might have applied for. The Claimant did not apply for vacancies and had said it was insensitive to send the alternative roles to him. He wanted to stay employed just for the PHI appeal purposes, not to get an alternative role.
74. We find the dismissal reasonable. We find the consultation reasonable. It was not predetermined. There was a genuine redundancy consultation with three opportunities to raise issues. One staff member was successfully able to avoid being pooled through the consultation process. A number of the Claimant's queries were addressed in that process. In addition the Claimant had consultation with HR after writing to the CEO (of which page 319 was part).
75. We agree that the final decision was not made until notice was given. The fact that the Respondent had decided the proposal was what they wanted to do, subject to consultation, does not stop it being a genuine process.

Should any award be reduced on the basis there is a chance the Claimant would have been dismissed fairly in any event?

76. We do not need to address this but we find it is likely that the Claimant would have been fairly dismissed in any event for incapacity following the decision, after appeal, that he was no longer entitled to PHI. The decision to stop the PHI was made by the insurers who followed their processes. The Respondent was under no obligation to challenge that further, as set out in the Handbook (page 108). The Claimant's position was that he was nevertheless unlikely to return to work. We find in fact the Claimant was better off being made redundant as he was given a redundancy payment.

Did the Respondent dismiss the Claimant because of something arising in consequence of the disability?

77. The Respondent did not select the Claimant for redundancy because of his absence as the Claimant suspects. We are satisfied that the three decision makers were not consciously or unconsciously motivated by the Claimant's absence. The Claimant was part of the redundant team and was made redundant in the absence of his applying for and successfully obtaining an alternative role.
78. Turning to what he was told by Ms Walters in the email on page 319 and whether that was unfavourable treatment as part of the redundancy process. It clearly was motivated by his absence. It was one statement out of several about alternative roles. Overall he was told repeatedly he was able to apply for vacancies. It was he who felt this was inappropriate because he was not fit and he who wanted to be taken out of the process and given a role for his PHI purposes only. If he had been genuinely seeking an alternative vacancy this comment might have put him off applying for alternatives but we do not consider she would have made the comment in those circumstances. She responded to

his question about whether he could be placed in a role so he could challenge the insurers' PHI decision with the Financial Ombudsman and in that context said that he could not apply for vacancies just to pursue PHI because the vacancies needed to be filled.

79. We find the reason he did not apply was not because of this comment but because of his position that he was not fit and his determination to pursue PHI. He was not interested in the vacancies for their own sake. We do not find that he felt debarred for applying for alternative roles by this statement and in the overall context it was not unfavourable treatment.

Was the treatment a proportionate means of achieving a legitimate aim?

80. Even if the comment was unfavourable treatment, we find it in pursuit of a legitimate aim. The aim was to explain he cannot have a role just to seek to challenge the PHI decision with the Financial Ombudsman and that the roles were genuine vacancies that needed filling.
81. We find it was proportionate in the context of it being only one comment out of many comments encouraging the Claimant to apply for vacancies, and that he was expressing that he was not fit and was unlikely to return to work in one of the vacancies. It was in response to his asking if he could have a special role outside the mainstream process. If the Claimant had concerns as a result of the comment he could have raised these in the process but did not.

Employment Judge Corrigan
22 January 2020