RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Sweeney**

Respondent: **Frederick J French (Contracts) Limited**

Heard at: **East London Hearing Centre**

On: **19 and 20 February 2020 and (In chambers) 6 March 2020**

Before: **Employment Judge Hallen**

Members: **Ms M Long**
Ms J Owen

Representation

Claimant: Mr G Whitehouse (Solicitor)

Respondent: Ms K Anand (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. **The Claimant's employment status comes within section 83 (2) of the Equality Act 2010 (EA) as he had a contract personally to do work with the Respondent. He is therefore entitled to make a claim for disability discrimination under the EA.**

2. **The Claimant's claim for direct discrimination contrary to say contrary to section 13 of the EA fails and is dismissed.**

3. **The Claimant's claim for discrimination arising from disability pursuant to section 15 succeeds.**

4. **The Claimant's claim for indirect disability discrimination contrary to section 19 of the EA fails and is dismissed.**

5. **The Claimant's claim in respect of reasonable adjustments pursuant to section 20 EA fails and is dismissed.**

6. The Claimant's claim in respect of Regulation Two of the Working Time Regulations (WTR) 1998 succeeds as he was a worker and is entitled to 8 days holiday pay.

7. The Claimant's claim in respect of one week's balance of notice pay fails and is dismissed.

The case is listed for a remedies hearing at the East London Tribunal on 8 June 2020 as previously advised to the parties.

REASONS

Background

1. In his Claim Form dated 2 July 2019 the Claimant who worked as a Senior Site Manager for the Respondent between 16 January and 16 April 2019 claimed disability discrimination, one week's notice pay and holiday pay. In his grounds in support of complaint, the Claimant asserted direct disability discrimination in respect of his dismissal due to disability related sickness absence contrary to section 13 of the Equality Act 2010 (EA), disability discrimination arising in consequence of his disability contrary to section 15 of the EA, indirect disability discrimination contrary to section 19 of the EA and a failure on the Respondent's part to make reasonable adjustments contrary to section 20 and 21 of the EA. He also asserted that he was entitled to contractual notice being the balance of his contractual entitlement of one week as well as holiday pay that had accrued and not been paid at the termination of his employment for the entirety of his service. The Respondent in its Response Form dated 30 August 2019 resisted all of these claims asserting in the first instance that the Claimant was not entitled to make a claim under the EA as he did not fulfill the definition in section 83(2)(a) of the EA as he was not employed under a contract of employment or a contract to personally do work and furthermore, he was not disabled as defined by the EA and therefore was not entitled to proceed with a claim for disability discrimination. It also asserted that he was not a worker as defined by the Working Time Regulations and not entitled to holiday pay and had been paid his correct notice pay as he did not offer to work out his two weeks' notice period.

2. The Claim Form was considered at a preliminary hearing on 7 October 2019 before Employment Judge Massarella at which directions were given for the substantive hearing and the issues were agreed between the parties. This substantive hearing was listed for two days on 19 and 20 February before a full Tribunal.

3. At the preliminary hearing, the Respondent did not admit that the Claimant was disabled as defined by the EA. However, after disclosure of relevant evidence following this hearing, the Respondent accepted that the Claimant was disabled on the grounds of Occipital Neuralgia and Idiopathic Facial pain on 13 February 2020 shortly before the substantive hearing.

4. The agreed list of issues confirmed that the Claimant bought claims of direct discrimination, discrimination arising from disability, indirect disability discrimination and a failure to make reasonable adjustments. The Claimant also bought claims of holiday pay,

notice pay and an uplift under section 207A TULRA 1992 with respect to the failure to follow the ACAS guidance on disciplinary and grievance procedures.

5. As the Respondent accepted that the Claimant was disabled as defined by the EA, the substantive issues for the tribunal were as follows: –

Status section 83(2) EA

6. Did the Claimant's employment status come within section 83 (2) of the EA?

Direct discrimination section 13

7. The Claimant claimed he was subject to direct discrimination when he was dismissed on 16 April 2019.

8. Did the Respondent treat the Claimant less favourably, by dismissing him, than he would have treated a non-disabled comparator?

9. The comparator relied upon by the Claimant is a hypothetical comparison.

10. Was the Claimant dismissed because of his disability?

Discrimination arising from disability section 15

11. The Claimant claims he was subjected to unfavourable treatment when he was dismissed because of his absence on 11 and 12 April 2019 which was a "something arising in consequence of his disability".

12. Was the Claimant's absence on those days something arising in consequence of his disability?

13. If so, has the Respondent shown that the dismissal was a proportionate means of achieving a legitimate aim?

14. The legitimate aims relied upon by the Respondent are (i) the ability to have all workers carry out their work (for example have access to the site), (ii) the effective and efficient running of the business, (iii) the need to meet deadlines set out set on projects and (iv) the effective management of attendance.

Indirect discrimination section 19

15. The Claimant claims that the Respondent applied the following policy criterion practices (PCP): –

16. The Respondent's disciplinary and dismissal policies and procedures in particular its PCPs to refuse to consider the effects of an employee's illness on his attendance and performance before making any disciplinary decisions;

17. The Respondent's sick absence policies and procedures, in particular the PCP to dismiss without procedure, any employee that is absent from work or is unable to communicate with the Respondent due to the effects of an illness;

18. The Respondent's standards and conduct policies and procedures.

19. Do these amount to PCPs?

20. If so, did the Respondent apply these PCPs?

21. Did the Respondent apply them to the Claimant and to non-disabled persons?

22. If so, did the PCP or PCPs put the Claimant at a particular disadvantage? The particular disadvantage relied upon by the Claimant was the greater risk of dismissal.

23. If so, did the PCPs put or would they put others who were who share the Claimant's disability at a particular disadvantage compared to non-disabled persons?

24. If so, has the Respondent shown the PCPs were a proportionate means of achieving a legitimate aim?

25. The legitimate aims relied upon by the Respondent are (i) the ability to have worker carry out their work (for example have access to the site), (ii) the effective and efficient running of the business, (iii) the need to meet deadlines set on projects and (iv) The need to uphold workplace standards.

Reasonable adjustments section 20 and 21

26. The Claimant claims that the Respondent applied the following policy criterion practices (PCP): –

27. The Respondent's disciplinary and dismissal policies and procedures in particular its PCPs to refuse to consider the effects of an employee's illness on his attendance and performance before making any disciplinary decisions;

28. The Respondent's sick absence policies and procedures, in particular the PCP to dismiss without procedure, any employee that is absent from work or is unable to communicate with the Respondent due to the effects of an illness;

29. The Respondent's standards and conduct policies and procedures.

30. Do these amount to PCPs?

31. If so, did the Respondent apply these PCPs?

32. If so, did the PCP or PCPs put the Claimant at a substantial disadvantage?

33. The Claimant claims the following reasonable adjustment should have been made: –

1. Adjust its PCPs to require the Respondent to carry out an investigation of the reasons for the employees absence before taking the decision to dismiss;

2. Adjust its PCPs regarding its sick absence procedure to allow consideration of the effects of an employee's disabilities on his levels of performance and attendance before dismissing;

3. Adjust its PCPs to require the Respondent to consult with an employee and their medical experts prior to taking the decision to dismiss that employee on the grounds of absence or poor performance;

4. Adjust its PCPs to take account of an employee's disabilities in any disciplinary procedures.

34. Are these adjustments reasonable?

35. Would they have alleviated the substantial disadvantage he faced?

Holiday pay

36. Was the Claimant an employee or worker within the meaning of Regulation 2 of the Working Time Regulations 1998?

37. At the effective date of termination did the Claimant have accrued but untaken holiday entitlement and were such sums paid to the Claimant?

38. The Claimant claims he is owed 8 days holiday pay.

Notice pay

39. Is the Claimant owed one week's notice pay pursuant to his contract?

Uplift of award

40. Is the Claimant entitled to be paid an uplift of award within section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992?

41. The Tribunal had before it an agreed bundle of documents and heard first from the Claimant who had prepared a written witness statement and was subject to cross-examination. The Respondent attended with three witnesses namely Julie Anne Readings (Page) External HR Adviser; Christopher James Davy, Managing Director of the Respondent and William McDairmid, Traffic Marshall. All of these witnesses prepared witness statements and were subject to questions from the Claimant's representatives and the Tribunal.

Facts

42. At the outset of this part of the judgment, it should be stated that the Tribunal preferred the evidence of the Claimant and resolved most of the conflicts of evidence in the Claimant's favour as shown in this section of the judgment.

43. For the majority of these proceedings, the Respondent did not accept that the Claimant was disabled as defined by the EA and only did so on 13 February 2020, 6 days before the substantive hearing accepting that the Claimant was disabled on the grounds of

Occipital Neuralgia and Idiopathic Facial pain only. The Claimant at the hearing confirmed that he was content that the Respondent accepted that he was disabled. The Tribunal made reasonable adjustments for the Claimant by allowing him breaks as and when he needed them as requested by his solicitor.

44. The Claimant's medical problems are basically chronic nerve pain conditions that he tries to manage with medication but which sometimes result in him suffering bad flare-ups and when this happens, it can leave him bed ridden meaning that he cannot communicate with those around him including the Respondent during such episodes. There is no cure for the Claimant's disability and he has to live with it for the rest of his life. The chronic nerve pain is sometimes unbearable for him and unsurprisingly, he has also developed depression and anxiety as a result.

45. The Respondent is a building and refurbishment contractor business based in Chelmsford, Essex. It has grown into a small but successful company employing approximately 18 permanent members of staff. The Respondent is supported by an HR consultant, Julie Page of Julie Page HR Ltd who assists the company with all aspects of day-to-day employee relations and recruitment.

46. In or around January 2019, the Respondent won a new construction project on Hatton Road, Shenfield. The site was an old HSBC building bank building and it was going to be developed into for new apartments and a retail units. This was the Respondent's first large contract and Julie Page helped with recruitment in respect of the Site Manager role.

47. An advertisement for Site Manager was placed on "Indeed' recruitment site online confirming that the Respondent was looking for a Site Manager paying between £200 to £250 a day. The job advertisement was a page 117 of the bundle of documents. It confirmed that the successful individual would be an experienced Site Manager with a new build background to help deliver a small development of four flats and one commercial unit. The position was advertised for a minimum of 12 months or until completion of the project. The advertisement also confirmed that there would be an option to become permanent as and when sufficient contracts materialised. The requirements for the position included a CSCS card, ability to prioritise tasks to meet changing business needs, an ability to be assertive and an in-depth knowledge of all aspects of the construction trade. The advertisement appeared to require personal service to be delivered by the successful candidate and for all intents and purposes it appeared to be an advertisement for employment.

48. The Claimant was interviewed by Ms. Page in early January 2019 by telephone on behalf of the Respondent. The Claimant appeared to come across well during the telephone interview and he was eventually offered a fixed term contract commencing on 16 January 2019. There was no contract of employment and the letter of appointment was at pages 53 to 54 of the bundle of documents. The letter of appointment was signed by Julie Page, HR manager and was sent by email to the Claimant. It confirmed the offer of fixed term work for 42 weeks on a self-employed contract. The job title was specified a Site Manager and the start date was stated to be 16 January 2019 at 9 am. The contract duration was 42 weeks and the hours of work were 8 am to 4 pm or 7 am to 3 pm with an hour for lunch. The daily rate was specified as £250 per day to be invoiced by the Claimant on a weekly basis. The notice period was specified as two weeks each way from the company and from the Claimant. The appointment was subject to references from the

Claimant's last contract and proof of eligibility to work in the UK as well as a national insurance number with a birth certificate and driving license. The letter of appointment required the Claimant to bring a laptop and clothing and specified that the Respondent would provide additional clothing and equipment as necessary. The letter of appointment was signed by the Claimant on 18 January 2019.

49. At the hearing, the Respondent sought to persuade the Tribunal that this contract gave the Claimant complete flexibility as to his hours attempting to persuade the Tribunal that he could come and go as he pleased. The Respondent also sought to persuade the Tribunal that the Claimant could provide a substitute as and when he wished and that there was not a requirement of personal service. The Tribunal did not accept this on the basis of the evidence that it heard. The letter of appointment at page 53 did not contain a substitution clause and specified fixed hours either from 8 am to 4 pm or 7 am to 3 pm which the Claimant confirmed that he did from Monday to Friday unless he could not do so due to illness. He did not take any other time off work and did not provide a substitute to undertake his duties when he was sick. He said that he was not told by the Respondent that he could do so.

50. The Respondent confirmed that the weekly requirement was five days per week for which the Claimant invoiced the Respondent on a weekly basis. There was a selection of invoices in the bundle of documents commencing at page 102 and finishing at 116. These invoices were from Sweeney Construction Services Ltd which the Claimant set up and were addressed to the Respondent and invoiced the Respondent on a weekly basis for the amount of days undertaken. When the Claimant could not attend work due to sickness (which was a total of six days during his service of three months) the Claimant did not invoice for those days. In addition, the Claimant did not receive sick pay for the sick days nor did he receive holiday pay. The Claimant stated that the fixed term arrangement of 42 weeks whereby he would invoice the Respondent for work undertaken was a common arrangement in the construction industry and this was accepted by the Tribunal. The Claimant had previously set up his own limited company on the advice of his accountant in 2018 before he commenced work for the Respondent. This company was called Sweeney Construction Services Ltd and had its own liability insurance and there was a policy schedule dated 13 April 2018 at page 99 of the bundle and a certificate of employer insurance a page 100 of the bundle.

51. The Claimant gave evidence which was accepted by the Tribunal that he was retained by the Respondent in a personal capacity to work for the Respondent on a fixed term basis and was never told about an ability to provide a substitute if for any reason he could not attend the Respondent's site. Indeed, the Claimant never did provide any substitutes for the six days that he was absent on sick leave working for the Respondent. In evidence, Mr. Davy confirmed that he did not inform the Claimant that he had such a right to provide a substitute. The Claimant gave evidence which was accepted by the Tribunal that he was expected to be on site from 8 am to 4 pm or 7 am to 3 pm Monday to Friday depending on what work needed to be done. He further gave evidence which was accepted that the company provided all tools and equipment to be used by him providing only his work boots. The Tribunal accepted that this was the case as at page 66 of the bundle of documents there was a letter dated 16 April 2019 addressed to the Claimant headed 'termination of contract' which stated that his contract was terminated with immediate effect and he would pay be paid one week's pay in lieu of notice and that he

was required to "*return the company mobile phone, company clothing, site keys and any other items you have been issued.'*

52. The Respondent sought to persuade the Tribunal that the Claimant had complete autonomy in respect of his duties as Site Manager and that he had no direct reporting line. The Tribunal did not accept this to be the correct characterisation of the situation. The Claimant gave evidence that he reported directly to Mr. Davy, the Respondents Managing Director who had overall control of what the Claimant did on the day-to-day basis and would often visit the site to oversee the Claimants work and provide detailed instruction. As Mr. Davy says at paragraph 32 of his statement, the Claimant was required to keep a daily diary of activity on the site and in addition, the Claimant confirmed that he kept his own diary of activity in order to keep Mr. Davy aware of what was happening on site.

53. The Claimant commenced his duties on 16 January 2019. He was responsible for health and safety checks, drafting risk assessments and method statements. He was also responsible for assessing and ordering materials for the site, managing the company's employees and any contractors on site and generally managing the whole Project.

54. After commencing work for the company things initially went well for the Claimant with him finding the work challenging and interesting. He had a flare-up of his illness in early February and was unable to attend work on 11 February for one day. He worried how the Respondent would react to his day off work due to his disability so he decided to make the Respondent aware of his medical problems in case they re-occurred. He telephoned Mr. Davy who did not appear to be particularly interested and he told the Claimant to speak to Julie Page who handles the company's human resources. As a consequence, he sent her an email letting her know of his disability. This email was at page 57 and was dated 15 February 2019. The Claimant set out his medical condition and his medication. Ms Page responded on 21 February asking whether the company needed to do anything work wise to accommodate his condition. At page 56, the Claimant responded stating that his condition was a disability albeit one that was not visible physically. It was a disease of the nervous system and would continue indefinitely. The Claimant explained that he was in constant pain all the time although it was controlled by medication. He confirmed that he may need to take time off to see his new Neurologist as the case maybe and would attempt to let Ms Page know in good time. He confirmed that his next appointment was on 28 April with a leading world specialist but he may be seeing his Neurologist prior to that date but would give her plenty of notice.

55. The Claimant and Ms Page agreed to meet on 12 March 2019 at which meeting Ms Page completed a medical questionnaire which was at pages 94 to 95 of the bundle of documents. This medical questionnaire reiterated the Claimant's disability. The Claimant did not request any workplace adjustments at this meeting as he confirmed that it was a constant condition for him that he had lived with for many years. He also confirmed to Ms Page that he was able to work alone and would be fine. Ms Page confirmed to the Tribunal that she did not undertake or commission a risk assessment following this meeting nor did the Respondent refer the Claimant to its own medical advisors to ascertain whether the Claimant had given the Respondent an accurate description of his condition and or needed any further support or assistance. Furthermore, the Respondent did not take professional medical advice on how and when the Claimant's condition would re-occur and or its impact on the Claimant's future attendance record with the Respondent. It seemed to the Tribunal that a reasonable employer given the information

that this employer was provided with by the Claimant on 12 March 2019 would at least have undertaken a risk assessment as well as taking its own medical opinion of the Claimant's condition and its impact upon the Respondent's contractual relationship with the Claimant especially his future attendance record. This was especially so given the fact that the Claimant was off work on disability related sickness absence on 11 February, 11 March and then subsequently on 29 March and 8 April. The Respondent is in the construction industry and it appeared to the Tribunal that a duty of care arose at this stage both to the Claimant and to others be they fellow workers or members of the public. Therefore, the Respondent should have made further enquiry as to whether the Claimant's disability had a wider impact on the Claimant and those working on the project.

56. After the Claimant had the meeting with Ms Page, neither she nor Mr. Davy mentioned the Claimant's medical problems again and other than the odd conversation with Mr. Davy, nothing else happened and things carried on as before.

57. On Thursday 11 and Friday 12 April 2019, the Claimant had a major flare-up which completely incapacitated him. He described this as a particularly bad attack that left him with chronic pain in the back of his head and his face and his eyes felt like they were on fire. All of his facial nerves were burning. The pain in his head was like an electrical shock and he had stabbing pains down the left side of his face. His left eye was severely watering with stabbing pains and he could not see. He described to the Tribunal that the effects were so bad that he was completely bedridden for two days. He could not get up and the pain was so bad he could not even use the telephone call telephone to call for help.

58. He gave evidence to the Tribunal which was accepted that these two days with the most terrifying experience for him and that he was in so much pain that he could not even think about what was happening. On the Thursday morning, he had arranged to pick up a labourer who was going to do some work on the site. The pain was getting progressively worse and he was worried that the labourer would be stood waiting for him so very early in the morning. He managed to send a text message to the labourer that he was too ill to pick him up. This message was at page 61 of the bundle of documents. It read "Hi Marc, I have to cancel today as I am unwell this morning.' The message was relatively short because as the Claimant said, he was too unwell to do very much else in terms of communication on the Thursday and Friday. The Claimant gave evidence to the Tribunal which was accepted that he tried to send a text to Mr. Davy to let him know that he was ill and would not be in but he simply could not do so as he decided to rest and have another go later on. However, he had already taken a sleeping tablet to getting through the pain and just passed out. For the next two days he said that he could not even get out of bed to focus his eyes.

59. By Saturday 13 April in the morning, the pain had begun to ease off and although the Claimant had not recovered he was at least able to get out of bed and walk around. When he checked his phone, he had a couple of text messages from Mr. Davy complaining that he had not been able to contact him about not being able to get to work. These messages were at page 60. The first message read as follows, "Declan, I've just heard you are not in I would appreciate a call'. This was sent at 13:42 on Thursday 11 April. On Friday Mr. Davy sent the following message "Declan I've now not heard from you for two days, this is an unauthorised absence. I would appreciate you contacting me or Julie Page to let us know exactly what is going on.' It should be noted that in spite of Mr. Davy's evidence to the Tribunal that the Claimant could come and go as he pleased, this

text messages contradicted such a statement as it referred to an unauthorised absence. If the Claimant could come and go as he pleased, the Tribunal would have expected Mr. Davy to make no reference to unauthorised absence at all. It appeared that Mr. Davey was clearly annoyed at the Claimant because of his absence which he stated to be "unauthorised".

60. The Claimant became very worried about Mr. Davy's text messages as he appeared to be annoyed with the Claimant. The Claimant had been unable to contact Mr. Davy due to his disability related illness. On Saturday13 April at 10 am, the Claimant sent Mr. Davy a text as follows, "been so ill last few days I was out of it totally I apologise for not contacting you just I don't remember the last few days had savage attacks can we speak Monday.' Mr. Davy sent the Claimant a reply saying, "sorry to hear you have been ill, I have things covered on site, Julie Page will make contact Monday'. When the Claimant received this message he felt relieved and thought everything was going to be okay. Mr. Davy sent the Claimant another message which he received on Monday morning as follows, "I was letting you know I had someone to cover the site as we did not know your plans, you did not let me know you were going to site or what was happening either. It seems that communication has broken down and it's very disappointing too Julie Page will call you later this morning.' When the Claimant received this message he was in shock. He could not understand what Mr. Davy meant by having everything under control or why Julie would be contacting him. He read this message as Mr. Davy dismissing him. He sent a message back which was at page 63 saying, "just seen your text this morning when I was at the site did I understand your text, are you letting me go? That's my understanding that you are firing me I picked up my stuff from the office and locked all up again I have keys and the phone I need to give you also. Am gutted by the way'. These messages were at page 63.

61. On Monday 15 April in the morning, the Claimant arrived at the site at 7:55 am and he was the first one there. At around 8:45 am, he received a phone call from Ms Page who told him that the company was not happy with him having two days off work sick the previous week and they felt they could not rely on him and that he was to be let go. There was some conflict over this phone call with Ms Page saying that it was much later in the afternoon. Nevertheless, the Tribunal believed the evidence of the Claimant in this regard as it was consistent with the text that had been sent the Claimant on Saturday and Sunday Mr. Davy saying that Ms Page would contact the Claimant on Monday.

62. Ms. Page further told the Claimant that the company felt that his going off sick jeopardised the whole project and that he would be receiving a dismissal letter in a couple of days. The Claimant tried to explain to Ms Page that he had a severe attack and could not even get out of bed let alone send an email or use the telephone. The Claimant told Ms Page that he took a sleeping tablet and that it completely knocked him out for two days but Ms Page confirmed that Mr. Davy was not interested. Ms Page told the Claimant that decision had been made and that there was nothing more to be said. The Claimant told her that he thought this was very unfair and that it was not his fault that he had been sick and that he could not help being ill. He asked Ms Page for another chance but she said that was not possible and that he was to be let go. When the Claimant stopped talking to Ms Page he felt physically sick. He felt that nothing had been discussed or agreed and he had not been able to discuss the matter directly before the decision had been taken to dismiss him. He took his personal items from the office and left the site.

63. The Respondent gave evidence to the Tribunal that the Claimant had prior to leaving the site set off fire extinguishers on Monday morning. The Respondent stated that this was some sort of act of revenge. The Claimant denied doing this. The Tribunal did not accept the Respondent's evidence. If this was the case, the Tribunal would have expected the Respondent to have mentioned it in two letters of dismissal at pages 65 and 66 of the bundle of documents at the very first opportunity. Furthermore, the Respondent gave evidence to the Tribunal that the Claimant was guilty of various acts of misconduct during the course of his service which were also reasons for his dismissal. Again, the Tribunal did not accept this evidence because again it was not mentioned in the two letters of dismissal of pages 65 and 66. It should be noted that these letters of termination were drafted Ms. Page, an experienced external HR manager with over 20 years experience and with her own HR consultancy business. The Tribunal would have expected such an experienced HR professional to have mentioned these important matters at an early stage if they were relevant.

64. On Tuesday 16 April, Mr Davy asked the Claimant to go down to the head office in Chelmsford to return his keys and other company property. The Claimant could not attend on this on the date (16 April) because he found out that the MOT on his vehicle had expired and therefore he could not travel to the meeting on this date. This was confirmed at page 86 where the Claimant states, "I can't make it to Chelmsford this morning I've noticed my MOT is up on my car need to get this done ASAP…. it could be a few days before I can get down to you… Apologies this cannot can't be helped.' The Respondent stated that this meeting was to explain the reasons for the Claimants dismissal. The Tribunal did not accept this to be the case. The decision had already been taken to dismiss the Claimant the day before due to the Claimant's recent sickness absence.

65. On Tuesday 16 April an employee of the Respondent came to the Claimant's house to collect all the company property including his phone, laptop and keys to the site office, gate and entry door.

66. As the Claimant did not fully understand why he had been dismissed, he sent Ms. Page an email which was a pages 67 and 68 of the bundle stating, "just getting in touch regarding our conversation yesterday in relation to my dismissal letter and reference you would provide.… can you email me confirmation on my dismissal.' On 16 April, the Claimant received a letter from Ms Page confirming the Claimant's termination of his contract which was at page 65 of the bundle. The Claimant then received a second letter drafted by Ms Page but signed by Mr. Davy which was at page 66 confirming the termination of his contract with one week's pay in lieu of notice and not two weeks as set out in his letter of appointment at page 53. The Respondent gave evidence to the Tribunal that the Claimant only received one week's pay in lieu of notice and not two as set out in the letter of appointment because he agreed to receive one week not two weeks. This was confirmed by the Claimant's signature at the bottom of page 66 where he agreed to accept one week's pay in lieu of notice and not two.

67. After receiving the two letters of dismissal on 17 April, the Claimant sent the Respondent an email which was a page 71 of the bundle. This was headed Appeal Dismissal. In it, the Claimant thanked the Respondent for sending him his letter of dismissal and stated that he could not understand why he been dismissed. He stated, "I appreciate that last week I had to take a couple of days sick. As you are aware I suffer from a number of medical conditions and sometimes these conditions make it very difficult for me to function or get to work. I am very disappointed that you have decided to dismiss me just because of a couple of days that were not my fault. I would like you to reconsider

your decision and I would like to appeal the decision to dismiss me. I tried to make every effort to deal with my medical problems but sometimes I just can't function. Is there any chance you would reconsider?'

68. The Claimant received an email from Ms Page which was at page 69 in response to his appeal headed termination of your self-employed contract. In the email she states "we were looking forward to you providing a good service in the Shenfield site. However, there were soon issues and questions about your timekeeping and communications with the office which caused us to question our decision to employ you. Whilst we continued with your employment, it soon became clear these problems remained which caused Chris to make the decision on Monday to terminate your contract..…… As far as your medical condition was concerned, we did all we could to find out the full details and support you. We have no problem with you having time off sick or even being late for work on occasion; but we do have issues when this is not communicated therefore you are on unauthorised absence from work, choosing to tell some work colleagues but not informing those who manage you.….I hope that you can therefore respect and appreciate our decision and move on accordingly, rather than expect this to proceed further and then be on record for future reference requests. We are all disappointed with the result but it is what it is, and there is no turning back.'

69. The Respondent sought to persuade the Tribunal that the reason for the termination of the Claimants contract was due to his timekeeping and communications as set out in the email dismissing the Claimants appeal. This appeared to be in contradiction to the Respondents earlier evidence to the Tribunal that the Claimant could come and go as he pleased, that he had complete autonomy and that she could send a substitute when he was not able to attend work for any reason. Not only did it contradict the Respondents earlier evidence, the Claimant's dismissal occurred immediately after he had taken two days off sick due to his disability. The reason for dismissal appeared to the Tribunal to relate to his absence and not due to his failure to communicate his absence. The Respondent was aware that the Claimant was disabled, had previously taken time off sick due to that disability and was in likelihood to take further time off work due to his disability.

70. The Claimant noted the veiled threat at the end of the letter dealing with the appeal that he should move on and not make a fuss for if he did it may affect any references provided on his behalf in future. He thought this was completely unnecessary. The Tribunal also thought this was an unusual thing for an experienced HR professional to state in an email dismissing his appeal against dismissal.

71. The Respondent has a disciplinary policy and procedure which was at pages 89 to 92 of the bundle of documents. The Respondent gave evidence which was accepted by the Tribunal that this disciplinary policy and procedure was not applied to the Claimant in respect to his dismissal as the Respondent genuinely believed that he was self employed and that the procedure only applied to employees employed under a contract of employment.

72. After the Claimant's dismissal, he had reason to instruct solicitors who wrote a letter before action on his behalf dated 26 April 2019 to the Respondent. This letter was at pages 72 to 74 of the bundle. The Respondent wrote back on 8 May 2019 which letter was drafted by Mr. Davy. In this letter, for the first time, the Respondent raised new issues relating to misconduct, damage and theft. These issues were raised for the first time in

this letter which was at pages 76 to 80. The Tribunal did not accept that these matters had any relevance to the Claimant's dismissal as they were not raised in the two letters of dismissal at pages 66 and 67 and nor was there any reference to these matters in the email from Ms Page at pages 69 to 70 dismissing the Claimant's appeal against dismissal. It appeared to the Tribunal that Mr. Davy raised these matters for the first time in his letter of 8 May 2019 in order to put forward an additional defence to the Claimant's potential claim for disability discrimination which his solicitor outlined would be made in the letter at pages 72 to 74.

73. The Claimant was questioned at the hearing in respect of his sickness record commencing 30 March 2017 and 12 February 2019. He accepted in evidence that between 30 March 2017 and 16 January 2019 there was a period of 94 weeks and that he had been signed off work for 66 weeks during this 94 weeks period which translated to a percentage of 70% when he was certified not fit to work. This meant he was fit to work for only 30% of the time.

Law

Status

74. In respect of the Claimant's pursuing a claim under the EA he has to show that he had the relevant status pursuant to section 83 (2) of the EA? The existence of a contract between employee and an individual is not enough to bring the relationship within the scope of discrimination law. Instead the contract must be a type of a type identified in section 83 (2) (a) namely a contract of employment, a contract of apprenticeship or a contract personally to do work. The Tribunal reminded itself that the definition in the above section is a wider definition than section 230(1) of the ERA 1996.

75. In ascertaining whether a contract is a 'contract personally to do work', the courts have focused on the question whether or not the dominant purpose of the contract is the provision of personal services. In Patterson v Legal Services Commission (2004) ICR 312, the Court of Appeal held that in accordance with Mirror Group Newspapers Ltd v Gunning (1986) ICR 145, the two questions that must be posed are: was the Applicant obliged under the contract to personally carry out work or labour? And, if so, what is that obligation the dominant purpose of the contract?

76. In James v Redcats (Brands) Ltd (2007) ICR1006, Mr. Justice Elias in the EAT commented that the problem lay in the word "purpose", which can refer to both immediate and longer term objectives. Justice Elias thought it more appropriate to ask whether the obligation for personal service is the dominant feature of the contractual arrangement. In Pimlico Plumbers Limited v Smith (2018) ICR 1511, Lord Wilson, giving the sole judgment of the Supreme Court, stressed that the sole test remains the obligation of personal performance. Nonetheless, he signalled his approval of Justice Elias analysis, when he indicated that there may be cases in which it is helpful to assess the significance of a right to substitute by reference to whether the dominant features of the contract is personal performance.

77. In Allonby v Accrington and Rossendale College and others (2004) ICR 1328, the European Court of Justice considered the meaning of the term "Worker" for the purposes of Article 141 of the EC Treaty. The European Court held that a worker is "a person who,

for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration". Workers, it explained, can be distinguished from "independent providers of services who are not in a relationship of subordination with the person who receives the services".

78. The Supreme Court confirmed the application of Allonby to section 83 (2) in Jivraj v Hashwani (2011) ICR 1004. Lord Clarke was of the view that the ECJ in Allonby had identified the essential questions in determining whether a person is in "employment' for the purposes of the discrimination legislation namely whether: –

1. On the one hand, the person concerned performs services for and under the direction of another person in return for which he receives remuneration; or

2. On the other hand, he is an independent provider of services who is not in a relationship of subordination with the person who receives the services.

Direct Disability Discrimination

79. It is unlawful for an employer to discriminate against a worker by dismissing him: – section 39 (2) of the EA.

80. The burden of proof in discrimination case is dealt with in section 136 of the EA, which is a two stage process. Firstly, the Tribunal must consider whether there are facts from which the Tribunal could conclude in the absence of an adequate explanation, that the Respondent has committed an unlawful act of discrimination against the Claimant. If the Tribunal could not reach such a conclusion on the facts found the claim must fail. Where the Tribunal could conclude that the Respondent has committed an unlawful act of discrimination against the Claimant, it is then for the Respondent to prove that it did not commit, or as the case may be, it is not to be treated as having committed that act. The Tribunal makes further observations on the burden of proof below.

81. Section 13 of the EA provides that it is direct discrimination to treat an employee less favourably because of disability than he treats or would treat others. In determining whether there is direct discrimination it is necessary to compare like with like. This is provided for by section 23 of the Act which says that in a comparison for the purposes of section 13 there must be no material difference between the circumstances relating to each case.

82. The court of appeal in Igen Ltd v Wong (203 2005) EWCA Civ142 made the following points in relation to the application of the burden of proof and claims of direct discrimination: –

'It is important to bear in mind in deciding whether the Claimant has proved facts from which the Tribunal could conclude that there has been discrimination that it is unusual to find direct evidence of… discrimination: few employers would be prepared to admit such discrimination, even to themselves and in some cases the discrimination or not be an intention but merely based on the assumption that "he or she would not have fitted in'.

83. In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal therefore usually depends on what inferences it is proper to draw from the primary facts found by the Tribunal. It is important to note the word "could" in the legislation. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal was looking at the primary facts before it to see you what inferences of secondary fact could be drawn from them. In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those for facts.

84. According to the Court of Appeal in the case of Madarassy v Nomura International Plc (2007) IRLR 246, a difference of status and a difference of treatment will not usually be sufficient to reverse the burden of proof automatically. Nor will it simply showing that the conduct is unreasonable or unfair usually, by itself, be enough to trigger the transfer of the burden of proof: Bahl-v- The Law Society (2003) IRLR 640, EAT approved by the Court of Appeal at (2004) IRLR 799.

85. Where the Claimant has proved facts from which the Tribunal could conclude that the Respondent has treated the Claimant less favourably because of disability, it is then for the Respondent to prove that it did not commit that act, or as the case may be, is not to be treated as having committed that act. As Igen made clear, to discharge that burden in the case of alleged direct discrimination it is necessary for the Respondent to prove on the balance of probabilities the treatment was in no sense whatsoever on the grounds of the protected characteristic. Where there is more than one reason for an employer's act, the question is whether the protected characteristic was an effective cause.

Discrimination arising from disability

86. An employer discriminates against a disabled employee if it treats that person unfavourably because of something arising in consequence of his disability and the employer cannot show that the treatment is a proportionate means of achieving a legitimate aim (Section 15 EA).

87. Simler P in Pnaiser v NHS England (2016) IRLR 170 EAT gave the following guidance as to the correct approach to a claim under section 15: –

> "A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects of respects relied on by B."

88. The Tribunal must determine what caused the impugned treatment, or what was 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, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for the impugned treatment in a direct discrimination context, so too, there may be more than one reason in section 15. 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 or cause of it.

89. The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability'. That expression "arising in consequence of' could describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

90. For employer to show the treatment in question is justified as a proportionate means of achieving a legitimate aim, the legitimate aim being relied upon must in fact be pursued by the treatment. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and reasonable needs of the undertaking. The Tribunal must weigh the reasonable seeds of the undertaking against the discriminatory effect of the employer's measure or treatment and make its own assessment as to whether the former outweigh the latter: Hardys and Hansens plc v Lax (2005) IRLR 726 CA.

Indirect disability Discrimination

91. Indirect discrimination is defined in section 19 of the Equality Act 2010 as follows: –

> "(1) a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom he does not share it,
>
> (c) it puts, of which put B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.'
>
> Subsection (3) lists the relevant protected characteristics which includes disability.

Failure to make reasonable adjustments

92. Under section 39 (5) of the EA, a duty to make reasonable adjustments applies to an employer. A failure to comply with that duty constitutes discrimination (section 21 EA).

93. Section 20 of the EA provides that the duty to make reasonable adjustments comprises three requirements set out in that section. This case is concerned with the first of those requirements which provides that where a provision, criterion a practice of an employers puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer must take such

steps as is reasonable to have to take to avoid that disadvantage. Section 21 (1) provides that a failure to comply with this requirement is a failure to comply with the duty to make reasonable adjustments.

94. In considering whether the duty to make reasonable adjustments arose, a Tribunal must consider: –

1. Whether there was a provision, criterion or practice (PCP) applied by way or on behalf of an employer;

2. The identity of the non-disabled comparators (where appropriate); and

3. The nature and extent of the substantial disadvantage in relation to a relevant matter suffered by the employee.

95. The EAT has held that a "practice connotes something which occurs more than on a one-off occasion and which has an element of repetition". Nottingham City Transport Ltd v Harvey (2013) EAT. There will not have been a breach of the duty to make reasonable adjustments unless the PCP in question placed a disabled person concerned not simply at some disadvantage generally, but at a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled: Royal Bank of Scotland v Ashton (2011) ICR 632 EAT.

Holiday Pay

96. The Working Time Regulations 1998 provide that a worker has the right to be paid the minimum holiday entitlement to conferred by regulation 13 and 13A and receive a payment in lieu of unused annual leave on the termination of his employment (Regulation 14).

97. Regulation 2 states "worker" means an individual who has entered into or works under (or, where the employment has ceased, worked under)-

a. a contract of employment; or

b. any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any professional business or undertaking carried on by the individual;

2. The definition of "worker" in regulation 2 is identical to that contained in section 230 (3) ERA and the National Minimum Wage Act 1998. Limb (a) covers individuals employed under a contract of employment. Limb (b) covers individuals who provide personal services under a contract.

98. In Pimlico Plumbers an another v Smith (2018) ICR 1511, SC, an Employment Tribunal found that the Claimant was (a) a "worker" under section 230 ERA; (b) a "worker' under regulation 2 of the Working Time Regulations and (c) an employee under section 83 (2) EA. The Supreme Court determined the appeal on the basis that the three decisions of the tribunal stood together, and that it was "conceptually legitimate as well as convenient'

to treat all three of them as having been founded on a conclusion that the Claimant was a limb (b) worker.

Discrimination – Polkey

99. Tribunals should not ignore the possibility that the discriminatory act was not the only causative factor. The EAT confirmed in Abbey National plc and Hopkins v Chagger (2009) IRLR 86 that the general rule in assessing compensation is that damages are to place the Claimant into the position they would have been in if the wrong had not been sustained. In the context of discriminatory dismissals, if there was a chance of a non-discriminatory dismissal, this must be taken into account. Underhill J said, "the Claimant (ought not to make a) "windfall"… 100% recovery in circumstances where he was likely to be dismissed in any event, simply because his employer had, it maybe subconsciously had only to a small extent-allowed himself to be influenced by discriminatory considerations. There is nothing in the statue to suggest that discrimination is to be treated as a specially heinous wrong to which special rules of compensation should apply.' Underhill J went on to note, however, that this is subject to one qualification in cases where the damage is done maliciously and – or knowingly.

Uplift in Compensation for failure to follow the ACAS Code of Practice on Dismissal procedures

100. The Claimant seeks an uplift to his compensation pursuant to section 207(A) of the Trade Union and Labour Relations (Consolidation) Act 1992 which provides as follows: –

> (2) if, in the case of proceedings to which this section applies, it appears to the Employment Tribunal that-
>
> (a) a claim to which the proceedings relate concerns the matter to which a relevant code of practice applies,
>
> (b) the employer has failed to comply with that code in relation to that matter, and
> (c) that failure was unreasonable,
>
> The Employment Tribunal may, if it considers just and equitable in all the circumstances to do so, increase the award it makes to the employee by up to 25%.

<u>Tribunals Conclusions</u>

Did the Claimant's employment status come within section 83 (2) of the EA?

101. The Tribunal had to determine in the first instance whether the Claimant was entitled to make a claim for disability discrimination pursuant to the EA. The Tribunal had to determine whether the contract between the Claimant and the Respondent was of a type identified in the section namely whether it was a contract of employment, a contract of apprenticeship or a contract personally to do work. In determining this question, the Tribunal had to determine whether the Claimant was obliged under an obligation to personally to carry out work or labour and if so was that obligation the dominant purpose of the contract? In addition, the Tribunal had to determine whether the Claimant performed

services for and under the direction of another person in return for which he received remuneration. The Tribunal reminded itself that the definition in the EA is wider than that in the ERA for an employee.

102. The Tribunal was satisfied on the balance of probabilities after considering the evidence during the course of the hearing that the Claimant was obliged under the contract to personally carry out work for the Respondent and that the obligation to carry out such work was the dominant purpose of the contract. Furthermore, the Claimant performed services for and under the direction of another person return for which he received remuneration. It was clear to the Tribunal that pursuant to the letter of appointment, the Claimant was retained personally to undertake the services of a Site Manager for a period of 42 weeks at the Shenfield site commencing work either between 8 am to 4 pm or 7 am to 3 pm with an hour for lunch. He was required to report directly to the Managing Director of the company, Mr. Davy who required regular updates of progress on the site and the Claimant was required to keep a diary as confirmed by Mr. Davy at paragraph 32 of his witness statement. This diary kept Mr. Davy abreast on a daily basis of actions taken on the site and Mr Davy would meet with the Claimant on a regular basis to ascertain what was going on at the site and what progress was being made. The Claimant did not have autonomy to go come and go as he pleased and was not informed of this fact at the commencement of his contract. If the Claimant has true autonomy the Tribunal would not have expected Mr. Davy to be concerned about his 'unauthorised' absence on 11 and 12 April 2019. In addition, the Claimant was not told of a right to provide a substitute. The Claimant was not a professional providing his services to the Respondent as asserted by the Respondent. He was in a subordinate capacity to Mr. Davy who controlled and oversaw the Claimant's activities. Furthermore, the Respondent provided the Claimant with a uniform and tools to undertake his duties such as a company telephone and a laptop as well as a uniform with the company's logo. Although the Claimant did invoice for the work undertaken under the banner of Sweeney Construction Services Limited, the Tribunal did not find that this was determinative in respect of the issue of personal service and subordination.

Direct discrimination contrary to section 13 EA

103. The Claimant claimed that he was subject to direct discrimination when he was dismissed on 15 April 2019. On this date, his fixed term contract was terminated by Julie Page on behalf of the Respondent. This was not however because he was a disabled person. The Respondent had known about the Claimant's condition from 13 February 2019 and his contract of employment was not terminated at that date. The Tribunal had to ascertain whether the Claimant's dismissal on 15 April was less favourable treatment of him compared to a non-disabled comparator. The Claimant relied upon a hypothetical comparator. The Tribunal found that based upon the hypothetical comparator, the treatment would have been exactly the same namely that a non-disabled hypothetical comparator who had six days sickness absence would have been dismissed in exactly the same circumstances as the Claimant for the level of sickness absence that the Claimant had during the short period of service that he had with the Respondent.

Discrimination arising from disability pursuant to section 15 EA

104. The Tribunal reminded itself that in such a claim to the Tribunal must first identify the unfavourable treatment. It must then identify the "something" that arise as a consequence of the Claimant's disability. The Tribunal must decide whether the

unfavourable treatment was because of the "something" that arises as a consequence of the disability and finally the Tribunal must consider whether the alleged discriminator can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

105. The Tribunal finds that the Claimant was subjected to unfavourable treatment when he was dismissed by the Respondent because of his absences on 11 and 12 April. This was something arising in consequence of the Claimant's disability. The Respondent accepted that the Claimant's absence on those two days was something arising in consequence of his disability. It was aware at the time that the Claimant was a disabled person as defined and that his sickness absence on 11 and 12 April were absences related to his disability. Indeed at page 62 of the bundle, the Claimant in a text to Mr. Davy on Saturday 13 April at 10 am confirmed as follows, "I just don't remember the last few days… Savage attacks… can we speak Monday?'

106. Therefore the key question in this claim is was there a causative link between Ms Page terminating the Claimant's engagement at Mr. Davy's behest and his failure to attend work on 11 and 12 April 2019? The Tribunal reminded Itself of the guidance in the case of T Systems Limited-v- Lewis EAT 0042/15 that the Tribunal must consider whether the 'something arising in consequence of disability operated in the mind of the alleged discriminator consciously or unconsciously to a significant extent.'

107. The reason why Ms. Page terminated the Claimant on Mr. Davy's instructions on 15 April. The Respondent sought to persuade the Tribunal that the Claimant's dismissal was due to his failure to communicate with the Respondent about his absence and the reason for it. The Tribunal did not accept this to be the case. As can be seen from the facts section of this judgment, the Respondent was aware that the Claimant was a disabled person, had taken four days off already on sick leave for disability related illness and was aware that this illness was related to his disability at the time it took the decision to dismiss him. Despite this awareness, the Respondent took no alternative action other than terminating the employment of the Claimant. It did not contact the Claimant to ascertain the nature of his illness and what action could be taken to support him. Instead, it appeared from the text communication between the Respondent and the Claimant from Friday 12 April to Monday 15 April that the Respondent was unhappy with the Claimant's sickness absence and had already taken action to replace the Claimant as the Site Manager and taken the decision to terminate the Claimant's services.

108. In considering the mindsets of Ms. Page instructed to dismiss by Mr. Davy at the relevant time, the Tribunal has taken into account the inconsistency in the Respondent's evidence as adduced by Mr. Davy that the Claimant was free to set his own hours and come and go as he pleased on the one hand and his criticism of the Claimant's 'unauthorised' absences from work on 11 and 12 April in his text to the Claimant on 12 April (page 60). If the Claimant could really come and go as he pleased as the Respondent was seeking to persuade the Tribunal, it seemed to the Tribunal that there was no need to terminate the Claimant's engagement in the manner that this engagement was terminated. There was no real engagement with the Claimant, no alternatives were considered and the decision was taken without any real engagement with the Claimant a disabled person.

109. As set out in the facts section of this judgment, the issues relating to misconduct, damage and theft raised by Mr. Davy in his letter of 8 May 2019 only became issues after the Respondent received a letter before action from the Claimant's solicitor dated 26 April 2019 confirming that the Claimant was considering making a claim for disability discrimination in respect of his dismissal. The Tribunal determined that this was not raised with the Claimant at the relevant time in two letters of dismissal nor was it raised by Ms Page when she dismissed the Claimant's appeal. It seemed to the Tribunal that if these matters were genuinely in the mind of the Respondent it would have raised them much earlier. Therefore, the Tribunal did not accept that misconduct had anything to do with the Claimant's dismissal. It was the Tribunal's view that after the Claimant had sickness absence on 11 February, 11 March, 25 March and April 8 April, the two days sickness absence related to disability on 11 and 12 April were too much for Mr. Davy and this is why he took the decision to dismiss the Claimant. Such a decision was discrimination arising from the Claimant's disability.

110. The Respondent asserted that the treatment of the Claimant was a proportionate means of achieving a legitimate aim. The legitimate aims relied upon were the ability to have all workers carry out their work and have access to the site, the effective efficient running of the business, the need to meet deadlines and the effective management of attendance. The Respondent produced no evidence in respect of any of these alleged legitimate aims and therefore the Tribunal did not accept that the discriminatory treatment was a proportionate means of achieving a legitimate aim.

Indirect disability discrimination contrary to section 17

111. The Claimant alleged that the Respondent applied the following provision criterion or practice (PCP): –

2. The Respondent's disciplinary and dismissal policies and procedures in particular its PCP to refuse to consider the effects of an employee is illness on his attendance and performance before making any disciplinary decisions;

3. The Respondent's Sick Absence policies and procedures in particular its PCP to dismiss without procedure any employee that is absent from work or is unable to communicate with the Respondent due to the effects of an illness;

4. The Respondent's standards and conduct policies and procedures.

112. The Tribunal did not accept that the above PCPs amounted to a Provision Criterion or Practice as no element of them could be shown to be repeated. The alleged practice must have an element of repetition about it and be applicable to both the disabled person and his or her non-disabled comparators. There was no evidence adduced to show that the employer routinely conducted its policies and procedures in this way. Furthermore, the application of a flawed disciplinary process did not cause the Claimant substantial disadvantage over and above his non-disabled comparators. It was clear to the Tribunal that failure to follow the above PCPs would cause misery to whoever was the victim be they disabled or non-disabled.

113. The Respondent did have a disciplinary procedure but this applied to employees and not self-employed contractors. It was therefore not applied to the Claimant. It was not part of that policy to refuse to consider the effects of an employee's illness on his attendance and performance before making any disciplinary decisions. The policy related to conduct and not the management of sickness absence. Furthermore, the Respondent did not have a sickness absence policy or a Standards and Conduct policy.

114. The Respondent did not have a policy or practice of refusing to consider the effects of an employee's illness on his attendance and performance before making any disciplinary decisions. The Respondent did not have a policy of dismissing without procedure any employee that was absent from work or was unable to communicate with the Respondent due to the effects of an illness. Even if the Respondent did have these policies or practices, it would not put people who shared the Claimant's disability at a particular disadvantage compared to non-disabled people. It would put anyone who had any absence at all, whether for any illness or not or whether disabled or not at a particular disadvantage. Therefore, this complaint is dismissed.

Failure to make Reasonable adjustments contrary to section 20 EA

115. The duty to make reasonable adjustments arises when a disabled person is placed at a substantial disadvantage by an application of a provision, criterion or practice (PCP). The alleged PCPs relied upon by the Claimant are the same PCPs relied upon in respect of the indirect discrimination complaint above.

116. As set out above, a flawed disciplinary process was not a PCP as it required an element of repetition as specified in the case of Nottingham City Transport Ltd cited in the legal section above. The alleged practice must have an element of repetition about it and be applicable to both the disabled person and his or her non-disabled comparators. The Claimant did not adduce any evidence to show that the employer routinely conducted it's disciplinary process in the way that he stated. Furthermore, the application of the flawed disciplinary process did not cause the Claimant substantial disadvantage over and above his non-disabled hypothetical comparator. Anyone would have been disadvantaged by these PCPs if they were absent from work whether for illness or otherwise. Therefore, this complaint is dismissed.

Was the Claimant a worker within the meaning of Regulation 2 WTR 1998?

117. In this case, the Tribunal determined that the Claimant provided services under a contract personally to do work and that was the dominant purpose of the contract. The Claimant was subordinate to Mr. Davy and therefore the Claimant was a worker. This means that he was entitled to holiday pay for his service with the Respondent and that equated to 8 days holiday pay.

Notice pay

118. The Claimant did not intend on working out his two weeks' notice period as he took all his possessions when he left the site on the morning of 15 April 2019. The contract at page 53 did not specify that he would be paid for notice not worked. It was subsequently agreed in writing that he would be paid one week in lieu of notice instead and the Claimant signed to indicate that he agreed with this arrangement. This letter was a page 66. Therefore, the Claimant is not entitled to an additional one weeks' notice.

Polkey type reduction

119. The Claimant did not challenge in questions put to him that for the period between 30 March 2017 and 16 January 2019 being a period of 94 weeks, he was signed off work for 66 weeks due to sickness absence. This meant that the Claimant was not fit for work for 70% of the time and was fit for work for only 30% of the time. Therefore, based upon this evidence, the Tribunal came to the conclusion that there was only a 30% chance that he would have been able to remain working until November 2019 being the end of the fixed term contract with the Respondent based on his previous periods of being fit to work.

Uplift of award- section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992?

120. The Respondent in this case had a genuinely held belief that the Claimant was not an employee employed under a contract of employment as defined by section 203 ERA. Rather the Respondent genuinely believed that the Claimant was a self employed contractor. As the ACAS code of practice on Disciplinary and Grievance procedures 2015 applies to employees the Tribunal does not award any uplift to the Claimant pursuant to the above provision.

Remedy Hearing

121. The case is listed for a remedies hearing at the East London Tribunal on 8 June 2020 as previously advised to the parties.

_____

Employment Judge Hallen
Date: 17 March 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE