EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Jakkhu	**v**	**Network Rail Infrastructure Ltd**

Heard at: Cambridge Employment Tribunal

On: 22nd September 2020 and 6th October 2020 (in chambers)

Before: Employment Judge King

Members: Mr C Davie
Mrs C Smith

Appearances

For the Claimant: Mr Stephenson (counsel)
For the Respondent: Ms Hicks (counsel)

RESERVED JUDGMENT

1. The claimant's claims for direct disability discrimination, discrimination arising from disability and victimisation are not well founded and are dismissed.

REASONS

1. This is the reserved judgment of the Tribunal in the above matter. The case was listed for a hearing on 22nd September 2020. The panel attended the hearing centre given the volume of documentation in this case and the parties and their representatives attended the hearing via CVP. Unfortunately there were a number of administrative difficulties which prevented the hearing commencing on time. Both parties had prepared submissions in advance of the hearing but these were not sent to the panel so had to be located on the morning of the hearing and then read. The bundles had not been located and sent to the hearing centre as requested but the members were able to locate their bundles. The parties had also not been sent a CVP hearing access but the hearing was underway by lunchtime.

2. Having read the submissions and in particular the claimant's submissions about the nature of the findings it wanted the Tribunal to make it was apparent that the Tribunal would not have sufficient time to consider the matter in one day. Before the end of the hearing the panel agreed to sit as soon as possible to continue its deliberations and the panel set a date of 6th October 2020 to do so but without the parties in attendance. The parties were informed of the new listing before the hearing concluded. On the second occasion the panel sat remotely for their deliberations.

The issues

3. This is a matter remitted back from the EAT. The claimant appealed our decision under new representation and HHJ Eady sitting alone gave a judgment following a hearing on 2nd August 2019 in a sealed judgment dated 12 November 2019. The key paragraphs of the EAT judgment were identified as 70, 71, 72 and 73.

4. In summary, the EAT remitted the hearing back to us on one ground namely the dismissal on 24th September 2014 and to reconsider our approach to the claimant's complaint in respect of detriment in the circumstances of his dismissal. The key issue was the reason why the claimant was dismissed notwithstanding the union agreement to the contrary and whether the failure to retract the notice of dismissal (or offer to do so) was by reason of the claimant's disability, or something arising from that disability or because of his protected act.

5. On 13th December 2019 a preliminary hearing took place before Regional Employment Judge Byrne on 13th December 2019 in which the issues were agreed as follows:

6. Jurisdiction

6.1 Has the claimant's claim been brought within the period of 3 months starting with date of the act to which the complaint relates (s.123 (1)(a) Equality Act ("EqA") 2010), bearing in mind:

a. the act or omission forming the subject of the complaint was made on 24 September 2014;
b. the parties entered into ACAS Early Conciliation between 1 June 2015 and 1 July 2015; and
c. the claimant presented his claim to the Employment Tribunal on 31st July 2015?

6.2 If not, has the claimant presented his claim in such other period as the Employment Tribunal thinks just and equitable within the meaning of s123(1)(b) EqA 2010)?

7. Detriment (s39 EqA 2010)

7.1 By dismissing him on 24 September 2014 did the respondent subject the claimant to a detriment within the meaning of s39(2)(d) EqA 2010?

8. Direct Discrimination (s13 EqA 2010)

8.1 Did the respondent treat the claimant less favourably than a hypothetical comparator by:

a. dismissing him on 24 September 2014?

8.2 Has the claimant proved facts from which the Tribunal could conclude that the respondent treated the claimant in this way because of his disability (s136(2) EqA 2010)?

8.3 Has the respondent shown the treatment was not because of disability in any way, consistent with s136 (3) EqA 2010?

9. Discrimination arising from a disability (s15 EqA 2010)

9.1 Did the respondent treat the claimant unfavourably by:

a. dismissing him on 24 September 2014?

9.2 Was this because of something arising in consequence of the claimant's disability; namely his need to take time off work for his colitis? Specifically was the claimant absent from work by reason of colitis at the material time?

9.3 Was the dismissal on 24 September 2014 a proportionate means of achieving a legitimate aim?

9.4 Has the claimant proved facts from which the Tribunal could conclude that the respondent treated the claimant in this way because of something arising in consequence of his disability (s136(2) EqA 2010)?

9.5 Has the respondent shown that the treatment was not because of something arising in consequence of his disability in any way, consistent with s136(3) EqA 2010?

10. Victimisation

10.1 Did the respondent subject the claimant to a detriment by:

a. dismissing him on 24 September 2014?

10.2 Did the respondent subject the claimant to this treatment because he had done a protected act, namely submit a grievance on 21st September 2014?

10.3 Has the claimant proved facts from which the Tribunal could conclude that the respondent treated the claimant in this way because of his protected ~~disclosure~~ [act] (s136(2) EqA 2010)?

10.4 Has the respondent shown the treatment was not because of his protected ~~disclosure~~ [act] in any way consistent with s136 EqA 2010?

11. Remedies (s119(4) EqA 2010)

11.1 The claimant having suffered no pecuniary loss as a result of the dismissal on 24 September 2014, to what award for injury to feelings (if any) is the claimant entitled?

12. For completeness we also record that the matter was supposed to be heard on 6th May 2020 but in light of the pandemic this was converted to a preliminary hearing with directions given for case management by Employment Judge King. The parties confirmed the issues were those agreed at the last preliminary hearing and the matter was listed for 22nd July 2020. This hearing was postponed due to unavailability of one member of the panel and relisted for 22nd September 2020.

13. With regard to whether dismissing the claimant on 24th September 2014 amounted to a detriment, the claimant seeks to materially widen the scope of the remittal hearing and asked the tribunal to examine all the circumstances of the dismissal. The parties now agree that the question for the tribunal should be why the Respondent failed to prevent the dismissal that took effect on 24th September 2014 when this was in breach of the union agreement. The claimant however says that the remittal goes further to examine the surrounding circumstances of the dismissal and seeks to go beyond the issues identified at the preliminary hearing. The claimant says all of the following are detriments within the meaning of the circumstances around dismissal:

13.1 Allowing the dismissal to take place on 24th September 2014 notwithstanding the agreement with the trade unions (agreed by respondent to be part of the issues);
13.2 Extending the notice period on the 22nd October 2014 rather than retracting the dismissal (respondent says EAT remittal was the failure to extend it until then and not to retract it);
13.3 Failure to retract the notice until 3rd February 2015;
13.4 Failure to secure the March 2015 job role to which Mark Daley was appointed;
13.5 The fact the claimant was at risk of dismissal still which is ongoing (2020) and which was arguably ongoing when he raised his 20th April 2015 grievance.

14. We do not accept the claimant's representations on the scope of the reminttal. This is a materially different case than was advanced at the

preliminary hearing when the issues were identified. We are not bound slavishly by the issues recorded by the Regional Employment Judge at that preliminary hearing and we accept of course the EAT's decision on the appeal. To extend this in the way the claimant wishes us to do so to reopen matters previously examined which were not part of the appeal.

15. On point 13.4 above we have already considered this matter as allegation 7.3 in the original claim. It was not part of the appeal and thus the EAT judgment and it would be wrong for us to re-open this part of our judgment which was not appealed and to do so would be to give the claimant a second bite of the cherry on this issue.

16. Likewise 13.5 above is asking us to go so much further than the EAT remittal particularly when the claimant's appeal on the respondent's failure to offer him a permanent role was put so generally first time around and not overturned on appeal.

17. We have regard in particular to the summary of the EAT judgment and paragraph 57 of the EAT judgment that this Tribunal should consider whether the failure to offer to retract the notice was an act of detriment. This was also put as why the Respondent had not sought to retract the notice of dismissal any earlier. As such issues 13.1-13.3 are relevant considerations for the remitted hearing. We should consider dismissal (even if subsequently withdrawn) can amount to a detriment according to paragraph 58 of the EAT judgment.

The law

18. Section 13 Equality Act 2010 (Direct Discrimination) states as follows:

> "**13 Direct discrimination**
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2) ….
>
> (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B. …"

19. Section 15 Equality Act 2010 (Discrimination arising from disability):

> "**15 Discrimination arising from disability**
>
> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

20. Section 27 Equality Act 2010 (Victimisation):

"27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

21. Section 39 Equality Act 2010:

"**39 Employees and applicants**

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

(a) in the arrangements A makes for deciding to whom to offer employment;
(b) as to the terms on which A offers B employment;
(c) by not offering B employment.

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

(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment.

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

(a) in the arrangements A makes for deciding to whom to offer employment;
(b) as to the terms on which A offers B employment;
(c) by not offering B employment.

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

(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment.

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

(6) …

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

(a) by the expiry of a period (including a period expiring by reference to an event or circumstance);
(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

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

22. Section 123(1) Equality Act 2010 (Time Limits):

"123 Time limits

(1) Subject to section 140(a) and 140(b) proceedings on a complaint within section 120 may not be brought after the end of —

(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

(1) …

(2) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

23. Section 136 Equality Act 2010 (burden of proof):

" 136 Burden of proof

(1)This section applies to any proceedings relating to a contravention of this Act.

(2)If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3)But subsection (2) does not apply if A shows that A did not contravene the provision.

(4)The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5)This section does not apply to proceedings for an offence under this Act.

(6)A reference to the court includes a reference to—

(a)an employment tribunal;……"

24. The claimant referred to a number of cases in his written submissions to which we have had regard namely:

Jeremiah v Ministry of Defence [1979] QB 87 CA
Chief Constable of the West Yorkshire Police v Khan [2001] ICR 1065
Shamoon v Chief Constable of the Royal Ulster Constabulary [2203] ICR 337
Garry v London Borough of Ealing [2001] IRLR 681
Qureshi v Victoria University of Manchester [2001] ICR
Anya v University of Oxford [2001] ICR 847
Ladele v London Borough of Islington [2009] IRLR 154
Macfarlane v Relate Avon Ltd [2010] IRLR 196
X v Y [2013] UKEAT 0322/13
Griffiths Henry v Network Rail Infrastructure Ltd [2006] IRLR 865
Igen v Wong [2005] EWCA Civ 142
Veolia Environmental Services v Gumbs [2014] EqLR 364
Secretary of State for Justice & Anor v Dunn UKEAT/0234/16
Trustees of Swansea University Pension Scheme v Williams [2019] ICR 230 SC
Basildon NHS Foundation Trust v Weerasinghe [2016] ICR 305
Buchanan v Commissioner of the Metroplois of Police [2015] IRLR 918
Homer v Chief Constable of West Yorkshire Police and Another [2012] IRLR 601
Hendricks v Metropolitan Police Commissioner [2003] IRLR 96

Owusu v London Fire and Civil Defence Authority [1995] IRLR 574
Cast v Croydon College [1998] ICR 500
British Coal Corporation v Keeble [1997] IRLR 336
Southwark London Borough v Alfolabi [2003] IRLR 220
DPP v Marshall [1198] ICR 518

As well as paragraph 5.7 of the Equality Act 2010 Statutory Code of Practice.

25. The respondent referred to a number of cases in their written submissions to which we have had regard namely:

Clarke v Hampshire Electro-plating Co Ltd [1991] IRLR 490 EAT
Barclays Bank Plc v Kapur [1989] IRLR 387 CA
Hendricks v Metropolitan Police Commissioner [2003] IRLR 96
Oxfordshire County Council v Meade UKEAT/0410/14
Bexley Community Centre (t/a Leisure Link) v Robertson [2003] IRLR 434
Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13
Edomobi v La Retraite RC Girls School UKEAT/0180/16
Accurist Watches Ltd v Wadher [2009]
British Coal Corporation v Keeble [1997] IRLR 336
Miller v Ministry of Justice UKEAT/0003/15
Derbyshire v St Helens Metropolitan Borough Council (Equal Opportunities Commission Intervening) [2007] ICR 842
Shamoon v Chief Constable of the Royal Ulster Constabulary [2203] ICR 337
Cordant Security Limited v Singh and Stones (UKEAT/014415/LA
Deer v University of Oxford [2015] ICR 1213
London Borough of Islington v Ladele [2009] IRLR 154
Laing v Manchester City Council [2006] IRLR 748
Nagarajan v London Regional Transport [1999] IRLR 572
Igen v Wong [2005]EWCA Civ 142
Brown v Croydon LBC [2007] EWCA Civ 32
Anya v University of Oxford [2001] EWCA Civ 405
Watt (formerly Carter) v Ahsan [2008] IRLR 243
Porcelli v Strathclyde Regional Council [1986] IRLR 134
Stefanko v Maritime Hotel Ldt [2019] IRLR 322
Madarassy v Nomura International Plc [2007] IRLR 246
Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305
City of York Council v Grosset UKEAT/0015/16

Findings of fact

26. We heard no evidence from either side at the remitted hearing. We have relied on our original findings of fact as set out in our judgment undated but sent to the parties on 31st July 2018. We have re-read our notes and the parties witness statements.

27. On the specific issue remitted back from the EAT the following findings of fact from our judgment sent to the parties on 31st July 2018 are specifically relevant:

    27.1 The claimant raised a grievance against Ian Hindler concerning race and disability discrimination in connection with a failure to make reasonable adjustments, training courses and being subjected to excessive scrutiny in respect of his diet and breaks (paragraph 55). This was found by us to be a protected act (paragraph 218).
    27.2 Notice of redundancy was served at the meeting on 25th March 2014 (paragraph 64).
    27.3 The dismissal date was given as 24th September 2014 due to his six month notice period (paragraph 64).
    27.4 The claimant could be said to have elected for redundancy as he confirmed he wished to take redundancy and to not be progressed for the alternative Waterloo role albeit that he did not volunteer in the usual sense. He has already declined relocation to Manchester which he was offered (paragraph 64).
    27.5 The letter confirming dismissal was sent on 2nd June 2014 giving the right of appeal which the claimant did not exercise (paragraph 67).
    27.6 His dismissal took effect on 24th September 2014 (paragraph 70).
    27.7 Before dismissal took effect the respondent made another referral to occupational health and a report was provided dated 29th September 2014 from BUPA (paragraph 71).
    27.8 On 22nd October 2014 Mr Barrett called the claimant to inform him that the respondent was extending his notice period. (In effect he was reinstated and continuity preserved.) This was confirmed by letter dated 31 October 2014 (paragraph 72).
    27.9 A national agreement between TSSA and RMT had been reached in 2014 so that no compulsory redundancies in bands 5 - 8 would take place until 31 December 2014. The claimant's notice period was extended until 31 January 2015 (paragraph 72).
    27.10 On 31 October 2014 the claimant emailed Mr Barrett and Ms Jethwa concerning the extended notice period and that he was unfit for work (paragraph 73).
    27.11 On 7th January 2015 the claimant had a meeting with Mr Barrett and Ms Jethwa in which he confirmed that he would look at voluntary redundancy or alternative roles (paragraph 76).
    27.12 Written confirmation of retraction of redundancy notice was sent to the claimant by letter dated 3rd February 2015 (paragraph 77).
    27.13 On 4th February 2015 the claimant returned to work (paragraph 78)

28. To this end the additional findings of fact necessary to consider the remitted case are as follows:

29. On 13th August 2014 the claimant requested and was given garden leave at the welfare meeting. By 14th August 2014 the claimant was out of the business at his request. The claimant confirmed in the welfare meeting

that there was no further support that Mr Barrett and Ms Jethwa could offer him and they had previously offered support with his CV.

30. At the welfare meeting of 13th August 2014 the claimant agreed to take annual leave during the period of garden leave so it was agreed he would be on garden leave from 14th August 2014 to 1st September and then on annual leave from 1st to 24th September 2014.

31. On 28th August 2014 the claimant said he did not wish to be on garden leave any longer but wished to be on sick leave instead.

32. The letter dated 31st October 2014 confirming the extension of this notice period also confirmed that the claimant would remain on garden leave for the duration of the extended notice period to 31st January 2015. The letter explained the date had been chosen in case the national agreement with the union was extended beyond 31st December 2014. It also confirmed that the (union) agreement was not widely communicated until the end of the year, it was put in place after his role was at risk and that the extension had caused the claimant some degree of anxiety as he had started to commence personal plans for the future.

33. We accept that the union agreement had not been reached until after the claimant was placed at risk of redundancy and had not been widely communicated which was unchallenged. Further, Ms Jethwa's unchallenged evidence at the last hearing was that she and Mr Barrett did not know of the existence of the union agreement until 15th October 2014 which we accept.

34. Mr Barrett and Ms Jethwa were told about the issue of the claimant's notice and the union agreement by Sinead Trudgill (HR) who told them to extend his notice period and provide him with access to jobs and roles within the period. This was after the claimant's dismissal. The instruction came from HR and was implemented by Mr Barrett and Ms Jethwa who were advised to do this.

35. Ms Jethwa's unchallenged evidence was that she discussed it with Mr Barrett when they became aware and it was agreed that Mr Barrett would call the claimant. Mr Barrett telephoned the claimant to communicate the extension on 22nd October 2014 one week after the instruction was given and the issue had come to light. The redundancy exercise impacted on others but they secured alternative employment or relocated so the claimant was the only one impacted by the union agreement relevant to these proceedings.

36. The claimant's evidence was that when he was told that his notice period was being extended he "thought it was a joke" and "couldn't believe it". He confirmed that "at the time he felt angry that the Respondent was trying to get rid of him but couldn't because of the union agreement." It was not the failure to prevent the dismissal that made him angry but the fact the respondent couldn't dismiss him. This was by this time what he wanted to happen. He had made other plans for his future. He had not been

processed as a leaver to receive his final salary payments of accrued holiday and redundancy payment when he was reinstated.

37. The claimant submitted a sick note for the period 24th September 2014 to 23rd December 2014 (retrospectively on 28th October 2014) notwithstanding that he was on garden leave and the respondent confirmed that accordingly he would not be required to use his annual leave during the garden leave period in the usual way.

38. The claimant's email of 31st October 2014 confirmed that:

"*Due to finding out 4 weeks after my initial redundant date I have made other plans going forward, this has cause* (sic) *me further anxiety and stress to my health.*

I have booked time away to relax and try to resolve my health issues as best as possible, The dates are:
10th November 2014- 8th December 2014
17th December 2014 – 4th January 2015

As these dates were booked after my redundancy and me not been aware I didn't officially leave NR, I'm sure NR will honour these date (sic) *due* (sic) *their incompetency.*

I have as of Wednesday 28th October sent in a sick note which will cover me for 3 months and this was sent via registered post and please confirm if you have/haven't received it."

39. At that point it was clear from the claimant's evidence that his frustration was at not being dismissed as planned and getting his redundancy. He had made other plans and was frustrated that this was then extended. At that time he saw no future with the respondent.

40. We also know that the claimant went to India in the first period arriving back in the UK on 8th December 2014. On 15th December 2014 the claimant emailed Ms Jethwa asking how if bands 5-8 cannot be made redundant he can be issued with notice without a confirmed end date in 2014. He was asking whether the notice should start when the union agreement ended instead. He emailed again on 19th December 2014 confirming that as he was on garden leave for the extended notice period he should be on full pay not half pay which related to his sickness absence. It was agreed a meeting would take place in the New Year to discuss matters. His sick note expired on 23rd December 2014 and he did not submit another in the relevant period.

41. On 7th January 2015 the claimant had a conference call with Mr Barrett and Ms Jethwa in which he confirmed that he would look at alternative roles in London. He was asked whether he wanted redundancy or other roles and confirmed that last year he didn't see anything for him with the respondent. He was asked whether he wanted them to ask for voluntary

redundancy on the same package and was told that he would have to confirm in writing. The claimant confirmed he needed to speak to his union representative and might hold out for compulsory redundancy as that was still not agreed with the unions. He asked about the difference in the packages between compulsory and voluntary redundancy which was confirmed to be the same. The claimant also confirmed that he *"didn't really want another role but in the end a job is a job and he did not want to be victimised."* It was agreed that the parties would meet in a week to see what his decision was. A discussion took place around pay and whether he was now on garden leave and it was confirmed that he was no longer off sick but on garden leave and on full pay.

42. The claimant was still by 7th January 2015 expressing a preference for redundancy and confirmed he did not really want another role with the respondent. The claimant was clearly taking union advice at that time.

43. This period of time is confusing as although on his records with the respondent, the claimant has submitted a sick note during garden leave he was at his request on garden leave from 14th August 2014 to 3rd February 2015. The respondent's systems had his absence from 6 May 2014 to 22nd December 2014 as sick leave which was in fact incorrect as 14th August he was on garden leave to alleviate his stress at his request. The claimant submitted a sick note for 28th August 2014 to 26th September 2014 and retrospectively (on 28th October 2014) for the period 24th September to 23rd December 2014 but again was already on garden leave. The claimant submitted sick notes after being told that his annual leave would need to be used whilst on garden leave and this was then credited back to him but he was paid in full rather than on half pay as per sick leave. He was clearly absent from the business but on garden leave and that was the reason for his absence if he was not covered by the sick note. Between 24th December 2014 to 3rd February 2015 he was on garden leave.

44. On 20th January 2015 the parties met and the claimant had his union representative in attendance. At the start of the meeting the union representative raised that there was an error in issuing the notice which needed to be withdrawn and the process restarted. The respondent confirmed that it could do that and that as the claimant's role had officially relocated to Manchester he would remain at risk and they would look at suitable alternative roles for him. The notice was agreed to be retracted in the meeting on 20th January 2015 but was subsequently confirmed in writing as set out below.

45. By email dated 30th January 2015 Ms Jethwa confirmed that the clamant would return to work on 4th February 2015 and would be sent a confirmation in writing of the retraction of his redundancy notice. This written confirmation was sent to the claimant by letter dated 3rd February 2015. This confirmed that the redundancy notice was retracted in the meeting on 20th January 2015 and that the claimant would return to work on project work on 4th February 2015 whilst he sought another role.

Conclusions

46. Taking each of the issues as identified at the preliminary hearing and agreed between the parties in turn (save for the issue of jurisdiction which we have looked at as the final issue as the question of the relevant date needs to be determined for each form of discrimination applicable). The conclusions were unanimous from the panel and we applied the balance of probabilities.

Detriment (s39 EqA 2010)

By dismissing him on 24 September 2014 did the respondent subject the claimant to a detriment within the meaning of s39(2)(d) EqA 2010?

47. The respondent did retract the notice in the meeting on 20th January 2015 and confirmed this in writing to the claimant on 3rd February 2015 having told the claimant by email on 30th January 2015 that the written confirmation would be sent as agreed at the meeting. We know that the union agreement was in place by the time the dismissal took effect on 24th September 2014 and that it was extended rather than retracted on 22nd October 2014. The union agreement ought to have led to the retraction (or at least the offer to retract it) of the claimant's notice of dismissal before it could take effect.

48. Dismissal can be discriminatory under s39(2)(c) EqA 2010 in its own right and the EAT at paragraph 57 of its judgment confirmed that we must look at this in the light of detriment and whether the failure to offer to retract the notice was an act of detriment and that dismissal even if subsequently withdrawn can amount to a detriment and that we were wrong to hold otherwise.

49. Claimant's counsel submits that we do not need to address the issue of detriment as the EAT has already directed that these matters amount to detriments. Given that this is a remittal we do not accept this as the EAT said that we were "required to adopt a broad approach to its consideration of whether detriment has been established" (paragraph 58) and that we should come to the matter afresh (paragraph 72) which we have done.

50. We spent a considerable time discussing detriment as the clear impression the panel had of the claimant's evidence on this issue was that he was unhappy that the notice period was extended and he was not dismissed with the redundancy package at that time. The claimant's own evidence was that he "felt angry that the Respondent was trying to get rid of him but couldn't because of the union agreement." He was stressed that they extended the notice and he had made other future plans.

51. Both counsel have referred us to the passage in *Shannon v CC of the Royal Ulster Constabulary [2003]* citing the leading authority of *Ministry of Defence v Jeremiah [1980]* that a "*detriment exists if a reasonable worker*

would or might take the view that the [treatment] was in all the circumstances to his detriment." We accept that the claimant had a sense of grievance about the decision to dismiss him back in March 2014 as he felt that the redundancy was a sham to get rid of him which we rejected in the last hearing.

52. The claimant's counsel in his submissions reminds us that the fact the claimant did not know what was going on at the time is immaterial as per *Garry v London Borough of Ealing [2001].* Mr Barrett and Ms Jethwa were unaware until 15th October 2014 and the claimant until 22nd October 2014 of the union agreement but this matters not.

53. The claimant had by the time he discovered this reconciled himself to leaving. However, we need to go back further in time. What would the claimant have considered if he had known about the union agreement and discovered that he was being dismissed notwithstanding it? We consider that he would have been aggrieved. We believe that this would have been his genuine perception at that time so conclude that allowing the dismissal to take effect notwithstanding the union agreement amounted to a detriment.

54. The failure to retract the notice in October 2014 when it was extended equally could be a detriment. Again, whilst the claimant had reconciled himself to leaving by this point, had he known about the process error subsequently highlighted by his union he would have felt aggrieved in the same way. We therefore conclude that failure to retract the notice in October 2014 (when instead it was extended) amounts to a detriment in this case. For completeness the failure to retract it up to this point could equally amount to a detriment in this case.

55. It must also follow that the failure to retract that notice until the meeting on 20th January 2015 (as communicated in writing on 3rd February 2015) was also a detriment for the same reasons as paragraph 54 above.

56. If allowing the dismissal to take effect notwithstanding the union agreement, the failure to (or to offer to) retract it in October 2014 which was ongoing until 20th January 2015 are all detriments then this is clearly capable of amounting to less favourable treatment for the purposes of s13 EqA 2010, unfavourable treatment for the purposes of s15 EqA 2010 and a detriment for the purposes of s27 EqA 2010.

Direct Discrimination (s13 EqA 2010)

Did the respondent treat the claimant less favourably than a hypothetical comparator by:

a. Dismissing him on 24 September 2014?

57. The claimant was dismissed and he relies on the hypothetical comparator here. The claimant's dismissal took effect notwithstanding that there was a union agreement that no compulsory redundancies take place.

58. The respondent makes the valid point that the claimant's redundancy was at that point at his election and therefore fell outside the union agreement in any event but this was not an argument before the EAT or this tribunal on the last occasion. In essence the claimant's role was redundant but he did not wish to relocate and as such we are prepared to consider that this fell within the remit of the union agreement.

59. The claimant was the only one dismissed. The claimant was not the only one at risk that would have been impacted by the union agreement. The others at risk applied for roles the claimant did not apply for and were therefore no longer at risk and were not dismissed.

60. Considering the detriments found at paragraph 56 the respondent did treat the claimant less favourably than a hypothetical comparator by allowing the dismissal to take effect notwithstanding the union agreement, the failure to (or to offer to) retract it in October 2014 which was ongoing until 20th January 2015 so we must now consider the reasons why this happened.

Has the claimant proved facts from which the Tribunal could conclude that the respondent treated the claimant in this way because of his disability (s136 (2) EqA 2010)?

61. There was no evidence of a prima facie case of discrimination. We specifically rejected on the last occasion the comparators that the claimant sought to draw as actual comparators and there was no appeal to the EAT in this regard.

62. We must consider the reason why the claimant's notice was not retracted when the union agreement was reached, why the dismissal was allowed to take place on 24th September 2014 notwithstanding the union agreement to the contrary and why this was not revoked in October 2014 but extended? Finally why was it not revoked until the meeting on 20th January 2015?

63. It is not in dispute that those that dismissed the claimant namely Mr Barrett and Ms Jethwa were unaware of the union agreement when the claimant's dismissal took effect. It is not necessary for the Tribunal to go through a two step approach under s136 EqA 2010 where the circumstances do not warrant it. *"In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if that is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test: see the decision of the Court of Appeal in Brown v Croydon LBC [2007] EWCA Civ 32 [2007] IRLR 259 paragraphs 28-29…"* As per *London Borough of Islington v Ladele [2009].*

64. The reason the claimant was placed on notice in the first place was as we found first time round a genuine redundancy situation. This dismissal

would have remained in place had it not been for the union's involvement and the agreement.

65. The reason why the respondent allowed the dismissal to take effect notwithstanding that agreement was put simply that those dismissing the claimant by reason of redundancy (Mr Barrett and Ms Jethwa) were totally unaware of the union agreement that had been made when the dismissal took effect. This is the reason why the dismissal took effect. It was the reason why the notice was not dealt with sooner as there was no knowledge of the issue. The decision to dismiss notwithstanding the union agreement was not related to the claimant's disability and there was no discrimination involved. This is the first part of the way the claimant invites us to examine dismissal under paragraph 13.1 above.

66. Under 13.2 above we must look at the decision on 22nd October 2014 to extend the notice period rather than retract it. We know that Mr Barrett and Ms Jethwa were told that the claimant could not be dismissed (because of a union agreement) and that his notice period should be extended. This was an instruction given to Mr Barrett and Ms Jethwa by email on 15th October 2014 by Sinead Trudgill (HR).

67. The claimant confirmed in oral evidence that he did not consider Mr Barrett or Ms Jethwa to be discriminatory towards him any longer having considered the evidence. Mr Hindler was not involved in the decision to extend the notice period and there is no evidence that Sinead Trudgill acted in this way because of disability. The claimant has never suggested that Sinead Trudgill was discriminatory and she was not involved in this case previously. There is no link with the claimant's case other than giving the advice and the instruction to extend the notice period.

68. The union agreement was that no redundancies would take place until after 31st December 201. The extension was therefore to give effect to the agreement. There is no evidence that this was because the claimant was disabled. This was simply to give effect to the union agreement. There was no suggestion raised by anybody at that time to retract it, Mr Barrett and Ms Jethwa were simply given the instruction by HR to extend it which they did.

69. We find that any employee who was band 5-8 would have been treated the same way and that given those involved in the decision were unaware of the union agreement any hypothetical employee without a disability would also have had their dismissal take effect. We further find that any band 5-8 employee without a disability would still have had their notice extended to give effect to the agreement in line with that instruction. These were not because of the claimant's disability.

70. We have considered the period between the 24th September 2014 and the 22nd October 2014 but Mr Barrett and Ms Jethwa were unaware of the union agreement until the 15th October 2014. Ms Jethwa's unchallenged evidence was that she discussed it with Mr Barrett when they became aware and it was agreed that Mr Barrett would call the claimant which took

place within a week. We see no issue with the delay of a week being communicated to the claimant. A week was not material in this case.

71. When looking at the question of why they extended rather than revoked the notice this was because HR advice was that this was what should be done in the circumstances. Mr Barrett and Ms Jethwa were told to extend it and that instruction was followed within a week.

72. In the period between 22nd October 2014 and 20th January 2015 why was it not revoked then? The HR advice had not changed in that period and to a certain extent things had moved on by the 31st October 2015 as the claimant had other plans, had booked leave and considered that the respondent was incompetent for having allowed this state of affairs as set out in his 31st October 2014 email. Certainly by 7th January 2015 the claimant was considering redundancy and expressed his views about how he saw his future not with the respondent. None of this would have led the respondent to consider revoking the notice as the HR advice they had to extend it was unchanged.

73. At the meeting on 20th January 2015 when the claimant's representative told the respondent that they should retract the notice they agreed to do so. The advice had not changed from HR in this period and when the union representative suggested it be revoked the respondent accepted this was the way forward and agreed to do it in the meeting.

74. We do not accept that this gives us grounds to infer discrimination from what the claimant submits is unreasonable conduct in not revoking the notice sooner. We do not accept that this along with the claimant's other submissions at paragraph 29 of his submissions are sufficient. We have found only one other discriminatory act the s15 claim in connection with the bonus (which was out of time) and this is not enough in our view to infer discrimination in accordance with *Igen v Wong [2005].* The claimant's list upon which he relies were not found as facts and in some cases are materially wrong such as the claimant being the only person placed at risk of redundancy. This is fundamentally wrong as others were at risk but he was the only one dismissed by reason of redundancy. This was because firstly he did not wish to relocate when others did and secondly as he was unsuccessful (for non-discriminatory) reasons in other applications or simply did not so apply like his colleagues. Other facts in this list we have found expressly not to be discriminatory but for other genuine reasons.

75. As per *London Borough of Islington v Ladele [2009]* we accept that "*direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts"*. Further that, as per *London Borough of Islington v Ladele [2009] "the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one…"* but we have not found that the claimant has been treated unreasonably in any event.

76. Further as we concluded on the first occasion, the claimant's disability was not the reason for any of his treatment leading up to the September

2014 dismissal under direct discrimination as the respondent's actions in voluntarily reinstating the claimant in circumstances where he had not appealed or complained are not supportive of that suggestion. We referred to the fact that the respondent had offered alternative employment which was contrary to the suggestion that dismissal was because of disability which was not challenged. We stand by these conclusions. Indeed, the retraction of the notice in 2015 is similarly contrary to the suggestion that the dismissal was because of the claimant's disability.

77. For the reasons set out above at paragraphs 62-76 there are no grounds to infer discrimination to satisfy stage one of the test.

Has the respondent shown the treatment was not because of disability in any way, consistent with s136 (3) EqA 2010?

78. Given we do not find that the claimant has established a prima facie case to shift the burden of proof we do not need to examine this in detail. We can however say that the respondent has advanced an explanation for allowing the dismissal to take effect notwithstanding the union agreement as those who made the decision were unaware. This was not disputed and we accept it.

79. Similarly, the reason notice was extended was to give effect to the agreement and there was a genuine redundancy situation in this case. The reason it was extended at this point was because of the HR advice and the email from Sinead Trudgill. We accept that. Rather than extend it to 1st January 2015 in case the union agreement was extended (which was outside the control of the decision maker) it was extended further just in case as was set out in the letter of 31st October 2014. We accept that.

80. As soon as Mr Barrett and Ms Jethwa were told by the union that procedurally they could not serve the notice whilst the agreement was in place they agreed to withdraw it. There was no change in their HR advice in the interim and nothing to make them revisit the matter.

Discrimination arising from a disability (s15 EqA 2010)

Did the respondent treat the claimant unfavourably by:

a. dismissing him on 24 September 2014?

81. As set out above dismissal (i.e the Respondent allowing it to take place notwithstanding the agreement with the Trade Unions and their failure to retract (or offer to retract) his notice of dismissal) was a detriment and is therefore unfavourable treatment for the purposes of s15.

Was this because of something arising in consequence of the claimant's disability; namely his need to take time off work for his colitis? Specifically was the claimant absent from work by reason of colitis at the material time?

82. At the time the claimant was given notice in March 2014 he was in work. We found (and this was not challenged on appeal) that his dismissal was for genuine redundancy reasons namely the department's relocation to Manchester and although the claimant was offered relocation he chose not to which was not for absence or disability reasons. We found that the September 2014 dismissal was not for a reason in consequence of his disability given the notice was not issued for that reason.

83. The EAT has however found that we must address dismissal in a wider sense so to look at this in accordance with the claimant's submission at paragraph 13.1 - 13.3 above. At a later time after notice was given, he was signed off with stress and his disability of colitis as confirmed in the welfare meeting in August 2014. In August 2014, the claimant requested and was given garden leave. He then submitted a sick note after he was told that he would be required to take annual leave to cover the period. The claimant's absence was recorded as sick leave so he was in part off by reason of colitis at the time the dismissal took effect (but also for non-disability related reasons) but if he had not been off sick he would have been on garden leave in any event.

84. The claimant was not "out of sight and out of mind". There was the welfare meeting on 13th August 2014 with the claimant, he was offered support with his CV, he was in contact with the respondent by email and confirmed in the welfare meeting that there was no further support that Mr Barrett and Ms Jethwa could offer him. He also went to an occupational health appointment in September 2014.

85. In the period immediately before the dismissal took effect the occupational health report in September 2014 also confirms the reasons for his absence in the period up to the dismissal as related to his sleep disorder (non-disability) as well as his disability and stress (non-disability). His absence was therefore for mixed reasons (disability and non-disability).

86. When the dismissal took effect he was not at work and we have considered the possibility that his absence was a factor in what happened in so far as he was "out of sight out of mind" which we have rejected at paragraph 84. We have considered whether our previous finding of his historic sickness absence as his attendance was poor and whether this was a factor but do not accept this for the reasons set out below. We accept that it need not be the reason and can simply be a factor in the mind of the decision maker.

87. The reason why the respondent allowed the dismissal to take effect notwithstanding that agreement was that those dismissing the claimant by reason of redundancy were totally unaware of the union agreement that had been made. It was unconnected to the claimant's disability absence. If he had not been absent on sick leave he would have been absent on garden leave and him being absent was not a factor in the decision. The claimant being at work or not made no difference to the knowledge or otherwise of Mr Barrett and Ms Jethwa as to the union agreement up to and including 15th October 2014.

88. The simple fact is that the dismissal was allowed to take effect as those who made the decision were unaware of the union agreement and this is the reason why the dismissal took effect. The decision was not related to his absence and as they were all unaware of the union agreement at the time of dismissal, dismissal would have taken effect even if he had been at work, irrespective of his attendance record and regardless of any disability related absence. This is the first part of the way the claimant invites us to examine dismissal under paragraph 13.1 above.

89. Under 13.2 above we must look at the decision on 22nd October 2014 to extend the notice period rather than retract it. We know that Mr Barrett and Ms Jethwa were told that the claimant could not be dismissed because of the union agreement and that his notice period should be extended. This was simply to give effect to the union agreement. The claimant was absent from work from 24th September to 22nd October 2014 but given that Ms Jethwa and Mr Barrett considered he had been dismissed by the time they knew (but was not yet processed as a leaver) his absence at that time was not covered by a sick note until he later got one retrospectively. The reason for his absence in that period was his dismissal. The claimant was not absent in the period 24th September 2014 – 22nd October 2014 due to his disability so there was not "something (namely absence) arising from his disability" at this relevant time.

90. The decision to extend the notice period was therefore taken whilst the claimant was absent for non-disability related reasons namely that he was considered no longer an employee at that time. Even if the claimant had been absent for disability related reasons at that time, the reason why Mr Barrett and Ms Jethwa extended the notice period was because Sinead Trudgill told them to. This was not challenged. There was no suggestion from the claimant that her decision was in anyway motivated by or related to his absence or indeed his attendance record. Mr Hindler was no longer involved in the matter at this stage. We have no reason to go behind the instruction to extend the notice period.

91. On 28th October 2014 the claimant obtained a retrospective sick note to cover him for three months since dismissal for disability and non-disability reasons. However, in the call on 22nd October 2014 Mr Barrett agreed with the claimant that he would be on garden leave from then until 31st January 2015. The decision to place him on garden leave pre-dated the sick note.

92. The decision to retract the claimant's notice was taken in the meeting on 20th January 2015. At that time, the claimant was on garden leave in any event. The claimant was not absent at that time for disability related reasons so his absence at that time was not the reason for or a factor in the decision not to retract the notice being taken sooner. Why did the respondent not retract it sooner in this period? Mr Barrett and Ms Jethwa had no reason to consider retracting it as the HR advice was unchanged and it had not been raised. As soon as it was raised by the claimant it was accepted as being a way forward and agreed in the meeting.

93. In summary, we find that the claimant's absence (or his attendance record) was not the reason why his dismissal took effect notwithstanding the union agreement, it was not the reason for notice being extended rather than retracted and it was not the reason why the notice was not retracted until the meeting on 20th January 2015. We therefore find that his absences which were not solely related to disability in any event were not the reason behind these decisions or even a factor in the decisions taken.

Was the dismissal on 24 September 2014 a proportionate means of achieving a legitimate aim?

94. We need not examine this further given our other findings.

Has the claimant proved facts from which the Tribunal could conclude that the respondent treated the claimant in this way because of something arising in consequence of his disability (s136(2) EqA 2010)?

95. For the reasons set out above the claimant has not proved facts from which we could conclude that the respondent treated the claimant this way because of his absence arising from disability. The burden of proof has not shifted.

96. The claimant invites us to link the bonus matter (we did find to be a s15 claim had it been brought in time) to this act. We consider this entirely separate as the bonus had express terms that meant absences were taken into account in deciding the bonus based on contribution. We found that as such he was subject to a detriment. This was a policy of the respondent and a decision taken by Mr Hindler. This process was changed by Ms Jethwa and Mr Barrett following the grievance he raised so that it did not happen again and we therefore do not find that this is enough to shift the burden. They were not found to have discriminated against the claimant or allowed any discriminatory policy to take effect. Different personnel were involved and there is simply no connection between Mr Hindler and Sinead Trudgill or indeed Mr Hindler and Mr Barrett or Ms Jethwa other than they are all employees of the respondent.

Has the respondent shown that the treatment was not because of something arising in consequence of his disability in any way, consistent with s136(3) EqA 2010?

97. For the reasons set out above even if it had shifted to the respondent then they would have shown that the reasons were not because of the claimant's absence. The dismissal took effect notwithstanding the union agreement as Mr Barrett and Ms Jethwa were unaware of it until 15th October 2014. It was extended rather than retracted because Mr Barrett and Ms Jethwa were so instructed by Sinead Trudgill of HR. Nothing changed that position until the claimant raised it in the meeting of 20th January 2015 via his union representative and it was then agreed in the meeting and confirmed in writing subsequently.

Victimisation

Did the respondent subject the claimant to a detriment by:

a dismissing him on 24 September 2014?

98. As set out above dismissal (i.e the Respondent allowing it to take place notwithstanding the agreement with the Trade Unions and their failure to offer to retract his notice of dismissal) was a detriment for the purposes of s27 EqA 2010 also.

Did the respondent subject the claimant to this treatment because he had done a protected act, namely submit a grievance on 21st September 2014?

99. The reference to a grievance in September 2014 in the list of issues is accepted by the claimant to be an error. What this actually refers to is the grievance submitted by the claimant against Mr Hindler in January 2014 as referred to in paragraph 55 of the original judgment. There was no grievance raised on 21st September 2014. No grievance was raised about Ms Jethwa or Mr Barrett at the relevant time.

100. We accepted that the claimant had done a protected act by raising the January 2014 grievance as set out in paragraph 218 of the original judgment but that his dismissal was not by reason of having done that protected act but because his role was redundant and he did not wish to take the alternative roles at paragraph 220 of the original judgment.

101. It is not in dispute that those that dismissed the claimant namely Mr Barrett and Ms Jethwa were unaware of the union agreement when the claimant's dismissal took effect. It is not necessary for the Tribunal to go through a two step approach under s136 EqA 2010 where the circumstances do not warrant it as set out in paragraph 63 above.

102. The reason the claimant was placed on notice in the first place was as we found first time round a genuine redundancy situation. This dismissal would have remained in place had it not been for the union's involvement and the agreement.

103. The reason why the respondent allowed the dismissal to take effect notwithstanding that agreement was (put simply) that those dismissing the claimant by reason of redundancy were totally unaware of the union agreement that had been made. The simple fact is that the dismissal was allowed to take effect as those who made the decision were unaware of the union agreement and this is the reason why the dismissal took effect. The claimant did not raise a grievance against either Mr Jethwa or Mr Barrett and he accepted in evidence that they did not discriminate against him. The decision was not because he had done a protected act and there was no discrimination involved. There is nothing to link the grievance against Mr Hindler to the decision. Mr Hindler was not involved. This is the first part of the way the claimant invites us to examine dismissal under paragraph 13.1 above.

104. Under 13.2 above we must look at the decision on 22nd October 2014 to extend the notice period rather than retract it. We know that Mr Barrett and Ms Jethwa were told that the claimant could not be dismissed and that his notice period should be extended. The claimant confirmed in oral evidence that he did not consider Mr Barrett or Ms Jethwa to be discriminatory towards him any longer. Mr Hindler was not involved in the decision to extend the notice period and there is neither the suggestion nor the evidence that Sinead Trudgill acted in this way because of disability. The personnel are different. The union agreement was that no redundancies would take place until after 31st December 2014, the extension was therefore to give effect to the agreement. There is no evidence that this was because the claimant had done a protected act. This was simply to give effect to the union agreement.

105. Under 13.3 given our conclusions at paragraph 103 and 104 it must follow that the reason why the respondent did not revoke the notice until the meeting on 20th January 2015 was not because the claimant had done a protected act. The advice from HR continued to remain in place and matters had moved on. When the union raised this in the meeting of 20th January 2015 this was agreed by the respondent in that meeting. There is no evidence that the failure to do it sooner was because the claimant had done a protected act. There was a passage in time of almost a year and different personnel were involved.

Has the claimant proved facts from which the Tribunal could conclude that the respondent treated the claimant in this way because of his protected ~~disclosure~~ (act) (s136(2) EqA 2010)?

106. For the reasons set out above the claimant has not proved facts from which we could conclude that the respondent treated the claimant this way because he had done a protected act. The burden of proof has not shifted.

Has the respondent shown the treatment was not because of his protected ~~disclosure~~ (act) in any way consistent with s136 EqA 2010?

107. For the reasons set out above even if it had shifted to the respondent then they would have shown that the reasons were not because the claimant did a protected act. It was because they were unaware of the union agreement at the time the dismissal took effect and secondly it was extended to give effect to the union agreement on the instruction of HR and there was no reason to deviate from this advice until it was raised by the claimant and agreed by the respondent.

Jurisdiction

Has the claimant's claim been brought within the period of 3 months starting with date of the act to which the complaint relates (s.123 (1)(a) Equality Act ("EqA") 2010), bearing in mind:

a. The act or omission forming the subject of the complaint was made on 24 September 2014;
b. The parties entered into ACAS Early Conciliation between 1 June 2015 and 1 July 2015; and
c. The claimant presented his claim to the Employment Tribunal on 31st July 2015?

If not, has the claimant presented his claim in such other period as the Employment Tribunal thinks just and equitable within the meaning of s123(1)(b) EqA 2010)?

108. The claimant invites us to look at the circumstances around dismissal in the ways set out in paragraph 13 above. We decline to do so save for 13.1-13.3 inclusive.

109. The issue identified at the preliminary hearing was the act of dismissal on 24th September 2014. We have considered this wider in the decision to extend notice not retract it (or indeed offer to do so) and the failure to retract it until the meeting on 20th January 2015. Even if we took these to be a continuing act or a series of acts the last would be 20th January 2015 when it was agreed to retract the notice in the meeting. Whilst it was confirmed in writing on 30th January 2015 (that the decision had been taken and a letter was coming) it was agreed that the return date was 4th February 2015. The letter confirming matters was sent on 3rd February 2015 but it is clear it had been agreed to be retracted before this date. The notice being retracted was communicated in the meeting on 20th January 2015 and the retraction and return date communicated by 30th January 2015.

110. It is not in dispute that ACAS early conciliation was not commenced until 1st June 2015 and ended on 1st July 2015 and that the claim was not submitted until 31st July 2015. The claimant accepts that any act or omission occurring before the 2nd March 2015 is prima facie out of time. This case falls well within that period. The true act complained of was the dismissal in September 2014 and is significantly out of time. The later acts the claimant now says form part of the circumstances of his dismissal are the October 2014 extension of notice and the fact the notice was not retracted until the meeting of 20th January 2015, all well before the 2nd March 2015. This was communicated to the claimant in January twice and in writing on 3rd February 2015. The omission of not retracting notice the claimant relies on ended on 20th January 2015 and the communication made on 3rd February 2015. ACAS was not commenced within the primary time limit and therefore the claims do not benefit from an extension of time.

111. Our conclusions which were not subject to appeal on the issue of jurisdiction are set out at paragraph 225 to 234 of the original judgment. The fact remains that the onus was on the claimant to establish that it was just and equitable to extend time and he did not provide us with any evidence as to why the claim was not brought in 2014 (or on this remitted case early 2015). He had advice from the union in January 2015 but did not seek to start ACAS Early conciliation then. He knew of his rights in November 2013. He commenced ACAS EC too late.

112. The issue would be more complex if we had accepted the claimant's claims in respect of dismissal given Mr Barrett was no longer an employee and could not give evidence in the claim.

113. We do not accept the claimant's attempts to introduce evidence now under the guise of submissions as to his mental state at the relevant time. This was not evidence before the tribunal when we heard this case. He was well enough to return to work in February 2015. He took holiday and travelled abroad in December 2014. He had union assistance in January 2015 (having had so previously) and as such the claimant has not established it is just and equitable to extend time.

114. If the claimant's claims had not failed on their merits, then we would have found that the Tribunal had no jurisdiction to hear the claims as they were out of time and the claimant has failed to establish that it was just and equitable to extend time.

Remedies (s119(4) EqA 2010)

The claimant having suffered no pecuniary loss as a result of the dismissal on 24 September 2014, to what award for injury to feelings (if any) is the claimant entitled?

115. It is not necessary to consider the issue of remedy.

116. For the above reasons the claimant's claims are not well founded and are dismissed.

_____

Employment Judge King

Date: ……05.01.2021……..

Sent to the parties on: 09 February 2021

For the Tribunal Office