EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 2200481/2017

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Held in Glasgow on 8, 9 and 10 October 2018

Employment Judge: W A Meiklejohn

10 **Members: Mr J Thomson**
Mrs A J Middleton

Mr I MacDonald **Claimant**
Represented by:
15 **Ms L Neil -**
Solicitor

Network Rail Infrastructure Limited **Respondent**
20 **Represented by:**
Mr R Bradley -
Advocate

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that -

1. The Claimant's claim of direct discrimination under section 13 of the Equality Act 2010 ("EqA") does not succeed and is dismissed;

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2. The Claimant's claim of discrimination arising from disability under section 15 EqA does not succeed and is dismissed;

3. The Claimant's claim of failure to make reasonable adjustments under section
35 20 EqA succeeds; and

4. The Respondent is ordered to pay to the Claimant the sum of FOUR THOUSAND FOUR HUNDRED POUNDS (£4400.00) together with interest

of FIVE HUNDRED AND SEVENTEEN POUNDS AND SEVENTY NINE PENCE (£517.79).

REASONS

Introduction and preliminary matters

5 1. This case came before us for a Final Hearing on both liability and remedy. Ms Neil appeared for the Claimant and Mr Bradley appeared for the Respondent.

2. At the start of the Hearing Mr Bradley referred to the earlier Preliminary Hearings (a) before EJ d'Inverno on 22 September 2017 at which the issues
10 had been agreed and (b) before EJ Gall on 5 June 2018 at which the issues had been narrowed, the Respondent having accepted that the Claimant was disabled for the purposes of section 6(1) EqA. He advised that the Respondent now took no issue on the question of jurisdiction (time bar) nor on the question of whether the Respondent knew that the Claimant was
15 disabled, and accordingly these were no longer issues to be decided by the Tribunal.

3. The issues to be determined by us related to the Claimant's claims of direct discrimination under section 13 EqA, discrimination arising from disability
20 under section 15 EqA and failure to make reasonable adjustments under sections 20/21 EqA.

4. Mr Bradley confirmed with reference to the Claimant's schedule of loss that the Respondent accepted that the Claimant's net earnings had been £600 per
25 week.

5. Mr Bradley noted that it had been directed at the earlier Preliminary Hearings that the Claimant's evidence should be heard first. Ms Neil asked that we hear the Respondent's evidence first.

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6. Mr Bradley sought better specification of the characteristics of the Claimant's hypothetical comparator for the purposes of the section 13 claim.

7. We adjourned the Hearing to allow time for us to read the joint bundle of productions and to consider these preliminary matters.

8. When the Hearing resumed we directed that the Claimant's evidence should be heard first. We found no reason to depart from what had previously been directed.

9. Mr Bradley suggested that the appropriate hypothetical comparator was an artisan masonry team leader employed by the Respondent on a fixed term contract ("FTC"). Ms Neil suggested there might be an actual comparator or comparators. She referred to Mr J McKechnie, Mr M Harrington and Mr P Graves but was not clear as to their job titles. We decided that it would be appropriate to hear the evidence before resolving this issue.

Procedural history

10. The Claimant's ET1 and the Respondent's ET3 had been submitted to the Employment Tribunal in England and Wales. A Case Management Order was issued by EJ Ross following a Preliminary Hearing in the Manchester Employment Tribunal on 26 June 2017.

11. The case was subsequently remitted to the Employment Tribunal (Scotland) and came before EJ d'Inverno for a Preliminary Hearing on 22 September 2017. Following that Hearing at which both parties were legally represented, Orders were issued which effectively updated the earlier Orders of EJ Ross with the exception of the Order relating to witness statements. A Preliminary Hearing was fixed to determine the preliminary issue of disability status. The Note accompanying said Orders set out the parties' respective positions and detailed the issues.

12. The paragraphs of the Note detailing the issues were in these terms -

"Direct Discrimination (s.13 Eq A 2010)

2.6 **(Sixth)** Did the Respondent treat the Claimant less favourably, by dismissing him because of disability, than it would have treated another employee who was not disabled?

5 2.7 **(Seventh)** The Claimant relies on a hypothetical comparator at this stage to be reviewed on completion of disclosure.

Discrimination Arising from a Disability (s.15 Eq A 2010)

10 2.8 **(Eighth)** Did the Respondent treat the Claimant unfavourably, by dismissing him because of something arising in consequence of his disability, namely, for disability-related reasons?

2.9 **(Ninth)** If so, was this a proportionate means of achieving a legitimate
15 aim?

Failure to Make Reasonable Adjustments (ss. 20 and 21 EqA 2010)

2.10 **(Tenth)** Did the Respondent apply a provision, criterion or practice
20 (“PCP”), namely the redundancy selection criteria, that put the Claimant at a substantial disadvantage (specifically dismissal), in relation to persons who were not disabled?

2.11 **(Eleventh)** If the Respondent did apply this practice to the Claimant,
25 did it put the Claimant at a substantial disadvantage in comparison with persons who were not disabled?

2.12 **(Twelfth)** Could any reasonable adjustment have avoided this disadvantage? The Claimant relies on the following:

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2.12.1 obtaining a medical report

2.12.2 **ascertaining if there were alternative roles available for the claimant to carry out.**

2.12.3 Would such adjustment:

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(a) have avoided the disadvantage?

(b) have been reasonable?"

10 13. The Preliminary Hearing referred to in paragraph 11 above did not proceed but, the Respondent having in the meantime accepted that the Claimant was disabled at the relevant time as mentioned above, the case came before EJ Gall for a further Preliminary Hearing on 5 June 2018 at which both parties were again legally represented. The Note issued following that Preliminary
15 Hearing confirmed that, apart from the issue of disability status, the issues set out in the Note following the Preliminary Hearing on 22 September 2017 continued to be the issues for the final Hearing.

Evidence and findings in fact

14. We heard evidence from the Claimant. For the Respondent we heard
20 evidence from Mr L McGill, Works Delivery Manager, and Mr M Evans, Senior Programme Manager (but at the relevant time Programme Manager). We had a joint bundle of documents to which we refer by page number.

15. The Respondent's business involves the management of railway assets in the
25 UK. These include railway tracks, principal railway stations, signalling, bridges, tunnels, sea defences and overhead line equipment. They employ some 33000 people across the UK.

16. Prior to the events described below, the Respondent used contract labour to
30 service project work. Their contractors included McGinley Support Services ("McGinley") which operated under a national contract with the Respondent. Prior to becoming an employee of the Respondent, the Claimant worked for

McGinley where he was a Team Leader. Mr McGill, who had also previously worked with McGinley, described the Claimant as "multi-skilled". Sometime prior to April 2015 the Respondent decided to set up a Special Projects Group to "self-deliver" project work in preference to using contract labour.

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17. The Special Project Group's "clients" were the Respondent's Route Asset Managers responsible for structures and earthworks (now referred to as geotechnics). They operated through three business divisions -

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- a division which dealt with structures/examinations/reactive works
- a division which dealt with development of projects
- a division which dealt with implementation of projects

15 18. The Respondent engaged the Claimant and a number of others as Team Leaders with effect from 1 April 2015 on Fixed Term Contracts ("FTCs"). We heard evidence about the manner in which these FTCs were entered into but this was not relevant to the issues we had to decide. A copy of the actual FTC entered into with the Claimant was not produced as the Respondent had 20 not been able to locate it but pages 26-38 were what Mr Evans described as a generic contract. We understood this to mean that the Claimant's contract would have been in the same terms (ignoring the dates which had been inserted in the generic version). The FTCs were for a term of one year.

25 19. Mr Evans explained that it would have been complicated to have engaged the Claimant, and the other Team Leaders who became employees of the Respondent at the same time as the Claimant, on permanent contracts. That complication was avoided by the use of FTCs. Mr McGill described the use of FTCs as giving security to those people who the Respondent used regularly 30 as contract labour and providing them with a "better deal".

20. Following his engagement as from 1 April 2015 the Claimant worked in the Respondent's division which dealt with implementation of projects. He ran a group or gang of "artisans" which we understood to mean the operatives

within his team. His team dealt mainly with earthworks (including drainage and rebuilding walls and fences) and covered mainly the area between Manchester and Carlisle. The Claimant's work formed part of a long term project which Mr Evans described as Line of Route (LOR) campaigns.

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21. LOR campaigns involved work on a particular section of railway line where the Team Leader and his gang would undertake general civil engineering duties such as devegitation, clearing drains and small earthworks. The Respondent received funding from the Treasury via the Ministry of Transport for works to be undertaken within a Control Period ("CP") which we understood to extend over 5 years and the LOR campaigns were covered by CP5.

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22. When the expiry date of the Claimant's FTC arrived on 1 April 2016, nothing happened in terms of termination, renewal or otherwise. The Claimant (and the other Team Leaders recruited at the same time as the Claimant) simply continued to work for the Respondent. Mr Evans acknowledged that this had disclosed a flaw in the Respondent's systems in that there had been no mechanism for notifying management of the expiry of FTCs.

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23. There occurred two significant earthwork failures affecting the rail network at Harbury and Eden Brown. Repairs had to be funded and this resulted in work re-prioritisation. In or around June 2016 there was a pause to LOR campaigns. This affected the work the Claimant and his gang had been undertaking.

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24. Mr Evans visited worksites to brief the Respondent's employees on this development. He explained that projects were under review. He also said that the Respondent was cutting all but essential overtime so that staff would be working their minimum contracted hours.

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25. In or around July 2016 Mr Evans instructed those who reported to him to review (a) contingent labour (ie agency workers as supplied by McGinley), (b) employees on expired FTCs and (c) employees on current (ie non expired)

FTCs. He instructed that contingent labour should not be used where this could be avoided. This led to a reduction in headcount within the Special Projects Division from 115 to 55. This reduction took place between July 2016 and February/March 2017. Subsequent to the events described below relating to the Claimant, LOR campaigns were deferred from CP5 to CP6 in or around October 2016.

26. So far as the Claimant and other Team Leaders were concerned, it was Mr McGill who was responsible for implementing the headcount reduction. He approached this in line with the instruction from Mr Evans. By the start of August 2016 around 30 agency workers had left the Respondent's workforce. The next stage was to look at employees on expired FTCs.

27. Mr McGill explained that there was a weekly planning meeting of what he described as the Civils Special Projects Team. This group, which included Mr McGill, looked at the skillsets of the individuals who were engaged on LOR work with a view to matching the skills of the workforce to the work which was available. The result of this process was a reduction in the number of Team Leaders employed by the Respondent from 11 to 6.

28. Before recording what happened to the Claimant we will deal with the evidence of what happened to a number of other Team Leaders who had joined the Respondent at the same time as the Claimant and were employed on the same type of contract, ie as at August/September 2016 they were all expired FTC employees.

29. Mr J McKechnie was retained by the Respondent. Work suitable for him (devegitation) was identified at a planning meeting. He did not receive a letter similar to the one sent to the Claimant (page 52). He remained in the Respondent's employment.

30. Mr K Spence received a letter similar to the one sent to the Claimant (page 52). He was called in for a meeting to discuss matters. He was happy to

proceed on the basis that his FTC had expired and left the Respondent's employment.

31. Mr M Harrington was retained by the Respondent. Work suitable for him was identified at a planning meeting. He did not receive a letter similar to the one sent to the Claimant (page 52). He subsequently chose to leave the Respondent's employment.

32. Mr P Graves was retained by the Respondent. Work suitable for him was identified at a planning meeting. He did not receive a letter similar to the one sent to the Claimant (page 52). He remained in the Respondent's employment.

33. Mr W Ferguson was retained by the Respondent. Work suitable for him was identified at a planning meeting. He did not receive a letter similar to the one sent to the Claimant. He subsequently chose to leave the Respondent's employment

34. It was apparent from the Respondent's treatment of these other Team Leaders that a process was being followed, the purpose of which was to seek alternative work for each Team Leader. The process included engagement with the Team Leader to communicate the availability of alternative work (as in the cases of Mr McKechnie, Mr Harrington, Mr Graves and Mr Ferguson) and a meeting with the Team Leader in the event that no alternative work had been found (as in the case of Mr Spence).

35. Towards the end of August 2016 the Claimant became unwell. He consulted his GP and was diagnosed with type 2 diabetes. A statement of fitness to work was issued confirming that the Claimant was not fit for work (page 38). This covered the period from 30 August 2016 to 30 September 2016.

36. The Claimant's evidence was that he had advised the Respondent before consulting his GP. Thereafter he complied with Mr McGill's request to keep him informed. He scanned and sent on his test results. He said that he

"phoned Mr McGill all the time". He said Mr McGill had not offered a referral to occupational health.

37. The Claimant accepted that he had been invited by Mr McGill on 14 September 2016 to attend a meeting on 16 September 2016. He said that Mr McGill had referred to having a "wee blether" and had made no reference to the expiry of his FTC. The Claimant sent an email to Mr McGill on 15 September 2016 (page 45) in these terms -

"Lawrie unfortunately I can't attend the meeting on Friday as I am currently having more tests at the doctor I have attached a letter as proof of the tests I am under going I would be happy for you to come to my home to carry out the meeting Preferably end of next week as I am in and out of the doctors at the moment Ian"

The letter attached to the Claimant's email was dated 12 September 2016 (page 46) and referred to blood tests relating to the Claimant's glucose level and for Weil's disease.

38. The Claimant sent another email to Mr McGill on 15 September 2016 (page 47) stating that he would speak to his doctor the following day and would revert to Mr McGill. The Claimant spoke with Mr McGill on 16 September 2016 and again on 20 September 2016 when a meeting to be held in Carnforth was arranged for 23 September 2016. This would entail a shorter journey for the Claimant of 3 hours (and a journey of 1.5 hours for Mr McGill).

39. On the morning of 23 September 2016 the Claimant sent an email to Mr McGill (page 50) in these terms -

"About today's meeting don't feel to good I will not be abill to travel today will try again on Monday because I can get a lift down"

The Claimant' son-in-law worked with McGinley and had the use of a van, and the Claimant had in mind to travel down with him on Monday 26 September 2016. However the Claimant did not do so.

5 40. Mr McGill's evidence relating to the same period differed in a number of respects from that of the Claimant. Page 59 was a chronology of events which Mr McGill had prepared. This started at 1 September 2016 -

"Case open due to sickness note sent in and MFA trigger. Hr case open and
10 OHA offer declined."

41. We understood that "MFA" stood for Managed Frequent Absence and that an absence of 5 days or more would result in the employee's manager opening a record or case within the Respondent's HR Direct online system (and this
15 happened in the Claimant's case because his statement of fitness to work was for a period of one month). The system would then prompt the manager at each stage regarding the appropriate steps to take. Mr McGill had thus been prompted to offer "OHA" which stood for Occupational Health Assist, the occupational health service which the Respondent offered to its employees.
20 He said that when he had offered OHA, the Claimant had replied that he was happy with his own doctor and did not want an OHA referral. We preferred the evidence of Mr McGill to that of the Claimant on the issue of whether a referral to occupational health had been offered. It seemed to us more likely than not that Mr McGill would have followed the prompt from HR Direct.

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42. Mr McGill's evidence confirmed that he had spoken with the Claimant on a number of occasions during his period of sickness absence in September 2016. Conversations had taken place on 1, 9, 14, 16 and 20 September 2016. Mr McGill also confirmed receipt of emails from the Claimant on 15 and 23
30 September 2016.

43. Mr McGill denied that he had invited the Claimant to meet him for a "wee blether ' when they spoke on 14 September 2016. He said that he told the

Claimant that his FTC had expired and they needed to meet to discuss this. Again we preferred the evidence of Mr McGill to that of the Claimant on the issue of what was said about the purpose of the proposed meeting. Mr McGill was carrying out the steps he had been instructed by Mr Evans to take (see paragraphs 25/26 above) and it was more likely than not that he would have referred to the Claimant's expired FTC.

44. Mr McGill's evidence was that he had also made a number of unsuccessful attempts to contact the Claimant by phone, particularly on 16 September 2016.

45. When no meeting took place on 26 September 2016 Mr McGill uploaded this to HR Direct and followed the advice he was given, which was to send a letter to the Claimant. This was the letter at page 52. It was undated but we understood that it was sent by Mr McGill to the Claimant on or around 27 September 201 6. The letter was headed "RE: Expiry of Fixed Term Contract" and stated as follows -

"I have tried to arrange the below meeting on several occasions but you have failed to attend.

As you are aware following our meeting held on [date], your fixed term contract is due to expire on 27/09/2016.

As explained to you at the meeting, unfortunately the organisation does not have any further work for you beyond that date and your employment with the organisation will therefore terminate on 04/10/2016."

46. The Claimant described Mr McGill's letter as "the biggest shock of my life". Later in evidence he said that he had been "devastated" by it. He did not understand the reference to his contract expiring on 27 September 2016. Mr McGill said in evidence that this date "came from the failure to get a meeting on 26 September" and that it was "a convenient date to put in the letter". He also said that he had been "a bit confused" because no meeting had taken

ptace and that he was "not qualified to take anything out of a letter provided by HR".

47. In reply to questions from the Tribunal Mr McGill said that he lived in Scotland and travelled home some weekends. His advice from HR had been not to meet with the Claimant at his (the Claimant's) home as the Respondent preferred a neutral venue (although he accepted that the meeting at Camforth, had it taken place, would have been at the Respondent's premises there). It had not occurred to him to suggest to HR that a meeting in Scotland should be organised.

48. He said that he would have gone through the same process with the other Team Leaders if work had not been found for them. He would have expected them to attend a meeting and he would have terminated their employment only after such a meeting if no other work had been found. He also said in answer to a question from the Tribunal about deficiencies in the Claimant's skillset that he (the Claimant) was "not required in our business" and that, in relation to the possibility of transfer to another department, that "did not happen because the meeting did not take place".

49. The Claimant exercised his right of appeal in terms of a letter dated 11 October 2016 (page 54) submitted on his behalf by Mr J McCourt of the Inverclyde Advice and Employment Rights Centre. The letter asserted that the Claimant's dismissal had been connected with his disability and therefore discriminatory, and that there had been a failure to make reasonable adjustments prior to dismissal.

50. The appeal took place by telephone conference call on 5 December 2016. Mr Evans was the appeal officer. The Claimant was represented by Mr McCourt. Ms E Hall was the notetaker. We were satisfied that the notes of the appeal (pages 56-58) were accurate, (apart from the word "Disciplinary" which appeared in the heading).

51. Mr Evans issued his appeal outcome letter (pages 60-61 - undated) in January 2017. In this he said the following -

"I reviewed the correspondence that the management team had with you regarding your contract being extended and I note that there were reasonable attempts made by text and letter for you to meet with them to discuss.

You avoided attending these meetings, even when an offer was made to meet you in Camforth to reduce your travel. No further attempts were made by you to meet the team and it is entirely reasonable for them to send you the letter in the absence of your lack of attendance.

Other employees attended these meetings and received support and help in finding vacancies within Network Rail.

Finally, I find no evidence anywhere of the decision not to renew your fixed term contract being based on your diabetes.

Summary

I uphold the original decision to not extend your fixed term contract was the reason for dismissal and not because you had raised to the management team that you had diabetes.

- Clear processes took place with other individuals who had fixed term contracts and were in the same situation.

- You avoided all reasonable attempts by the management team to meet with you to discuss the contract end date and did not engage with the team in order review vacancies within the organisation."

52. Mr Evans said that a consequence of the Claimant not attending a meeting was that the Respondent had been unable to share with him details of

vacancies which were potentially available to him. He explained that there was the facility to access a vacancy list - to see the national picture - and to assist an application or arrange a transfer.

5 53. Mr Evans accepted that the Respondent had made no medical enquiry into the background to the Claimants non-attendance at the meetings which had been arranged, and that such enquiry might have produced a different result.

54. Following the termination of his employment the Claimant claimed Universal
10 Credit. He secured employment (as an agency worker) with Carillion in late May 2017. This lasted some 13/14 weeks according to the Claimant's bank statement (pages 67-77) which detailed his earnings in that employment. He had to leave that employment because he was suffering from the same symptoms (including sore legs) as has caused him to seek medical advice
15 prior to his diagnosis of diabetes.

55. In addition to continuing issues with his diabetes, the Claimant had suffered other health problems. He had required to undergo an investigation into blood in his urine. He had recently been discharged from hospital having been
20 treated for sepsis. He had been diagnosed with COPD. He was currently certified as not fit for work until November 201 8.

56. Included in the bundle of documents were two letters dated 3 March 2018 and 4 April 2018 (pages 61-62 and 63-64 respectively) from Prof A Collier, a
25 Consultant Physician in Diabetes and Endocrinology at University Hospital, Ayr. The earlier letter stated that it was unlikely that the Claimant would be fit for work "in the near to mid-term future". The later letter stated that it was unlikely that the Claimant would be fit for work "for some considerable time".

30 57. At the time his employment terminated the Claimant was receiving sick pay from the Respondent. In terms of the generic contract (pages 26-36, at page 29) this was based on length of service and, in the case of an employee (such as the Claimant) with between 1 and 5 years' service, the maximum payable was 16 weeks' full pay followed by 16 weeks' half pay.

Submissions for the Claimant

58. Ms Neil highlighted the apparent contradiction in the Claimant's alleged contract of employment. This was asserted by the Respondent to be a one year FTC yet it contained sick pay provisions applicable to more than one year's service.

59. Ms Neil submitted that the circumstances of the Claimant's dismissal were akin to redundancy. It was for the Respondent to follow a fair procedure.

60. She referred to the Respondent's use of FTCs. In the Claimant's case, the fixed term had ended. New terms had not been agreed. In her submission the Claimant's employment status had become indefinite.

61. Ms Neil referred to Chapter 3 of the Equality and Human Rights Commission: Code of Practice on Employment (2011) and submitted that the Claimant had been suffered direct discrimination because of his disability. He had been excluded from discussion of job opportunities. His comparators were the other 5 Team Leaders about whose treatment by the Respondent the Tribunal had heard evidence.

62. Ms Neil submitted that the Claimant had suffered detriment, ie he had been treated unfavourably. He had been invited to attend a meeting some 3 hours from his home. Only one other Team Leader had been terminated through the Respondent's skills assessment process. The Claimant's disability did not have to be the sole or principal reason for the Respondent's treatment of him; it simply had to have a bearing on the outcome.

63. Ms Neil submitted that the Respondent had failed to make reasonable adjustments. They should have kept an unfit employee such as the Claimant on the payroll. They should have accorded him more favourable treatment to remove the disadvantage he suffered as a disabled employee. They should have acceded to his request for a meeting at home.

64. Finally Ms Neil invited us to make an award to the Claimant, including injury to feelings, in line with the schedule of loss.

65. In the course of her submission Ms Neil referred to the following cases -

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Greater Glasgow Health Board v Lamont UKEATS/0019/12
Shamoon v Chief Constable of the Royal Ulster Constabulary (Northern Ireland) [2003] IRLR 285
Madden v Preferred Technical Group Cha Limited and another [2004] EWCA Civ 1178

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Anya v University of Oxford and another [2001] EWCA Civ 405
Nagarajan v London Regional Transport [2001] 1 AC 501
Strathclyde Regional Council v Zafar [1997] UKHL 54
Hinsley v Chief Constable of West Murcia Constabulary UKEAT/0200/10

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Submissions for the Respondent

66. Mr Bradley recognised that the Respondent was open to criticism in some respects. In particular -

- They had no system for reviewing the anniversary dates of FTCs

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- They had been unable to produce a copy of the Claimant's written contract

- The time gap between "raising a position" and filling the post (which we understood to be a reference to Mr Evans' explanation for stating a FTC expiry date of 31 October 2015 in his appeal outcome letter)

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- The reference in the Claimant's termination letter to a meeting which did not happen

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However, these flaws and criticisms did not mean that the Claimant should succeed on the issues in this case.

67. Mr Bradley highlighted what he submitted was a contradiction in the Claimant's position. The Claimant's primary assertion in his ET1 was that he had been dismissed because of his disability. However he also asserted that the Respondent had applied a PCP - the redundancy selection criteria - which necessarily implied that his disability could not, as alleged, have been the only "intervening event".

68. Mr Bradley also criticised Ms Neil's focus on faimess/unfaimess as being irrelevant. The provisions of the Employment Rights Act 1996 and the ACAS Code of Practice: Disciplinary and Grievance Procedures (2015) were not engaged in this case.

69. Mr Bradley reminded us that the issues in this case had been agreed at the Preliminary Hearing held on 22 September 2017 and slightly altered at the Preliminary Hearing held on 5 June 2018. At both of these Preliminary Hearings the Claimant had been legally represented. There had been ample time, opportunity and expertise to be clear on what case the Claimant was making. The Claimant was limited to the agreed list of issues.

70. Mr Bradley referred to the Judgment in **Land Rover v Short** (citation below) at paragraph 32 -

"....the parties had agreed a list of issues, which exhaustively set out the issues of law and fact which the Tribunal was required to determine, and it was trite law that it was the function of an Employment Tribunal to determine the claims which the Claimant brought, rather than the claims which he might have brought, and accordingly the Claimant was limited to the complaints set out in the agreed list of issues."

Mr Bradley submitted that there had been careful case management in the present case and the Tribunal had to decide the case based on the agreed issues irrespective of what the Respondent was criticised for doing or not doing.

71. Turning to the Claimant's direct discrimination claim and referring to the comparators identified in the course of the evidence, Mr Bradley reminded us that there had to be no material difference between the circumstances of the Claimant and those comparators. He submitted that the evidence showed that the putative comparators had different skills. Just because they started at the same time as the Claimant and were all on FTCs did not make them appropriate comparators.

72. Mr Bradley referred to the Judgment in **Madarassy v Nomura International pic** (citation below) at paragraph 56 -

"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

In the present case there was "nothing more" than the bare facts. The Claimant had been dismissed because (i) there was a downturn which affected the whole workforce within the department where he worked and (ii) as a FTC employee along with other Team Leaders who were also FTC employees, the Respondent downsized its team. He had not been dismissed because of his disability. Rather, he had been dismissed because he had not attended the meetings arranged for 16, 23 and 26 September 2016 to discuss the ending of his employment.

73. Moving to the Claimant's claim of discrimination arising from disability, Mr Bradley argued that there had been no unfavourable treatment of the Claimant arising in consequence of his disability. He accepted that dismissal for failing to attend 3 meetings could constitute "something" arising in consequence of the Claimant's disability, but he submitted that there had been no questions put to any of the witnesses nor anything in Ms Neil's submission about that "something". Rather it had been addressed in questions from the Tribunal and it was not for the Tribunal to construct the

"something" for the purposes of section 15 EqA if it was not part of the agreed list of issues. The Tribunal could only rule on the act of discrimination complained of. If that act was not proven, it was not for the Tribunal to find another act.

74. Turning to the claim of failure to make reasonable adjustments, Mr Bradley reminded us that the Claimant's position was that the Respondent had applied a PCP, namely the redundancy selection criteria, which had put the Claimant at a substantial disadvantage (specifically dismissal) in comparison with persons who were not disabled.

75. If the selection criteria (if such they were) had been to select agency workers and then to select employees on expired FTCs, those "criteria" did not put the Claimant at any substantial disadvantage.

76. If the selection criteria were the skillsets of the various Team Leaders including the Claimant, based on the evidence of Mr McGill, then again it could not be said that these put the Claimant at a substantial disadvantage (dismissal) in comparison with persons who were not disabled.

77. It was for the Claimant to raise the issue as to whether a specific adjustment should have been made. Two adjustments were suggested - (i) obtaining a medical report and (ii) ascertaining if there were alternative roles available for the Claimant to carry out. There was no evidence to allow the Tribunal to say whether these adjustments would have avoided the alleged substantial disadvantage.

78. Mr Bradley said that the PCP might have been (i) that the requirement for a meeting on the Respondent's premises before considering alternative employment or (ii) that the failure to conduct a meeting with the Claimant in Scotland put the Claimant at a substantial disadvantage, but this was not the case pled by the Claimant.

79. Referring to the Claimant's schedule of loss Mr Bradley submitted that there was a paucity of evidence as to the Claimant's alleged injury to feelings. The award of £10000 sought by the Claimant could not be justified.

5 80. In the course of his submission Mr Bradley referred to the following cases -

Land Rover v Short UKEAT/0496/10
Scicluna v Zippy Stitch Limited and others (Court of Appeal) A2/201 6/4430
10 **Madarassy v Nomura International pic [2007] IRLR 246**
Secretary of State for Justice v Dunn UKEAT/0234/16
City of York Council v Grosset [2018] EWCA Civ 1105
Chapman v Simon [1994] IRLR 124
Jennings v Barts and the London NHS Trust UKEAT/0056/12
15 **Chief Constable of West Yorkshire v Vento (No 2) [2003] IRLR 102**

Applicable law

81. The relevant sections of EqA provide as follows -

13 Direct Discrimination

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(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...

25 **15 Discrimination arising from disability**

(1) A person (A) discriminated against a disabled person (B) if -

(a) A treats B unfavourably because of something arising in
30 consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim....

20 Duty to make adjustments

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(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes the person on whom the duty is imposed is referred to as A.

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(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage....

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21 Failure to comply with duty

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(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

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23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of sections 13, 14 or 19 there must be no material difference between the circumstances relating to each case.

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(2) The circumstances relating to a case include a person's abilities if -

(a) on a comparison for the purposes of section 13, the protected characteristic is disability. ...

Discussion and disposal

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82. We found all of the witnesses to be credible and indeed there was little dispute as to the facts in this case. Where, as recorded above, we preferred the evidence of Mr McGill to that of the Claimant, this was on the basis that we found Mr McGill's recollection of the relevant events to be more reliable and supported by the other evidence. That is not to imply that the Claimant was not doing his best to provide an accurate account of events.

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83. The background to this case was the loss of LOR campaigns from the Respondent's workbank in June 2016. These campaigns were initially paused and later (in October 2016) deferred. This led to a significant reduction in headcount within the Special Projects Group where the Claimant and the other Team Leaders were employed. This was effectively a redundancy situation. The Respondent's requirement for employees to carry out work of a particular kind had ceased or diminished.

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84. We considered firstly the Claimant's section 13 EqA claim of direct discrimination. Prior to the Hearing the Claimant's position had been that he was comparing his treatment by the Respondent with that of a hypothetical comparator. However at the start of the Hearing Ms Neil identified three actual comparators - Mr McKechnie, Mr Harrington and Mr Graves. Each of these was, like the Claimant, a Team Leader within the Respondent's Special Projects Group, employed at the same time as the Claimant and engaged on the same type of contract as the Claimant.

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85. The Respondent's treatment of the Claimant and these comparators involved a number of steps. All were effectively placed at risk of redundancy by the Respondent's loss of LOR campaign work. The availability of suitable alternative work was considered at a weekly planning meeting. The next step was a meeting with the employee - in the case of the comparators mentioned

in the preceding paragraph we had no evidence as to whether a meeting actually took place but we believed it was reasonable to assume that it did as the availability of the alternative work that was identified for each of them must have been communicated in some way.

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86. In the case of the Claimant a meeting was offered on 14 September 2016, to take place on 16 September 2016. This was rescheduled to 23 September 2016 and then to 26 September 2016. No meeting took place because the Claimant was unable to attend. The absence of a meeting was a difference in the Respondent's treatment of the Claimant when compared with the comparators. It was less favourable treatment. The treatment was because of the Claimant's disability. It was the Claimant's disability which prevented him from attending a meeting on 16, 23 and 26 September 2016.

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87. Unfortunately for the Claimant, this was not the issue which we had to decide. The issue in terms of the agreed list was not whether the failure to hold a meeting with the Claimant was less favourable treatment because of disability, but whether the Respondent had treated him less favourably "by dismissing him because of his disability*'. Mr Bradley's argument based on **Land Rover v Short** was well founded (see paragraph 70 above).

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88. The reason for the Claimant's dismissal was clear from Mr McGill's letter (page 52) as quoted in paragraph 45 above. It was the absence of work (which arose from the Respondent's failure to identify suitable alternative work for the Claimant) which caused the dismissal. It was not the Claimant's disability. The section 13 claim, as pled, could not succeed.

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89. We considered next the Claimant's section 15 EqA claim of discrimination arising from disability. Again, unfortunately for the Claimant, we had to decide the issue which had been agreed - "Did the Respondent treat the Claimant unfavourably by dismissing him because of something arising in consequence of his disability, namely, for disability-related reasons?"

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90. If the case pled for the Claimant under section 15 EqA had been that the failure to hold a meeting with the Claimant was unfavourable treatment arising in consequence of his disability, we would have had no difficulty in finding in his favour. There was no meeting because the Claimant could not attend. He could not attend because of his disability. A meeting would have afforded the Claimant the opportunity to discuss his skillset and experience in the context of possible alternative work. To deny him that opportunity was unfavourable treatment.

91. However, that was not the issue we had to decide. The issue per the agreed list focused on the dismissal, not the failure to hold a meeting. For the same reason as stated in paragraph 88 above, the Claimant's claim under section 15 EqA, as pled, could not succeed.

92. We considered lastly the Claimant's section 20/21 EqA claim of failure to make reasonable adjustments. We reminded ourselves that we needed to identify -

a. the relevant PCP,

b. the persons who are not disabled with whom comparison is made,

c. the nature and extent of any substantial disadvantage suffered by the Claimant, and

d. any step or steps it would have been reasonable for the Respondent to take.

93. The PCP was stated in the agreed list of issues to be the redundancy selection criteria. The adjustments identified by the Claimant were (a) obtaining a medical report and (b) ascertaining if there were alternative roles available for the Claimant to carry out. We reminded ourselves of the passage from **Jennings** to which Mr Bradley drew our attention (at paragraph 92) -

"....what any Claimant has to do, in our judgment, is to raise the issue as to whether a specific adjustment should have been made; he or she can, if they wish to do so, given [sic] evidence as to its practicability, its economic impact or, even, as to its reasonableness. So, too, of course, can the Respondent.
5 On that material the Employment Tribunal must then decide whether or not that was a reasonable adjustment."

94. There was some force in Mr Bradley's argument that the redundancy selection criteria - selecting agency workers then employees on expired FTCs - did not
10 place the Claimant at a substantial disadvantage. However, it seemed to us that this involved too narrow an interpretation of the agreed issue, which was expressed in these terms -

"Did the Respondent apply a provision, criterion or practice ("PCP"), namely
15 the redundancy selection criteria, that put the Claimant at a substantial disadvantage (specifically dismissal), in relation to persons who were not disabled?"

We considered that the correct approach was to focus as much on the word
20 "apply" as on the words "redundancy selection criteria".

95. Taking this approach, we considered it was appropriate to look not only at the redundancy selection criteria themselves but the manner in which they had been applied by the Respondent to the Claimant so as to put him at the
25 substantial disadvantage of being dismissed. Dismissal was clearly a substantial disadvantage and we did not understand Mr Bradley to argue otherwise.

96. The first adjustment contended for was that the Respondent should have
30 obtained a medical report. We had to decide whether this was a reasonable step for the Respondent to have to take to avoid the disadvantage (ie dismissal). We understood the reference to "dismissal" in the agreed issue as quoted above to be a reference to the Respondent's actual dismissal of

the Claimant, ie the dismissal communicated by Mr McGill's letter (page 52) and taking effect on 4 October 2016.

97. We were satisfied that, on the balance of probabilities, the Claimant would not have been dismissed as he was (ie on 4 October 2016) had the Respondent chosen to obtain a medical report. When the Claimant was unable to attend meetings on 16, 23 and 26 September 2016 the Respondent, being aware of his diagnosis of diabetes, should have sought a medical report before deciding what action to take. In the context of trying to avoid termination of employment for their expired FTC Team Leaders the Respondent was looking for alternative work. To find alternative work for the Claimant the Respondent needed to be aware of what he might be able to do following his diagnosis of diabetes. Obtaining a medical report would have been a reasonable step to take to establish what work the Claimant might be able to do with a view to ascertaining whether such work was available within the Respondent's organisation.

98. The second adjustment contended for was that the Respondent should have ascertained if there were alternative roles available for the Claimant to carry out. While we noted the evidence of Mr McGill that this had been done at a planning meeting, that was in the context of the Respondent's understanding of the Claimant's skillset before his diagnosis of diabetes. The symptoms experienced by the Claimant as described in the reports from Prof Collier (pages 62-63 and 64-65) and his inability to continue with his work at Cari Ilion indicated that it was unlikely, on the balance of probabilities, that he would have been able to cope with the work he had been performing prior to his absence from work commencing at the end of August 2016.

99. We found that it would have been a reasonable adjustment for the Respondent to have ascertained if there were alternative roles available for the Claimant to carry out, having regard to his disability. That process might not ultimately have been successful but we considered that, if this step had been taken, it was more likely than not that the Claimant would not have been dismissed on 4 October 2016.

100. Accordingly, the Claimant's claim under sections 20/21 EqA succeeds.

101. Turning to remedy, we felt there was a greater likelihood than not that, even if the reasonable adjustments had been made by the Respondent, the Claimant's period of employment would not have been extended for more than 4 weeks. That would have allowed sufficient time for the Respondent to have obtained a medical report and ascertained if a suitable role, based on the terms of that report, was available. We were able to make this assessment with the benefit of knowing what had happened to the Claimant in terms of both employment and health since the termination of his employment with the Respondent.

102. Had the Claimant's employment continued for a further 4 weeks he would have received sick pay (at the rate of full pay) under his contract of employment. We therefore decided that the Respondent should be ordered to pay to the Claimant the sums of £2400 representing the net pay he would have received during said period of 4 weeks.

103. We lastly considered what compensation the Claimant should receive for injury to feelings. The Presidential Guidance: Vento Bands (2017) did not apply in this case as the claim had been presented before 11 September 2017. We reminded ourselves of the Claimant's evidence as recorded in paragraph 46 above. We also reminded ourselves of the terms of the reports from Prof Collier - these referred to the Claimant having developed moderate to severe depression. It was apparent from these reports that the Claimant's depression was linked to his diabetes rather than his dismissal.

104. It was apparent that the Claimant had suffered some injury to feelings but we felt that this was at the lower end of the scale within the lower Vento band. Looking at matters in the round, we decided that a figure of £2000 was appropriate.

105. We calculated interest on these awards at 8% as follows. We took the date of dismissal (4 October 2016) as being the date of the act of discrimination,

being the last date upon which the failure to make reasonable adjustments could be said to have occurred. The calculation date was 16 October 2018. The mid point date was 10 October 2017. Interest on the loss of remuneration award of £2400, calculated from the mid-point date to the calculation date, totalled £195.16. Interest on the injury to feelings award of £2000, calculated from the date of the act of discrimination to the calculation date, totalled £322.63. The total amount of interest is accordingly £517.79.

Employment Judge: **W Meiklejohn**
Date of Judgment: **17 October 2018**
Entered in register: **19 October 2018**
and copied to parties