



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A. Kennedy

**Respondent:** Office for National Statistics

**HELD AT/BY:** Wrexham by CVP **on:** 20<sup>th</sup> – xx April 2022

**BEFORE:** Employment Judge T. Vincent Ryan  
Ms M. Walters  
Ms C. Izzard

## REPRESENTATION:

**Claimant:** Mr Kennedy represented himself (a Litigant in Person)

**Respondent:** Mr N. Caiden, Counsel

**JUDGMENT** having been sent to the parties on 27<sup>th</sup> April 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

**The Issues:** The following brief case summary, list of “complaints”, and list of issues were agreed at a preliminary hearing on 26<sup>th</sup> January 2022 conducted by Employment Judge C. Ward; the parties confirmed at the outset of the hearing that it still reflects the issues to be determined save as indicated below and underlined by me for emphasis:

### Case Summary

1. The Claimant was employed by the Respondent, on a short-term basis to assist with the census from 16 March 2021 until 5 May 2021 The claim form was presented on 29 May 2021
2. The claim is about what happened when the claimant required further cancer treatment and went on sick leave before his short-term contract came to an end. The Respondent’s defence is there were no reasonable adjustments that

could be offered to the Claimant that would have allowed him to have continued working while receiving treatment.

## The Complaints

3. The Claimant is making the following complaints:
  - 3.0 Disability discrimination about;
  - 3.1 A failure to make reasonable adjustments and
  - 3.2 Direct discrimination.

## The Issues

### 4 Direct disability discrimination (Equality Act 2010 section 13)

4.1 Did the Respondent do the following things:

4.1.1 told by Andrew Hanley (also known as Nigel Hanley) to resign on instruction by Chris Fozzard, with the whom the Claimant was unable to have any direct communication?

4.2 Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

4.3 If so, was it because of disability?

### 5 Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

5.1A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs? - yes:

5.1.1 The Respondent requiring the Claimant to interact with members of the public in his role as a Census Officer (the respondent accepted at the outset of this hearing that this did amount to a PCP);

5.1.2 The Respondent's policy of paying statutory sick pay only during sickness absence (the respondent accepted at the outset of this hearing that this did amount to a PCP).

5.2 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that;

2.2.1 He was not able to work and was forced to take sickness absence; (the respondent accepted at the outset of this hearing that the PCP requiring public interaction did place the claimant at a substantial disadvantage compared to non-disabled comparators).

2.2.2 He did not receive his full contractual pay during his sickness absence;

5.3 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

5.3.1 Paid the Claimant full pay during his sickness absence;

5.3.2 Provided the Claimant with additional training;

5.3.3 Promoted the Claimant to the position of Team Leader;

5.3.4 Transferred the Claimant to another role or allocated him other 'non-public facing' duties.

5.4 Was it reasonable for the Respondent to have to take those steps and when?

5.5 Did the Respondent fail to take those steps?

#### **The Facts:**

7. The parties have agreed a Cast List and Chronology which the Tribunal find to be factually correct. They are appended to this judgment and adopted to avoid mere recital of agreed and uncontroversial dates and information.

8. The respondent (R):

8.1 R is the executive office of the UK Statistics Authority, the “recognised national statistics institute of the UK”, reporting directly to the UK Parliament.

8.2 R is responsible, amongst other things, for management of the decennial Census for England and Wales (“a count of all people and households” that has occurred every ten years since 1801 save for 1941). For the purposes of rehearsal and the effective Census, R recruits specifically, engaging people on short term contracts as this task bears no relation to R’s other activities.

8.3 The most recent, and the relevant, census for our purposes was the one held on 21<sup>st</sup> March 2021, during the COVID-19 pandemic (which in this, as in every aspect of our living, had a substantial disruptive effect).

8.4 Initially during the claimant’s employment his Line Manager was Andrew “Nigel” Hanley, and latterly Joanna Drammeh. We only heard evidence from Ms Drammeh and from Sue Stokes, R’s Head of HR Workstreams.

9. The 2021 Census:

9.1 R's requirements of its Census Officers:

9.1.1 Census-related HR: recruitment, induction and provision of HR advice (including the provision of an HR helpdesk and advice to managers) for Census roles is contracted out to Adecco. The Tribunal did not hear evidence from any witnesses from Adecco. It is clear that they were slow to respond to repeated and increasingly urgent queries raised by R's managers about the claimant; those enquiries were conscientious, appropriate and timely.

9.1.2 Census Officers: Census officers, such as the claimant, were recruited for a seven weeks' period at 25 hrs pw, the first week being pre-operational for induction and training purposes (16-23/03/21), followed by a five-week operational period (23<sup>rd</sup> March – 29<sup>th</sup> April 2021), and then one week's post-operational accrued annual leave leading to effective termination of the fixed term of employment (29<sup>th</sup> Ap – 5<sup>th</sup> May 2021). The officers' role was to visit homes to encourage people in their designated geographical area to participate in the Census, to sign-post people to sources of advice and assistance, explaining that failure to participate may lead to a fine. The role required Officers to be out and about in the field each day going house to house meeting people, including in their homes; they were required to interact with members of the public which was the essence of their role. Officers were given written contracts which in turn referred to applicable policies including that on Absence Management. Officers were entitled to SSP when ill, subject to satisfying qualifying criteria. The contract provides that R could dismiss an Officer who was incapacitated for 8 days or more, on 1 week's N (p95). The aim was to recruit 12 Officers for each designated geographical area, but R was unable to recruit enough Officers; that said it did recruit approximately 25,000 Census roles.

9.1.3 Team Leaders: A profile for this role is at pages 248 – 251. The Team Leader is considered to be “a lynch pin” managing up to 12 Census Officers, being their main point of contact, fielding enquiries including about kit and equipment (including IT) which they distribute, collect and store. They visit homes with Census Officers to observe and supervise performance. They complete written reports. There was an insufficient number of Census Officers in the area worked by C and its neighbouring area such that Ms Drammeh was the Team Leader for two adjoining areas, leading a team of 14 Officers. There were no vacancies at the material time.

9.1.4 Census Area Support: A role profile is at pages 248-251; the role is to provide any support required by Census Officers as directed by an Area Manager, which would include delivering kit and equipment to Census Officers in the field and attending their other needs as they visit peoples' homes. There were no vacancies at the material time.

10. The claimant (C):

10.1 Background: the claimant had managerial experience before his recruitment for the respondent. The Tribunal was not given any details of his pre-employment experience, but it is accepted that he was suitable for the recruited role, and competent; he had relevant experience and knowledge in managing workload. At the material time the claimant was on furlough from his main job.

10.2 C was recruited as a Census Officer for Cuddington, Eaton and Winsford, Cheshire. His contract of employment is at pages 88-113; he was employed on a fixed-term basis between 16<sup>th</sup> March – 6<sup>th</sup> May 2021 (seven weeks).

10.3 Diagnosis and treatment of C's disabling condition: C was diagnosed with cancer two months before his application to R for a role as Census Officer. He chose not to disclose the diagnosis at that stage. One month before commencement of his role he underwent a biopsy with a view to further treatment as required. On his first day with R (16<sup>th</sup> March 2021), at his induction, C disclosed his diagnosis to Mr Hanley. On 18<sup>th</sup> March he discussed treatment options with his treating consultant. C was to undergo chemoradiotherapy on the basis of a 5-week course with treatment 5 days of each week. Initially treatment was due to commence on 12<sup>th</sup> April but on 31<sup>st</sup> March that date was brought forward to 6<sup>th</sup> April 2021. C was absent from work from 5<sup>th</sup> April until the effective date of termination of employment on 5<sup>th</sup> May 2021, he was therefore absent during the operational period from 5<sup>th</sup> April - 29<sup>th</sup> April i.e., 24 days.

10.4 Effect of the requirement for public interaction on C: C's immune system was compromised by the said treatment. He was advised by his Oncologist to avoid interaction with the general public. C did not know how he would fare during treatment and what, if any side effects he would have. C provided R with a fit note which is at p124. The note said that C was unfit for work; his GP scored-out options for a phased return to work, altered hours, amended duties and adaptations; the period of incapacity was stated as 31<sup>st</sup> March to 29<sup>th</sup> April but C's actual first day of absence was 5<sup>th</sup> April. C was unable throughout the Operational period to interact with the public and therefore to perform the essentials of the role for which he was employed. R did not dismiss C as it could have under the contract, but it made an adjustment to the contractual condition and provision (we do not know

its practice) in the circumstances of the claimant's illness; he was permitted to remain in employment on SSP.

10.5 Effect of the sick pay provisions on C: C received backdated (overpaid) SSP. He therefore was paid less than full wage. Any employee such as C who was absent and who qualified would have received SSP and contractually R could have dismissed anyone absent for 8 days regardless of SSP.

11. Meeting between C and Mr Hanley after 19<sup>th</sup> March but before 1<sup>st</sup> April 2021: Mr Hanley, who had been discussing with his Area Manager Fozzard, discussed matters generally with C; no one is sure as to the exact date of this meeting. One possibility was that C would be asked to resign. Mr Fozzard was to check what to do with Adecco. He asked whether whether C was to be allowed continue in employment, to be paid SSP, or to be asked to resign, or whether R should terminate his employment. Mr Fozzard asked Adecco repeatedly for an answer as to what he should do and allow or not allow. As stated, we did not have the benefit of direct evidence from Mr Hanley. We find on balance from all other available evidence that it is more likely than not Mr Hanley mentioned all possibilities to C at that meeting, including resignation but did not ask for it. It was left vague and unresolved. They also discussed possibility of other roles with R. C did not resign and he was not asked to; he was not dismissed; he was paid SSP. Mr Hanley did not receive a helpful and timely response from Adecco; R was wary of doing the wrong thing by C and anxious to do the right thing for C and itself.

**The Law:** The summary below supplements the respondent's detailed legal submissions in its "Opening Submissions on Liability" document; the Tribunal accepts and adopts the legal analysis of the leading relevant authorities set out therein (without repeating it). We also took full account of the claimant's "Closing Submissions" document and both parties' oral submissions.

12. Direct: S.13 EqA:

12.1 A person discriminates against another if because of a protected characteristic, such as disability, they treat that other less favourably than a comparator (whether a named comparator or a hypothetical comparator but in either case the person whose material circumstances are the same save in respect of disability).

12.2 Unlawful discrimination cannot be inferred from unreasonableness alone (*Bahl v The Law Society & others* [2004] EWCA Civ 1070) nor can it be established by showing merely a difference in status (e.g., disabled versus non-disabled) and a difference in treatment of the two (*Madarassy v Nomura International Plc* [2007] ICR 867).

12.3 Disability does not have to be the only or main cause of the treatment as long as it had "a significant influence" (*Nagarajan v London Regional Transport* [2000] 1AC 501). To make a valid comparison there must be no material difference between the circumstances of each case (s.23 EqA).

13. Reasonable adjustments:

- 13.1 S.20 & s.21 EqA: where a PCP, or a physical feature, puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a duty on an employer to make reasonable adjustments to avoid the disadvantage. It is necessary to identify: (a) the PCP applied by or on behalf of the employer; (b) the identity of non-disabled comparators (where appropriate); (c) the nature and extent of the substantial disadvantage suffered by the claimant (see *Environment Agency v Rowan* [2008] IRLR 20).
- 13.2 'Practice' connotes something which occurs on more than on a one-off occasion and has an element of repetition about it (*Nottingham City Transport Ltd v Harvey* [2013] EqLR 4).
- 13.3 Substantial means more than minor or trivial. The disadvantage must arise from the disability (*Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley* UKEAT/0417/11). Identification of a substantial disadvantage involves the accumulative assessment of the PCPs. Physical features or lack of auxiliary aids (*Environment Agency v Rowan* [2008] IRLR 218). Not being able to work as efficiently or productively as colleagues who do not live with disabilities may amount to a substantial disadvantage in this context.
- 13.4 The duty does not arise if R did not know, and could not reasonably have been expected to know, both that C was disabled and that C was likely to be at a substantial disadvantage in comparison with persons who are not disabled (*Secretary of State for Work and Pensions v Alam* [2010] IRLR 283).
- 13.5 Paragraph 6.28 of the EHRC Code of Practice recommends that when deciding what is a reasonable step for an employer to have to take some of the factors that should be considered are: whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step; the financial and other costs of making the adjustment and the extent of disruption caused; the extent of the employer's financial or other resources; the availability to the employer of financial or other assistance to help make an adjustment (e.g. through Access to Work); the type and size of employer.
- 13.6 Where the duty arises, an employer who was unaware of the duty to make reasonable adjustments may still show that it was not in breach of the relevant duty because a particular step would not have been a reasonable one to take. The question is whether, objectively, the employer complied with its obligations or not (*Tarback v Sainsbury's Supermarket Ltd* [2006] IRLR 664, paragraph 71).
- 13.7 An employee does not have to suggest any, or any particular, adjustments at the material time and may even first make the

suggestion during a final hearing (Project Management Institute v Latif [2007] IRLR 579).

14. The burden of proof provisions of the Equality Act 2010 are set out in s.136. If there are facts from which the Tribunal could decide, in the absence of any other explanation, that A contravened the provision concerned, the tribunal must hold that the contravention occurred, save where A shows that A did not contravene the provision. This is referred to as a two stage test, facts being established at the first stage showing a potential for discrimination and then at the second stage a respondent (A) showing, proving facts, to establish an innocent explanation for acts, omissions or words (or otherwise, such as where A establishes in fact that the alleged acts etc did not occur) and therefore that there was no contravention as alleged.
15. At the so-called first stage the tribunal must find sufficient facts, which may be proved by either the claimant or the respondent, to pass any burden of showing there was no contravention of the provision to A, although any mere explanation from the respondent (A) is to be ignored at that first stage. One would expect the claimant to advance evidence to prove facts beyond merely making assertions of discrimination.
16. In discrimination cases there is often the obvious difficulty of positively proving that discrimination took place from available oral and documentary evidence. A tribunal may, but is not obliged to, draw adverse inferences from established facts, and by that route find that there was contravention of a relevant provision. In this judgment if adverse inferences have been drawn from established facts this will be made clear; if it is not clear that adverse inferences have been drawn then, on consideration and for good reason, it was not deemed necessary to draw any.

### **Application of law to facts:**

### **The Issues**

#### **17. Direct disability discrimination (Equality Act 2010 section 13)**

17.1 Did the Respondent do the following things:

- i. *told by Andrew Hanley (also known as Nigel Hanley) to resign on instruction by Chris Fozzard, with the whom the Claimant was unable to have any direct communication?* No. They discussed all possibilities, including resignation but there was request or instruction.

17.2 Was that less favourable treatment?

*The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.*



*If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.*

Even if the Tribunal is wrong above, we find that the treatment was not unfavourable compared to how R would have treated others; R would have discussed options with any employee and sought HR advice before making any decision. Careful consideration of options, consultation with an employee on options, taking advice upon both of those things and then acting in the least detrimental way open to it (prolonging employment and continuing to pay SSP) is not unfavourable. R would have discussed options with any employee unable to do their essential role.

17.3 *If so, was it because of disability?* Even if we are wrong on above, the discussion was around ability to perform field work in a short operational period when C had a fit note saying he was incapable through most of the operational period. The same factors would have applied for any employee who was unable to perform the essential role for the operational period through non-disabling ill health or other reasons.

## **18 Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

18.1A *“PCP” is a provision, criterion or practice. Did the Respondent have the following PCPs?*

18.1.1 *The Respondent requiring the Claimant to interact with members of the public in his role as a Census Officer (the respondent accepted at the outset of this hearing that this did amount to a PCP); Yes.*

18.1.2 *The Respondent's policy of paying statutory sick pay only during sickness absence (the respondent accepted at the outset of this hearing that this did amount to a PCP). Yes.*

18.2 *Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that*

18.2.1 *He was not able to work and was forced to take sickness absence; (the respondent accepted at the outset of this hearing that the PCP requiring public interaction did place the claimant at a substantial disadvantage compared to non-disabled comparators). Yes. The statutory duty arose in respect of this PCP.*

18.2.2 *He did not receive his full contractual pay during his sickness absence; This was not a substantial disadvantage compared to non-disabled colleagues. The standard contract provided for SSP with the possibility of dismissal. That was same for all who could not perform the job. The statutory duty did not arise in respect of this PCP.*

18.3 *What steps could have been taken to avoid the disadvantage in respect of the PCP requiring public interaction? The Claimant suggests:*

18.3.1 *Paid the Claimant full pay during his sickness absence;* if the Tribunal is wrong above in respect of the pay PCP, full pay would not have assisted C's return to work. He was unfit to work. Furthermore, he did not know effects the treatment would have on him and whether he would be able to return before the end of the operational period. His placement was time limited and there was no reasonable expectation of a return to work. Full pay would merely (albeit significantly) just provide him with more comfort away from work and not remove a substantial disadvantage at work. The Tribunal considered whether this case would be one of those where a payment adjustment would come under the banner of "reasonable adjustment" and concluded that it would not. It would only facilitate C remaining absent in more comfort, perhaps hastening a decision by R to terminate his contract as it was entitled to do once he was incapacitated for 8 days.

18.3.2 *Provided the Claimant with additional training:* There was insufficient time within the period of time in question for R to provide meaningful training and there were no vacancies for C to fill in any event. There is no evidence before us that any training would have assisted a return to work for the reasons above. C was incapacitated.

18.3.3 *Promoted the Claimant to the position of Team Leader:* There were no such vacancies. C was medically incapacitated from work. Promotion would not have facilitated his return to work. He could not have completed the essentials of any Census roles, namely public interaction.

18.3.4 *Transferred the Claimant to another role or allocated him other 'non-public facing' duties:* There were no vacancies. He was unfit to work. A transfer as suggested would not have assisted C's return to work. He could not have completed the essentials of a new role working on the census namely public interaction.

18.4 *Was it reasonable for the Respondent to have to take those steps and when?* No. The Tribunal concludes that there were no reasonable adjustments available that would have addressed the substantial disadvantages faced by the claimant in respect of the PCP requiring public interaction

18.5 Did the Respondent fail to take those steps? The respondent did not take the steps suggested by C, but the claims fail for the reasons stated above.

Employment Judge T.V. Ryan

Date: 25.05.22

JUDGMENT SENT TO THE PARTIES ON 27 May 2022

FOR THE TRIBUNAL OFFICE Mr N Roche