EMPLOYMENT TRIBUNALS

Claimant: **M Thurling**

Respondent: **Rockwool Limited**

Heard at: **Cardiff** **On: 4, 5 and 6 May 2022**

Before: **Employment Judge R Harfield**
Members **Ms A Fine**
Ms L Owens

Representation:
Claimant: Mr A Windross (Counsel)
Respondent: Ms M Bayoumi (Counsel)

RESERVED JUDGMENT

It is the unanimous decision of the Employment Tribunal that;

(a) The claimant's complaint for breach of section 15 Equality Act 2010 is well founded;

(b) The claimant's complaint of failure to make reasonable adjustments is not well founded and is dismissed;

(c) The successful complaint will be listed for a remedy hearing.

REASONS

Introduction

1. By way of a claim form presented on 21 September 2021 the claimant brings claims of discrimination arising from disability and a failure to make reasonable adjustments. The respondent resists the complaints.

2. The case was case management by Employment Judge Ward at a case management hearing on 26 January 2022. EJ Ward set out a list of issues [49] that has since been updated by the claimant with the consent of the respondent [51]. The updated list of issues as relating to liability is as follows

Section 15 Equality Act 2010: Discrimination arising from disability

1. *Did the respondent subject the claimant to unfavourable treatment within the meaning of 15(1) of the Equality Act 2010 by:*

    a. *Limiting the salary to the Grade 1 role that the claimant had taken?*

2. *If so was the treatment because of something arising in consequence of the claimant's disability?*

3. *If so was the treatment a proportionate means of achieving a legitimate aim for the reasons stated in paragraph 23 of the Grounds of Resistance.*

    [We interpose here paragraph 23 of the Grounds of Resistance is at [38] and states:

    > *"The Respondent denies that it treated the Claimant unfavourably because of something arising in consequence of the Claimant's disability. The decision to limit the Claimant's current pay was based on the fact that he had taken a new role at Grade 1 which is paid at Grade 1 salary. The pay structure model of the Respondent is transparent and reflects the skill, qualification and demands required by the role. Putting the claimant onto the normal salary for the role he was performing was a proportionate means of achieving a legitimate aim – being overall fairness to colleagues working similar roles, avoiding tension and complaints about pay within the workplace."]*

Sections 21 and 22 Equality Act 2010: failure to make reasonable adjustments

1. *Did the respondent apply a provision, criterion or practice ("PCP") in the form of the requirement that all Rod Mill Operators carry out duties which include heavy manual handling and frequently going up and down stairs?*

2. *If so, did that PCP place the claimant at a substantial disadvantage in comparison with employees who are not disabled? The Claimant contends*

that he is unable to perform heavy manual handling duties and he is unable to go up and down stairs on a frequent basis.

3. *If so, did the Respondent make reasonable adjustments? The claimant contends that in moving him to a warehouse operator role (grade 1) for health reasons, this should have included, without limitation, continuing to afford his pay protection from 6 October 2021 onwards.*

4. *Did the respondent not know, or could the respondent not reasonably be expected to know that the claimant was likely to be placed at the disadvantage.*

3. The claimant's counsel confirmed that this list of issues remained correct and that the claimant was not seeking to rely upon an alternative argument, set out in the claimant's witness statement that there was a failure to make reasonable adjustments relating to other alternative employment at grade 2, which the claimant's witness statements canvas may have been available. Nor indeed is the Claimant's case predicated upon a suggestion, that again cropped up in evidence, that it may have been possible for him to remain in his existing grade 2 rod mill operator role with the assistance of an additional colleague who it is said had since been allocated to float across the team. It was said that the claimant's case before us related to pay protection only. As such, we only heard limited evidence on these wider issues.

4. We heard evidence from the claimant and from Ms Richards from the GMB union. We had before us a witness statement from Mr Kerton, from the GMB branch on site. Mr Kerton did not give oral evidence. The parties made submissions as to the weight to be given to Mr Kerton's evidence. His statement is not signed and potentially appears to misspell his own name. It ultimately appeared that in any event his purported evidence had no relevance to the issues that were before us and did not take matters forward. For the respondent we received written statements from and heard evidence from Mr Leonard, Ms Gassor, Ms Reddy, Mr Richards and Mr Strong. We received oral closing submissions from both counsel, together with some of the key case law. For reasons of expediency, we have not set out the submissions here, but took them fully into account, and they are incorporated where relevant by reference below.

5. We had before us a bundle of documents extending to 124 pages. References in this decision which are in brackets [ ] are references to the page number in that bundle.

Findings of fact

5. We need only make findings of fact that are necessary to decide the issues in the case i.e. the pay protection issue.

The process followed in redeployment and considering pay protection

7. The respondent is a manufacturing company of insulation products for the construction industry. It has over 500 employees. The claimant worked at the Bridgend site, starting on 9 September 1993. The claimant was employed as a rod mill operator, a grade 2 role, from 2009 until he was redeployed as a warehouse operator, a grade 1 role. The question of whether there should be extended pay protection for that redeployment is the subject of this claim.

8. In May 2017 the claimant was diagnosed with leukaemia and was absent on long term sick leave. When on sick leave the claimant's sick pay was topped up by the respondent's insurers, Unum. In May 2019 the claimant returned to work on a phased return. In March 2020 the claimant had a period of absence with a chest infection. The covid outbreak then occurred and the claimant was shielding and on furlough.

9. On 9 March 2021 the claimant was reviewed by occupational health [76-77]. Dr Mansouri, the consultant in occupational health medicine, recorded that the claimant had breathing difficulties and joint pain which was probably the adverse effects of chemotherapy. Dr Mansouri advised:

"*Given his respiratory and joints problems, in my opinion, undertaking physically demanding duties is likely to be very difficult. Based upon my assessment today and the nature of his employment, I advise that in my opinion Mr Thurling is unfit to undertake the full range of his duties as a Rod Mill Operator for the foreseeable future. Whilst he may be able to drive the forklift truck and the 44 machine or work in the warehouse, in my opinion, he is unfit to efficiently and safely undertake heavy manual handling operations e.g. lifting, carrying, pushing and pulling heavy items, or frequently going up and down the stairs. I suggest that you arrange a meeting with Mr Thurling to discuss the possibility of redeployment to an alternative suitable position*."

10. The claimant returned to work again on 1 April 2021. On his own evidence he accepts he had started to struggle with the full duties of the rod mill operator role which he describes as a physically demanding role including heavy manual handling and frequently going up and down stairs. The claimant was placed on temporary light duties driving a forklift truck until a capability meeting could be arranged in light of the content of the

occupational health report. He was still on his grade 2 pay during that time.

11. On 5 May 2021 Ms Reddy, HR Advisor, wrote to the claimant inviting him to a capability meeting on 11 May 2021 [79]. The claimant was told that the doctor's report would be discussed as would potential options available in order to change the claimant's job role.

12. The minutes at the meeting are at [80 – 81]. The claimant attended with Mr Kerton. The meeting was chaired by Ms Gassor, the claimant's line manager, with assistance from Ms Reddy. Ms Gassor noted that the claimant had already approached her to discuss roles in the warehouse that were available. She said that Ms Reddy had also been looking at roles available in the business and had suggested that the claimant complete a 4 week trial of the warehouse operator role to see how the claimant got on. The claimant was told there were 3 roles available on each shift so the claimant could pick a shift. He was told if the trial was successful the role could be made permanent or, if not, they could review the situation to see if other alternative roles were available. He was told that the main focus of the capability process was to keep him in employment and find alternative roles within the business. However he was also told that if there were no roles available (if he struggled with the role on offer), or the claimant was to reject the proposed role and there were no other roles available, then there was a possibility the respondent may exhaust all options and could dismiss him on grounds of ill health capability. It was stressed, however, that was not the reason for the meeting and the aim was to redeploy the claimant. The claimant asked about whether there was other roles available that would keep him at grade 2 but was told there were no role available in production and possibly no jobs in fabrication.

13. The claimant asked where he stood with pay protection. He was told by Ms Gassor there was a possibility Unum may be able to top up his pay and that Ms Reddy would make further enquiries. The claimant was told there could be no promise that they would top up his pay. Mr Kerton said he thought that the claimant would get pay protection under the Equality Act and he needed to speak to the GMB office to look into this. Mr Kerton also asked Ms Reddy to find out why the company would not give the claimant pay protection and who would make that decision. Ms Reddy said she would make enquiries and confirm the position.

14. On 2 June 2021 Ms Reddy wrote to the claimant [64] stating the claimant had accepted the proposal to begin a temporary 4 week trial as a Warehouse Operator, to start on 6 June 2021. The claimant was told his salary would remain unchanged for the duration of the trial. The claimant

was told that enquiries were continuing to be made regarding the claimant's pay query and a follow up meeting would be arranged to discuss this and the claimant's trial.

15. On 3 June 2021 the claimant raised a grievance [90-91] saying that he was unable to take the cut in pay and believed the respondent should support him so that he did not suffer any financial detriment in taking the warehouse position, following a trial, on what would be a considerably reduced salary and at a far lower grade. He said it was causing him undue stress and anxiety to undertake a trial without knowing if he would receive pay protection. The claimant said he considered it to be discrimination due to his disability and a failure to make reasonable adjustments. The claimant said he was well aware that other employees had received support with pay protection in the past and therefore he would like to be treated the same as his colleagues. On 7 June 2021 Acas early conciliation was commenced.

16. On 10 June 2021 Ms Reddy wrote to the claimant expressing surprise at receiving his grievance, saying that a final decision regarding rate of pay had not yet been made. Ms Reddy said they could not respond to a grievance about a matter that had not yet concluded, and that the grievance could complicate and delay the capability process. The claimant was asked whether he would withdraw his grievance at that time to allow the capability process to continue, with the opportunity at the end of that to raise his concerns at that point. Alternatively, he could proceed with the grievance and pick up the capability process at a later date. On 16 June 2021 Ms Richards, GMB organiser, confirmed that the grievance would be placed on hold to allow the capability process to conclude. On 17 June [83] the claimant was then invited to a follow up capability hearing on 22 June.

17. The minutes of the meeting on 22 June are at [84 – 85]. The claimant said the trial was going alright, and he was picking it up well. He said from a health perspective the role was fine for him. Ms Gassor told the claimant, on the issue of pay, "*As you know, the role is a grade 1 role and we have paid you at the grade 2 rate as a goodwill gesture for 1 month whilst you complete your trial. We have had discussions, and we don't feel 1 month is a long enough trial period. We need to make sure you are trained in all areas within logistics and have agreed to extend your trial to 3 months and keep you at grade 2 pay for the trial period. You have completed 1 month and have 2 more months to complete. Once the trial is completed, you will go down to the grade 1 pay, but may be able to make a claim through Unum after 12 months.*"

18. Ms Reddy clarified that the trial period was in fact an additional 3 months on top of the original 1 month (so 4 months in total) and the claimant would be paid his grade 2 pay during that time. She said Mr Leonard in logistics had advised that to be fully trained in all areas of the Warehouse the claimant would need to complete 3 months training, and that they were also aware the claimant would need time to adjust to a change in the rate of pay, so the claimant was being paid for a notice period. She said the claimant's salary would then be reduced to grade 1 as that is the level of the grade of the role he was being redeployed into.

19. The claimant asked why his pay protection could not continue. He was told it was a redeployment of his role as they could not make reasonable adjustments to his original role. He was told he could make a claim through Unum after 12 months in the role. Ms Reddy explained that as part of Unum's terms and conditions there was a deferred period of 12 months before the claim could be made. She said she had confirmed with Unum the 12 month deferral period could run from the date the trial began. The claimant was told there was no guarantee that Unum would approve the claim. She said she had been told a claim for top up pay was a claim they would consider, but Unum would need to do a full assessment of medical documents and job information.

20. The claimant said his worry was that if he took the reduction in salary, in 12 months time he could get told Unum would not take on his claim. He said there were men in his department doing the same role who were pay protected and he was not. He said he had worked there for 26 years and did not understand why he was being penalised.

21. Ms Gassor stated that the claimant's role he was moving to was not pay protected and was a grade 1 role. She said she could not comment on other pay protection cases as there were historical agreements in place but she was not aware of their circumstances. Ms Reddy stated that the claimant's pay protection was as a grade 2 operator and as his role was changing the pay protection would end. She said those working in the warehouse who were pay protected and changed roles would also have their pay protection end.

22. Mr Kerton referred to case law he had sent through. Ms Reddy said they had taken legal advice and that the case law applied to different circumstances as the claimant was being redeployed to a new role at a lower grade. She said the role occupational health had deemed the claimant fit to work was as a forklift truck role, but that the forklift truck roles available were paid at a grade 1 salary. The claimant was told he needed to decide whether he was accepting the trial.

23. On 1 July 2021 Ms Reddy wrote to the claimant [88-89] confirming the proposal of a further 3 month trial which would be paid at the grade 2 salary and that would reduce to grade 1 once the claimant had completed the trial and wanted to transfer to the warehouse department, with effect from 1 October 2021. She said the salary would reduce as the role the claimant was undertaking was a grade 1 operator role. She confirmed that they would submit a claim to Unum but could not guarantee that Unum would accept the claim and Unum could not accept any claim until after a 12 month deferral period, which would be from 6 June 2021, the date the trial period began.

24. The claimant reactivated his grievance. He was invited to a meeting with Mr Strong, Shift Manager, on 3 August 2021. The minutes of the grievance meeting are at [96-97]. Ms Richards said that the claimant could not afford the drop in pay of £400 per month and it would be reasonable to allow him to continue to receive the higher salary or provide more support in the claimant's previous role. She said the claimant was being treated less favourably than others in the business who had benefitted from pay protection. Mr Strong said that such individuals had been through a different process and it was a historic agreement. The claimant said that he accepted that he should move to the warehouse and that he was ok with a reduction to his shift allowance as he was following a different shift pattern, but that he wanted his pay to remain the same. There was a discussion between Mr Strong and Ms Richards about different interpretations of the case law on pay protection.

25. On 6 August 2021 Mr Strong wrote with his decision [98]. Mr Strong said that the reasons put forward by the claimant for pay protection was that there were others in the business who were pay protected and that the claimant considered it should be a reasonable adjustment. Mr Strong said "*Following a review of any instances of pay protection in the business, where these are in place, they are historical and linked to a redundancy process. None are related to health capabilities and none have been put in place in recent years."* He therefore said he was not upholding the grievance. In relation to reasonable adjustments, he referred to the grade 2 salary for the trial period, and said it was not reasonable to expect the company to continue to pay the grade 2 salary associated with the claimant's substantive role once the trial had been completed.

26. The claimant exercised his right of appeal [99- 100]. He said he had been treated less favourably than other employees who were able bodied that had received pay protection but he had been refused due to his disability. The claimant referred to his 28 years loyal service. He disagreed with Mr Strong's assessment of what would be a reasonable adjustment.

27. On 13 August 2021 the claimant was sent a letter [101] inviting him to a grievance appeal meeting on 17 August 2021 with Mr Richards, project manager. The minutes are at [102 – 103]. Ms Timms from HR confirmed they were only aware of one similar example to the claimant that was covered by Unum and that they would apply for this for the claimant after 12 months. The claimant said that if he had stayed in his previous role he could have got better. Ms Timms said there could be grade 2 roles in the future that the claimant could apply for if his health improves.

28. On 26 August 2021 the claimant was sent the grievance appeal outcome [104]. His appeal was not upheld. Mr Richards said that the respondent had shown commitment to the claimant in finding another position for him and that he had been told there were no other suitable roles. He said his thoughts had been that the respondent should support the claimant for a length of time so that he could personally plan and transfer into a new amount of monthly income, but he had been told that this had already been agreed for a 4 month period. Mr Richards said he understood that support was consistent with that given to an employee in a similar situation and that a claim would be made to Unum as soon as the policy allowed. He therefore said he considered that all reasonable avenues had been explored.

29. On 14 September 2021 Mr Leonard, Logistics Operations Manager, confirmed the claimant had passed the trial period and they could offer him a permanent operator's role in Logistics. On 15 September 2021 Ms Reddy wrote to the claimant reminding him that from 1 October 2021 his salary would reduce as the role he was undertaking was a grade 1 operator role. She said they would start the process of submitting a claim to Unum for a salary top up. She confirmed that the claimant's 3 month trial had completely successfully. On 22 September 2021 Ms Reddy again wrote to the claimant to confirm his appointment as a grade 1 operator [66] and with changes to his terms and conditions including pay. The claimant did not sign and return the letter because of this ongoing dispute about pay but he continues in the role with the reduced pay.

The pay protection agreement

30. The pay protection agreement is at [59 – 63]. It records that an agreement had been reached between the respondent and the trade unions about the implementation of a grading structure during 2007. It is said that the agreement introduces a permanent change to the terms and conditions of employees covered by recognition agreements. The positions in the factory had been divided into grades with figures for basic pay and shift

allowance. Ms Reddy explains in her witness statement that a new, lower grade 1 salary was introduced for new employees and those employees currently doing the job were put in a grade 1 job but kept their original contractual salary (which was the same as the new Grade 2 salary). It was, in effect, retained pay.

31. The agreement states:

"**4. Pay protection for Current Employees in Grade 1 Jobs**

The following clause is agreed by the parties:

For employees receiving the Grade 2 salary while occupying Grade 1 jobs, this agreement provides pay protection until normal retirement age and includes any pay increases agreed in that period. Providing the job holder i.e. Grade 1 designate is prepare to co-operate with any request for reasonably flexibility within his current capabilities, pay protection will continue to apply, except where it is established that the job holder does not have the capability to perform a Grade 2 role when given the opportunity to move to one. The company will undertake to offer suitable training and opportunity for job enhancement to any such job holder whenever practicable. It is agreed that there will be a joint review in year 7 of this agreement and any further change resulting in detriment will be discussed with the joint trade unions in order to agree an equitable settlement."

The claimant's grade 2 job

32. The respondent's factory is split in two in terms of production areas, with the logistics department being the third last step in the process. In the logistics department orders are dealt with and prepared for customers and loaded into lorries for delivery.

33. The first half of the process is heavy industry work where raw materials are loaded into industrial furnaces and the waste product is processed. It is called the "hot end" and is busy, noisy, hot and requires protective gear to handle the machinery and material. The roles are physically demanding which includes the rod mill operator role. The rod mill is a plant on the site which has a number of floors and handles and recycles the waste product that comes off the furnaces. The rod mill processes around 10 tonnes of rock-wool per hour which is then crushed and processed into briquettes. Waste is collected from the furnaces via a CO2 combustion system which filters out the fly ash into the various fly ash pots. The pots are 10 – 12 feet high. The rod mill operator role includes driving a forklift, loading pallets, offloading pallets by hand on to conveyor belts, and pushing and

pulling heavy rubber pipes. It also involves connecting the fly ash pots to a forklift, transporting it to a silo, and manually connecting pipes and valves to empty it. The operators clean out the fly ash pots by climbing 8 feet vertical ladders on the side and use bars and hammers to empty it completely. This needs to be done many times in each shift. It involves going up and down flights of stairs from one level to another multiple times per shift. The role involves being outdoors in the elements and the shifts are 4 days/nights on and off including weekends. The job description is at [67-70].

The grade 1 warehouse operator role

34. The warehouse operator role is based in the logistics department. It is a clean space for preparing the final product for distribution. Outside working is limited to taking packed pallets on the forklift truck out to the loading bay. The role mostly involves moving packaged products from the storage locations to the loading bay using a forklift. Mr Leonard estimated this involves 60 to 70 % of the claimant's working time, with other time spent checking delivery paperwork and order forms, staging orders for wrapping or counting shipment orders. The role has limited intensive manual labour and no requirement to operate production machinery. The job description is at [71].

The pay differential and Unum

35. The claimant's schedule of loss at [120] calculates the difference in salary, with a potential impact too on pension. The pay difference is £379.08 a month, and is claimed until a retirement age of 67 at £217,971.00 (ignoring any additional potential impact on pension or taxation). It is of subject to the possibility that some could be covered by Unum. Ms Reddy told us that the Unum process would be subject to an initial evaluation and then regular review processes, but that there was in theory no overall cap on the amount that Unum could pay out over the years. We accept her evidence. The claimant complains that it is not evidenced in documents. However, there has been no specific disclosure application put before the Tribunal about the Unum terms and conditions. Further, we have to ultimately decide the case and reach our findings on the evidence the parties (both represented throughout) put before us. Ms Reddy works in HR and the bundle shows had email contact with Unum. She is therefore likely to know Unum's processes and terms and conditions.

The legal framework

36. Complaints of disability discrimination are brought under the Equality Act 2010. Section 39(2) (a) and (d) prohibit discrimination against an employee as to the terms of employment or by subjecting him to a detriment. Discrimination includes a complaint under section 15 of the Act. Section 39(5) applies to an employer the duty to make reasonable adjustments.

Burden of Proof

37. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides:

> *"(2) if there are facts from which the Court (which includes a Tribunal) 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."*

38. Consequently, it is for a claimant to establish facts from which the tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

39. In Hewage v Grampian Health Board [2012] IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provisions should apply. That guidance appears in Igen Limited v Wong [2005] ICR 931 as supplemented in Madarassy v Nomura International Plc [2007] ICR 867. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence. Furthermore, in practice if the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Duty to make reasonable adjustments

40. The duty to make reasonable adjustments appears in Section 20 as having three requirements. In this case we are concerned with the first requirement in Section 20(3) –

> *"(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."

41. Under section 21 a failure to comply with that requirement is a failure to comply with a duty to make reasonable adjustments and will amount to discrimination. Under Schedule 8 to the Equality Act an employer is not subject to the duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the claimant has a disability or that the claimant is likely to be placed at a substantial disadvantage.

42. In Environment Agency v Rowan [2008] ICR 218 it was emphasised that an employment tribunal must first identify the "provision, criterion or practice" applied by the respondent, any non-disabled comparators (where appropriate), and the nature and extent of the substantial disadvantage suffered by the claimant. Only then is the tribunal in a position to know if any proposed adjustment would be reasonable.

43. The words "provision, criterion or practice" ["PCP"] are said to be ordinary English words which are broad and overlapping. They are not to be narrowly construed or unjustifiably limited in application. However, case law has indicated that there are some limits as to what can constitute a PCP. Not all one-off acts will necessarily qualify as a PCP. In particular, there has to be an element of repetition, whether actual or potential. In Ishola v Transport for London [2020] EWCA Civ 112 it was said:

"*all three words carry the commutation of a state of affairs… indicating how similar cases are generally treated or how a similar case would be treated if it occurred again."*

It was also said that the word "practice" connotes some form of continuum in the sense that it is the way in which things are generally or will be done.

44. The purpose of considering how a non-disabled comparator may be treated is to assess whether the disadvantage is linked to the disability.

45. Substantial disadvantage is such disadvantage as is more than minor or trivial; Section 212.

46. Consulting an employee or arranging for an occupational health or other assessment of his or her needs is not normally in itself a reasonable adjustment. This is because such steps alone do not normally remove any disadvantage; Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 663; Project Management Institute v Latif [2007] IRLR 579.

47. What adjustments are reasonable will depend on the individual facts of a particular case. The Tribunal is obliged to take into account, where

relevant, the statutory Code of Practice on Employment published by the Equality and Human Rights Commission. Paragraphs 6.23 to 6.29 give guidance on what is meant by reasonable steps. Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicality of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantial disadvantage.

48. In County Durham and Darlington NHS Trust v Dr E Jackson and Health Education England EAT/0068/17/DA the Employment Appeal Tribunal summarised the following additional propositions:

- It is for the disabled person to identify the "provision, criterion or practice" of the respondent on which s/he relies and to demonstrate the substantial disadvantage to which s/he was put by it;
- It is also for the disabled person to identify at least in broad terms the nature of the adjustment that would have avoided the disadvantage; s/he need not necessarily in every case identify the step(s) in detail, but the respondent must be able to understand the broad nature of the adjustment proposed to enable it to engage with the question whether it was reasonable;
- The disabled person does not have to show the proposed step(s) would necessarily have succeeded but the step(s) must have had some prospect of avoiding the disadvantage;
- Once a potential reasonable adjustment is identified the onus is cast on the respondent to show that it would not been reasonable in the circumstances to have to take the step(s)
- The question whether it was reasonable for the respondent to have to take the step(s) depends on all relevant circumstances, which will include:
    - The extent to which taking the step would prevent the effect in relation to which the duty is imposed;
    - The extent to which it is practicable to take the step;
    - The financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of its activities;
    - The extent of its financial and other resources;

- The availability to it of financial or other assistance with respect to taking the step;
- The nature of its activities and size of its undertaking;

- If the tribunal finds that there has been a breach of the duty; it should identify clearly the "provision, criterion, or practice" the disadvantage suffered as a consequence of the "provision, criterion or practice" and the step(s) the respondent should have taken.

Discrimination arising from disability

49. Section 15 of the Equality Act states:

"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."

50. The approach to determining Section 15 claims was summarised by the Employment Appeal Tribunal in Pnaiser v NHS England and Another [2016] IRLR 170. This includes:

- In determining what caused the treatment complained about or what was the reason for it, the focus is on the reason in the mind of A. This is likely to require an examination of the conscious or unconscious thought process of A;
- The "something" that causes the unfavourable treatment need not be the main or sole reason, but must at least have a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it;
- Motives are not relevant;
- The tribunal must determine whether the reason or the cause is "something arising in consequence of B's disability";

- The expression "arising in consequence of" can describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link;
- Knowledge is only required of the disability. Knowledge is not required that the "something" leading to the unfavourable treatment is a consequence of the disability.

51. The respondent will successfully defend the claim if it can prove that the unfavourable treatment was a proportionate means of achieving a legitimate aim. This is often termed "objective justification." The burden of proof is on the employer to establish justification.

52. The Supreme Court in Ministry of Justice v O'Brien [2013] ICR 449 re-stated the general principles of objective justification that:

    (a) firstly, the difference in treatment must pursue a legitimate aim;

    (b) second, it must be suitable for achieving that objective; and

    (c) third, it must be reasonably necessary to do so.

53. The Equality and Human Rights Commission Code of Practice on Employment contains guidance on objective justification, to reflect some of the case law in the field. It terms the first issue as being determination of whether the aim is the aim legal and non discriminatory and one that represents a real, objective consideration. In Bilka-Kauhaus GmBH v Weber von Hartz [1987] ICR 110 it was termed "*correspond to a real need on the part of the undertaking."*

54. In Chief Constable of West Yorkshire Police and anor v Homer [2012] ICR 704, the Supreme Court reiterated that the measure in question has to be both an appropriate means of achieving the legitimate aim, as well as being reasonably necessary in order to do so. Some measures may simply be inappropriate to the legitimate aim in question or they may be appropriate but go further than is reasonably necessary and so be disproportionate.

55. As to the third stage, the EHRC Employment Code notes "*Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts."* We pause here to note that in a section 15 claim, it is of course the treatment that is being justified, not a provision, criterion or practice (the terminology from an indirect discrimination complaint).

56. It was said by the Employment Appeal Tribunal in Ali v Drs Torrosian, Lochi, Ebeid & Doshi t/a Bedford Hill Family Practice [2018] UKEAT0029 18 0205 (a section 15 case) that:

(a) Justification of the unfavourable treatment requires there to be an objective balance between the discriminatory effect and the reasonable needs of the employer;

(b) When determining whether or not a measure is proportionate it will be relevant for the Tribunal to consider whether or not any lesser measure might nevertheless have served the employer's legitimate aim;

(c) More specifically, the case law acknowledges that it will be for the Tribunal to undertake a fair and detailed assessment of the working practices and business considerations involved, and to have regard to the business needs of the employer;

(d) As to the time at which justification needs to be established, that is when the unfavourable treatment in question is applied;

(e) When the putative discriminator has not even considered questions of proportionality at that time, it is likely to be more difficult for them to establish justification.

57. In Hardy and Hansons Plc v Lax [2005] ICR 1565 Pill LJ stated: *"It is for the employment tribunal to weigh the real needs of the undertaking, expressed without exaggeration, against the discriminatory effect of the employer's proposal. The proposal must be objectively justified and proportionate."*

58. Further, Pill LJ said: *"I accept that the word 'necessary' .... has to be qualified by the word 'reasonably'. That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject [the employer's] submission ... that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances."*

59. The Court of Appeal said in O'Brien v Bolton's St Catherine's Academy [2017] ICR 737:

"…it is well-established that in an appropriate context a proportionality test can, and should, accommodate a substantial degree of respect for the judgment of the decision-taker as to his reasonable needs (provided he has acted rationally and responsibly), while insisting that the Tribunal is responsible for striking the ultimate balance; and I see good reason for such an approach in the case of the employment relationship."

60. The Employment Appeal Tribunal said in Birtenshaw v Oldfield [2019] UKEAT 0288 18 1104 repeated the above but added that it does not follow that the tribunal has to be satisfied that any suggested lesser measure would or might have been acceptable to the decision-maker or otherwise caused him to take a different course. That approach would be at odds with the objective question which the tribunal has to determine; and would give primacy to the evidence and position of the Respondent's decision-maker.

61. Therefore the test is ultimately an objective one and at the other end of the scale it remains potentially open to an employer to justify the treatment after the event, even if in fact it was not properly articulated or thought through by the decision maker at the time. So it was said by the Employment Appeal Tribunal in Chief Constable of West Midlands v Harrod, [2015] ICR 1311

"I consider also that [Counsel for the employer] is right in his contention that the Tribunal focussed impermissibly on the decision making process which the Forces adopted in deciding to utilise A19. When considering justification, a Tribunal is concerned with that which can be established objectively. It therefore does not matter that the alleged discriminator thought that what it was doing was justified. It is not a matter for it to judge, but for courts and tribunals to do so. Nor does it matter that it took every care to avoid making a discriminatory decision. What has to be shown to be justified is the outcome, not the process by which it is achieved. For just the same reasons, it does not ultimately matter that the decision maker failed to consider justification at all: to decide a case on the basis that the decision maker was careless, at fault, misinformed or misguided would be to fail to focus on whether the outcome was justified objectively in the eyes of a tribunal or court. It would be to concentrate instead on subjective matters irrelevant to that decision. This is not to say that a failure by a decision maker to consider discrimination at all, or to think about ways by which a legitimate aim might be achieved other than the discriminatory one adopted, is entirely without impact. Evidence that other means had been considered and rejected, for reasons which appeared good to the alleged discriminator at the time, may give confidence to a Tribunal in reaching its own decision that the measure was justified. Evidence it had not been considered might lead to a more

intense scrutiny of whether a suggested alternative, involving less or even no discriminatory impact, might be or could have been adopted. But the fact that there may be such an impact does not convert a Tribunal's task from determining if the measure in fact taken can be justified before it, objectively, into one of deciding whether the alleged discriminator was unconsidering or irrational in its approach."

62. It was, however, also observed in O'Brien that a court or Tribunal is likely to treat with greater respect justification for a policy which was carefully thought through by reference to the relevant principles at the time when it was adopted. It was commented it would be more difficult for a respondent to justify the proportionality of the means chosen to carry out their aims if they did not conduct the exercise of examining the alternatives or gather the necessary evidence to inform the choice at that time.

63. Whilst justification under section 15 has to be established at the time when the unfavourable treatment was applied, the Tribunal when making its objective assessment may take account of subsequent evidence; City of York Council v Grosset.

64. The more serious the discriminatory impact, the more cogent must be the justification for it; Macculloch v Imperial Chemical Industries plc [2008] UK EAT 0119/08.

65. When conducting the balancing exercise required, the tribunal is entitled to give weight to the fact an employer did not make reasonable adjustments as required by sections 20 and 21; Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265. However, this does not mean that, where a reasonable adjustment cannot be made, the treatment cannot still amount to discrimination within the meaning of section 15. They are separate provisions with their own legislative requirements.

Pay protection case law

66. The parties referred us to the key case law in the field of pay protection as a reasonable adjustment. Indeed, the case law was before the parties themselves and discussed when the claimant was going through the internal processes. It is important, however, always to remember that each situation is specific to its own facts.

67. O'Hanlon v Commissioners for HM Revenue & Customs [2007] ICR 1359 CA was not a pay protection case per se. It involved an employee who was entitled under sick pay rules to 6 months full pay and 6 months half pay. The employee argued it would be a reasonable adjustment to pay for all disability related sickness absence at full rate. The Employment Appeal

Tribunal accepted that paying money to an employee who was absent sick was capable of being a reasonable adjustment. But held that it would be a rare and exceptional case. Elias P expressed reservations about tribunals usurping the management function of an employer in deciding whether they were financially able to meet the costs of modifying their policies by making such enhanced payments. He observed there was a difference between a single claim turning on its own facts where the cost may be limited, and a claim which if successful would inevitably apply to many others in the workplace.

68. Elias P went on to say that the purpose of the legislation was to assist the disabled to obtain employment and to integrate them into the workplace. He said: "*it is not to treat them as objects of charity, which as the tribunal pointed out, may in fact sometimes and for some people tend to act as a positive disincentive to return to work*." O'Hanlon went on to the Court of Appeal but on a much narrower point. There Hooper LJ said that the EAT's approach had "much force."

69. G4S Cash Solutions (UK) Limited v Powell (UKEAT 0243/15), involved a claimant who became disabled through a back injury. The employer gave him work in a new role at his existing rate of pay and led him to believe that the role was long term. The following year, however, the employer said that it was only prepared to employ him in this role at a reduced rate of pay. The parties could not reach agreement and the claimant was dismissed. The tribunal held there was a failure to make reasonable adjustments in not permanently employing the claimant in the new role without reduction in pay. The tribunal took account of the fact that it was a new role where the employer had a free hand to determine the rate of pay, and was at relative small cost to the employer. The tribunal said:

"The main objection put forward by the Respondent to not paying Mr Powell at the higher rate, according to the evidence of the witnesses, was that it would cause discontent amongst other employees if they came to know that Mr Powell had been given this special treatment. We make two comments about this proposition. Firstly, no evidence was put before us about anyone else being in the same position. This was treatment which was completely individual and restricted to the circumstances of Mr Powell's case. If anyone complained, the employer had an obviously available argument that what they were doing was a reasonable adjustment for a disabled employee, and that the law required it. Secondly there was in fact no evidence before the Tribunal about any complaints been made by any other employees throughout the whole of the year or so and Mr Powell was in key running role at this higher, original rate of pay."

70. The Employment Appeal Tribunal upheld the decision. The EAT noted that the claimant had been led to believe that the new role at the old higher rate of pay was long term, and the claimant had been paid it for a year. The EAT held that there was no reason in principle why section 20(3) of the Equality Act should be read as excluding a requirement upon an employer to protect an employee's pay in conjunction with other measures to counter the employee's disadvantage through disability, and that the question will always be whether it is reasonable for the employer to have to take that step. The EAT said that there was no reason in principle why pay protection, which is no more than another potential form of cost for an employer should be excluded as capable of being a step. The Employment Appeal Tribunal noted that the Code of Practice gives examples of potential reasonable adjustments including paying employees for disability related breaks, and that it was not unusual to have such paid provision when an employee is permitted additional absence for rehabilitation, illness or training.

71. The EAT rejected a contention that O'Hanlon v Commissioners for HM Revenue & Customs (2007) ICR 1359 CA excluded pay protection in principle from being capable of being a reasonable adjustment. They said "*If enhanced sick pay is within its ambit, albeit in a rare and exceptional case, I can see no reason why ordinary pay should not be."* The EAT also noted that in O'Hanlon Elias P was dealing with a claim that inevitably impacted on many others. The EAT further noted that O'Hanlon was about a situation where the proposed adjustment was simply to augment sick pay for employees who inevitably were not in work. It was said "*The objective is to keep employees in work, and I see no reason why a package of measures for this purpose, which includes some pay protection, should not be a reasonable adjustment.*"

72. In Powell it was also said:

"*I do not expect that it will be an everyday event for an Employment Tribunal to conclude that an employer is required to makeup an employee's pay long-term to any significant extent – but can envisage cases where this may be a reasonable adjustment for an employer to have to make as part of a package of reasonable adjustments to get an employee back to work or keep an employee in work. They will be single claims turning on their own facts: see O'Hanlon. The financial considerations will always have to be weighed in the balance by the Employment Tribunal: see Cordell. I make it clear, also, that in changed circumstances what was a reasonable adjustment may at some time in the future cease to be an adjustment which it is reasonable for an employer to*

have to make; the need for a job may disappear or the economic circumstances of a business may alter."

73. On the facts the EAT held the tribunal's decision was not perverse and emphasised again that the effect of the decision was to say the respondent should continue an arrangement which had been in place for nearly a year and which the respondent had led the claimant to expect to be long-term. The EAT also said "*The main reason for not paying the Claimant the SLM rate was said to be the likelihood of discontent from other employees: this is an unattractive reason, and the Employment Tribunal was entitled to reject it for the reasons it gave."*

74. Aleem v E-Act Academy Trust Limited UKEAT/0099/20RN concerned an employee who, due to disability, was unable to continue in a teaching role. She returned to work from sick leave in a cover supervisor role which ordinarily attracted a lower rate of pay. The employee, however, continued to be paid at teacher's rates temporarily while she tried out the cover supervisor role for a 3 month probation period. It was then extended while a grievance and grievance appeal ran their course. The employment tribunal noted that the employee had been clearly told of the lower rate before she started, and that the respondent had made reasonable adjustments in offering the claimant the cover role itself and in paying her the teacher's rate during the trial period and to get the claimant back to work, and possibly to her substantive teaching post. The tribunal held it was not a reasonable adjustment to continue the arrangement indefinitely beyond the 9 months that had been granted. The tribunal in its reasoning also noted the cost and that the respondent was a publicly funded educational establishment facing financial difficulties.

75. The EAT noted that the tribunal's conclusions were in effect that the arguments in favour of the adjustment during its temporary 9 month period no longer held good when they ceased as the employee was no longer in a probationary period in the cover supervisors role and there was no longer an unresolved grievance. The EAT held that the tribunal had not taken into account irrelevant factors.

76. The EAT said "*It is contended that the Tribunal erred by characterising the proposed adjustment as entailing the respondent paying the claimant at teachers' rates "indefinitely". However, the starting point was that the appropriate rate of pay for the cover supervisor's job was the cover supervisors' rate. The respondent had previously paid the claimant at the teachers' rate for particular reasons for a limited period. In holding that the temporary continuation of the old rate for those reasons constituted a reasonable adjustment, and referring to the potential for it to assist the*

claimant back into work, and possibly, back into the teaching role, the Tribunal plainly had the O'Hanlon guidance in mind.

But in November 2016 the situation was materially different. The claimant had had a probation or try-out period in the cover-supervisor role. Her grievance, and grievance appeal had run their course. The November OH advice was that she was unfit to return to teaching responsibilities, and that her mental ill health was chronic and long-term. The decision now being taken was as to a permanently, and in that sense, indefinite, change to the position in which the claimant was employed, not a temporary arrangement for a limited purpose.

What the Tribunal had to decide was whether, in those new circumstances, it was incumbent on the respondent, as a reasonable adjustment, to maintain the claimant on teachers' rates, if she now elected to accept the offer to work in the cover-supervisor's role on a permanent indefinite basis going forward. The fact that it had been a reasonable adjustment hitherto, in particular circumstances, to maintain that rate, did not show that it would be reasonable to do so, going forward, in those different circumstances."

77. The EAT noted that a respondent could not only resist a claim if it could show impecuniosity or at least some kind of serious financial difficulty. It was also emphasised that the fact that in the Tribunal in Powell had not erred in finding it was a reasonable adjustment to maintain full pay, did not mean that the Tribunal in this case was wrong to not find it would be a reasonable adjustments on the facts. It was said "*Indeed, a striking factual difference is that Mr Powell was led to believe that preservation of his pay in the new role was indefinite; whereas, in the present case, the Tribunal found that the respondent was at pains to make sure (an effort in which it succeeded) that the claimant did not misunderstand the position. Further, we cannot see anything in the facts found in this case that should have led the Tribunal to the conclusion that, in terms of the general guidance given in O'Hanlon (and Powell), there was something particularly exceptional or unusual about this case, such that it was a necessary reasonable adjustment for the claimant's pay rate from the old rate to be maintained going forward in the new role."*

Discussion and Conclusions

Reasonable adjustment

78. It is not in dispute that the respondent applied a PCP of requiring all rod mill operators to carry out duties which included heavy manual handling and frequently going up and down stairs.

79. We accept that this PCP placed the claimant at a substantial disadvantage in comparison with employees who are not disabled. The pleaded disadvantage is that the claimant is unable to perform heavy manual handling duties and is unable to go up and down stairs on a frequent basis. The claimant could not cope with the physical nature of the role, as confirmed by the occupational health report. The disadvantage as pleaded, however, only identifies the first part of the disadvantage: it does not of itself identify a disadvantage that relates to pay, just to the performance of the claimant's job role.

80. But the claimant did face the concomitant risk (as indeed eventuated) of being placed in a capability process that could potentially lead to a risk of dismissal or of being redeployed to alternative lighter duties on a lower level of pay. A non-disabled employee would not have the claimant's difficulties in coping with the physical nature of the role and therefore not face this ensuing disadvantage, including the risk of being redeployed to a different role on lower pay. Ms Bayoumi, did not object to our considering the question of substantial disadvantage from this wider perspective.

81. It is not in dispute that the respondent knew of the claimant's disability and knew of the disadvantage.

82. We turn therefore to the question of reasonable adjustments. Here the claimant wrote in the list of issues: "*The claimant contends that in moving him to a warehouse operator role (grade 1) for health reasons, this should have included, without limitation, continuing to afford his pay protection from 6 October 2021 onwards."* The expression "without limitation" is somewhat curious. However, we consider that its fair and natural meaning is that the claimant is saying he considers the reasonable adjustment would have been to give him indefinite pay protection at grade 2 from October 2021 onwards. Indeed, that is the basis on which his claim was presented at the hearing.

83. Such a step would have removed the financial element of the disadvantage. The case law makes clear extending pay is potentially capable of being a reasonable adjustment, usually as part of a wider package to address the overall disadvantage, such as a wider package including redeployment. The case was not pleaded or presented to us by Mr Windross on the basis that the claimant's redeployment to a grade 1 role was a failure to make reasonable adjustments. The focus was upon pay protection following that redeployment as being, in effect, the outstanding disadvantage. Here do not consider on the facts, viewed objectively, that indefinite pay protection was a reasonable step for the respondent to have to take to avoid the disadvantage.

84. In our analysis we took account of the fact this is not a case in which the respondent has relied on factors of affordability or cost. It is also not, on the face of it, a situation in which is likely to open the floodgates for a deluge of similar claims, such as in O'Hanlon. To anyone's knowledge, there had only been one similar situation in the past, which had resulted in Unum paying the top-up. Albeit in a different context of the pay protection agreement, it is also relevant to the evaluation of reasonableness to say the respondent also already has staff working in a grade 1 job but being paid grade 2 pay.

85. Notwithstanding those points we did *not*, on balance, consider that to require the respondent to indefinitely pay the claimant at grade 2 pay when working a grade 1 job, was reasonable. We consider and find that the purpose of the respondent's grade 2 pay level was to reward those doing the physically and environmentally difficult grade 2 work, such as the rod mill operator role. The respondent's witness statements, which we accept, set out the heavy, manual nature of the rod mill operator role, compared to the warehouse operator role. They also set out how the roles are graded to reflect differences in skills, qualifications, responsibilities and demands to produce the overall pay structure.

86. Ms Reddy's witness statement says that the roles within the respondent are clearly defined and categorised according to skill, qualification and demands. She says: "*The roles are entirely, different, which is reflected in the pay. All of the roles at Rockwool are graded and the pay structure throughout the business is transparent and fair, reflecting the roles themselves. The pay grades are agreed annually with the union."* Ms Gassor's statement similarly states: "*There is a difference in pay between the Rod Mill Operator role and the Warehouse Operator role due to the grading system. It is not possible for the Respondent to continue paying his Grade 2 salary once he had taken on the Grade 1 job permanently. The reasons for this are because the roles at the Respondent are strictly categorised by grade depending on the kind of job, qualifications required, skill set and demands. The Warehouse Operator role is a Grade 1 role, and to pay the Claimant a grade 2 salary would not be fair on other employees."*

87. Mr Leonard's statement says: *"The roles at Rockwool are clearly defined and categorised into grades. These grades reflect the skills required, qualifications, training, responsibility and physical demands. It is important to state that there is a big difference between the Rod Mill Operator role and the Warehouse Operator role."* He then sets out in some detail the differences in responsibilities and demands of the two roles. Mr Strong does the same, saying that the roles are "*chalk and cheese."* He said "…*I*

agreed that it would have been unfair for the other employees in light of the clear pay patterns, that the Claimant was paid a Grade 2 salary but employed to do a Grade 1 role."

88. In our judgement, it is reasonable for the respondent to seek to pay grade 2 pay to reward employees doing that demanding grade 2 work, and not to those employees who are not. In the Chief Constable of West Midlands Police v Manley and Blackburn [2007] UKEAT 0007_07_1112 the Employment Appeal Tribunal held it was a legitimate objective for an employer to pay extra for night work as fair reward because of the social, psychological and other stresses that such work created. We accept that decision was in the very different context of an equal pay claim and that the concept of reasonable adjustments is different and unique to disability discrimination laws, so as to potentially require more favourable treatment of the disabled, compared with other discrimination law strands. However, it does demonstrate that such differentiations can be a reasonable consideration for an employer. Likewise, the same principle was commented on in Aleem that: "*the starting point was that the appropriate rate of pay for the cover supervisor's job was the cover supervisor's rate."*

89. The principle of paying the rate of pay for the graded job concerned, reflecting different job demands, also accords with the sentiment expressed by the EAT in O'Hanlon, that the purpose of the legislation is to assist the disabled into employment and to integrate them into the workplace. Here, in conjunction with the provision of the grade 1 role, the claimant was being kept in work, integrated in the workplace and rewarded for the work he was doing. We accept and acknowledge that in Powell it was confirmed that a reasonable adjustment could potentially include paying an individual for work they were not actually doing (such as paid breaks). We also accept that to achieve a level playing field a reasonable adjustment can involve treating a disabled person more favourably than a non-disabled person. However, we consider that in general the payment, for example, of paid breaks, or paid time off for disability related medical treatment, or maintenance of pay for a transitional period on redeployment is very different in substance to a commitment to retain higher rate of pay, on a long term permanent basis, for a job no longer being done on redeployment. We accept that was found to be reasonable on the particular facts in Powell but that does not mean it automatically follows it is reasonable on the facts of this case.

90. Further, we agree with Aleem that what was exceptional and distinguishing in Powell, was that the claimant had been paid the higher rate, on redeployment, for a year, and with no forewarning that this was not a permanent arrangement. It became unreasonable on those

particular facts for the employer to renege on the legitimate expectation they had given the employee as to his position. Here however, as in Aleem, the respondent has been clear with the claimant that pay protection would only be granted for the trial period. The claimant understandably did not like the message, but his expectations were managed by the respondent.

91. We also did not consider that the existing pay protection agreement made it reasonable to maintain the claimant's rate of pay on an indefinite basis. We accept the pay protection agreement involves a practice of paying a group of grade 1 employees at the grade 2 rate of pay. Ms Reddy said she thought that now affected about 10 employees. The claimant similarly gives details of 10 individuals both current and past who he is personally aware of. We were not in receipt of evidence on the point from the Union.

92. But we do not consider that this arrangement means it would be reasonable for the respondent to do the same in the claimant's particular circumstances. We accept and find that the existing pay protection agreement was in place for a very defined purpose: to protect the group of employees who had been recruited on the original higher rate of pay for what became classified as grade 1 work when the grading was introduced, but who were entitled to maintain their original terms and conditions. They were being kept on the same rate of pay for the same work they had always done, whilst at the same time it was agreed between the employers and the unions that new staff could be recruited at a lower rate of pay. It was part of a regrading and restructuring exercise. That there was otherwise a difference in the expectations of the graded roles is reflected by the fact pay protection could be lost if a grade 1 designate did not have the capability to perform a Grade 2 role, with training, and by the commitment to offer opportunity for progression through grades.

93. In contrast, in the claimant's case he was being offered individualised redeployment into new work, with less physical demands, as a bespoke adjustment for him, not because there was a restructuring of the organisation that was otherwise disadvantageous and in breach of contract in terms of job role and pay. We did not consider that just because the respondent could and did pay grade 2 pay for grade 1 work, in the particular legacy circumstances concerned of the group of employees with retained pay rights, meant that it was reasonable for them to do so in the claimant's situation.

94. It is for that reasoning that we did not consider the maintenance of the claimant's grade two pay, without limitation, was a reasonable adjustment. We should add that we did not consider reasonable the respondent's arguments that maintaining the claimant's pay at grade 2 would be

unreasonable because it would lead to employee complaints and unrest. We found the evidence on that point unconvincing, and in any event was something the respondent's managers could manage if indeed it in fact arose. But for the other reasons already given, we did not find the indefinite maintenance of pay was reasonable.

95. If open to us we would have been minded to find that it would have been a reasonable adjustment to have maintained the claimant's grade 2 pay for a longer temporary period, until Unum made a decision on the top-up. That step would have the potential to remove or reduce the disadvantage the claimant faced. If Unum granted the top-up the claimant would not suffer the loss of pay unless and until the position changed in some way. If Unum refused the top up the disadvantage would have been reduced, in terms of giving the claimant a longer transitional period and the opportunity to exhaust the options available to top up his pay, somewhat akin as to what was found reasonable in Aleem. It would not, in the longer, substantive term have offended the respondent's pay and grading structure; the respondent themselves would have been paying the claimant grade 1 pay to do his grade 1 job.

96. However, in the context of a reasonable adjustments claim we do not consider that making such an alternative finding is open to us, as it was not a pleaded potential adjustment identified by the claimant.

97. It was held in Project Management v Latif that by the time a case is heard there must be some indication by the claimant as to what adjustments it is alleged should have been made in the sense that it is necessary for the respondent to understand the broad nature of the adjustment proposed, and to be given sufficient detail to enable the respondent to engage with the question of whether it could reasonably be achieved or not. It is not the respondent's responsibility to show there is no adjustment that could reasonably be made. The EAT further said that in exceptional cases the proposed adjustment may not be identified until the tribunal hearing itself, and indeed in certain circumstances it may be appropriate for the tribunal to raise the matter itself, particularly if the employee is not represented, and provided the employer has a proper opportunity of dealing with the matter. The example was given of an adjustment set out in the Code.

98. It was said in Jennings v Barts and the London NHS Trust UKEAT/0056/12/DM that "a *Claimant must raise the reasonable adjustments that he or she suggests should have been made. No doubt these must be raised with a sufficient degree of specificity so as to enable the Respondent to address them evidentially and the Employment Tribunal to consider their reasonableness."*

99. An adjustment of a longer, but temporary, maintenance of pay is not something canvassed by the claimant in his pleaded case or witness evidence. The claimant has been legally represented throughout and by representatives who took particular care in setting out how they wished to set out the reasonable adjustment claim (having written into the tribunal saying at case management stage the wrong list of issues had been set out by the tribunal – see [51]).

100. The alternative adjustment of an extended period of temporary pay protection until Unum made a decision was mooted in evidence because we raised it with Mr Richards. This was on the back of the claimant having asked him about it in their meeting as recorded in the minutes of that meeting [103]. It is also something that "shouted out" to us as a Tribunal as a potential adjustment in any event. We raised the point with both parties in closing submissions. Ms Bayoumi did not consider it was a matter which could properly be before us but that in any event it was not a reasonable adjustment. Mr Windross said it potentially could be before us, but that evidentially it was not made out as reasonable, albeit for different reasoning to Ms Bayoumi.

101. We come back to the point that it was not a pleaded adjustment, in what was a very carefully pleaded case by a represented party. We therefore do not consider that we can, in the context of the reasonable adjustments case, recast the pleadings to add it in. There was also no application to amend to add it as an alternative. We return to the similar consideration that arises in respect of the discrimination arising from disability claim, separately below.

102. We therefore find that the complaint of failure to make reasonable adjustments is not well founded and is dismissed.

Discrimination arising from disability

103. We turn to the section 15 discrimination arising from disability complaint. The unfavourable treatment is expressed in the grounds of complaint as being "*the decision to limit his pay protection to a 4 month period from 06 June 2021 to 05 October 2021*." The same expression was used in the Claimant's draft list of issues [42]. The list of issues drafted by EJ Ward uses the slightly different expressing of "*limiting the salary to the Grade 1 role that the Claimant had taken."* The respondent did not ultimately dispute in closing submissions that limiting the claimant's salary to the grade 1 role (after expiry of the trial period it was permitted for)/limiting pay protection to a 4 month period amounted to unfavourable treatment.

104. The respondent did not specifically concede in closing arguments the question of whether the unfavourable treatment was because of

something arising in consequence of disability. The grounds of resistance deny that it was, saying: "*The decision to limit the Claimant's current pay was based on the fact he had taken a new role at Grade 1 which is paid at a Grade 1 salary."* What that leaves out of the equation is that the claimant took on the Grade 1 role (with the pay implications) because the claimant was not fit to undertake the full range of his duties as a rod mill operator for the foreseeable future because of the adverse effects of chemotherapy, as confirmed in the occupational health report of Dr Mansouri. The case law is clear that there can be more than one chain in the causal connection. We are satisfied and find that the unfavourable treatment (limiting the claimant's salary to Grade 1 salary) was because of something arising in consequence of disability (his inability to perform the full duties of his existing Grade 2 role, due to the side effects of chemotherapy, which led to the claimant being redeployed in a Grade 1 role which on the respondent's stance attracted Grade 1 pay).

105. In truth the heart of the section 15 dispute is about justification. There is a dispute about the legitimate aims relied upon by the respondent. The claimant says that paragraph 23 of the grounds of resistance should be read as identifying the legitimate aims as: overall fairness to colleagues working similar roles, avoiding tension and complaints about pay within the workplace. The respondent says it should be read more broadly to reflect the earlier sentence in paragraph 23 of the grounds of resistance that the pay structure model of the respondent is transparent and reflects the skill, qualification and demands required by the role and in that context the claimant was being put onto the normal salary for the role he was performing.

106. It is somewhat frustrating this dispute came up in closing submissions. The respondent has been professionally represented throughout and should have been able to be clear from the outset what the legitimate aims relied upon were. Any confusion was not picked up when the list of issues was drafted because it merely referred back to the paragraph in the grounds of resistance, as opposed to transposing across the specific legitimate aims relied upon. If the list of issues had been drafted as a standalone document it probably would have highlighted the potential problem. Both parties had been represented throughout and should have been able to identify and either resolve between them or bring to the tribunal's attention at an earlier time any uncertainty or dispute.

107. But that aside, in our judgement, we accept the stated: "*overall fairness to colleagues working similar roles"* was a legitimate aim held by the respondent and that that the concept of fairness it embodies was more than avoiding tension and complaints about pay within the workplace. In

particular, that the concept of fairness it incorporates includes the fairness of having a graded pay structure where there are demarcations between the demands of a job, with more demanding grades receiving greater pay to reflect those demands. The structure of paragraph 23 of the grounds of resistance could have been more clearly set out in this regard, including whether there were clear separate legitimate aims relied upon, and the use of the words "working similar roles". However, what we have set out reflects the wider wording of paragraph 23 which refers to the pay structure reflecting skills, qualifications and the demands required by the role, and that the claimant was put on the normal salary for the role he was performing. It also reflects the witness evidence, summarised above in our analysis of the reasonable adjustments claim.

108. We do not consider that we have recast the legitimate aim so that it becomes something that was not pleaded. Terminology does not exist in a straitjacket; it is not uncommon for a tribunal to, having heard the evidence and undertaken their deliberations, express a pleaded point in a slightly different way, which is different to pleading a different case (as indeed we did above when setting out the substantial disadvantage in the reasonable adjustments claim, there to the claimant's benefit). This point was expressed in Lamb v The Business Academy Bexley UKEAT/0226/15/JOJ: "*As cases develop, sometimes issues derived from the pleadings can or should be put slightly differently. This should be raised with the parties, and the issue can be redefined, so long as that can be done without injustice to either side."* How we have set out the aim is fundamentally about achieving fairness for colleagues working similar roles; which includes those undertaking the more demanding grade 2 work, as well as those in grade 1.

109. We accept that the aim of having a fair graded pay structure where there are demarcations between the demands of a job, with more demanding grades receiving greater pay to reflect those demands /overall fairness to colleagues working similar roles is legal, non discriminatory (of itself) and does correspond to a real, genuine need on the part of the undertaking.

110. We also accept that the respondent had a second aim of avoiding tension and complaints about pay within the workplace. Again, that is a legitimate aim for an employer to hold and we accept it is legal, non-discriminatory (in itself) and represents a real, objective consideration, although we return to the question of the strength of this aim below as that is relevant to proportionality.

111. We also accept that the means used, in limiting pay protection given to an employee being redeployed to a lower grade role as a reasonable

adjustment, is appropriate (subject to proportionality) to achieving the aims.

112. We turn therefore to proportionality. The effect for the claimant in being placed on Grade 1 pay is clear. Absent the Unum insurance policy making good some or all of the loss, he will earn net a month £379.08 less, potentially with some unquantified impact on his pension too. He says, which we accept, it impacts on his personal and family life as he has to watch every penny and has had to reduce his spending and has nothing to put aside for emergency situations. That is understandable as it is not unusual for most people to live within their means. It has caused and causes him worry, particularly with the cost of living increases, and that worry impacts on his family relationships. Unless Unum make good any of the losses, this position will continue for the claimant for the foreseeable future, and potentially for the remainder of his working life. He is 56 years old and so the potential impact is significant. However, we do also factor in that this is not a dismissal case. The claimant has not lost his job. He has been redeployed maintaining his job security (often particularly important for those with disabilities), his long continuity of service and is still receiving an income (albeit at the lower rate).

113. We have to weigh that impact against the real needs of the respondent. To be clear, the respondent advanced no argument in this case that they could not afford the cost of maintaining the claimant on grade 2 pay whilst doing grade 1 work or that the lifetime cost would be disproportionate, so we do not weigh such matters into the equation. We accept that the respondent had a reasonable need to have a grade pay structure with a demarcation between grades based on the type of work being undertaken, including the demands of the job. We accept they had a reasonable need to, as part of that structure, reward employees undertaking particularly physically and environmentally demanding work, such as the rod mill operator work. This is an industrial, physically demanding workplace where it is reasonable to seek to reward those undertaking that type of work. It is a system that was accepted by the unions in the setting up of the grading arrangement and the introduction of the retained pay arrangements following the 2007 restructure. We reach these findings based on the respondent's evidence put before us, as summarised above in the reasonable adjustments analysis. It is part of the rationale lying behind the statements frequently made to the claimant that it would not, in the respondent's view, be fair to permanently pay him at a grade 2 rate in a grade 1 role.

114. We have to balance that business need as against the discriminatory effect on the claimant. As part of that, we have to consider whether or not

any lesser measure might nevertheless have served the respondent's aim.

115. We consider that there was a proportionate alternative measure the respondent could have taken with the potential to remove the discriminatory effect. In particular, we consider that the respondent could have extended the temporary period on which the claimant was on his grade 2 pay, until Unum reached their decision on whether to top up the claimant's grade 1 pay. Such a measure would have served the legitimate aim; whatever the outcome of the Unum process the claimant would end up in the substantive long term, being paid by the respondent grade 1 pay for a grade 1 job. If the Unum process was unsuccessful that would be the result. Even if it was successful, the respondent would still only be paying grade 1 pay to the claimant, with the top up coming from Unum.

116. That there would be a further temporary period in which grade 2 pay was being maintained pending the Unum determination, would be, during the additional temporary period, a proportionate interference with having in place a demarked pay grade structure reflecting the demands of the various jobs. It would be a temporary measure, for a disabled individual, facing serious financial consequences in terms of the drop of his pay, whilst the options of finding ways to avoid this consequence were exhausted. It would be easily explicable on that basis to other workers. The claimant would not be being paid, long term, by the respondent (as opposed to Unum) for a job that he was not doing.

117. In terms of wanting to avoid tension and complaints about pay in the workplace, whilst we accept it is a legitimate aim, it was not one that we considered was worthy of much weight in the circumstances. There was no evidence before us of actual complaints from employees as to the claimants' pay situation; the notion of likely discontent was put forward on a hypothetical basis. Protest would not come from the union given they were supportive of the claimant's request to maintain pay. Moreover, as was set out in Powell, managers are able to tell any workers expressing discontent that it is an adjustment in place for a disabled employee, as required under the Equality Act.

118. But in any event, the lesser measure we have identified would have served the aim. It is highly unlikely that extending the claimant's grade 2 pay for a further limited period would actually cause tension or complaints in the workplace. There was no evidence of there being any complaints when the claimant was kept on his grade 2 pay in the trial period; in fact we were told workers were supportive of it. But in any event the claimant being given the additional pay extension for a limited time for easily

explicable individual reasons would be a proportionate way of achieving that aim.

119. We therefore consider that such a step would strike a fair balance between the reasonable needs of the respondent and the discriminatory effect on the claimant. We accept and we took full account of the fact there remains a risk for the claimant that Unum will not cover him. If so, we accept that the discriminatory effect is not removed, merely delayed and reduced for a short additional period of time. But we consider that to be a fair balance between the respondent's reasonable needs and the impact on the claimant. It gives the claimant the opportunity to exhaust his options in terms of pay top up whilst achieving overall the respondent's aims with little, if any, real interference with them.

120. This is of course not the alternative means put forward by the claimant. The claimant's case is that proportionate alternative means would have been for the respondent to keep him on grade 2 pay for the foreseeable future irrespective of whatever decision is made by Unum.

121. We raised with the parties in closing submissions whether we could consider in our deliberations other potential alternative means. Evidentially, we raised this option with Mr Richards in our questions for him, because it had been something specifically raised by the claimant with Mr Richards in their meeting. That said, the potential for there to be other options aside from the permanent maintenance of grade 2 pay or the 4 month extension given, had always sung out to the Tribunal from the facts of the case.

122. The respondent's counsel said it should not be an alternative open for the Tribunal to make findings on as it was not an alternative relied upon by the claimant in these proceedings, particularly where both parties have been represented throughout. Ms Bayoumi's alternative submission was that if it was open to the Tribunal to consider, then we should take into account the respondent's evidence that they considered the 4 months given to be a reasonable period of time for the claimant to be given notice, adjust his lifestyle and given the claimant was always on notice that they would not redeploy him permanently with retained grade 2 pay.

123. For the claimant, Mr Windross, accepted that looking at a different period of temporary pay protection was not the way the case had been pleaded or responded to, but if the tribunal consider the issue arose from the evidence he did not see that as being a barrier to our considering it. He said, however, that we did not have sufficient quality evidence before us to make a decision on how to set an alternative period or the likelihood of

success of Unum granting cover. Therefore he discouraged us from doing so for that reasoning, which differed to Ms Bayoumi's reasoning.

124. On reflection we considered that whether there were alternative measures (other than those put forward by the claimant) could properly be considered by us, at least in relation to the section 15 discrimination arising from disability claim. The Supreme Court said of objective justification in Essop and others *v* Home Office (UK Border Agency), Naeem *v* Secretary of State for Justice [2017] UKSC 27:

"The burden of proof is on the respondent, although it is clearly incumbent upon the claimant to challenge the assertion that there was nothing else the employer could do. Where alternative means are suggested or are obvious, it is incumbent upon the Tribunal to consider them. But this is a question of fact, not of law, and if it was not fully explored before the Employment Tribunal it is not for the EAT or this Court to do so."

125. The statutory question we have to ask and answer is whether, on our own objective assessment, the treatment of the claimant (placing him, after the 4 month trial period, on grade 1 pay in a grade 1 role/not further extending his grade 2 pay) is a proportionate means of achieving a legitimate aim. The case law is clear that this involves considering whether any lesser measure might nevertheless have served the employer's legitimate aim. We do not consider that we can properly undertake our statutory, objective assessment if we are constrained to consider only the one alternative measure put forward by the claimant. The situation is not on all fours with the reasonable adjustment situation. Applying Naeem, the claimant has challenged the assertion there was nothing else the employer could do. The alternative means of an extended transitional period were obvious to us as a Tribunal, and were raised by the claimant in a sense, (although admittedly only in the internal grievance procedure, and not in the Tribunal claim), with the respondent.

126. We accept principles of procedural fairness and natural justice impinge upon this. The respondent must be given fair notice to be able to evidentially address the point, and make their submissions. But this was an alternative means that the claimant had specifically raised with Mr Richards. It was there before us on the evidence and, as we have said, cried out to us as a Tribunal. Mr Richards was asked about in evidence by the Tribunal; being the individual in the respondent who was asked about it by the claimant at the time of the events in question. In closing submissions, we then specifically raised the matter with both counsel in turn who had the opportunity to say what they wanted to in submissions both as to whether the point should be before us for consideration and the substance of the point. We do not therefore consider that the respondent

has been improperly ambushed by the point. Indeed, one of the respondent's counsel's central submissions as to why it was said the respondent had acted proportionately in refusing to permanently pay the claimant at grade 2 was because of the availability of the very same Unum policy.

127. We also do not agree with the claimant's counsel's objections to our analysis. We had the evidence, that we accept, of Ms Reddy, that Unum would consider the application after 1 year, and that is reflected in the emails between her and Unum in the bundle. We had Ms Reddy's evidence, again that we have accepted, that subject to Unum's criteria being met, and subject to reviews, there was no ultimate financial cap on the amount they would pay out. We have the evidence that Unum paid the top-up previously in the case of another employee. To say a proportionate measure would be to extend the temporary pay protection until Unum made their decision is therefore not a period of time plucked out the ether. Mr Windross argued that we also could not be certain that Unum would grant the top-up. This we accept, but it misunderstands the rationale behind our considering it would be a proportionate measure; which is that, somewhat like the situation in Aleem, it would give the claimant the benefit of exhausting the available processes that might result in the maintaining or topping up of his pay. If unsuccessful and the insurance cover is not granted, and his pay for the foreseeable future becomes his grade 1 pay then that is part of what we would consider the proportionate measure that appropriately balances the detrimental impact on the claimant as against the reasonable needs of the respondent.

128. It follows that we find the respondent has not established that the treatment in reducing the claimant's pay to grade 1 on transition to the grade 1 job (after the trial period) was a proportionate means of achieving a legitimate aim. There was a lesser measure available that would nonetheless serve the respondent's aims. The complaint of discrimination arising from disability is therefore well founded.

129. What we consider to be a proportionate alternative measure becomes relevant to remedy issues, as to what would have happened to the claimant if this respondent acted in a fair and non discriminatory fashion. We therefore confirm that we did not consider the claimant's proposed lesser measure of permanently extending grade 2 pay to be proportionate.

130. Indefinite maintaining of the claimant's grade 2 pay would remove the pay disadvantage faced by the claimant, but it would not strike a fair balance against the needs of the employer. The respondent would potentially be paying the claimant long term for a job he was not doing. That is not without meaning on the facts of this case. As we have said, we accept

that the grade 2 pay was there to reward employees working in tough physical and environmental conditions and as part of a wider pay grading scheme agreed with the unions. Those strenuous physical and environmental demands are not replicated in the grade 1 role the claimant moved to; indeed that was the very reason behind the job move. To pay an individual potentially for many years for the demands of a role that he was not actually performing would, in our judgement, have been a disproportionate step when balancing the discriminatory effect on the claimant (who has kept a job on redeployment) as against the reasonable needs of the employer.

131. Again, we have taken into account that under the pay protection agreement there were employees already working in grade 1 jobs earning grade 2 pay, because they had retained pay. However, we accept this is due to the historic pay protection agreement as part of the restructuring and regrading exercise being undertaken by the respondent. We accept that it is a different situation to that of the claimant's. He was being moved from a grade 2 to a grade 1 job as an individual adjustment for his disability, outside of the pay protection agreement.

132. We accept that it could be said the workplace should be used to employees receiving grade 2 pay for grade 1 work, and also therefore maintaining the claimant on grade 2 pay for grade 1 work for disability related reasons would not be seen as something out of the ordinary, and that the respondent already has an existing practice of not always sticking to their pay grade demarcations.

133. However, we still did not consider that these factors, on balance, would make permanent maintaining of pay for the claimant a proportionate alternative measure. We remain of the view that the existing pay protection arrangements for grade 1 employees are very different to the claimant's situation. That pay protection arrangement is inherently built into the respondent's pay structure model because, at the time of the restructuring and pay grading exercise, of the need to be fair those existing employees who had been recruited to do a grade 1 job on the higher rate of pay and who had that contractual entitlement. That pay protection arrangement is inherently part of the respondent's graded pay structure. To use it to justify making an individualised long term adjustment for the claimant is therefore, in our judgement, distorting the arrangement and using it for very different means.

134 We therefore would find that the permanent extension of grade 2 pay would be a disproportionate alternative measure when balancing the discriminatory impact on the claimant as against the reasonable needs of

the respondent. As such, it would not meet the respondent's reasonable needs.

135. We make a final observation for the benefit of the respondent for future reference. We had to objectively consider for ourselves the outcome of the pay considerations, we have done this above. It was therefore not for us to evaluate the reasonableness, in itself, of the procedure followed by the respondent. Further, because of the way in which the case was presented, it was not for us to consider whether there were alternative adjustments, other than pay protection, open to the respondent, such as finding the claimant another grade 2 role, or keeping him in his existing grade 2 role with adjustments.

136. We therefore heard limited evidence and make no findings as to other jobs or options that may have been available. However, on what we did hear, we did consider that potentially the respondent could have followed a better process. It did not appear that the respondent had taken a step back and actively considered what skills the claimant had, as against the grade 2 role profile. Moreover, it did not on the face of the limited evidence we have heard, appear that the respondent had gone away and fully looked at all the job opportunities that may be open to the claimant. Ms Gassor only spoke of there possibly being no jobs in fabrication. The impression we got from Ms Reddy's evidence was that she had focused on the suggestion in the occupational health report that the claimant could drive a forklift truck, and because there was such a vacancy, that was the route they went down. Whilst it may be that the claimant expressed an interest in the forklift role, it does not appear likely that he would have personally had knowledge of other opportunities in the workplace, and it is also likely he would not have known the pay implications at the point in time he expressed that interest. Building on the tribunal's industrial experience, we would suggest it would ordinarily be good practice for an employer to set out to an employee in the claimant's situations all vacancies that are available, without prejudging what the individual may be interested in or what the respondent considers is the best fit. But given our task was to objectively assess the outcome given to the claimant in terms of limited pay protection, as we have said, these are not matters which ultimately fell for us to determine.

137. Similarly, we do not consider that the respondent's witnesses demonstrated active thought for other options once the pay protection period had been extended to 4 months. They appeared to consider it a choice between that or permanent pay protection. Mr Richards had been asked about this by the claimant which was noted by Ms Timms but no outcome was ever given to the claimant and the respondent's witnesses

struggled to provide sensible answers to the Tribunal as to why they did not think about, for example, extending it until Unum looked at the claim. For example, Mr Richards said he did not know when Unum would look at it, but could not give an answer as to why, if he did not know, he did not make that enquiry with HR. But as the quote set out above from Harrod makes clear our task is ultimately an objective one, focussed on the outcome, and not the process, even if deficient, as to how the respondent got there.

138. The complaint of discrimination arising from disability is well founded and is upheld as there was an alternative lesser measure open to the respondent that would have met their legitimate aims i.e. maintaining the claimant on grade 2 pay until Unum assessed his insurance top up claim. The case will be listed for a remedy hearing and remedy directions sent to the parties.

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Employment Judge R Harfield
Dated: 6 July 2022

JUDGMENT SENT TO THE PARTIES ON 18 July 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche