EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Mr G Blythe **Network Rail Infrastructure Limited**

v

Heard at: Watford **On**: 9-12 January 2023

Before: Employment Judge George
Mr W Dykes
Miss G Binks

Appearances

For the Claimant: In person
For the Respondent: Mr M Selwood - Counsel

JUDGMENT

1. The claim of discrimination for a reason arising in consequence of disability contrary to s.15 of the Equality Act is not well-founded and is dismissed.

2. The claim of the breach of duty to make reasonable adjustments is not well-founded and is dismissed.

REASONS

1. The present claim arises out of the claimant's employment as an Off Track Maintenance Technician by the respondent which started on 5 October 2015. The claimant contacted ACAS to fulfil his obligations in relation to early conciliation on the 9 December 2019. The certificate in the bundle, indeed the same that is on the Tribunal file, is dated the 23 January 2020. There is some curiosity about this because the claim form appears to have been date stamp as received by the Tribunal on the 19 December 2019 However, it is clear that the claimant had the early conciliation certificate at the time when he completed the claim form because he was able to insert the full number of that certificate into the relevant box. Since the full EC certificate number appears in the body of the claim form we are quite satisfied that on the face of it there is no irregularity about the claim form and, if there were any doubt about it, confirm that it was correctly accepted. In any event, that is not a point taken by the respondents.

2. The claim was served on the respondent, and they responded by a grounds of response that was received on the 24 February 2020. They sought some further information about the claimant's claim and he provided further and better particulars. They were prepared at a time when he was represented and they have the hallmarks of professionally drafted particulars.

3. The claim was case managed at a telephone case management hearing on the 25 November 2020 by Employment Judge Kurrein. The respondent entered an amended grounds of response on the 6 March 2021 responding to the claim as it was then understood. Judge Kurrein included an agreed list of issues in the record of the case management hearing and that is in the bundle starting at page 52.

4. In this hearing we have been taken to a number of documents in a bundle of documents which is in three volumes: two volumes of documents and then an additional volume setting out landscape copies of particular spreadsheets which are easier to read. In total the bundle runs to some 919 pages and page numbers in these reasons refer to that bundle.

5. The parties exchanged witness statements in December 2021. The original listing of September of that year had been postponed on the application of the respondent because of the non-availability through ill-health of the Mr Lee Draper. When the witness statements were exchanged the claimant provided a statement that was prepared by him and also relied on one from Oliver Hudson who is also a Technician. Mr Hudson acted as the claimant's trade union representative from the RMT Union during the relevant meetings. The respondents served three witness statements from the following witnesses: Mrs J Hall - the senior HR Business Partner; Mr C Weller - senior Finance Business Partner (who conducted the grievance investigation) and Mr D Collison - the Infrastructure Maintenance Engineer.

6. Some of the allegations made by the claimant involve his then Line Manager, Mr Draper, who was a Section Manager. As previously indicated, the application for postponement of the September 2021 appears to have been made on the basis of his non-availability. On the 8 December 2022 the respondent sent to the claimant an approved witness statement bearing Mr Draper's signature and an application for permission to rely on that statement notwithstanding that it had been provided late. We heard that contested application at the start of day one and we granted it for reasons which were given at the time and which are not now repeated. However, we remind ourselves that when we granted that we made clear that where individuals do not attend to be cross-examined upon a witness statement then we are likely to give less weight to those statements. This potentially applies to not only to the statement of Mr Draper but also to that of Mr Hudson, who we understand had been unavailable to attend and be cross-examined on his witness statement because he is not presently in the United Kingdom due to a period of annual leave.

7. Our approach to the weight to be given to those statements, in particular in the case of the statement of Lee Draper, is as follows. Where he provides evidence which is not corroborated by documentary evidence or by other credible

evidence to which we do give weight it is likely, but not certain, that we would give Mr Draper's statement little or no weight. Similarly, where the statement of Mr Draper is contradicted by other apparently credible evidence given by a witness who has attended to be cross-examined, such as the claimant, we are likely to give less weight to the evidence which has not been confirmed or subject to challenged.

8. On Day One of the hearing, before the Tribunal undertook its reading, the respondent, through Mr Selwood, explained the legitimate aims that they intended to rely on in defence of the claim of discrimination arising from disability. That led to an amended list of issues which was provided on the 10 January 2023 to the Tribunal in hardcopy and which is set out in the following paragraphs.

The issues

9. The issues to be decided are as follows:

"Disability

1. The Respondent admits that the Claimant is a disabled person due to his musculoskeletal symptoms and degenerating changes at C5/C6 and C8/C7.

Discrimination arising from disability (section 15 Equality Act 2010)

2. Was the Claimant's inability to use power tools something which arose in consequence of his disability? (This was accepted by the Respondent)

3. Did the Respondent treat the Claimant unfavourably in the following ways:

   (a) The Respondent's decision to remove the Claimant from his gang (and therefore from overtime, night shifts and on-call duties) on 22 July 2019

   (b) The Respondent's decision that the Claimant was not fit to perform the role of Technician on 4 October 2019

   (c) The Respondent sending a letter to the Claimant on 1 November 2019 which stated that he may be required to leave the Respondent's employment

   (d) The Respondent's failure to renew the Claimant's competencies in June 2019, which the Claimant became aware of in approximately December 2019/January 2020

   (e) The Respondent's decision to redeploy the Claimant into an alternative role on 24 January 2020

4. If so, were any of the unfavourable acts because of the Claimant's inability to use power tools?

5. If so, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? Specifically:

   (a) The need to preserve the health and safety of the Claimant and his colleagues, the need to ensure that employees are able to carry out their contracted roles, and the need to allow flexibility in the deployment of resources within the business

   (b) As (a)

   (c) The need to ensure that employees are able to carry out their contracted roles, the need to ensure that the Claimant was notified of the possible outcome of his incapacity, and the need to run the business efficiently and effectively

   (d) The need to preserve the health and safety of the Claimant and his colleagues

   (e) As (a)

Failure to make reasonable adjustments (sections 20 and 21 Equality Act 2010)

6. Did the Respondent apply a provision, criterion or practice of requiring Off Track Technicians to carry out work which required power tools?

7. If so, did that PCP place the Claimant at a substantial disadvantage in comparison with persons who are not disabled in that he was unable to use power tools?

8. If so, did the Respondent fail in its duty to take such steps as it would have been reasonable to have taken to have avoided the disadvantage? The Claimant contends that the following would have been reasonable adjustments:

   (a) The Claimant could perform an inspection role for six months of the year during the busy vegetation period and could perform other duties during the remaining six months of the year.

   (b) The Claimant could remain in his gang and carry out the site warden/lookout role which was required on every job.

   (c) The Claimant could remain in his gang and they could be rostered to undertake jobs which did not require vegetation work, and where that was not possible, the Claimant could carry out the role of site warden/lookout on the jobs which required vegetation work.

(d) The Claimant could move to Tony's gang, which carried out work which did not require power tools

(e) The Claimant could move to Daniel's gang which carried out Japanese knotweed duties for six months of the year and could carry out other duties for the remaining six months of the year.

9. If so, did the Respondent fail in its duty to make reasonable adjustments to alleviate that disadvantage?

Time limits

10. Insofar as any of the matters for which the Claimant seeks a remedy by way of disability discrimination occurred more than three months prior to the presentation of his claim form, allowing for the effect of early conciliation, can the Claimant show that:

(a) They formed part of conduct extending over a period ending within three months of presentation; or

(b) That it would be just and equitable to allow a longer period for bringing the claim?

Remedy

11. If either of the above complaints succeeds, should the Tribunal make a declaration that the Claimant has been subjected to disability discrimination?

12. If either of the above complaints succeeds, should the Tribunal make a recommendation?

13. If either of the above complaints succeeds, what is the appropriate remedy?"

10. As noted above, it was conceded by the respondent both that the claimant was unable to use power tools and that that was something that arose in consequence of his disability of musculoskeletal systems and degenerative changes at vertebrae C5 to C6 and C8 to C7. So, list of issues 2 was in fact not something that we needed to decide because it was common ground. Similarly, it was made clear in closing submissions that there was no need for the Tribunal to make a decision about list of issues 6 and 7 because the respondent accepted that it had and applied a provision or practice of requiring Off-Track Technicians to carry out work which required power tools and that that put the claimant at a substantial disadvantage in comparison with persons who are not disabled by reason of the claimant's condition in that he was unable to use them.
11. Therefore, in due course, the focus of our discussion of facts found and of our conclusions will be on whether there had been unfavourable treatment as alleged and, if so, whether that treatment was justified and also on whether there were steps which it was reasonable for the respondent to have to take that it did not take as alleged by the claimant.

12. In the light of our decision on those matters we have not needed to make or draw conclusions in relation to issues on time limits, nor will it be necessary to go on to consider remedy.

Law applicable to the issues in dispute

Discrimination arising from disability

13. Section 15 Equality Act 2010 (hereafter referred to as the "EQA") provides as follows:

> "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."

14. Discrimination arising from disability is where the reason for the unfavourable treatment is something arising in consequence of disability. The example given in the EHRC Code of Practice on Employment (2011) (hereafter the EHRC Employment Code), is dismissal for disability related sickness. Another might be a requirement that an employee take annual leave to attend medical appointments for a disabling condition; they need regular absences for medical treatment in consequence of their disability and they are required to take annual leave to do that. It should not be forgotten that the treatment must be unfavourable nor that the defence of justification is available in claims of s.15 discrimination. Unfavourable does not require a comparison to be made with how the employer treated or would have treated any other employee.

15. The EHRC Code of Practice on Employment (2011) covers the meaning of "unfavourable" in this context in para 5.7

> "This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed form their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably."

16. This was described in Williams v Trustees of Swansea University Pension and Assurance Scheme [2018] UKSC 65 as being "helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section." Williams was a case in which it was argued that an employee had not received unfavourable treatment when he received a

pension at the age of 38 years on his ill health retirement to which he was only entitled by reason of his disabilities but which was lower because he had worked reduced hours for the last three years of his employment than it might had been had he been working full time at the date of retirement. The two questions we must ask ourselves are (1) what was the relevant treatment and (2) was it unfavourable to the claimant. In most cases, there will be little or no distinction between what can amount to "unfavourable" treatment and what would amount to a detriment or disadvantage under s.13 EQA.

17. The importance of breaking down the different elements of this cause of action was emphasised by Mrs Justice Simler, as she then was, in Pnaiser v NHS England [2016] I.R.L.R. 160 EAT at paragraph 31 (so far as is relevant for the present case),

> "the proper approach can be summarised as follows:
>
> (a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
>
> (b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
>
> (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant […].
>
> (d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. …
>
> (e) For example, in Land Registry v Houghton UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.
>
> (f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
>
> (g)[…].
>
> (h) […]

(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

18. The Court of Appeal considered s.15 EQA in City of York Council v Grosset [2018] ICR 1492 CA and held as follows:

a. On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability?

b. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something".

c. The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something". In the present case this second issue is admitted in that if we conclude that the reason for any of the matters complained of was the claimant's inability to use power tools then it is accepted by the respondent that that arose in connection with disability.

d. Section 15(1)(a) does not require that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability.

e. The potential defence of justification is available to an employer and that means that it is open to the respondent to show that they had a legitimate aim in respect of the treatment that they subjected their employee to and that the treatment was likely to, and reasonably necessary to achieve that legitimate aim. The test of justification is an objective one, according to which the employment tribunal must make its own assessment: see Hardy & Hansons plc v Lax [2005] ICR 1565, paras 31–32, and Chief Constable of West Yorkshire Police v Homer [2012] ICR 704, paras 20, 24–26 per Baroness Hale of Richmond JSC, with whom the other members of the court agreed. What is required is an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. This is for the respondent to prove.

Breach of the duty to make reasonable adjustments

19. The obligation upon an employer to make reasonable adjustments in relation to disabled employees so far as it is relevant to this claim is found in ss. 20, 21, 39 and 136 and Schedule 8 EQA 2010.

a. By s.39(5) the duty to make reasonable adjustments is applied to employers;

b. By s.20(3) and Sch.8 paras.2 & 5 that duty includes the requirement where a PCP applied by or on behalf of the employer puts a disabled person, such as the claimant, at a substantial disadvantage in relation to his employment in

comparison to persons who are not disabled to take such steps as are reasonable to have to take to avoid the disadvantage.

c. When considering whether the duty to make reasonable adjustments has arisen, the Tribunal must separately identify the following: the PCP (or, if applicable the physical feature of the premises or auxiliary aid); the identity of non-disabled comparators and the nature and extent of the substantial disadvantage: Environment Agency v Rowan [2008] ICR 218 EAT.

d. By s.21 a failure to comply with the above requirement is a failure to comply with a duty to make reasonable adjustments. The employer discriminates against their disabled employee if they fail to comply with the duty to make reasonable adjustments.

e. By s.136 if there are facts from which the tribunal could decide, in absence of any other explanation, that the employer contravened the Act then the tribunal must hold that the contravention occurred unless the employer shows that it did not do so. The equivalent provision of the Disability Discrimination Act 1995 (DDA 1995), which was repealed with effect from 1 October 2010 upon the coming into force of the EqA 2010, was interpreted in Project Management Institute v Latif [2007] IRLR 579 EAT in relation to an allegation of a breach of the duty to make reasonable adjustments to mean that the claimant must not only establish that the duty has arisen but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. This requires evidence of some apparently reasonable adjustment which could be made.

20. In the present case, it has been accepted that the respondent had a PCP which put the claimant to a substantial disadvantage compared with people who do not share his disability. So, the focus is on whether the claimant has provided evidence of some apparently reasonable adjustment which could have been made which had a prospect of alleviating the substantial disadvantage and then on the question of whether those were steps which it was reasonable for the employer to have to take.

21. In Archibald v Fife Council [2004] IRLR 651 HL, having posed the question whether there were any adjustments which the employer could have made to remove the disadvantage and when considering the adjustments which were made Lord Hope explained ([2004] IRLRL 651 at page 654 para.15) that,

> "The making of adjustments is not an end in itself. The end is reached when the disabled person is no longer at a substantial disadvantage, in comparison with persons who are not disabled, by reason of any arrangements made by or on behalf of the employer or any physical features of premises which the employer occupies"

22. Furthermore (at para.19);

> "The performance of this duty may require the employer, when making adjustments, to treat a disabled person who is in this position more favourably to remove the disadvantage which is attributable to the disability."

23. The requirement on the employer is, in the words of s.20, to take "such steps as it is reasonable to have to take to avoid the disadvantage". The test for a breach of the duty to make reasonable adjustments is an objective one and

thus does not depend solely upon the subjective opinion of the respondent based upon, for example, the information or medical evidence available to it. Among the circumstances which it is relevant to consider is the extent to which it is likely that the proposed step would remove the disadvantage to which the claimant is subjected. This seems to us to be particularly relevant in certain aspects of the present case where there is a question about the reasonableness of some adjustments and whether they would be long-term compared with the redeployment into a position that would be likely to meet the claimant's medical restrictions on a long-term or permanent basis.

Findings of Fact

24. These are the findings we consider to be necessary for us to make in order to answer the questions that we have been asked to answer. We do not rehearse all of the evidence that we have heard, and we do not make findings about all of the matters in dispute - only about those disputes in the evidence that we think it is necessary for us to resolve in order to answer the questions that we have to consider.

25. The claimant started his employment as Off-track Maintenance Technician on the 5 October 2015 and that employment continues albeit in a different role.

26. On the 23 March 2018 the claimant had an OH assessment (page 186), which recommended that the claimant keep use of vibratory tools to a minimum. This assessment took place by way of a regular review and, since Mr Blythe reported the symptoms described in that report, there was a more detailed occupational health referral in July of the same year. The claimant was also referred to a consultant.

27. There is a further occupational health report dated the 23 August 2018 (page 193). It does appear from the wording of this report that, as the claimant accepted, by this point he was already working in a group of workers which has been referred to as "Ben's gang". The occupational health referral refers to a recommendation that he remain on the crossing gang and Ben's gang was one of two crossing gangs. Compared with others in the off-track section, the crossing gangs carry out a lower proportion of vegetation clearance work. It is the vegetation clearance work which necessarily involves the use of power tools or vibratory tools. We will return in due course to the question of the extent to which other kinds of work, carried out off-track, might also involve the use of power tools. The claimant accepts that these two gangs had a reduced proportion of work clearing vegetation compared with the other gangs, but there is a dispute between parties about the extent of the availability of other kinds of work.

28. We draw the inference from this reference in the occupational health report that Mr Draper, the claimant's Line Manager, had by this time already taken a step to reduce the claimant's exposure to the effects of vibratory tools. The consultant's letter (page 195) confirmed that the reason for the symptoms that the claimant was experiencing was not in fact a HABS problem, but was to do with degenerative changes to part of his neck. That is the specific condition relied on as a disability and the respondent has accepted this connection.

29. The claimant states that reasonable adjustments to his role were agreed to remove the necessity to use vibratory tools but there was no maximum time frame on how long this adjustment would last. He also states that, in approximately September or October 2018, he was confirmed in his position in Ben's gang at least for the time being. In fact, although Lee Draper says in his paragraphs 17 and 18 that the move took effect in October, the claimant's oral evidence that he had been moved there by the time of the July occupational health appointment (referred to in the August report) is more plausible and we accept it.

30. That report of 23 August 2018 (page 193) does not refer to any need for the claimant to avoid hyperextension of the neck. It seems likely that Mr Draper took his information from that occupational health report. The reason that we say that is because of the content of the health management plan that was completed by Mr Draper after a meeting with the claimant on the 1 October 2018. The plan itself is at page 198 and the contents of it only refer to the need to avoid the use of vibratory tools.

31. The claimant continued in Ben's gang from this point in the interim and there is no complaint by him until about the Summer of 2019. The claimant now makes a complaint about a failure in June 2019 by Mr Draper to renew his competencies which had been referred to be before us by the abbreviation ACC. The claimant was unaware at the time of the anniversary of the ACCs (June 2019) that they were not renewed. He said that he had knowledge of the failure to renew them from December 2019 or January 2020.

32. Page 173 is the Annual Capability Conversation guide or policy. This is described as being the process by which a person's competencies are reviewed to confirm that they meet with the requirements of their role. The policy shows that the Manager has a window within which to renew competencies before it impacts upon the individual employee. We do not have much in the way of an explanation as to why this had not been renewed prior to September 2019. That date is of significance for the reasons which will be explained in greater detail in a moment but essentially because that was when the claimant's PTS was withdrawn. When it came to the claimant's grievance, Mr Weller partly upheld the complaint based upon the failure to renew because little by way of explanation had been given to him as to why the competencies were not promptly renewed; essentially it was a managerial administrative task which should have been carried out and the grievance was partly upheld because of this failing. However, it was not something that the claimant was aware of or had focused on until it was drawn to his attention approximately at the end of the year 2019/2020.

33. Possibly the most contentious issue, in terms of the degree of dispute about what took place, is that of the strimmer incident in June or July 2019. According to the claimant's paragraph 4, he had a conversation with one of the supervisors, Paul Jones, who reported to him, again this is according to the claimant, that Mr Draper had told Mr Jones that he did not know that the claimant was unable to use a strimmer. Page 187 is said to be the claimant's note of a subsequent conversation that he says that he had with Mr Draper.

According to the hearsay statement of Mr Draper the discussion that he had with Mr Jones was probably in July and definitely did not include him saying that the claimant's medical restrictions had expired or that he had not known that the claimant was unable to use a strimmer. That would clearly fall within the category of vibratory tools that the claimant was precluded from using by his medical restrictions. In his written statement, Mr Draper says he thought it was more likely that any reference he made was to not being aware that the claimant could use a sprayer.

34. In his oral evidence before us in relation to the question of his use of a sprayer, the claimant explained that he considers himself to be able to use a sprayer if either it is of a model which has a smaller reservoir than that commonly used in the off-track section or if it is not filled to capacity.

35. We observe that the claimant, quite understandably, had a particular determination to continue in the off-track team. It was one that he had worked in for some time, he had friends in the team. He has explained to us that, at the time, he did not fully understand that under the ill-health severance policy he might be redeployed to another team with no financial loss to himself. He was fearful of losing his job. All of that is very understandable on human level.

36. However, there does seem to us, to be a mismatch between (on the one hand) the range of tasks that the claimant told the respondent he could do in the welfare meetings and those that he has told us in oral evidence he could undertake and (on the other) the range of tasks which, to judge from the supervisors' statements, the claimant was actually doing.

37. There are two reasons why we have reservations about the reliability of the note at page 187, which is said to be a note about the claimant's conversation with Mr Draper. It has what appears to be a comment at the bottom which includes reference to a meeting which post-dated June 2019. It therefore appears to be a composite document and not merely a contemporaneous note of an alleged conversation. Additionally, the date at the top of 26 June 2018 is clearly inaccurate and was accepted by the claimant in cross-examination to be probably inaccurate. We also think it would be strange for Mr Draper to have said that he believed the claimant to be able to use a strimmer or for the medical exemptions to have expired when there is no suggestion of a time limit in October 2018 health management plan authored by him. Furthermore, there were no grounds in the occupational health report to think that the condition was likely to improve, quite the reverse as it was described as a degenerative condition.

38. Having made those observations, however, we note that it is common ground that at some point in June or July 2019 Paul Jones (supervisor) had had a conversation with Lee Draper. Paul apparently explained that, due to Ben being on leave, one of the team members being an apprentice and the claimant's medical restrictions, he needed additional resource. Whatever the details and whenever it took place, that much is common ground. In addition, we note Mr Draper's paragraph 19 where he said that Ben, who was the Team Leader, had reported problems with the impact of the adjustments for the

claimant on the rest of the team. His account of his conversation with Paul Jones is at his paragraph 24.

39. We have noted that Paul Jones, at some later point, provided at page 725, a statement that dates that conversation in June and it may be that what Mr Jones told the claimant about the conversation he had with Mr Draper was not identical to the full information that he had in fact provided to Mr Draper. Of course, we are considering what was likely to be said by individuals who have not been called to give evidence and there is no suggestion that anything was deliberately withheld by Mr Jones, more that there is the possibility that greater or lesser detail or emphasis in two different conversation might very well have led to different recollections by Mr Draper and by the claimant of the two conversations with Mr Jones. It is a disputed area of allegation and counter-allegation. What is accepted is that Paul Jones did say to the respondent that the claimant's medical restrictions meant that (in round terms) there was not enough resource in the team in order to carry out power tool work, particularly during the Team Leaders absence, and that additional resource was needed.

40. Mr Draper says in his statement that he had previously believed that the adjustments were sustainable because there were other roles (in the plural), that the gang was doing which did not involve vibrating tools. He listed fencing, level crossing work, drainage and lookout duties. The fact that Mr Draper made an occupational health referral (apparently on the 5 July 2019 – page 225) supports the hearsay evidence that there was some new information provided to him that caused him to doubt that the adjustments that had been made at the previous year were in fact sustainable. So, although we give less weight to Mr Draper's witness statement because he was not present to be cross-examined on it, there is some extraneous evidence to corroborate his statement.

41. We also note Mr Rudge's statement that starts at page 606, provided during the investigation of the claimant's grievance which, in essence, covered these allegations. It also provides supportive evidence that the reality of what the claimant was doing on a day-to-day basis was more of a constraint on the resource in the team than Mr Draper would have expected when it was put in place originally. There is some tension between the way Mr Rudge and Mr Clarke in their statements describe it on the one hand and the way in which the claimant and Mr Hudson in the welfare meetings try to make it appear. Nevertheless, this supportive evidence from the supervisors and the acceptance that Mr Jones made his complaint about lack of resource means that our conclusion on how concerns about the long-term viability of adjustments came to light in the summer of 2019 is not simply dependant of Mr Draper's hearsay witness statement.

42. As we say, there was an occupational health referral on 5 July 2019. According to the claimant (see his own note at page 208), he then had a conversation with Mr Clarke on the 10 July. Amongst other things this note seems to record that the claimant had already had a conversation with Lee Draper when he had been told he was going to be taken out of Ben's gang. This points to a chronology of Mr Draper telling the claimant that he was going to be removed

from Ben's gang prior to the disputed telephone conversation that took place on the 18 July.

43. Mr Draper gives his account of this conversation in his paragraph 28. The claimant gives his account in a note that he has provided in the bundle (page 220). So, the claimant's evidence means that in total the claimant refers to two face to face conversations of note with Mr Draper, one prior to the 10 July and one on the 22 July (as well as the telephone conversation on 18 July).

44. In relation to the content of the earlier conversation, it may be that Mr Draper mistakenly stated to the claimant that he understood him to be no longer able to carry out lifting duties, but as we have said there is extraneous evidence, in particular from Mr Rudge, that the claimant was in practice not carrying other core tasks of a Technician than simply those which involved vibrating tools.

45. The occupational health interim report is dated the 17 July 2019 (page 209), but it refers to the need for a further assessment and then the following day there was an incident which led to the telephone conversation that has already been alluded to. It is alleged that there were rostering issues as Ben's gang had been directed to work a day shift rather than the rostered night shift and that, had they worked the day shift, it would have reduced their 36 hours minimum break away from work following a night shift.

46. The claimant alleges that there was a telephone call between him and Mr Draper about this issue in which Mr Draper became aggressive. He makes the forensically valid points that he sent an email to his trade union representative the same day (page 215) which supports his account. This email suggests that he was upset by something that had been said and believed, as a result, that he had been told that he would be put on a disciplinary.

47. Again, we are mindful that Mr Draper is not present and has not attended to be cross-examined on his statement evidence about this and there is no complete explanation for his absence. His paragraph 20 statement that the conversation happened "before I had sought further OH advice" is not consistent with the dates on the interim occupational health report (page 209). On the other hand, the telephone consultation with the occupational health advisor did not provide further information; Mr Draper had not had substantive occupation health advice and there was a further report on the 22 July (page 225). Nevertheless, despite giving little weight to Mr Draper's statement, we still find that it is much more likely that removing the claimant from Ben's gang on the 22 July was putting into effect the decision to remove him from the gang that had already been considered prior to the 18 July telephone conversation and resulted from concerns raised by the supervisors about how the arrangement worked in practice. The context of the conversation of the 18 July only makes sense if the claimant was still on Ben's gang as at that date. Nevertheless, we are satisfied that that telephone conversation, even if the claimant's account is accurate, cannot have been the trigger or any part of the reason for his removal from Ben's gang. Those reasons were the concern that reasonable adjustments were not working for the team. The basis our conclusion is the chronology and the fact that actions had been taken prior to 18 July by Mr

Draper to find out more information. The reasons do not include the claimant's concerns about being asked to forego the 36 hour rest period.

48. As we say, there was an occupational health report dated the 22 July 2019 (page 225). That states:

> "That the claimant has been advised not to use vibrating tools as this can aggravate his condition and that is stated to be a long-term restriction. He has also been advised not to perform activities involving constant neck extension. However, Mr Blythe has not been able to identify any task at work which involves this activity. He should be fit for other aspects of his work as discussed today."

49. Even if avoiding hyperextension does not prevent all lifting or all heavy work, it is clearly a different and additional medical restriction to that of avoiding power tools. So, when we consider the conversation which the claimant alleges took place between him and Mr Draper on the 22 July, his own notes at page 220 tend to suggest first, that there was a reference by Mr Draper to this occupational health report and secondly, that the information in it, together with the reports certainly from Paul Jones and (according to Mr Draper) also from Ben, of what was happening on the ground, were the reasons for the removal from the gang and his allocation to the inspector's assistant role.

50. It is the claimant's firm believe that his disability was used against him as a reason to remove him from Ben's gang. However, viewed objectively, the 22 July 2019 occupational health report is the first occupational health report which makes the recommendation to management that they should avoid hyperextension. We do not ignore the specialist's letter, but this was the first occupational health report to raise this different medical matter. Furthermore, the occupational health report investigation in July was prompted by recent information provided by supervisors about a way in which adjustments were impacting on the team.

51. In our view it would have been wrong for the respondent not to take these medical restrictions seriously. It is stated to be a degenerative condition and they would have been rightly criticised had they not taken the steps to avoid the claimant carrying out the work which was likely to exacerbate it.

52. There is a dispute about the extent to which the claimant was allocated overtime after the transfer to the inspector's assistant role. The claimant was cross-examined about some of his pay slips to the effect that there was a variation of wages during the period allocated to Ben's gang. It was not put to him that he had had overtime after the 22 July 2019 in the inspector's role. The pay slips for August and September do appear to be lower than those earlier in the year. The evidence tends to show that he did not work overtime in those two months. However, we do not think it is right to draw the conclusions that he was deliberately deprived of or not allocated overtime.

53. There was a face-to-face occupational health assessment on the 14 August 2019 and that report is at page 229. Page 230 sets out the following information about his capacity for work:

> "Mr Blythe is medically fit to undertake trackside duties if ths can be accommodated operationally avoiding vibration tools. This restriction should remain in place for the foreseeable future.
>
> Mr Blythe is fit for lifting tasks at work. It is advisable that he avoid hyperextension of his neck, that is doing tasks requirement him to extend his neck back. Mr Blythe says he is not aware of any tasks at work that he is required to undertake as part of his usual duties that require hyperextension of his neck."

54. It is appropriate at this stage for us to make our findings about what the role of Technician in the Off-Track section involved. There is disagreement between the parties about the proportion of vegetation work and the amount of work requiring the use of power tools in those activities. It was strongly argued by the claimant (and by his trade union representative) both in the meetings to discuss whether he was fit to carry the off-track technicians role and thereafter that he could do the vast majority of the tasks.

55. However, it is clear that they were looking at a complete list of all of the tasks which could be included within the job description for the role. Their arguments did not assess quantitively how much of the role involved power tools and how much of the role involved vegetation work day-to-day or week-by-week based on the tasks a Technician would be likely to execute on a typical shift.

56. The claimant argued that the job description or policies were one thing, but that what happened on the ground was different. He argued that, in reality, everyone accommodated what one particular member of the gang needs. It is, in some ways, encouraging that that was his experience. Nevertheless, there are other sources of information available to us from which to judge whether to prefer the claimant's evidence or the management evidence of the degree to which the demands of role required him to carry out tasks that he was precluded from doing by reason of his condition.

57. Mr Draper analysed the proportion of jobs which had been carried out by all of the gangs on vegetation over a period of time (page 310). He provided that analysis when he handed the matter over to Mr Robinson later in the process and it appears to show that around 82% of the hours worked by all gangs for the year to 26 November 2019 had been vegetation work which required power tools. As has previously been discussed, evidence provided within the grievance investigation from Mr Jones and Mr Rudge do suggest that the limitations on what the claimant could do had an effect on the workload of the team which suggests that the claimant was not able to be fully occupied or that it was disadvantageous for the other members of the team to pick up the slack, so to speak.

58. We also had a Mr Collison's oral evidence and statement evidence. Mr Collison's involvement in the process began when he attended the January 2020 meeting at which the decision was taken to offer the claimant a redeployment role. We will deal with the details of this meeting below. His particular role in the company of Infrastructure Maintenance Engineer is to lead and direct the Engineering team in relation to works on all infrastructure assets

(see DC para.1). He has held the role since 2016. Because he spoke with the knowledge and authority of that experience, we consider that his evidence was particularly impressive on the issue of what the role of Technician involved.

59. The context within which he came to consider the claimant's role and whether he was able to carry out a sufficient proportion of the full range of tasks was that the decision that the claimant was not fit for the substantive role had already been made and Mr Collison's part in the process was to enable the claimant to seek alternative employment or to find alternatives to ill health severance. However, during his meeting with the claimant and by his representative, the question of the claimant's fitness for the Technician's role was urged upon him again. He did, therefore, consider it.

60. His oral evidence was that he believed that the vegetation clearance was a higher volume of work carried out by the gangs that the claimant argued for and he said this:

> "I am so confident because I set the annual volumes of maintenance, so we have an activity-based plan, and that plan sets out the volumes of maintenance which are undertaken in the delivery units for all disciplines including off-track. Because I set the volumes, I am aware of the higher volumes of vegetation work that is undertaken."

61. Then he went on to consider the other types of activities that the off-track section undertakes and explained why he believes that the use of power tools is not limited to vegetation work. He described to us the ways in which he would expect po63wer tools to be available and regularly used by the gangs in fencing work and other types of clearance. The claimant cross-examined him on that evidence. Up to a point we can accept his arguments and evidence that, in reality, his personal experience was that he had not been asked to use power tools on matters such as fencing, for example.

62. The obligation on an employer to consider reasonable adjustments is to seek a long-term solution to remove the risk to the employee's continued employment. The claimant's suggestion would almost involve the management supervisors hoping that on any particular week the work allocation did not contravene the claimant's medical restrictions. We accept Mr Collison's evidence that there could realistically be a need for a technician to use power tools in non-vegetation clearance work in order to work efficiently.

63. The respondent also has to bear in mind the likely effect on the health and safety, not only of the claimant but on the other members of the gang. The claimant argued that he could take the look-out role or the site warden role. Mr Draper in his paragraph 16 explains that ordinarily this role, which is a single role, is rotated and there are two reasons for this. The first, he says, is to keep the warden's attention sharp and the second is so the others do not always do the physically demanding work. The claimant was unwilling to accept these points without reservation. In particular, in relation to the first, he argued that in reality there are sufficient breaks taken to avoid the need for those who are doing physical work to become overtired.

64. However, the evidence of the impact of doing so much vegetation work of even that one incident on Mr Jones suggests that there is likely to be an effect on colleagues of the claimant being permanently allocated the look-out role We accept that it is intended that these roles rotate and for good reason. Given that, it would not be reasonable for the respondent to expect a long-term adjustment which did not permit the rotation to happen. Objectively this is not a sustainable solution.

65. So, taking all of that into account our conclusion is that the claimant was not fit to do the range of work he would have reasonably have been expected to do as an Off-Track Technician.

66. Moving on slightly in the chronology, and unrelated to this process, on the 26 September 2019 the claimant underwent a hearing test as part of his personal track safety medical (PTS). We have no reason not to accept the claimant's evidence that the third-party healthcare provider carried out the test punctured his ear canal which led to a temporary hearing problem, and he failed a hearing test that was part of this medical. He therefore automatically failed the PTS medical and that excluded him from trackside work. We can well understand the claimant's frustration at this time. It is not quite clear whether he ultimately passed the PTS medical, although there is a later occupational health report which confirms that he done so, but it can be no earlier than the last week or the week before last in November 2019 because as at the 22 November 2019 Mr Draper was repeatedly chasing by email to find out the position about whether the claimant had passed the PTS medical.

67. The claimant and his representative attended a welfare meeting on the 4 October 2019 with Mr Draper who was supported by Michaela Johnson of HR. The claimant's evidence (his paragraph 9) is that there was a dispute about the scope of his role and that the adjustments he suggested were dismissed by the respondent. It was at this meeting that the decision was taken that, even with the previously agreed adjustments, the claimant was unable to do a sufficiently substantial proportion of the core tasks of a Technician that it meant, in effect, he was unable to do the role. Furthermore, the respondent decided that they no longer considered the adjustments that had been put in place in the recent past were sustainable in the future. The claimant's proposed solution was primarily that he continue in Ben's gang, and it is in discussion about this, according to the notes, that Mr Draper refers to the advice of against hyperextension of the neck.

68. Three different sets of notes were admitted as evidence of the discussions in this meeting. We have the respondent's notes which the claimant argues forcefully were so incomplete as to not be reliable (page 249). There are then Mr Hudson's notes (page 254) and the claimant's notes (page 262). In making the conclusions that we make, we have drawn on the claimant and Mr Hudson's notes. There seems to have been a dispute about whether the claimant could work safely, and we have already explained what our conclusions are about what the role involved and what the claimant, viewed objectively, was actually doing. We accept that the respondent accurately understood both the claimant's medical restrictions and the nature of the role. Mr Hudson's notes

indicate that he suggested that the claimant should move gangs and specialise in other areas, but it seems that discussion became somewhat circular.

69. The parties have both focused in detail on a comment made by Michaela Johnson to the effect that the claimant needed to actively be looking for a role. We have considered in particular the claimant's notes and Mr Hudson's notes on this, and it does read as though Ms Johnson emphasised that the onus was on the claimant to look for a role.

70. The claimant has, fairly, pointed to the redeployment and reasonable adjustments policy which indicates that the *respondent* has an obligation to look for roles. Mrs Hall, in cross-examination, rightly accepted the respondent has a responsibility to look for alternative roles when redeployment is happening and pointed out that the process is most efficiently done when HR, the manager and the employee look jointly.

71. What appears to have happened at the meeting on 4 October 2019 was that Mr Draper said that the claimant had been looking for roles and then there appears to have been a discussion of a particular role, an MON role, which at the time the claimant expressed concerns about because of his hearing issue and also of a health and safety position at the Tottenham depot. It is then recorded that Michaela Johnson commented that any extra training would be arranged. The claimant's notes, again, appear to include research that he had subsequently carried out, which means that it is difficult to rely upon those as a completely accurate contemporaneous record of what was said and nothing more.

72. We do not think it wrong for the respondent to say to an employee that they should look for alternative role in this situation. The respondent does not know which roles the individual might be interested in outside the standard competency matching. The employee may wish to use a redeployment process as an opportunity to change career in a direction that is not necessarily known to the respondent. However, Mr Hudson's notes and the claimant's notes suggest that the claimant received a message loud and clear that it was predominantly the claimant's responsibility, whereas the policy states that the respondent has the responsibility. On the other hand Mr Hudson's notes do also record Ms Johnson saying that the respondent would actively support the claimant and, information about specific roles was brought about to the discussion by Mr Draper at this meeting. It is only fair to consider all of those matters in the round when looking at the claimant's complaints about the conduct of this meeting and the balance between his responsibility to seek alternative roles and that of the respondent.

73. The claimant complains about the letter dated the 1 November 2019 (page 282). It followed the 4 October welfare meeting. It was drafted by Mrs Hall, but bears Mr Draper's name and he states,

> "We would like to meet with you to discuss the possibility that you may be required to leave the organisation under the ill-health severance arrangements. Within this meeting you will have the opportunity to discuss any suitable alternative employment options which you believe could be considered in your circumstances." and it goes on the specify the time and place for a meeting.

74. That letter would have been an ideal opportunity to include a statement of the respondent's obligations to look for alternative employment. On the other hand, the claimant was represented by his union and, to judge by what is added onto his notes of the 4 October meeting, he appears to have been able to find out that the respondent has an obligation from other information available to him.

75. By the 13 November the claimant had put in a grievance against Michaela Johnson and a separate grievance against Mr Draper.

76. He was invited to a rearranged ill health severance meeting by the letter at page 299. By this time Peter Robinson had been asked to conduct the meeting because of the grievance against Mr Draper. It took place on the 9 December and Mrs Hall was present. Again, the claimant argues that he suggested adjustments which were refused. There had been a further occupational health report dated the 23 November (page 302), but it adds little to the other information available to the respondent, save that it appears that the PTS had been re-instated. It was therefore possible once again to consider the claimant for track work. Although, thankfully, as it turned out the hearing problem was short-lived it was not initially possible for the respondent to predict that the hearing problem would definitely be resolved within a short period of time.

77. As we have already mentioned, Mr Draper provided his analysis of the work of a Technician to Mr Robinson (page 304). It is an analysis of the proportion of hours carried out by the gangs on vegetation work and the matrix setting out the work carried out by a track technician.

78. During the course of the hearing before us the claimant, somewhat late in the litigation process, started to ask why the role he has now in fact been redeployed into, was not mentioned in the 9 December meeting with Mr Robinson.

79. The notes start at page 315 which incorporate track changes suggested by Mr Hudson (see the email at page 314) These notes suggest that the claimant and Mr Hudson sought to rerun the argument that the claimant was fit to carry out sufficient elements of his substantive role with reasonable adjustments for him to remain in it. To judge by the fourth entry down on page 318, it does appear that Mr Hudson acknowledges that Mrs Hall has mentioned redeployment and in particular has mentioned Network Rail's obligations in relation to redeployment. At that point, she is noted in the meeting as stating that the "onus is on NR [Network Rail] and GB [he claimant] to work together". The claimant accepted the conclusion of the meeting was that there was to be further investigation of the infrastructure maintenance protection co-ordinator role, the IMPC role. This may have required a trial period. We accept Mrs Hall's evidence in her paragraph 21 about how the process is intended to work. She confirms in her paragraph 20 that the outcome of this meeting was as outlined above.

80. The respondent then wrote to the claimant on 11 December 2019 and asked whether he wanted a trial of the IMPC role (page 312). The claimant, for perfectly understandable reasons, decided against that role. It was not initially

expected to last more than a fixed-term period and the claimant decided that it was not something that he wished to pursue. However, when considering the argument now raised by the claimant that the operative role that he has been redeployed into could have been mentioned sooner, there is certainly evidence that the respondent was seeking alternative suitable employment that the claimant was in fact interested in and which did not involve a lower grade position.

81. The next event of importance is an informal meeting between the claimant and Mike Winter of HR on the 16 December 2019 where redeployment was again discussed. The progress of the grievance was also touched on and there is evidence from the notes of that meeting that there was some analysis of the application that the claimant had made. The fact that he has had interviews for roles that had not been identified by the respondent does not mean that there was a breach of policy. As previously stated, the individual employees may be applying for roles that they are interested in outside of the process governed by the redeployment policy.

82. The claimant was then invited to another ill health severance meeting (page 546). The meeting took place on the 24 January 2020 and was conducted by Mr Collison. A request was made to record the meeting so that the notes should be verbatim. The claimant suggested moving to Danny's gang. This has been referred to in the hearing as a gang that does a substantial amount of knotweed spraying during some part of the year. It refused by the respondent on the basis that Danny's gang would not provide a solution for the whole of the year.

83. During the course of this meeting, Mr Collison offered the track inspection operative role to the claimant. That was Mr Collison's decision. As previously noted, the claimant now argues that he should have been offered the role in the December meeting. He also questions why the operative role had not been mentioned at the beginning of the meeting. The transcript of this meeting starts at page 549. It is clear that, contrary to the claimant's recollection, the discussion of the track inspector operative role starts prior to the break in the middle of the meeting (noted as an interval at page 555).

84. It is important to note that Mr Collison felt that he needed to double-check that he was able to offer the operative role with the claimant's existing salary red circled (or protected) and that this would not only be for a limited period of time but would be red circled until the operative salary rises to the same level as the technician's salary. At the top of page 553 it is noted that Mr Collison described there being two operative roles in track and stated that the claimant's restrictions would not stop him from carrying out the role. It seems to be common ground that the role that the claimant has in fact been redeployed into is one that he can carry out without any restrictions. He can carry out the full range of the tasks required in the role. Mr Collison said "we could work around your restrictions" and he would be working under Daniel Allen "on a 3 month trial and it would be down to the line manager on whether your (sic) be suitable for that role" long-term.

85. It is clear that Mr Collison made sure of his facts before making the offer. It is a distinct advantage that the nature of the operative's role means that the claimant's medical restrictions do not stop him from carrying it out. The claimant suggested an operative's role on the overhead lines but Mr Collison's view was that that was not suitable because there would be too great a risk of the claimant having to carry out activities that involved hyperextension of his neck or of not being able to carry out a range of the necessary tasks of those roles.

86. Mr Collison checked whether there were vacancies in grinding and welding and it is clear that this operative role that the claimant is now redeployed into was mentioned during the meeting before he took that step. The claimant's recollection as to the order in which things happened in that meeting seems to be mistaken.

87. We return to the reasons why the operative role had not been identified by Peter Robinson. We remind ourselves that the claimant had not focused on this specific aspect of the way that the respondent managed the process before the full merits hearing and so, to some extent, the respondent may not have expected to analyse the point in any great detail. Mrs Hall, who was present at the December meeting, certainly was not in a position to say why it had not been identified by Mr Robinson, who was not called as a witness. To judge by the notes, the December meeting was focusing on a different job which was of interest to and was offered to the claimant. As Mrs Hall says, that role would have been in the nature of a promotion subject to a trial. We do not think there are very strong grounds in those circumstances to criticise the respondent for not additionally pinpointing an operative role which was not at the same level as the claimant's substantive role.

88. Mr Collison clearly came into the January meeting determined to find a suitable role for the claimant so that he could keep him in the business and that is to his credit. The claimant accepted that offer of redeployment on the 27 January 2020 and he is, as we understand it, happy and fulfilled in that role. In due course his redeployment was confirmed after a successful trial. The claimant's grievance was partly upheld by a decision of the 6 October 2020, but it is not necessary for us to go into the detail of those findings when reaching conclusions on the issues which are distinct.

Conclusions on the issues

89. We do not need to reach conclusions on List of Issues (LOI) 1 and 2 which were conceded by the respondent. The question in LOI 3(a). is first whether the claimant has shown the treatment that he complains of occurred as a matter of fact. It is clear that the respondent did remove the claimant from Ben's gang on the 22 July 2019, but additionally it is suggested that the respondent removed the claimant from overtime night shifts to non-call duties.

90. It would appear to be the case that in the short period before he lost the trackside permit because of the hearing difficulties, the claimant did not work the same amount of overtime as he previously had. However, there is nothing from which we can infer that it was the intention of the respondent that that

should be the case or that that was something that they subjected the claimant to. The treatment was the removal from the gang. It may have had financial consequences but that was not what they decided to do to the claimant.

91. The respondent argues that it was not unfavourable treatment to remove the claimant from the gang because the claimant was in a role where he could not perform substantial part of it. We reject that argument. A reasonable employee might reasonably consider themselves to be disadvantaged if they are removed from a gang, when he had been in it for approximately a year and in that section for some four years, and when the consequence of removal is potentially that he has reduced opportunity for overtime coupled with the uncertainty of the overall situation. We consider that to be unfavourable treatment even in circumstances when the employee was unable to carry out a substantial part of the role.

92. A judgment was made by the employer about whether the claimant would be fit for this substantial role in the future. That puts his employment at risk, subject to the proper application of the policy and the respondent complying with their duties under the Equality Act 2010. In that context we consider that that is unfavourable treatment and they have made a judgment that for his safety something needs to be changed. After all, “disadvantage” has been described as a low bar. The respondent positively argues that part of the reason for that was the claimant’s inability to use power tools and therefore the determinative question here is whether the respondent has shown that it was a proportionate means of achieving a legitimate aim.

93. Before we set out our conclusions on justification, we also look at LOI 3(b) because the questions of justification really are very similar in relation to (a) and (b). As a matter of fact, the respondent did decide that the claimant was not fit to perform the role of technician in off-track on the 4 October 2019 and did so at least in part because of his inability to use power tools.

94. The legitimate aim in relation to both LOI 3(a) and (b) was said to be the need to preserve the health and safety of the claimant and his colleagues; to ensure that they carry out their contracted roles; and the need to allow flexibility in the redeployment of the resources within the business.

95. The claimant does argue that Mr Draper’s aim was to remove him from the business. We reject that argument. The respondent is the position of having to seek to prove what Mr Draper’s aim was in respect of both LOI 3(a) and (b) without having Mr Draper present. However, we are satisfied that there is sufficient objective evidence other than that in his written statement to support a finding that his aims were the health and safety of the claimant and his colleagues. In particular, he was responding to reports by some of those colleagues. The formal process followed by Mr Draper suggests that he took his responsibilities in that regard seriously. The statement that he is recorded to having made in the 4 October meeting is consistent with him having a sense that there is core of the technician job that he needs technicians to be able to do. Based on the contemporaneous documents, we accept that these were Mr Draper’s aims and that they were legitimate.

96. So, the question is whether the removal from the gang on the 22 July 2019 as an interim basis and the judgment that the claimant was not fit was a proportionate means of achieving the legitimate aim.

97. We are satisfied that they were. The claimant's case was that the respondent should have left him to do what he had been doing in Ben's gang indefinitely. We do not think that the respondent could have done otherwise than to remove the claimant from the working environment which they reasonably concluded meant there was an unacceptable risk that either the claimant would carry out tasks that were contrary to his medical restrictions or that there would be a lack of resource in the business that risked the health and safety of the other members of the gang or their effectiveness. We acknowledge that the respondent might be expected to accept a reduced level of efficiency from a disabled employee up to a point, but it is a question of what is reasonable in all the circumstances and these circumstances include the responsibility of the employer to other members of the team. There was strong evidence that the claimant could not perform a high proportion of the technician's work judged on quantitative basis. It was that which tipped the situation from one where there were adjustments in place which the respondent thought they could support to adjustments they knew they could not.

98. Turning to LOI 3(c), as a matter of fact, the letter of the 1 November 2019 was sent. It was sent because the claimant had been found unfit to carry out the substantive role and including because he was unable to work power tools. Therefore, the burden again passes to the respondent to show a legitimate aim. The aim relied on was to ensure that the claimant was notified of the possible outcome of his lack of fitness. This was a legitimate aim. That was the respondent's aim to make sure that the claimant was informed of the possible outcome of his incapacity.

99. The stage in the process that had been reached was that the claimant had been found unfit for his substantive role and the letter only confirmed what he had already been told in the meeting of the 4 October 2019. It was certainly necessary to warn the claimant what the possible outcomes might include. We have some reservations about this because the message the claimant received in the meeting of the 4 October, in particular from Ms Johnson, was that the responsibility for finding alternative employment was his. The wording of the letter does not help to change that and could have been improved. However, taking into account everything said at the meeting and in particular Mr Draper raising two different roles for discussion, then as a whole we think that this letter was a reasonably necessary and sending the letter was justified in all of those circumstances.

100. As to LOI 3(d), the alleged failure to renew the competencies, it is true as a matter of fact that Mr Draper did not renew the claimant's competencies in June 2019. The first argument of the respondent is that this is not unfavourable because the claimant did not know about it until December 2019 (so it was not unfavourable at the time it happened) and because it had no impact on him at that time.

101. Had the claimant known and had it been of concern to him at the time, our conclusion might be different but we agree that at the time that the anniversary of the competencies past there was no unfavourable treatment because the failure to renew was known by the claimant, he was not worried about it and the failure to renew did not have any impact because there is a window, a grace period for the manager to take action. By the time the claimant was aware of the failure to renew, there was an impediment to doing so, namely the lack of the PTS for unrelated reasons. The respondent had to wait for the claimant to pass a hearing test so that he could pass his PTS medical. This is an annual event entirely separate to the occupational health referrals that were connected to the claimant's disability.

102. We have concluded that there is no connection whatever between the failure to renew and the claimant's inability to use power tools. The s.15 claim fails for that reason. The claimant argues that Mr Draper could have had the ACC conversation, but it was pointless until the PTS was renewed.

103. Looking then at LOI 3(e), the respondent did deploy the claimant into an alternative role. It is argued on behalf of the respondent that to the extent that the claimant complains of a failure to redeploy him sooner, that is in effect inconsistent with the redeployment being unfavourable. However, the claimant's underlying complaint certainly prior to the full merits hearing was that the judgment that was unfit was wrong and therefore that the redeployment was unfavourable. The claimant has not previously focused on the reason for the treatment being unfavourable was a failure to redeploy sooner and that is not actually in the list of issues.

104. It is clear that there was a lot going on with the change of personnel, the grievance investigation and the other roles which were discussed and offered in December 2019 at the first ill health severance meeting. In substance we think there is nothing to criticise in the respondent's actions in not mentioning the operative role in the December meeting. Looking as at originally worded in the list of issues - the decision to redeploy somebody to another role because they had been judged unfit - that is an act the respondent has done in relation to the claimant. They moved him to another role because he had been judged unfit for his substantive role. By doing so they maintain his employment. He was put in a role that he could carry out the whole of, 100% of. It is an outside role, not in an office which was something that the claimant was not interested in and it maintained his salary. This seems to us to be the respondent complying with its duty to make reasonable adjustments, because as it said in Archibald, the adjustments are not the end in themselves. The duty is to remove the disadvantage and by putting the claimant into another role that had long-term prospects both in terms of it being a permanent role and in terms of it being a role that fitted with the claimant's medical restrictions, the potential disadvantages were removed. They were removed in a way that the adjustments urged by the claimant might not have been able to achieve. Even if technically, it could be regarded as unfavourable it is plainly a proportionate means of achieving a legitimate aim, in particular that of ensuring that the claimant is in a role where he can carry out his contracted duties. We are

pleased to note that this redeployment appears to have been a success. We congratulate the claimant on having taken advantage of it.

105. For all of the above reasons, the s.15 EQA claim fails.

106. We turn to the reasonable adjustments claim and to the particular individual adjustments urged by the claimant. The first one, LOI 8(a), concerns the argument that the claimant could perform an inspection role for six months of the year during the vegetation period and perform other duties during the remaining six months of the year. This was not an existing role, and although in some circumstances an employer might need to create a role, in this case there was a suitable existing role. In those circumstances, it would not be reasonable for the respondent to have to create such a role. These is in fact no evidence that such a role would fit within the makeup of the gangs that the respondent had. What the other duties might be was vague. We do not think that this is a step that it was reasonable for the respondents to have to take.

107. LOI 8(b) is the argument that the claimant should remain in his gang and carry out the site warden lookout role. For reasons that we have explained to do with the health and safety of the other members of the gang, as well as of the individual carrying out the site warden role, this was not a step that was reasonable for the employer to have to take (see paras.63 and 64 above). In reality, there is very little difference between the proposed adjustment at LOI 8(c) and what the respondent tried. Given the additional restrictions which the OH clinician first included in the report of 22 July 2019 (see para.50 above) of not hyperextending the claimant's neck we have found that there was not sufficient work the claimant could do and comply with his medical restrictions for it to be a reasonable adjustment for him to remain in the gang and roster that gang to undertake jobs which did not require vegetation. He had already been put in one of two gangs with the least amount of vegetation, so in effect that is what had been tried.

108. The proposal at LOI 8(d) is that of moving the claimant to "Tony's gang". Both parties accept that there was a serious clash of personalities between the claimant and Tony in the past - to put it neutrally. There was not strong evidence that the work in Tony's gang was so different to that in Ben's gang that it could be said that the claimant was medically fit to carry out proportionately more of the duties of a technician in that gang viewed quantitively. In the circumstances explained to us, and in particular the explanation that the claimant gives in the meeting, noted at page 316, his description of his experiences with Tony mean that it was not a reasonable step for the employer to require two individuals to work together when there was a risk of a physical confrontation between them because of their previous history.

109. The proposal at LOI 8(e) refers to the knotweed gang. As Mrs Hall says, Daniel may have said that he was willing to have the claimant in his gang, but the claimant's explanation of the way in which he can carry out spraying means that there are some limitations on him being able to use a full pack. An operative might not be required to use a full pack every day, but this comes back to it not being reasonable to expect the extent of the limitations in the role that the claimant needed. There would be a risk to the claimant's health. In

any event, for five to six months of the year the gang was not spraying knotweed. It was also a temporary solution and the respondent was looking rightly, in our view, for a longer term solution. So, the adjustment that it was reasonable for the respondent to have to make is the one that they made and the reasonable adjustments claim fails.

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Employment Judge George

Date: 16 April 2023 ……..

Sent to the parties on: 17 April 2023

For the Tribunal Office