EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104200/2023

Held in Glasgow on 10, 11, 15, 16, and 18 January 2024

Employment Judge S MacLean
Tribunal Member EA Farrell
Tribunal Member J Burnett

Mr Ryan Smeaton	**Claimant** **Represented by:** **Mr T McGrade - Solicitor**
Taylor Wimpey UK Limited	**Respondent** **Represented by:** **Mr S Hughes – Advocate** **Instructed by:** **Ms K Staples – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

(1) the Tribunal finds and declares that the respondent unlawfully discriminated against the claimant, contrary to section 39 of the Equality Act 2010, and his complaint of discrimination contrary to sections 15, 20 and 21 of the Equality Act 2010 succeed;

(2) the discrimination claims contrary to sections 13 and 26 of the Equality Act 2010 are dismissed; and

(3) the respondent unfairly dismissed the claimant under section 98 of the Employment Rights Act 1996.

REASONS

Introduction

1. The respondent employed the claimant as a management trainee from 17 September 2018 until 21 March 2023. In the claim form, the claimant claims disability discrimination under sections 13, 15, 20, 21 and 26 of the Equality Act 2010 (the EqA) and unfair dismissal under section 98 of the Employment Rights Act 1996 (the ERA). The respondent resisted the claims and raised preliminary issues of time and disability status, which were reserved for the in-person hearing to consider liability.

2. Evidence in chief was given by witness statements. Witnesses were cross-examined and re-examined in the usual way.

3. The claimant gave evidence. Marlene Smeaton, his mother and Fraser Woods, assistant design and planning executive gave evidence on his behalf. For the respondent, the Tribunal heard evidence from Graeme Oswald, technical design and planning manager, Marc Nelson, design and planning executive, Colin Blair, formerly technical director for West Scotland business unit, Martin Findlay, technical director for West Scotland business unit and Gavin Hamilton, managing director for East Scotland business unit. Mr Nelson gave his evidence remotely by cloud video platform.

4. The list of issues prepared by the representatives, was refined to take account of the evidence and submissions. The agreed termination date was 21 March 2023. The respondent no longer insisted that the claims were time barred. At the relevant time, the claimant is a person with a disability, under section 6 of the EqA, owing to the diagnosis of Pompe disease. The claimant no longer sought to rely upon his psychological health problems as constituting a separate disability. The claimant also did not insist upon the section 13 (direct discrimination) claim and section 26 (harassment) claim.

5. The Tribunal has set out facts as found that are essential to the Tribunal's reasons or to an understanding of important parts of the evidence. The

Tribunal considered the submissions during its deliberations and has dealt with the points made in submissions and the remaining issues whilst setting out the facts, law and the application of the law to those facts.

Findings in fact

6. The respondent is a FTSE 100 company carrying on business as a housebuilder in the UK. The respondent organises its business into business units on a geographical basis. In 2022 the respondent had an operating profit of more than £900 million.

7. The respondent employed the claimant as a management trainee in the West Scotland business unit between 17 September 2018 and 21 March 2023. He was initially employed on a four-year fixed term training contract between 17 September 2018 and 16 September 2022, which was extended until 16 March 2023 by letter dated 22 February 2022 (the contract).

8. In the first two years the claimant was to complete an NC in architectural technology. He was then to complete an HNC in architectural technology during the second two years. The claimant was allowed to attend college one day per week to obtain these qualifications.

9. Fraser Woods, assistant design and planning executive, was a management trainee from September 2014. He was kept on as a trainee at the end of four years to allow him to meet all of the objectives. Mr Woods was not given an end date to his training contract; it was a running review. During the extension he remained on a trainee salary.

10. Marc Nelson, design and planning executive, was assigned as the claimant's mentor when his original mentor went on extended sick leave. Mr Nelson joined the respondent in January 2011 as a technical management trainee. He secured a role as assistant design and planning executive in July 2016.

11. The claimant's line manager was Graeme Oswald, design and planning manager. Mr Oswald reported to the technical director. Colin Blair (Mr Blair) was technical director between October 2019 and August 2022. He was replaced by Martin Findlay on 1 November 2022. The technical director

reports to managing director for West Scotland business unit, David Blair (Mr D Blair).

12. Until March 2020, the claimant was on track. He worked exclusively in the office and occasionally attended site. The claimant saw Mr Oswald and his colleagues on a daily basis. The claimant enjoyed his job and felt he was thriving. He had a good working relationship with other management trainees and Mr Woods.

13. The claimant is a person with a disability: Pompe disease, an uncurable metabolic disorder which causes muscle weakness, joint pain and fatigue. He was diagnosed with the condition around March 2020. He found it difficult coming to terms with the diagnosis and dealing with the physical symptoms: loss of energy, dizziness, aching muscles, fatigue and low mood.

14. The claimant was furloughed during April and May 2020. In June 2020, the claimant and his colleagues started working from home (WFH).

15. The claimant wanted to maintain work activity. Mr Oswald knew about the claimant's symptoms. On medical advice, and following discussion with Mr Oswald, it was agreed that from around June 2020 until September 2020 the claimant would work 20 hours per week.

16. By September 2020, the respondent knew of the claimant's diagnosis and the possibility of him receiving enzyme replacement therapy (the treatment). The claimant was eager to return to being himself and to working full-time hours. He returned to his normal hours WFH.

17. From November 2020, the claimant underwent the treatment fortnightly. Initially, the claimant required to attend hospital but then nurses came to his home to administer the treatment which lasted a full day. The claimant felt completely floored between four to seven days after the treatment with flu-like symptoms. He felt very sore and was often so tired he could not get out of bed. The following week he would feel better but then have to restart the treatment. The respondent was aware of the claimant's treatment and its impact on him. The claimant remained WFH.

18. At home the claimant worked at a low dining room table while sitting on a straight-backed chair, with little support. It was uncomfortable. He had pains in his lower back and down through his legs. He had neck pain leaning forward to see the screen. The claimant knew that it was not good for him. He would then work from his bed, lying back with his laptop on his knees and mouse on his bed. Mr Oswald knew this. He told the claimant that he should not be working if he was unwell.

19. From around April 2021 most of the claimant's colleagues worked on a hybrid basis (three days in the office, two WFH). This included returning to sites.

20. Fortnightly architects' meetings, attended by various planners and designers took place to allocate work. The claimant participated remotely but found it difficult to engage with colleagues and felt disconnected from work. He was being allocated less challenging work.

21. In early September 2021, following a medication change that interacted with the treatment, the claimant was admitted to hospital. The claimant was sick absent from 6 September 2021. The claimant's mental health deteriorated, and he had difficulty with self-motivation. He was reluctant to reach out to colleagues.

22. The respondent referred the claimant to occupational health (OH). The OH report dated 14 September 2021 (the September 2021 OH report) confirmed that he was temporarily unfit for work. It was recommended that the respondent interview the claimant on his return to work; check he was well enough to resume dutie; update on any changes; and query whether he required additional support.

23. On 14 September 2021, Mr Blair sought guidance from an HR business partner about the claimant's disability, his ongoing treatment, and his "worry about his career and position within TW" (Taylor Wimpey). Mr Blair considered that the claimant was probably a year behind with no imminent likelihood of catching up or even starting to progress. He proposed to the HR business partner that the claimant should be supported, "by formally

extending his trainee contract (4 years due to expire next August) by another 12 months".

24. Having seen the September 2021 OH report, the HR business partner advised that Mr Blair should complete the recommendations; ask the claimant what support or reasonable adjustments he needed to perform his role; and consider a phased return to work. Regarding extending the training period, the HR business partner agreed that it should be extended. Mr Blair was advised that to extend the contract he needed to reissue the contract with a new date.

25. The claimant remained absent. The claimant spoke to Mr Blair who was aware that the claimant had been working from his bed and was uncomfortable using the dining room table and chair.

26. By early November 2021, the claimant was keen to return to work on a phased basis. An HR business partner advised Mr Blair to ask OH to review the claimant, advise on a phased return and adjustments to support him. Concern was expressed about the claimant only having had one interface with OH. The OH report was to be discussed with the claimant at his return-to-work interview.

27. The claimant returned to work on 15 November 2021 on a phased basis. Mr Blair did not discuss with the claimant the extension to the contract. Mr Blair, rather than Mr Oswald, dealt with the claimant's entitlement to company sick pay.

28. By December 2021, the claimant wished to return full-time. There was an awkward telephone conversation between Mr Blair and the claimant about his return to work and the payments to which he was entitled. After the conversation the claimant liaised directly with the HR business partner to resolve the matter.

29. On 23 December 2021, the claimant had an OH assessment. An interim report was issued on 27 December 2021 (the December 2021 OH report).

The claimant was assessed fit for full-time work with recommended adjustments/restrictions.

30. The current adjustment of WFH was appropriate until the COVID-19 risk was deemed to be reduced to a level that was safe for him to return to the office. OH also recommended:

    a. Time to receive his essential fortnightly treatment.

    b. Work stress identification and management meeting in line with HSE recommendations to identify organisational stressors/triggers that may affect his psychological health.

    c. An ergonomic DSE workstation assessment be carried out given his domestic working arrangement to mitigate muscular skeletal symptoms he may be experiencing.

    d. Review and possibly modify performance targets and absence management to an appropriate level in the context of his disability.

31. Mr Blair spoke to the claimant on 22 February 2022 about an extension to the contract because it was recognised that the claimant had missed a lot of training. The contact was to be extended by six months until 16 March 2023. This was to reduce stress, allow the claimant to focus on the treatment and progress his training when he was able to do so. Mr Blair confirmed the extension in writing.

32. The claimant was due to complete his HNC qualification in May 2022. Around February 2022 the claimant was told by the college that he had an extra year to complete the course.

33. The claimant continued to WFH. He felt it was difficult to learn as he was not able to go on site. He continued to feel anxious and isolated.

34. In June 2022, the claimant decided to stop the treatment. This was a significant decision given that he had not completed the recommended two-year programme. The claimant felt that this might allow him to focus on his

training as he would need less time to recover from the fatigue he experienced after the treatment.

35. The claimant was referred to OH for an update on his current health status and for advice on information requested by the respondent. He participated in an OH assessment on 22 July 2022.

36. A "final" OH report was issued to the respondent (the July 2022 OH report). The claimant was not absent from work. He remained fit for work with recommended adjustments/restrictions.

37. In addition to the current adjustments, OH recommended:

    a. A re-referral to an OH physician to consider the need for a permanent WFH role.

    b. A DSE assessment for a more supportive chair.

    c. A stress risk assessment.

    d. Possible modifications to absence management triggers.

    e. Attending medical appointment during working hours.

    f. A flexible pace of work to reflect variable stamina and concentration.

    g. Continued to permit breaks as needed if fatigued.

38. In response to additional questions, on permanent adjustments, posed by the respondent, OH reiterated the recommendation at paragraph 37a above. In relation to whether five half days or three full days in the office was achievable to support the claimant's development and training/learning from the team, it was recommended that online training be considered or his permission for a colleague or trainer to visit his home to provide training and support.

39. On 29 July 2022, Mr Blair invited the claimant to a "formal medical capability meeting" on 9 August 2022 (the August meeting) to discuss the current adjustments and the July 2022 OH report. The claimant was advised of his

right to be accompanied. Mr Blair knew that a referral to an OH physician was scheduled for 15 August 2022.

40. At the August meeting, conducted by Mr Blair, the claimant was accompanied by a trade union representative. An employee relations advisor took notes. Mr Oswald was present to review any conclusion given Mr Blair's imminent departure from the respondent's employment.

41. The discussion focussed on the July 2022 OH report. Mr Blair said that he wanted to review the current WFH requirements on a full-time basis and the impact that this was having on the claimant's training and development.

42. The respondent's view was that the claimant not being able to attend the office or site was detrimental to his development and ability to carry out his job. The claimant felt that it was hard to say what days he could work. Sometimes he could get fatigued quickly. It was intermittent. The claimant said that he had done the work on Teams that he had been asked to do.

43. Mr Blair considered that the potential adjustment of sending different colleagues/trainers to the claimant's home each day to provide training was unsustainable in the long term as it would make employees feel uncomfortable. He questioned how the claimant, and his family, would feel about it. The trade union representative asked why work could not continue on Teams. The claimant said he had been working on Teams without a problem. He attended meetings remotely when invited and he was able to do so.

44. Mr Blair referred to the competency matrix as support that the claimant was not where he should be at this stage in his training and that home working was detrimental. The claimant explained that he had little guidance or support on this issue. It was agreed that the claimant did not have sufficient experience to become a design and planning assistant. Mr Oswald said that a lot of items were technical and required the claimant to be on site to appreciate the scale and seriousness of the tasks. Mr Oswald considered that trainees needed to be fully engaged with the team. The claimant was also questioned about specific tasks that Mr Blair considered the claimant

had not carried out. Mr Blair said that the technical roles are hard to carry out remotely and the claimant should consider alternative roles more suited to WFH.

45. On 15 August 2022, the claimant had an OH assessment. An interim report was issued on 24 August 2022 (the August 2022 OH report). The update recorded that the claimant had stopped taking the treatment. He continued to suffer a lesser degree of fatigue which was mitigated by taking five-minute breaks, and concentration levels had improved. He felt able to attempt a return to work in the office. The claimant felt unsupported by the respondent and referred to the August meeting where he felt disappointed and distressed about the questioning in relation to potential reasonable adjustments.

46. The August 2022 OH report recommended a review in four weeks to discuss further developments. The recommendations included:

    a. A workstation assessment in the office and at home.

    b. A phased return to work in the office.

    c. A work pattern of two non-consecutive days in the office and three non-consecutive days at home.

    d. Allowing flexibility if the claimant felt unwell on a particular day to attend the office.

    e. An individual stress risk assessment.

    f. Regular meetings with his manager to discuss difficulties and support.

47. The August 2022 OH report was not available before Mr Blair departed. Mr Oswald contacted Maureen O'Brien, executive secretary to obtain the report which was received by the respondent on 24 August 2022.

48. Mr Oswald had not anticipated the claimant returning to the office. Although they discussed the August 2022 OH report on 31 August 2022, Mr Oswald did not comment on the reference to the claimant's distress at the August

meeting. Mr Oswald emailed the claimant to confirm that a workstation assessment and stress assessment would be arranged. A phased return to work pattern was agreed which included the claimant's attendance in the office every Monday and Wednesday. The claimant would complete a work diary which would be completed on a Friday for discussion on the Monday and four weekly review meetings.

49. In September 2022, the respondent appointed a design and management trainee on a four-year management training contract.

50. The workplace assessment was arranged on 5 September 2022 and took place on 15 September 2022. A report was received, and the purchase of the recommended equipment was authorised by Mr D Blair. The equipment was installed in the claimant's house at the end of September 2022.

51. At the beginning of October 2022, the claimant indicated that he would return to the office. The equipment required to enable the claimant to do so was in place by the end of October 2022. The claimant returned to office working on a phased basis. The equipment helped take the pressure off the claimant's muscles and alleviated some pain.

52. On 1 November 2022, Martin Findlay joined the respondent as technical director. He met the claimant on 12 December 2022. The claimant discussed his illness; the contentious decision to stop the treatment; and how this was allowing him to attend the office more often and he felt overall much better. Mr Findlay decided that it would be a fresh start and he would continue to work with the claimant.

53. The claimant returned to college in December 2022 to complete the graded unit.

54. Mr Findlay had a positive meeting with the claimant on 21 December 2022. They agreed that the current work pattern should continue. The competency framework was discussed. Mr Findlay said that the claimant was not ready to progress to a design and planning executive role. The focus was to be on development and performance as a trainee. Mr Findlay proposed an

informal performance management plan to set short term goals to be actioned in the new year. A meeting was to be arranged to discuss tasks and what was expected of the claimant. Mr Findlay also agreed to arrange the stress risk assessment.

55. On 12 January 2023, the respondent announced to staff a companywide restructuring change programme as a result of economic downturn. Mr D Blair sent an email to staff in the West Scotland business unit at 11:48 on 12 January 2023 advising that employees who were at risk of redundancy as a result of the proposed changes had been informed and there were no other proposed changes in the business. To mitigate potential redundancies vacant positions were to be removed and the respondent looked "to end temporary contracts where it is appropriate to do so".

56. At 12.30pm Mr Findlay made an announcement to staff that should the proposals go ahead it was anticipated that one redundancy would be made from the team: the role of site engineer soils. Mr Findlay had spoken to the affected employee at 9.30am. Consultation was taking place. Seven vacant posts were removed from the business structure. The site engineer soils post was made redundant.

57. The claimant was on annual leave when the announcement was made. On his return to the office on 18 January 2023, Mr Findlay spoke to him to reassure the claimant that he was not to worry; he was not at risk of redundancy.

58. On 1 February 2023, Mr Findlay sent the stress risk assessment template to the claimant for completion. They met on 8 February 2023 to conduct the stress risk assessment. Mr Finlay completed the stress risk assessment on 13 February 2023 and sent it to the claimant. The recommendations included regular breaks; weekly catchups with Mr Oswald; utilising the employee assistance programme; reaching out to Mr Findlay if the claimant was unable to speak to Mr Oswald; and for the claimant to reach out to colleagues for further support, if needed.

59. On 14 February 2023, Mr Oswald carried out the claimant's performance review. It was a positive meeting. The claimant was progressing and was seen to be improving. Mr Oswald set out five objectives for completion over the next six months: two for completion within three months and three for completion within six months. The objectives relating to the contract were intended to stretch the claimant. The meeting boosted the claimant's confidence. He left feeling encouraged and motivated.

60. The claimant received a letter from Mr Findlay dated 14 February 2023, inviting him a meeting to discuss the completion of his management trainee programme which could lead to dismissal (the February meeting). The claimant was confused given his previous discussions with Mr Oswald and Mr Findlay. The claimant spoke to his trade union representative who was shocked; he did not know to what the February meeting related.

61. Before the February meeting, Mr D Blair told Mr Findlay to terminate the claimant's employment. The contract was ending and there was no vacancy available. Mr Findlay was provided with a semi-populated document which was to form the basis of the meeting note which was to be completed by a notetaker during the February meeting.

62. At the February meeting a trade union representative accompanied the claimant. Mr Findlay used the semi-populated document as a script. Mr Findlay summarised the timeline. The claimant said that other trainees had been given a six-month extension because of COVID-19. The notetaker said that this would need to be confirmed. Mr Findlay advised the claimant that he was to be given four weeks' notice of termination of employment and that his employment therefore ended on 21 March 2023, unless he secured alternative employment with the respondent before then. Mr Findlay advised that there was not a role for the claimant within the business due to redundancies. The trade union representative proposed that the claimant be kept on until he completed his trainee programme. The claimant had not had the same experience as other due to his health condition. Mr Findlay said that the respondent would pay for the claimant's college course up to 30 April 2023. The claimant was asked whether he wished to work his notice

or be paid in lieu. The claimant said that he wished to work his notice. The claimant was devastated.

63. Mr Findlay telephoned Mr Oswald on the evening of 21 February 2023 to advise that the claimant had been given notice. Mr Oswald had not been previously consulted. He knew it was not Mr Findlay's decision. Mr Oswald thought the decision was probably taken by someone at head office.

64. The claimant attended work the following day. He was speaking in confidence to two colleagues with whom he had a good relationship. When Mr Nelson arrived, they stopped talking. Mr Nelson discussed this with Mr Oswald in a corridor. This conversation was overheard by one of the claimant's colleagues.

65. Mr Oswald spoke to the claimant. Mr Oswald was sorry that the contract was not being extended and offered continued support during his notice period. The claimant formed the impression that his situation was common knowledge. He had a panic attack and went home.

66. The claimant telephoned his GP the following morning for a fit note for a week or two. Mr Findlay telephoned the claimant. The claimant attempted to explain what had happened the previous day. Mr Findlay said that he had not made anyone aware that the claimant's contract was being terminated. He acknowledged that the claimant was distressed. Mr Findlay decided that the claimant should not work his notice and receive a payment in lieu of notice.

67. By letter dated 23 February 2023, Mr Findlay confirmed to the claimant that the respondent was unable to extend the contract following his four-year service due to current cost challenges and its impact on the business. The contract was ending on 21 March 2023. The claimant was being paid in lieu of notice. The claimant was advised of his right of appeal.

68. The claimant appealed the decision. The claimant indicated that he felt the reasons for his dismissal was due to his disability. Gavin Hamilton was appointed to conduct the claimant's appeal.

69. The appeal meeting took place on 14 April 2023. A trade union representative accompanied the claimant. Afterwards Mr Hamilton emailed Mr D Blair who confirmed that the claimant's position was not affected by the change programme but due to the contract expiring and there not being a vacancy available in the technical team.

70. Mr Hamilton decided not to uphold the claimant's appeal. He concluded that there was no evidence that the decision to terminate the contract was due to the claimant's disability. This was confirmed in a letter sent to the claimant on 28 April 2023.

71. The claimant has been certified as unfit to work since the termination of the contract. He has not returned to college.

Observations on witnesses and conflict of evidence

72. The Tribunal appreciated that during the relevant period the claimant was seriously unwell. While he was not always able to recall specifically when certain discussions took place, his evidence was supported by the information provided during OH assessments.

73. The Tribunal disagreed with Mr Hughes' submissions about the claimant's credibility in raising but then not insisting on the harassment claim. The claimant was legally represented throughout the proceedings. None of the respondent's witnesses were parties to the proceedings. Given the time limits for presenting claims, it is not unusual for claims to be raised and withdrawn once further information is provided during the proceedings. The same could be said about preliminary issues taken by respondent which were not insisted upon as the evidence progressed.

74. Other than Mr Blair, the respondent's witnesses are employed by the respondent. The Tribunal was in no doubt about their allegiance to and belief in the respondent. For example, even though Mr Oswald did not know who decided to terminate the claimant's employment, he was very confident that "TW" never discriminated.

75. In the Tribunal's view there was vertical management where employees followed, without question, the instruction of their line manager/head office. For example, Mr Findlay was told to dismiss the claimant; Mr Oswald was told to contact the claimant's college; if employees were instructed to visit the claimant's home for training/supervision they would do so. Each tier of management had its place and responsibilities. For example, Mr Blair and Mr Findlay said that technical directors would not have regular direct contact with management trainees, that was the responsibility of the line manager. The fact that they dealt with the claimant directly was seen as significant. Mr Hamilton only spoke to Mr D Blair because, as a managing director, he was the person with whom Mr Hamilton had contact even though on the face of the documents the decision was taken by Mr Findlay.

76. The Tribunal considered that Mr Oswald was out of his depth when the claimant returned to work in June 2020. This was not a criticism of Mr Oswald who undoubtedly had many priorities given the ongoing COVID-19 restrictions. Mr Oswald engaged with HR about the claimant's restricted hours but there was no attempt to involve OH even when it was proposed that the claimant return to full time hours in September 2020. The Tribunal felt that the claimant was out of sight and out of mind until September 2021 when he was sick absent. The Tribunal formed this view because of the minimal engagement and Mr Oswald's evidence that trainees needed to take the initiative and engage with the team.

77. The Tribunal felt that Mr Nelson was a partial witness who, despite being the claimant's mentor, did not appear to have been particularly supportive while the claimant was employed and was noticeably at the centre of the incident on the claimant's last day at work. Against this background the Tribunal found his evidence about the timing and his continued interest in the claimant's college work unconvincing.

78. The claimant's evidence was that he complained repeatedly to Mr Oswald and Mr Blair about being uncomfortable using the dining room table and chair for work. Mr Oswald was aware that the claimant would work from his bed as this was more comfortable. Mr Oswald told the claimant that if he

was unwell he should not be working. The Tribunal did not doubt that the claimant told Mr Oswald about the discomfort he was feeling. The Tribunal's impression was Mr Oswald did not initially appreciate that the claimant was working from his bed due to not having a suitable workspace, rather than being ill. However, the Tribunal considered that from the December 2021 OH report the respondent knew that the claimant was substantially disadvantaged using the dining table and chair given the muscular skeletal symptoms he may be experiencing.

79. Mr Blair became directly involved with the claimant in September 2021. The Tribunal accepted that Mr Blair's direct involvement was unusual and out of his concern for the claimant, who was proposing to return to work full time. Given that Mr Blair was responsible for the technical team and Mr Oswald reported directly to him, the Tribunal considered that it was highly likely that before contacting the HR business partner, Mr Blair would be aware from the previous appraisals that he had signed, and from Mr Oswald, how far the claimant was behind in the training programme. The Tribunal considered that as Mr Blair did not know if there was precedent for an extension, he would have thought carefully what length of extension was required before contacting HR.

80. The Tribunal considered it strange that Mr Blair made these enquires in September 2021 to take the element of worry away from the claimant, then did not act upon them until February 2022. The relationship between Mr Blair and the claimant became awkward in November/December 2021. The Tribunal's impression was that Mr Blair considered that he was going above and beyond for the claimant who, he felt, did not appreciate it. The Tribunal was unconvinced that Mr Oswald had any input into the length of the extension. Mr Oswald did not mention it in his evidence. The Tribunal felt that Mr Blair was engaging directly with the claimant and would not feel the need to "consult" with Mr Oswald.

81. Mr Blair's evidence was that he could not recall seeing the December 2021 OH report and if he had known a DSE workstation assessment and a stress identification and management meeting had been recommended, he would

have arranged for this to be actioned. The claimant said that he discussed the report with Mr Blair. Mr Oswald believed that Mr Blair had provided the report to him. The Tribunal had no doubt that Mr Blair had received the December 2021 OH report but felt that he gave it cursory attention.

82. The Tribunal considered that from December 2021, Mr Blair's attention towards the claimant waned. The Tribunal formed this view because Mr Blair delayed reassuring the claimant about the extension; gave little or no consideration to the December 2021 OH report; notwithstanding the lack of progress between September 2021 and February 2022 (due to the claimant's sick absence) the contract was only extended six months, rather than a year as initially proposed; and Mr Blair had little direct involvement until the August meeting, following which he was leaving the business.

83. In relation to the extension of the contract, the claimant said that it was related to COVID-19 restrictions, and other trainees were offered an extension although they did not all need it. The Tribunal thought it highly likely that there were discussions within the business about the impact of COVID-19 restrictions on training programmes, particularly as other trainees mentioned this to the claimant, and when the claimant raised this at the February meeting the notetaker from HR needed to confirm the position. However the Tribunal accepted Mr Blair's evidence that the reason for the extension of the contract was because the claimant had missed a lot of training.

84. The Tribunal had difficulty understanding the respondent's procedure for obtaining OH reports. The managing attendance policy was not produced. Under the contract the respondent had the right to require the claimant to undergo medical examination. None of the referrals to OH was produced. The referring manager for all but the August 2022 OH report was Ms O'Brien, executive secretary. Mr Blair was sent copies of the OH reports obtained by Ms O'Brien. It was unclear whether she sent copies to anyone else. Mr Oswald saw all the OH reports but he could not recall how they were cascaded.

85. From the email correspondence around 23/24 August 2022, Mr D Blair was being copied information about the August 2022 OH report as Mr Blair had left the respondent's employment. The Tribunal did not know if Mr D Blair read the August 2022 OH report or the extent of Mr D Blair's involvement, if any, in discussions about the claimant's return to the office in late 2022. He did approve the purchase of the auxiliary aids.

86. It was clear that it was not Mr Findlay's decision to dismiss the claimant; he was told to do so by Mr D Blair. Mr Oswald's gut feeling was that the decision was taken by someone above Mr D Blair: "head office". Mr Hamiliton contacted Mr D Blair at the appeal stage for confirmation that the contract was terminated when it expired, and the claimant's position was not redundant as part of the Change Programme. While Mr D Blair confirmed that the claimant's position was not affected by the Change Programme but "due to the expiry of the contract and there being no vacancy within the technical team", the Tribunal was none the wiser whether this was Mr D Blair's decision or the decision of someone at "head office".

87. Mr D Blair did not give evidence. There was no explanation for this or a request for him to do so. While documents relating to the Change Programme were eventually produced during the hearing, they did not assist the Tribunal. The respondent's evidence was that the contract ended. While the respondent was looking to "end temporary contracts where it is appropriate to do so" there was no evidence about what, if anything was in the decision maker's mind about whether the contract was a "temporary contract" given that it had already been extended, and if so, whether it was appropriate to terminate in circumstances where the training had not been completed because of the claimant's illness and therefore he was not in a position to apply for a position in the design and planning team, even if it had existed.

88. In relation to the conversation between the claimant and Mr Findlay on 23 February 2023, the claimant's position was that he wanted to work his notice. He did not ask or agree to receiving a payment in lieu of notice. Mr Findlay's evidence was that it was his preferred route for the claimant to work his

notice and it was the claimant who asked to be paid in lieu. On 21 February 2023 it was agreed that the claimant would work his notice. The Tribunal did not doubt that it would be challenging for him to work his notice, but working was important to the claimant, and he needed support and supervision from colleagues to complete his grading unit. The incident on 22 February 2023 was upsetting for the claimant and no doubt frustrating for Mr Findlay who was dealing with a team who were already unsettled following the Change Programme. The Tribunal considered, given the wording in the termination letter, that it was more likely that Mr Findlay concluded that in the circumstances it was more expedient for the claimant not to return to the office.

Discussion and deliberations

89. The Tribunal referred to the remaining list of issues. Deliberations started with the discrimination claims.

Direct discrimination and harassment

90. Given that the discrimination claims under sections 13 and 26 of the EqA were not insisted upon, the Tribunal dismissed these claims under rule 52 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

Failure to comply with reasonable adjustments

91. The Tribunal referred to section 20 and 21 of the EqA. Employers are required, when the duty is triggered, to make reasonable adjustments to alleviate disadvantages suffered by employees with disabilities. The duty under section 20 comprises three requirements, two of which are relied upon by the claimant: the application of two PCPs and the lack an auxiliary aid causing substantial disadvantage.

92. The PCPs relied on by the claimant are:

a. Those seeking to enhance their skills and experience should do so through direct contact with their colleagues in the working environment (PCP 1).

b. Those coming to the end of their training programmes who had not been able to find alternative employment with the respondent would be dismissed (PCP 2).

93. The Tribunal referred to the list of remaining issues and considered each PCP in turn, before moving onto consider the lack of an auxiliary aid.

Did the respondent apply PCP 1 to the claimant?

94. Mr Hughes argued that the respondent did not apply PCP 1 to the claimant. He also said that it was the nature of the job, rather than a PCP, which made it desirable for a trainee, in the claimant's position, to have direct contact with colleagues in the working environment and essential for such a trainee to carryout site visits. The respondent permitted him to work from home for lengthy periods.

95. PCP is not defined in the EqA. The EHRC Code of Practice in Employment states that the terms should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions.

96. The Tribunal acknowledged that during the COVID-19 restrictions trainees worked from home. Most returned to hybrid working in April 2021. The claimant was allowed to continue WFH and liaised remotely with senior colleagues. The possibility of permanent WFH was raised in the July 2022 OH report. At the August meeting the respondent made clear that a design and planning trainee needed to go out on site with a more senior colleague to see the key elements of design and planning. The Tribunal considered that this was a practice that denotes how things had and will generally be done. While the claimant was WFH under remote supervision, the items on competency matrix in July 2022 required the claimant having direct contact with colleagues in the working environment, particularly on site. Accordingly

the Tribunal concluded that PCP 1 was a practice and it was applied by the respondent to the claimant.

Did PCP 1 put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

97. "Substantial disadvantage" is defined as something that is "more than minor or trivial". It is important for the Tribunal to identify the nature and extent of any substantial disadvantage suffered by the claimant.

98. The claimant was unable to attend the office between March 2020 and November 2022. Other management trainees were in a similar position until April 2021, when they returned to work on a hybrid basis. From then they, unlike the claimant, had in person contact with and guidance from senior colleagues. They progressed with their training programmes. While the claimant attended meetings remotely, he had no in person contact with his mentor or other colleagues. He could not attend sites or go through plans with the group "on the table". He was behind where he should have been on the training programme. The Tribunal considered that PCP 1 did put the claimant at a substantial disadvantage.

Did the respondent know or ought it to have known that the claimant was likely to be put at a substantial disadvantage by PCP 1?

99. The respondent knew of the claimant's disability from September 2020. The respondent raised with OH in July 2022 whether the claimant could return to the office five half days or three full days for continued support and development, training and learning from the team. The respondent was aware that the claimant was behind in the competency framework. It was difficult for him to reach out for new opportunities and engage with colleagues remotely. The Tribunal concluded that the respondent did know that PCP 1 was likely to put the claimant at a substantial disadvantage.

Did the respondent take such steps as were reasonable to avoid that disadvantage?

100. It was necessary for the Tribunal to identify tangible steps that should have been taken to remove the disadvantage rather than it simply being a failure by an employer to consider making adjustments.

101. The claimant says that the respondent could have permitted colleagues to attend his home or provide some other means of support or mentoring, to assist the claimant to enhance his skills and experience. This was a recommendation from OH in July 2022.

102. The Tribunal noted that the OH recommendation was in response to the respondent asking about the claimant's return to the office in the context of continued support and learning from colleagues. The July 2022 OH report did not suggest that the claimant wanted the recommendation. The Tribunal's impression from the August meeting was that from the claimant's perspective he was coping with the work, a lot of which could be conducted on Teams. The claimant attended meetings remotely when invited and when he was able to do so, given how quickly he could become fatigued. The Tribunal did not consider that the claimant wished colleagues to come to his home. Had that been so, the Tribunal considered that, given his interjection, the trade union representative would have explored this, even as a short-term proposal. The Tribunal felt that if the recommendation was in place, it would have put the claimant under pressure to be available when he might otherwise not be fit especially if more than one colleague was visiting. The Tribunal concluded that it was not a reasonable adjustment.

Did the respondent apply PCP 2 to the claimant?

103. The respondent agreed that it applied PCP 2 to the claimant.

Did PCP 2 put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

104. It was undisputed that the claimant had failed to achieve the level of progress that the respondent expected, because of his disability. He lacked the skills and experience that other trainees had acquired, and this would have made

it more difficult for him to obtain alternative employment. Accordingly the Tribunal considered that PCP 2 put the claimant at a substantial disadvantage in comparison with people who were not disabled.

Did the respondent know or ought it to have known that the claimant was likely to be put at a substantial disadvantage by PCP 2?

105. Mr Blair had already extended the contract for this reason in February 2022. Accordingly, the Tribunal considered that the respondent knew that the claimant was likely to be put at a substantial disadvantage by PCP 2.

Did the respondent take such steps as were reasonable to avoid that disadvantage?

106. In September 2021, Mr Blair considered that the claimant was a year behind where he ought to be. There was no indication then that there would have been any issue to extending the contract by a year to September 2023. The claimant was absent for two months between September and November 2021. He would therefore have fallen further behind. The claimant had not returned to the office. At the August meeting, the contract had seven months remaining, and the claimant was not where the respondent needed him to be on the training programme. Mr Blair was concerned that if the claimant continued to WFH, he would not be able to complete the training and suggested the claimant seek other opportunities. At the performance review in February 2023 there was no suggestion that the claimant was going to complete the training by mid-March 2023. To the contrary, Mr Oswald's opinion was that the objectives that he set, which were intended to stretch the claimant, would take at least six months.

107. The respondent accepted that it would have been a reasonable adjustment to extend the contract by between six and 12 months from March 2023 to enable the claimant to acquire qualifications, experience and skills. Mr Hughes submitted that given the economic situation prevailing in the respondent's business at the time, it was not reasonable for the respondent to have extended the training programme.

108. The Tribunal accepted that the respondent faced a challenging trading situation in early 2023, however given the respondent's operating profit in 2022, the Tribunal did not consider that the cost of extending the claimant's contract for a few months was too much of a financial cost for the respondent to bear.

109. The Tribunal agreed with Mr McGrade's submission that by extending the claimant contract to 31 December 2023 the substantial disadvantage would be removed or at least alleviated. It would have allowed the claimant to achieve the level of progress that the respondent expected on completion of the training by obtaining the skills and experience that other trainee had acquired. This would have enabled the claimant to find alternative employment with the respondent or another employer. Accordingly the Tribunal concluded that the respondent did not take such steps as was reasonable to avoid the disadvantage.

Was the claimant placed at a substantial disadvantage because of the absence of an auxiliary aid: workstation equipment?

110. The Tribunal considered that the December 2021, the July 2022 and the August 2022 OH reports established that the claimant was placed at a substantial disadvantage because of the absence of a workstation equipment. He experienced muscular skeletal symptoms which cause him to work from his bed.

Did the respondent take such steps as was reasonable to provide the workstation equipment?

111. The December 2021 OH report recommended a DSE workstation assessment. The respondent did not make an ergonomic referral until 5 September 2022. Mr Blair's evidence was that he could not recall seeing the December 2021 OH report and had he known that a workstation assessment had been recommended he would have arranged for this to be actioned. Mr Hughes submitted that the delay was in part due to the claimant's lack of engagement and reluctance to have persons visit his home.

112. The Tribunal was unconvinced by this submission. While the claimant had been shielding due to COVID-19, that ended in late 2021. Understandably he would be cautious about the risk of being infected with COVID-19 but having an assessment would not have been intrusive. It would have been of considerable benefit to the claimant mitigating muscular skeletal discomfort. The claimant wanted to work. He took significant decisions about his ongoing treatment in 2022 so that he would be less fatigued afterwards. The Tribunal concluded that the respondent was in breach of its obligation to make reasonable adjustments.

Discrimination arising from disability

113. The Tribunal referred to section 15 of the EqA which provides protection from discrimination arising from disability. The first element of this claim is that the claimant has to have been treated unfavourably. The EHRC Employment Code states that this means that the disabled person must have been put a disadvantage. The threshold required to engage section 15 is relatively low.

114. The claimant says that he was treated unfavourably by being dismissed and not being permitted to work his notice. The Tribunal consider these in turn.

Did the respondent treat the claimant unfavourably?

115. The claimant says that he was treated unfavourably because he was dismissed. The respondent did not challenged this. The Tribunal considered that dismissal was unfavourable treatment.

Was the dismissal because of something arising from his disability.

116. The Tribunal asked whether the “something” that led to the claimant’s dismissal had a connection to his disability.

117. The respondent knew, in relation to Pompe disease, that the claimant was a person with a disability. The claimant says that his performance and ability to complete his HNC arose from his disability. The Tribunal asked if this was the reason for his dismissal.

118. There requires to be a causal connection between the claimant's dismissal and his performance and ability to complete his HNC. The Tribunal's difficulty was that it did not know who the decision maker was and what they knew or did not know at the time.

119. Mr McGrade invited the Tribunal to draw inferences from Mr Oswald's sense of frustration in spending so much time with the claimant putting reasonable adjustments in place and the remarks at the August meeting about the respondent not being satisfied about the claimant's progress. The Tribunal considered that neither Mr Oswald nor Mr Blair took the decision to dismiss the claimant. Mr Findlay was supportive of the claimant and helped identify areas of work still to be covered in his training programme. Mr Findlay had no input in the decision to dismiss and appeared unaware in February 2023 of Mr Oswald's remarks in claimant's performance review. While Mr Hamilton emailed Mr D Blair, the Tribunal did not know if Mr D Blair made the decision, and other that approving the purchase of the claimant's workstation equipment, the extent of his knowledge about the claimant's disability.

120. Accordingly, the Tribunal was not satisfied that the burden of proof shifted to the respondent and that the dismissal was because of "something" arising from his disability.

Did the respondent treat the claimant unfavourably by not allowing him to work his notice?

121. The claimant says that he was not permitted to work his notice having asked to do so. This was in the Tribunal's view unfavourable treatment.

Was not being permitted to work his notice because of something arising from his disability?

122. The "something" relied on by the claimant was the deterioration in his health because of his disability. The Tribunal found that Mr Findlay decided to make a payment in lieu of the notice because of the deterioration in the

claimant's health. The Tribunal was satisfied that the claimant was treated unfavourably because of something arising from his disability.

Can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

123. The respondent said that the claimant was provided with a PILON instead of working his notice in light of struggling with health issues. While the Tribunal could understand the respondent not wanting to place the claimant under further stress, the Tribunal did not consider that deciding to make a PILON for the notice period was a proportionate means of achieving a legitimate aim. The parties had already agreed that it was to both parties' benefit for the claimant to work during his notice. The claimant's fit note did not cover the entire period of notice. The respondent could have allowed the claimant to returned to work after his short sick absence. The Tribunal concluded that the respondent had discriminated against the claimant because of something arising from his disability.

Unfair dismissal

124. The Tribunal then turned to the unfair dismissal claim. The claimant relied on regulation 8(1) of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 to argue that his contract was no longer a fixed term contract. From Mr Hughes' submissions the Tribunal understood the respondent to accept say that this was "irrelevant" because there was a dismissal which the respondent must show to be fair.

125. The Tribunal referred to section 98 of the ERA. The onus of proof is on the respondent to show the reason for dismissal.

What was the reason for dismissal?

126. The respondent initially asserted that the reason was some other substantial reason, and also submitted that the reason was redundancy.

127. In January 2023, the respondent was implementing the Change Programme. The claimant was told by Mr Findlay in January 2023 that he was not part of

that programme and was not at risk of redundancy. This was also confirmed by Mr D Blair in his email to Mr Hamilton following the appeal hearing.

128. As part of the Change Programme, the respondent was looking "to end temporary contracts where it is appropriate to do so". The Tribunal's impression was that the respondent considered that the contract was temporary but appeared to have had no consideration about the effect of the contract exceeding four years. There was no evidence about what factors, if any, were taken into consideration in deciding whether it was appropriate to end the contract.

129. The Tribunal did not know who took the decision to dismiss the claimant. It might have been Mr D Blair, but his failure to attend the hearing, and the comments made by Mr Oswald about the decision being taken by head office, cast doubt on this. As set out when making observations on the evidence, the Tribunal considered that it had insufficient information about the facts and beliefs known to the decision maker which caused them to dismiss the claimant.

130. The Tribunal was not satisfied that the respondent had proved the reason for dismissal and that it was a potentially fair one.

Was the decision to dismiss reasonable?

131. In any event the Tribunal considered that even if there was a potentially fair reason, the respondent did not satisfy the reasonableness test under section 98(4) of the ERA.

132. Mr Findlay who was ostensibly the dismissing offering was told by Mr D Blair to issue the invitation to the meeting on 21 February 2023. HR provided Mr Findlay with a pre-populated script which showed that the claimant was to be dismissed. The decision was pre-determined. While the claimant was offered a right of appeal, the Tribunal felt that this was a tick box exercise.

133. There was no consultation with the claimant. The Tribunal considered that any reasonable employer would have ensured that the decision maker knew that the claimant was disabled, he fallen behind his training because of his

disability and that his line manager had just advised him that it was likely to take at least six months for him to complete the majority of the objectives that had been set, to enable him to satisfactorily complete this training. There would have been discussion about the delay in putting workstation equipment in place; and to what extent the arbitrary extension given in February 2022 accurately reflected the additional time that was needed for the claimant to complete his training. There would also have been discussion about whether the claimant could remain in post even though at that stage there were no vacancies available when his training completed.

134. The Tribunal concluded that the dismissal was unfair.

S MacLean
Employment Judge

11 March 2024
Date

Date sent to parties **13 March 2024**