EMPLOYMENT TRIBUNALS

Claimant: Mr A Rueda-Cortes

Respondent: Biffa Municipal Ltd

HELD AT: Manchester **ON:** 4, 5 and 6 October 2017

BEFORE: Employment Judge Ross
Ms C S Jammeh
Mr S Stott

REPRESENTATION:

Claimant: Mrs Rueda-Cortes (claimant's wife)
Respondent: Mr Williams, Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant's claims for direct disability discrimination, unfavourable treatment because of disability, disability related harassment and failure to make reasonable adjustments in relation to allegations 3,5,6,8 and 8 as identified below (and in the schedule of allegations at pages 60-62 of the bundle) fail and are dismissed.

REASONS

1. The claimant was employed by Manchester City Council from 1998 and then transferred to the respondent when the council outsourced its street cleaning. At the time relevant to these claims he was working as a street cleaning operative. He remains employed by the respondent although he has been absent on sick leave since June 2016. The claimant has hearing difficulties, a back condition and pain in his feet. He is Spanish, speaking English as a second language. He is illiterate in both Spanish and English. He brings claims of disability discrimination.

2. The claimant had the benefit of an interpreter during the Tribunal hearing appointed by the Tribunal service. He was represented throughout by his wife.

3. At the outset of the hearing the Tribunal used a schedule of allegations which had been drawn up by the respondent, mindful of the overriding objective, in an effort to understand the claims being brought by the claimant. The schedule was discussed and adopted at the case management hearing before Employment Judge Holmes on 10 April 2017 (pages 60-62). It was not disputed that by the time of the hearing before this Tribunal allegations 1, 2, 4 and 7 from that list had been withdrawn.

4. There remained a lack of clarity about the remaining allegations in the sense it was unclear whether the claimant was bringing a claim for discrimination pursuant to s13 and/or s15 and/or s20-22 Equality Act 2010. At the outset of the Hearing the Tribunal spent time with the parties identifying the legal claims and, with the consent of the respondent, formulating the basis of the claimant's claim for failure to make reasonable adjustments. These are identified below in relation to each allegation.

5. So far as the issue of disability is concerned, the claimant said he was a disabled person within the meaning of section 6 Equality Act 2010 by reason of a foot condition, his back condition and his hearing loss. The respondent agreed that he was a disabled person by reason of his feet and his hearing loss at the relevant time. The respondent disputed they had knowledge that his back condition caused him to be a disabled person or that he was a disabled person by reason of his back condition throughout the relevant period. The earliest period of time that the respondent concedes the claimant may have been a disabled person by reason of his back condition is after the end of December 2016.

6. We heard from the claimant. For the respondent, we heard from Mr Grahame, Mr Salter, Mr Hinds, Mr Nadat and Mr Hodkinson.

The Facts

The Tribunal found the following facts:

7. The claimant was employed by Manchester City Council from 6 January 1998. He originally worked in grounds maintenance at Heaton Park. During that period, he developed hearing problems which resulted in the claimant needing to be redeployed on medical grounds. The claimant, when he worked at Heaton Park, was employed on grade 4. There is no dispute that when he was redeployed to Manchester City Centre to work in Street Cleansing Services his pay was protected. It is not disputed that his grade as a street cleansing operative would normally be grade 3. The claimant's contract of employment is at pages 88-94 of the bundle.

8. There was no dispute that a pay protection policy at pages 151A-E formed part of the claimant's contract of employment. Paragraph 2.2 of the policy (page 151C) states:

> "The purpose of pay protection is to mitigate the impact of reductions in pay where an employee's contractual pay is diminished as a result of service redesign, an "m people" move and/or job evaluation. It will also apply where employees need to move roles through medical incapacity."

9. At paragraph 4.3 the policy states:

> "Individuals will be entitled to have their existing pay rates protected under such frozen pay arrangements for a maximum period of three years from the date they are appointed to the new post or until such time as the salary grade ceiling for the new post (if determined by National pay awards) exceeds the frozen rate of pay if that is earlier."

10. There is no dispute that the claimant received protection to his pay not just for three years after his transfer (which occurred in 2008) but until the issue came to light with the respondent, many years later in 2016.

11. The claimant was automatically transferred from Manchester City Council to Biffa Municipal Limited on 4 July 2015 as part of a TUPE transfer when the council outsourced the City's street cleansing to a private contractor, the respondent.

12. We accept the evidence of Mr Nadat that the usual policy of Manchester City Council when they had protected pay for medical reasons was to review the matter at the end of three years to consider whether the employee should remain in the transferred role. Mr Nadat told us he was unaware of any case where pay protection was extended for medical reasons beyond three years.

13. There is no dispute in this case that this had not occurred. The claimant's review was overlooked by the Council. No one from the Council had noticed the period of three year pay protection was at an end. Therefore, although the three years pay protection period was over, the claimant working as a street operative in Manchester City Centre continued to be paid as a grade 4, whereas his colleagues were all paid at grade 3.

14. We find that the old Manchester City Council rotas for the street cleaning operatives had expired in September/October 2015. We find that Mr Grahame and Mr Hodson-Ridgeway had created a new rota whereby all employees in the claimant's team, not just the claimant, who worked weekends would work four weekends on and four weekends off. We accept the respondent's evidence that street cleaners in the team affected by this rota change worked in pairs and all the employees (four) were affected by the change in shift pattern which occurred from December 2015.

15. We find there was a complaint about the new shift pattern and as a result Mr Hinds moved all employees including the claimant back onto the old rota system with the moving shift pattern as on the old rotas (page 206).

16. We find that the respondent, Biffa, decided to make changes to the way the street cleansing service operated in Manchester. We find these changes led to a change in existing working patterns and required the introduction of new shifts and shift patterns for all the street cleansing employees in Manchester.

17. We accept the evidence of Mr Nadat and the respondent's witnesses that the reason for the change in the rota was that Manchester City Centre is increasingly busy on Friday, Saturday and Sunday nights and there is a much greater demand for street cleansing services during that period than there is during the quieter period of Monday, Tuesday, Wednesday and Thursday. We find the respondent wished to deliver a better and more effective service for Manchester's residents and visitors.

18. We find that the respondent consulted with the trade union and conducted individual consultation with employees.

19. The respondent sent a general memo to all staff at page 207, although we accept the claimant's evidence that he had not received this document. However, we find there was individual consultation with the claimant. We find he was sent a letter on 15 April 2016 (pages 208 and 209) informing him of the new shift pattern which would mean operating on a Saturday and a Sunday from 7.00am to 7.00pm and working two further shifts of seven hours during the course of the week to make up a total of 35 hours per week. The claimant was invited to a meeting to discuss this with Mr Nadat and Mr Denmark on 22 April 2016.

20. We find there was a consultation meeting with the claimant and Mr Denmark. Mr Nadat said that he left Mr Denmark to deal with that meeting. When being asked questions at the Tribunal the claimant had no clear memory of the meeting. However the letter sent following the meeting to the claimant's home address refers to "the recent consultation meeting" dated 28 April 2016 (pages 210 and 211). We find the letter states:

> "*In accordance with the requirements to fulfil the proposed street cleansing service changes your shift pattern will change to one of the new City Centre weekend day shifts that will operate on a Saturday and Sunday from 7.00am to 7.00pm (including unpaid breaks of 1.5 hours per day). In addition to the weekend shift you will be required to work a further two standard shifts of seven hours each (excluding unpaid breaks) during the course of Monday to Friday which will make up your total contracted hours of 35 hours per week. The 2 x 7 hour shifts will be worked on a flexible basis as required to meet the needs of the service*."

21. The Tribunal is satisfied that there was a consultation meeting with the claimant on 22 April 2016.

22. There was no dispute that the change to shift pattern started on 9 May 2016.

23. The claimant worked the new shift pattern until 14 June 2016 when he was absent from work due to "low back spasms and pain and stiffness". He has a further sick note also due to low back spasm and pain (see pages 216 and 217). Meanwhile the claimant's wife had written on his behalf in a letter dated 6 May 2016 (pages 212-215) complaining of several issues and including a request:

> "Antonio would like to go on a workday Monday to Friday. It's stressful not knowing when he's coming or going. He also has trouble with his feet. As you have a letter from his doctors and has been to work's doctors with foot problem it would not be good to walk 12 hours a day two days on the run."

24. The claimant did not receive a reply to this letter.

25. The respondent contacted the claimant by letter dated 11 July 2016 under their attendance monitoring review process, noting that the claimant had been absent from work due to lower back pain for four weeks. The claimant's wife wrote a letter to the respondent's Mr Hinds on 18 July 2016 (page 220). She asked:

> "Can you please consider Monday to Friday going back to normal hours and can I please stay on early mornings?".

26. She enclosed a letter from the claimant's GP (see page 219) which stated:

> "I will recommend that he works the previous usual working hours.7 hours daily for five days rather than 12 hours on any single day. Working longer than this, especially for his age, will likely not help his back strain."

27. We rely on the minutes of the grievance hearing (page 236) and on the evidence on the claimant in that meeting that he had been concerned that he had not been paid for boots his wife had purchased. He had raised that as a concern. We find the claimant had been told to speak to his supervisor if he did not understand his payslips. We find in his June payslip he had been paid £70 to cover the cost of the boots. The claimant said in a meeting about his grievance: "Spoke to supervisor and he said there was plenty of money in my bank. He said I had been paid ok."

28. The claimant was asked "what did he mean by plenty of money in the bank" and he replied that he had been told: "I am a supervisor and I have looked at your wages and your wages are almost as high as mine". The claimant was asked if this was Paul Grahame and he said yes it was. We find Mr Grahame had become aware the claimant was being paid higher than grade 3.

29. We find by the end of July 2016 Mr Hinds, who is senior to Mr Grahame, became aware that the claimant was still being paid on grade 4. This is because both Mr Hinds and the claimant's wife agree that there was a conversation at the end of July about the claimant's wages. "Around the end of July 2016 my wife then telephoned Colin Hinds and asked if he had received this letter and he stated yes he has. He also stated 'we might have found him something but he would have to go back on grade 1 and lose £6,000'." See page 229.

30. In giving evidence to the Tribunal Mr Hinds agreed that a conversation in relation to pay took place. He agreed that he may have referred to grade 1 but actually meant level 1. He explained that there had been a previous system of payment and grade 3 had previously been described as level 1. We find that understandably the claimant's wife was confused by this and thought there was a suggestion of moving the claimant from grade 4 to grade 1.

31. On 17 August 2016, the claimant's wife lodged a formal grievance on his behalf (see pages 221-231). She raised a variety of issues. The grievance was investigated and heard by Mr Nadat. We find him to be a clear and careful witness. We find he approached the grievance conscientiously, interviewing relevant witnesses and carefully considering the issues raised. He interviewed Mr Hinds, Mr Hodson-Ridgeway, Mr Grahame, Mr Salter and Mr Peake. The grievance hearing took place on 7 September 2016 and we find the minutes are at pages 236-241. Although during the Tribunal hearing the claimant's wife said she did not receive these minutes, we find that is inconsistent with her letter of 22 October where she refers to the minutes:

> "I would like to refer to a few inaccuracies within the notes/minutes of grievance." (Page 274)

32. We find Mr Nadat carefully considered the claimant's concerns.

33. During the outcome hearing he dealt with the issue that the claimant was being paid at grade 4 although he was carrying out a grade 3 role (see pages 260-261). He explained that he believed the failure to change the claimant's grade and salary from grade 4 to grade 3 after the expiry of the three year pay protection period as set out at page 151A-D was an error by the Council. He described it as an oversight. He said it should have been corrected approximately five years earlier. He stated:

> "We do not believe in the circumstances that it is fair or appropriate that you continue to be paid at the top of grade 4 scale for a role that is a grade 3 position."

34. He explained that from 1 November 2016 the claimant's grade would change to a grade 3 and the claimant would be paid at scale point 16, which was at the top of the scale. A letter was sent to confirm this (see page 267).

35. We find that grade 3 of the pay scale went from 14 to 17 but that the final point 17 was only for employees with special or additional responsibilities.

36. In the grievance outcome Mr Nadat also dealt with other concerns including the claimant's request that instead of working the 12 hour shifts which exacerbated his back condition he be permitted to work Monday to Friday. He agreed to this request.

> "We explained to you that if we were to do this then you would lose your 10% flexibility payment that you currently receive which you advised us you accepted."

37. Mr Nadat also investigated the claimant's concerns that he was being treated unfairly and with disrespect in relation to the incidents concerning Paul Grahame and Paul Salter. He dealt carefully with these concerns (see page 262).

38. Mr Nadat also told us that he had conducted a meeting with the claimant and Mr Grahame where they had shaken hands and agreed to work together in the future.

39. The claimant appealed against Mr Nadat's decision. The appeal letter on the claimant's behalf from his union accepts that the claimant should not be in receipt of pay at grade 4 level, but asks for him to be placed at the top of grade 3 (point 17). The claimant's wife then also sent a letter of appeal dated 22 October 2016.

40. We find a grievance appeal hearing took place on 28 November 2016. The minutes are at 269A-D and the outcome is at page 284. We find that Mr Hodkinson was a clear witness. We find he exercised his discretion to place the claimant at scale point 17 of grade 3 which meant that he was being paid more than any other comparable employee.

41. During the Tribunal hearing we heard some evidence about boots provided by the respondent not fitting properly and the claimant purchasing boots himself. There was no dispute that the claimant was reimbursed for the boots that he purchased

himself (see page 262). The claimant withdrew his claim in relation to boots in any event and the Tribunal has not found it necessary to make detailed findings of fact with regard to this matter.

42. The claimant gave contradictory evidence about what he was told about the length of the pay protection period. He suggested that it was for 4 years or that it was for life. The Tribunal prefers the evidence of the respondent's witnesses that the pay protection was for 3 years and as suggested in the pay protection policy.

The Law

43. The relevant law is found and the Equality Act 2010 Section 13 (Direct Discrimination), Sections 20 to 21 (Duty to make reasonable adjustments) and Section 15 (Discrimination arising from disability) and s26 (Harassment). The burden of proof provisions are relevant, Section 136.

44. We reminded ourselves of the principles in Igen Limited & others v Wong [2005] ICR 931 CA; Anya v The University of Oxford [2001] IRLR 377; Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL; Barton v Investec Securities [2003] ICR 1205; Madarassy v Nomura International PLC [2007] ICR 867; Laing v Manchester City Council [2006] ICR 1519; and Nagarajan v London Regional Transport [1999] ICR 877 HL and more recently chief Constable of Greater Manchester v Bailey 2017 EWCA Civ 425.

45. In the reasonable adjustments claim the Tribunal had regard to the principles in Environment Agency –v- Rowan 2008 ICR 218 EAT, Project Management –v- Latif 2007 IRLR 579 and Smith –v- Churchills Stair Lifts Plc 2006 IRLR 31 CA.

46. The Tribunal also had regard to the EHRC Code of Practice.

47. In the Section 15 claim the Tribunal had regard to Pnaiser –v- NHS England and Another 2016 IRLR 170 EAT.

48. In the direct discrimination claim the Tribunal had regard to Section 23(1) Equality Act 2010 concerning the comparator, Shamoon –v- The Chief Constable of RUC 2003 ICR 337 and the principle in High Quality Life Style Limited –v- Watts 2006 IRLR 850 and Stockton on Tees Borough Council –v- Aylott 2010 ICR 1278 CA.

Applying the law to the facts.

49. The Tribunal turned to consider the schedule of allegations. Allegations 1 and 2 had been withdrawn so the first allegation is allegation 3.

<u>Allegation 3</u>

50. **"The claimant was the only person issued with a new rota".** The claimant relied on this as an allegation of direct discrimination pursuant to section 13 of the Equality Act 2010 and less favourable treatment pursuant to section 15 of the Equality Act 2010 in relation to the new rota in December 2015.

51. There was no dispute that the claimant relied on his impairment relating to his feet and the impairment relating to his hearing loss in relation to these allegations (his back condition did not develop until June 2016).

52. We turn to the claim that the claimant was less favourably treated pursuant to section 13 of the Equality Act 2010. The Tribunal finds that the claimant is referring to the shift pattern introduced in December 2015. The Tribunal reminds itself that a real or hypothetical comparator must be in the same set of circumstances as the claimant with the same limitations on ability. There was no appropriate real comparator and so the Tribunal considered a hypothetical comparator with the same limitations in ability in terms of hearing and feet impairment.

53. The Tribunal relies on its finding of fact that the three other people working on the same duties as the claimant were also issued with a new rota. The Tribunal finds a new rota was issued to all the employees in that team. Accordingly, the Tribunal finds a hypothetical comparator would have also been issued with a new rota. The claimant cannot show that he was "less favourably treated" than a real or hypothetical comparator. Therefore this claim fails.

54. The Tribunal turns to the section 15 claim. The claimant cannot show that he was unfavourably treated because of something arising in consequence of his disability because the rota was issued to everyone working that shift pattern. Furthermore, there was no clear evidence as to how the shift pattern of four weekends on and four weekends off impacted unfavourably on the claimant because of his feet or hearing loss. Therefore this claim fails.

55. Allegation 4 was withdrawn so the Tribunal turned to allegation 5.

Allegation 5

56. "**The claimant's shift pattern was changed to 12 hour shifts on Saturday and Sunday and two seven hour shifts Monday to Friday effective from 9 May 2016 after both collective and individual consultation".** The claimant brought section 13 and section 15 claims. The claimant also brought a claim for a failure to make reasonable adjustments pursuant to s20-22 Equality Act 2010.

57. We turn first to the claim pursuant to section 13 Equality Act 2010. There is no dispute that this new shift pattern was introduced by the respondent across Manchester City Centre Street Cleansing Department in general. It was not targeted at the claimant and accordingly the claimant cannot show that he was less favourably treated than a real or hypothetical comparator.

58. The Tribunal then turns to the section 15 claim. The first question is: did the respondent treat the claimant unfavourably because of something arising in consequence of the claimant's disability?

59. The Tribunal is not entirely satisfied that the claimant can pass this first hurdle. The claimant identified in his wife's letter of 6 May that he had difficulty working 12 hour shifts because of his feet. Later the claimant provided medical evidence from his GP (see page 219) that because of his back condition working seven hours' daily rather than 12 hours on a single day would be of benefit. However, the claimant only worked the new 12 hour shifts for a relatively short

period of time, from the introduction of the rotas on 9 May 2016 until he developed a back problem and went sick on 14 June 2016. However, if the claimant can be said to have been unfavourably treated during this short period of time, the Tribunal takes into account that once the claimant identified that he did not wish to work the "12 hour super shift" the respondent stated that he could work Monday to Friday (see outcome of grievance).

60. If the delay in granting this request means that the respondent treated the claimant unfavourably because of something arising in consequence of the claimant's disability, the Tribunal must turn to the second part of the test: can the respondent show that the treatment is a proportionate means of achieving a legitimate aim?

61. The Tribunal is satisfied that it can. The Tribunal finds that operating a 24 hour street cleaning service in the City Centre at the weekends was a legitimate aim. The respondent adopted a proportional response once it realised the claimant had difficulty in complying with this by granting his request to work Monday to Friday seven hours a day. Accordingly, this claim fails.

62. The Tribunal turns to the claimant's claim for failure to make reasonable adjustments. Firstly, the Tribunal must identify the provision, criterion or practice ("PCP"). We find the PCP was the change in shift pattern to two 12 hour shifts on Saturday and Sunday and two seven hour shifts Monday to Friday.

63. The next question is: did the PCP put the claimant at a substantial disadvantage in relation to a relevant matter? We find that it did because he had problems with his back and his feet and the claimant found it difficult to do this long shift which fell only on the weekends.

64. We turn to the next issue. Did the respondent make such adjustments as it is reasonable to make? The claimant requested an adjustment, namely to work a shift pattern of Monday to Friday, seven hours a day. The respondent granted that request.

65. The claimant did not ask to work shorter hours at the weekend and indeed made it clear he did not wish to work at the weekends; neither did the claimant ask to work in the evenings. In fact his wife's letter states that he wished to work early shifts. The claimant told the Tribunal he wanted to work 9-4.30pm Mon-Fri and did not want to work weekends. We find that this requested shift pattern is the shift pattern Mr Nadat gave him in the outcome of his grievance (page 260).

66. Accordingly, the flexibility payment was not engaged for the period the claimant wished to work because it was payable for weekend or evening working. We are satisfied that the respondent made such adjustment as it was reasonable to make to avoid the disadvantageous effect on the claimant. It adjusted his shift pattern so he worked shorter shifts (7 hours not 12) to avoid the pain in his back/feet and as he requested, he worked these shifts Monday to Friday during the day. In fact it was the adjustment he requested. Therefore this claim fails.

Allegation 6

67. **"Paul Salter believed to be an employee of Manchester City Council, Paul Grahame and one of the respondent's supervisors (unnamed) shouted and humiliated the claimant in front of colleagues". The claimant alleged this occurred on 22-24 and 29 May 2016**.

68. The Tribunal reminds itself of the issues in the claim for harassment pursuant to s26 Equality Act 2010:

> *"A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant."*

69. There was no dispute that the claimant had concerns about the way Mr Salter and Mr Grahame had spoken to him on occasion. He raised these concerns with Mr Nadat who investigated the matter carefully. It was clear to the Tribunal that the claimant did not accept that Mr Salter, a stand in supervisor, was genuinely a supervisor and accordingly thought he was not entitled to criticise or comment on his work. The Tribunal is satisfied that Mr Salter was a stand in supervisor and was entitled to comment on the claimant's work.

70. The claimant was asked both by the respondent's counsel and later by the Tribunal why he thought Mr Grahame and Mr Salter had shouted at him. He was specifically asked whether he thought it was anything to do with his feet, back or hearing. The claimant specifically said it was not to do with his disabilities.

71. The Tribunal is not satisfied there was any evidence to suggest the way the claimant was spoken to by Mr Salter or Mr Grahame was in any way connected to the claimant's disability. The Tribunal is aware of the burden of proof provisions. The Tribunal is not satisfied there was any evidence to shift the burden of proof to the respondent. In any event the claimant himself said explicitly the way he was spoken to was not related to his disabilities. Accordingly, this claim for disability related harassment fails.

Allegation 8

72. **"The claimant lost his entitlement to the 10% flexible payment after his shift pattern changed to Monday to Friday at his request, and on the basis of the letter from his GP".** The claimant brought this as a claim for section 13, section 15 and a failure to make reasonable adjustments claim.

73. We turn to the section 13 claim. We find the claimant cannot show that he has been less favourably treated than a real or hypothetical comparator because the only reason the claimant lost his entitlement to the 10% flexible payment was because his shift pattern changed to Monday to Friday 9.00am to 4.30pm and accordingly he was neither working antisocial hours in the evening nor was he working at weekends. There was no real comparator suggested and we find a hypothetical comparator in the same circumstances would have been treated in the same way because the eligibility requirements for the 10% additional payment were not met for an employee working Mon-Fri 9-4.30pm. Accordingly that claim must fail.

74. We turn to the section 15 claim. The first question for the Tribunal is: was the claimant treated unfavourably by the respondent because of something arising in consequence of his disability?

75. The Tribunal finds that at first when considering this, it appears that the claimant was treated unfavourably because of something arising in consequence of the claimant's disability, because he was unable to work the 12 hour shift at the weekends because of his feet and/or back. However, the Tribunal finds that the position is more complicated. The claimant gave evidence that he wanted to work 9.00am to 4.30pm Monday to Friday. When cross examined in relation to a request in his wife's letter that he work an early shift he very clearly stated he did not want to work an early shift. He never requested an evening shift; neither did he ever suggest to the respondent that he might work a shorter shift on the weekend. He said he did not want to work weekends.

76. Accordingly, the Tribunal finds that the reason why the claimant lost his entitlement to the 10% flexible payment was because he was no longer working antisocial hours.

77. However, if the Tribunal is wrong about this and the fact that he could no longer work the 12 hour weekend shifts because of his feet and/or back means that he was unfavourably treated by the respondent as a consequence of his disability in relation to a relevant matter we must turn to consider the respondent's defence. Can they show that the treatment was a proportionate means of achieving a legitimate aim?

78. We find they can. We are satisfied that the legitimate aim of the business was to provide 24 hour street cleaning in Manchester City Centre at the weekends and that required 12 hour weekend shifts. The respondent adopted a proportionate means of achieving this aim. They consulted with their affected staff including the claimant and when he suggested an alternative shift pattern they allowed him to work it instead of the new longer weekend shifts. Therefore this claim fails.

Allegation 9

79. **"The respondent changed the claimant's grade from grade 4 to grade 3".** The claimant brought this claim as a section 13 and section 15 claim. He also brought it as a failure to make reasonable adjustments. The provision, criterion or practice was "the operation of the respondent's pay protection policy which ceases after a number of years".

80. We turn to the section 13 claim: can the claimant show that he was less favourably treated than a real or hypothetical comparator? We find the claimant cannot. We accept the respondent's evidence that the Manchester City Council pay protection policy transferred with the claimant to Biffa by reason of the agreement that his employment was protected by TUPE (Transfer of Undertakings Regulations 1998). We find that the policy was that an individual received pay protection for a period of three years. P.151A-D. The claimant, it is undisputed, received pay protection until the mistake came to light in or around 2016, so for five further years. Accordingly he cannot show that he has been less favourably treated because we find a hypothetical comparator in the same set of circumstances who had, as a result

of the same oversight been paid at a grade 4 in excess of 3 years would have been treated in the same way.

81. The claimant sought to rely upon Mr Carden as a real comparator. We accept the evidence of Mr Hinds. We remind ourselves of the narrow category of comparator in a disability discrimination case. We accept Mr Hinds' evidence that Mr Carden was not medically redeployed and his role was not changed because of ill health. Accordingly, he cannot be a comparator for the claimant.

82. We turn to the claimant's claim for section 15 discrimination: did the respondent treat the claimant unfavourably because of something arising in consequence of his disability?

83. The Tribunal is not satisfied that the claimant was treated unfavourably because of something arising in consequence of his disability. Manchester City Council made an error and forgot to revisit the issue of the claimant's pay protection at the end of the three year period. We accept the evidence of Mr Nadat that normally a medically transferred person would only receive pay protection for three years. The claimant continued to receive it for several more years. He was actually more favourably treated than a hypothetical comparator.

84. However, if the Tribunal is wrong about this and it can be argued that the claimant was treated unfavourably by the respondent because the need for him to work as a street cleaner in Manchester City Centre arose because he was no longer able to carry out his job as gardening maintenance operative due to his work related noise induced deafness, the Tribunal turns to the defence.

85. Can the respondent show that the treatment of the claimant was a proportionate means of achieving a legitimate aim? We find they can. Once the respondent realised that the claimant had been overpaid it was proper for them to correct the anomaly.We find it was not proportionate to continue to pay the claimant his old rate of pay indefinitely.

86. However, the respondent did not seek any repayment from the claimant for the sums he had received after the 3 years of pay protection had expired. Moreover, not only did the respondent place the claimant at the top of the pay scale, but after intervention from the claimant's union in the appeal they placed him at spinal point 17 which we were informed was normally only paid to an employee with additional skills/responsibilities relevant to that role, which the claimant did not have.

87. There was no dispute that therefore the claimant was paid more than any other comparable employee. Accordingly we were satisfied that the respondent has proven that the treatment was a proportionate means of achieving a legitimate aim. Therefore this claim fails.

88. We turn finally to the claim for a failure to make reasonable adjustments. We find that the operation of the respondent's pay protection policy which ceases after three years is capable of amounting to a "PCP".

89. We turn to the next question: did it put the claimant at a substantial disadvantage in relation to a relevant matter? The Tribunal is not satisfied that the claimant has been put at a substantial disadvantage in relation to a relevant matter.

By mistake or oversight the claimant had received the pay protection for considerably more than three years the policy suggests. Thus the Tribunal finds the claim fails at this stage.

90. However, if we are wrong about this we turn to the third issue: has the respondent made such adjustment as is reasonable to make to avoid the disadvantageous effect? The Tribunal finds that the respondent did. Once they discovered the error the claimant not only did the respondent place the claimant at pay point 16, at the top of scale 3, but on appeal moved him to pay point 17. In addition the respondent did not seek to recover the overpayment from the claimant. Neither did they impose the reduction in grade immediately. A letter informed the claimant about the reduction in pay was dated 30 September but it was not to take effect from 1 November 2016 (see page 267). Accordingly this claim fails.

91. Given that all the claimant's claims have failed it has not been necessary for us to determine if the claimant's claims were presented out of time as suggested by the respondent, nor has it been necessary for us to determine when the claimant became disabled by reason of his back condition.

Employment Judge Ross

Date 19 October 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
25 October 2017

FOR THE TRIBUNAL OFFICE