



# EMPLOYMENT TRIBUNALS

**Claimant**  
**Mr J Robinson**

**BETWEEN**  
**AND**

**Respondent**  
**NACRO**

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL (RESERVED JUDGMENT)

**HELD AT** Birmingham **ON** 2, 3, 4 & 7 September 2020

**EMPLOYMENT JUDGE GASKELL** **MEMBERS: Mr D McIntosh**  
**Mr MZ Khan**

### Representation

**For the Claimant: Mr B Frew (Counsel)**  
**For Respondent: Mr G Graham (Counsel)**

## JUDGMENT

**The unanimous judgment of the tribunal is that:**

- 1 The Claimant was fairly dismissed by the respondent. His claim for unfair dismissal is not well-founded and is dismissed.
- 2 The respondent did not, at any time material to this claim, act towards the claimant in contravention of Section 39 of the Equality Act 2010. The claimant's complaints of direct disability discrimination; discrimination for a reason arising from disability; and a failure to make adjustments pursuant to Section 120 of that Act, are dismissed.

## REASONS

### Introduction

1 The claimant in this case is Mr James Robinson who was employed by the respondent, NACRO, from 3 March 2001 until 20 March 2019 when he was dismissed. At the time of his dismissal, the claimant was employed as a Support Officer - East Midlands. The reason given by the respondent at the time of the claimant's dismissal was capability.

2 By a claim form presented to the tribunal on 31 July 2019, the claimant claims that his dismissal was unfair and that he suffered unlawful disability discrimination. The strands of discrimination alleged are: direct discrimination;

discrimination for a reason arising from disability; and a failure to make adjustments.

3 The respondent concedes that, at the material time, the claimant was a disabled person. The relevant impairments being Sickle Cell Disease and Retinitis Pigmentosa. The respondent admits that the claimant was dismissed but maintains that he was dismissed for a reason relating to his capability and that his dismissal was fair. The claimant denies direct discrimination; and maintains that to the extent that the claimant's dismissal was unfavourable treatment for a reason arising from disability (the claimant's inability to perform his duties safely) such treatment was objectively justified. The respondent denies any failure to make adjustments.

4 The parties agreed a List of Issues which was refined at a Preliminary Hearing conducted by Employment Judge Cookson on 13 December 2019. The List has been further refined during the course of this Hearing and the issues for determination are set out later in this judgement.

### **The Evidence**

5 The claimant gave evidence on his own account. He had made a witness statement running to some 34 pages; he gave supplementary evidence-in-chief; he was cross-examined; and we had the opportunity to ask questions. We heard the claimant's evidence first. The claimant called one witness - Mr Amritpal Sandhu - who was employed by the respondent from October 2010 until June 2019. Both the claimant and Mr Sandhu attended the tribunal to give evidence in person.

6 The respondent called two witnesses: Ms Dawn Abigail - Employee Relations Adviser who provided HR support to Mr Bill Clark the respondent's Regional Manager whose decision it was to dismiss the claimant; and Ms Phyllis Geraldine Clydesdale - Regional Manager (South) who heard the claimant's appeal. Ms Abigail gave evidence by video link; Ms Clydesdale attended the tribunal to give evidence in person.

7 In addition, we were provided with an agreed trial bundle running to in excess of 380 pages. We have considered the documents from within the bundle to which we were referred by the parties during the course of the hearing.

8 The claimant was a most unsatisfactory witness whose evidence was frequently inconsistent with contemporaneous documents and at times his oral evidence, given under cross examination, was inconsistent with his witness statement. The following are examples of the inconsistencies: -

- (a) On 18 June 2018, the respondent undertook a Disability Risk Assessment and considered reasonable adjustments for the claimant. The assessment was undertaken by Suki Aujla and Richard Baldwin; the claimant fully participated in the assessment and signed it on the final page. The claimant places considerable importance in that assessment in the general pursuit of his claim. The assessment makes clear that on occasion the claimant would have to be driven to work-related locations by members of his family and it had been agreed that the family member would park away from the specific property to be visited by the claimant to ensure that the address of the property was not inadvertently disclosed to the family member or anyone outside the respondent's organisation. The respondent's witnesses explained that the reason for this was that all of the respondent's employees who actually visited properties needed to be security cleared and that the address of the properties was highly confidential. Despite having signed the risk assessment, when he gave evidence, the claimant insisted that there were no security implications; there was no reason for the general public not to be made aware of the specific addresses; and that in fact his family members parked outside the properties and not away from the properties as indicated in the assessment.
- (b) The respondent's records indicate that the claimant's first formal meeting to discuss sickness absence occurred on 10 October 2018 when an OH report (eventually received on 6 November 2018) was still awaited. The claimant was insistent in his evidence that the meeting took place on 10 November 2018 and that the OH report had been available at the meeting. There is no mention of this in the record of the meeting and yet at no stage prior to giving evidence had the claimant ever pointed out this omission. When giving evidence, the claimant asserted that either Ms Abigail or Mr Clark had "doctored" the record. Later he retracted this assertion.
- (c) The second formal meeting took place on 4 January 2019. In his witness statement, and in a grievance letter dated 23 January 2019, the claimant asserts that he indicated at that meeting that he was fit to return to work if adjustments were made. But, his oral evidence before the tribunal was the by that date he was fit for work without adjustments being made.
- (d) The claimant's evidence before the tribunal was that when he received the notes of the second formal meeting he contacted Mr Baldwin to tell him that those notes were inaccurate. But there is no reference to this in his grievance letter or in his witness statement.
- (e) The claimant attended a third formal meeting on 5 February 2019. The respondent's case is that at that meeting he agreed that consideration should be given to his grievance letter of the 23 January 2019. Later, the claimant asserts that he did not agree; and that the grievance should have been dealt with separately. We were directed to a letter dated 8 February

- 2019 from Mr Clark recording the claimant's agreement. The claimant agrees that he received that letter but never took issue with its contents. Further, in the claimant's appeal letter dated 22 April 2019 there was no suggestion that he had not agreed to the discussion of his grievance at the sickness review meeting.
- (f) There was a fourth meeting held on 13 March 2019 (a second stage three meeting). At that meeting, the claimant handed to Mr Clark a fit note from his GP dated 12 March 2019 clearly intending Mr Clark to take account of its contents. In oral evidence before us, the claimant indicated that he disagreed with the GP's comments - he did not make this clear to Mr Clark and could not explain to us why.
  - (g) One of the claimant's central complaints is that his brother-in-law was not permitted to accompany him at meetings. He told us in evidence that he had requested his brother-in-law as a companion rather than a work colleague or trade union representative because his brother-in-law had a particular understanding of his medical conditions. The claimant accepted that he did not explain this to the respondent but could not account for this omission.

9 We found the evidence of Ms Abigail and Ms Clydesdale to be much more satisfactory those witnesses were consistent with each other their evidence remained consistent during cross examination and their evidence was consistent with contemporaneous documents we found them both to be reliable in the accounts they gave

10 Mr Sandhu was a truthful witness but, in our judgement, his evidence had no relevance to the issues which the tribunal had to decide.

11 Where there is a conflict in the factual evidence given by the claimant and that given by the respondent's witnesses, we prefer the evidence given by the respondent's witnesses. It is on this basis that we have made our findings of fact.

### *Medical Evidence*

12 We considered the following medical evidence: -

- (a) Drugs and Discharge Summary: South Warwickshire NHS Foundation Trust - 6 November 2014.
- (b) OH Report: 22 January 2018.
- (c) Claimant's Certificate of Vision Impairment: 16 June 2018.
- (d) GP's Fitness for Work Notes: 23 August 2018; 3 September 2018; 2 October 2018; 30 October 2018; 3 December 2018; 3 January 2019; 6 February 2019; 12 March 2019; 13 March 2019; & 20 March 2019.
- (e) Record and Discharge Summary: South Warwickshire NHS Foundation

- Trust 24 August 2018. (leg DVT)
- (f) Letter to Claimant's GP: Dr Sarah Nicole, Consultant Haematologist – 5 September 2018.
  - (g) Letter to Mr M Taylor, Consultant Orthopaedic Surgeon: Dr Sarah Nicole – 12 October 2018.
  - (h) OH Report: Dr Suzane Gupta, Occupational Physician – 6 November 2018.
  - (i) Letter to Claimant's GP: Dr Sarah Nicole, Consultant Haematologist – 2 January 2019
  - (j) Letter "To Whom it may Concern": Dr Alastair Watt, Claimant's GP – 16 August 2019.
  - (k) Letter to Claimant: Dr Sarah Nicole, Consultant Haematologist – 25 September 2019.

*Other Significant Documentary Evidence*

13 We considered documents containing evidence from other external sources relating to the claimant's medical condition and help available to him: -

- (a) Letter to Respondent: Ms Vicky Johnson, Employment Advisor, RNIB – 12 March 2019.
- (b) Emails and Notes of a Telephone Call between the respondent and Ms Johnson – Various dates.
- (c) Notes of a Telephone Call between the respondent and Access to Work – 15 March 2019.
- (d) Access to Work Factsheet.
- (e) Claimant's Access to Work Grant Approval – 14 January 2020.

**The Facts**

14 In May 2001, the claimant commenced employment with Stoneham/Homegroup (the respondent's predecessor), as a Project worker, at a high-risk probation hostel in Coventry. Following various changes to the provision of services for offenders and ex-offenders, in October 2010, the claimant commenced a new role of Support Officer for the Bail Accommodation and Support Service (BASS), East Midlands - covering Northampton and Corby. The role involved managing five properties which housed ex-offenders who had been released from prison on Home Office Detention Curfew Orders. On 18 June 2018, the relevant MOJ contract was passed to the respondent and the claimant was transferred to the respondent's employment under the TUPE provisions.

15 A Support Officer is responsible for managing the day-to-day operation of the BASS properties. Day-to-day tasks include visiting properties to meet with service users and respond to any issues; conducting induction and support

meetings with service users; developing support plans; monitoring compliance with criminal justice conditions and requirements; conducting basic cleaning and maintenance of properties; maintaining accurate service user records; and liaising with third-party agencies such as police, the courts, and the probation service. The Support Officer is required to make a minimum of twice weekly visits to each of the properties under his/her control. It may be necessary to visit properties more than once in a day and it may be necessary to attend the property at short notice and, in particular, to meet a client referred from prison towards the end of the day. BASS were required to induct residents at any time up to 8pm. To accommodate service requirements, the respondent operated a 12-hour working day from 8am until 8pm. Support Officers were expected to work 7.5 hours per day with a 30-minute break for lunch. But the 7.5 hours could in theory be any 7.5 hours within the 12-hour working day.

16 As previously stated, the claimant was responsible for five properties in the Northampton and Corby areas. The geographical span of the properties was around 100 miles; and, again as previously stated, the claimant may be required to visit a particular property more than once in a single day. The claimant's average weekly mileage prior to June 2018 was 650 miles per week (excluding travel from his home address to/from the first and final visits of the day).

17 The claimant did not have an office base of any kind; and he was not required to attend the respondent's head office. Where he had administrative tasks such as report writing to perform, this work was done from home. In order to perform his duties, the claimant had to be security check as do all other employees working for the respondent. The particular addresses used by the respondent to house ex-offenders and those on bail is confidential information which must not be disclosed outside the respondent's organisation. Even within the organisation, that information is only available to those who need to have it in order to perform their duties.

18 The claimant has Sickle Cell Disease; a condition from which he has suffered for most of his life. It is a disease which can cause serious symptoms including chronic pain; anaemia; bacterial infection; swelling in the joints; aseptic bone necrosis; pulmonary hypertension; and vision problems. Sickle Cell Crisis can be brought on by sudden changes in the weather; dehydration; and severe stress and anxiety. Treatment for a Crisis is vaccination; antibiotics; high fluid intake; intravenous pain medication; and/or blood transfusion. The claimant's Sickle Cell Disease is well managed by his lifestyle choices and by medication. The claimant's last Sickle Cell Crisis occurred in November 2014.

19 From late 2017, the claimant experienced a significant deterioration in his vision - particularly at night-time. An early manifestation of this deterioration was that he was involved into night-time road traffic accident's both of which he

acknowledged as his fault. His first step in addressing this deterioration was to limit his night-time driving. The respondent referred him to OH in January 2018. Even at this early time, the view was expressed that the claimant was not able to perform his normal driving duties; management were advised to discuss alternatives with him whilst he underwent further assessment. It was suggested that he would be able to perform administrative tasks from home or at a local centre accessible by public transport.

20 The deterioration in the claimant's eyesight continued; and, in June 2018, the claimant was diagnosed with Retinitis Pigmentosa. The claimant was told that his eyesight no longer met the minimum requirements to hold a driving licence at all. Pursuant to that advice, the claimant surrendered his driving licence. This presented obvious difficulties in the performance of his duties at work.

21 The respondent concedes that, by reason of the claimant suffering from Sickle Cell Disease and from Retinitis Pigmentosa, at all times material to this claim, he has been a disabled person as defined by Section 6 and Schedule 1 of the Equality Act 2010 (EqA).

22 In response to the difficulties presented to the claimant in the loss of his driving licence, on 18 June 2018, the respondent's line manager, Mr Richard Baldwin, with support from Ms Suki Aujla – Service Manager, conducted what is described as a Disability Risk Assessment. The process was well documented; the written record was signed contemporaneously by the claimant; and he agrees its contents. Together with the claimant, Mr Baldwin and Ms Aujla addressed the practical difficulties which the claimant would now face; and important adjustments were made. The claimant's geographical area was changed in that the claimant gave up responsibility for properties in Corby but took responsibility for additional properties in Leicester - this made it easier for him to travel across his geographical area using public transport. Further, it was acknowledged that he would not be able to work as flexibly as would generally have been expected; he needed to plan his week so as to visit particular properties on particular days rather than "as required". Having said that, there were always going to be occasions where at short notice and sometimes at antisocial hours the claimant would need to visit a property. It was to cover these occasions that it was agreed that where necessary members of his family would provide transport; the claimant would be permitted to claim their mileage as an expense. It is recorded in the Assessment that on these occasions family members would wait nearby but not immediately outside the property to be visited by the claimant. Whilst this is clearly recorded, the claimant can offer no explanation as to why it should be recorded bearing in mind his case that there were no security implications and no need for the precise locations not to be known to the relevant members of his family. This makes no sense: and we have no hesitation in accepting the respondent's account that it was of importance that outsiders to the respondent's

organisation and those who had not specifically been security checked should not ever be aware of the precise locations of the properties concerned.

23 This written Assessment of 18 June 2018 as an important document in this case; and one in which the claimant places great store in presenting his claim. In our judgement, it was clearly a genuine attempt by Mr Baldwin and Ms Aujla to provide working solutions. Whether the arrangements would have stood the test of time as a permanent solution is not known because the working of the arrangement was overtaken by later events. Further, having heard the evidence of Ms Clydesdale, it seems unlikely that these arrangements were agreed by senior managers - and had they been aware of the proposals, there may have been serious objections.

24 From 20 June 2018 until 1 August 2018 (a period of six weeks), the claimant worked under the new arrangements. From the respondent's point of view during this period the claimant conducted his duties satisfactorily. However, on the basis of the claimant's own evidence there must be some doubt as to whether these arrangements could have continued indefinitely. The claimant told us that the vagaries of public transport often meant that he was travelling for many hours each day to perform his duties. Several times he left home for work at 7am and did not return until 11pm.

25 On 1 August 2018, the claimant commenced a period of three weeks annual leave travelling to Greece for his summer holiday. The claimant returned to the UK on 19 August 2018 with two swollen ankles and a swollen painful left knee. The claimant consulted his GP who was concerned about his general health and referred the claimant to the local hospital for tests to be carried out for a suspected Deep Vein Thrombosis (DVT). It was soon established that the claimant did not have a DVT; and the swelling in his ankles went down fairly quickly; but the swelling and pain in his left knee remained and caused severe restrictions to the claimant's mobility. The claimant then became concerned that this could be a Sickle Cell Crisis. He obtained an early appointment with Dr Nicole, his treating Haematologist. Dr Nicole saw the claimant in clinic on 5 September 2018 and it was soon established that the problem with the claimant's need was unrelated to Sickle Cell Disease.

26 In the meantime, the claimant saw his GP, Dr Alistair Watt, on 29 August 2018. After examining the claimant, Dr Watt advised that the claimant should take some time off work and that his body was showing signs of needing complete rest. Dr Watt advised to the claimant that he should look into the possibility of taking ill-health retirement as he had now been diagnosed with a second chronic health condition (Retinitis Pigmentosa). This advice was repeated and enhanced by Dr Nicole when the claimant saw her on 5 September 2018 she



too advised ill-health retirement and she confirmed this advice in a letter to Dr Watt following the clinic.

27 On 29 August 2018, the claimant emailed HR making enquiries as to ill-health retirement. He was directed to his pension provider; but, on obtaining details of what might be available to him financially were he to retire on ill-health grounds, the claimant did not proceed any further with this.

28 Once DVT and the possibility of Sickle Cell Crisis had been eliminated as potential causes of the claimant's knee problems, the claimant was referred to Mr Mark Taylor - Consultant Orthopaedic Surgeon for further investigations. The claimant underwent an MRI scan on 9 October 2018 and then a consultation with Mr Taylor on 28 October 2018. Mr Taylor advised that the claimant was suffering from Arthritis and severe Ligament Damage; ideally he required knee replacement surgery, but because of the claimant's suffering from Sickle Cell Disease, Mr Taylor felt that the risk of such an operation was too high. On 18 December 2018, the claimant underwent a minor surgical procedure by way of a steroid injection; this had the effect of reducing the inflammation and eliminating the pain. It is the claimant's case that, from January 2019, he was no longer troubled by his knee and was fit to return to work on the same basis as he had been working in the six-week period prior to 1 August 2018; and without further adjustments.

29 The claimant was continuously absent from work as medically unfit from 19 August 2018 and did not return to work at any time prior to his dismissal. He produced a series of medical certificates from his GP (see Paragraph 12(d) above). All but two of these certified the reason for the claimant's absence simply as "*debility*"; the certificate dated 3 September 2018 made reference to "*Sickle Cell Crisis*" and the certificates dated 12 and 13 March 2019 referred to "*Sickle Cell Disease*" and "*Retinitis Pigmentosa*". None of the medical certificates at any stage referred specifically to "*Arthritis*"; or "*Ligament Damage*"; or otherwise to the problems with the claimant's knee. Despite this, the claimant insisted in evidence before us that at no stage was the absent from work due to Sickle Cell Disease or Retinitis Pigmentosa. His absence was occasioned entirely by his knee problems which were resolved by early January 2019. The claimant could offer no explanation for his continued production to the respondent of medical certificates justifying his absence from work for nearly three months after he claims to have been fully fit to return.

30 On 13 September 2018, the respondent made a referral to its OH provider. The claimant was seen by Dr Suzane Gupta - Occupational Physician on 30 October 2018; and her report is dated 6 November 2018.

31 In the meantime, on 10 October 2018, the claimant attended a Stage 1 Long Term Sickness Absence Meeting - this was conducted by Ms Aujla. The notes of that meeting, which we find to be an accurate record, indicate that the claimant agreed that in order to return to work he should be looking at alternative role within the respondent's organisation or at a further reallocation of his geographical area enabling him to travel to properties by public transport more efficiently. It was agreed that no conclusions could be reached at that meeting pending receipt of the OH Report which was still awaited.

32 The OH report dated 6 November 2018 was unequivocal: it recommended that the claimant was no longer fit to undertake the duties of Support Officer. The following are extracts taken from the report: -

- (a) *"Mr Robinson reports that as a result of his visual impairment he tends to bump into objects at night time and feels that the change in the weather condition is causing him to have pain in his joints, abdomen and bones."*
- (b) *"I would have concerns regarding him returning to his substantive role due to his own safety and the safety of individuals he supports. The only type of role he could be considered fit from a medical point of view would be one which is mainly working indoors in an office based environment, if such a role could be accommodated within the business. He may then need a workstation assessment and to be provided with the necessary modification in view of his visual problems."*
- (c) *"I would have concerns regarding his own safety and the safety of individuals he is supporting and returning to his substantive role. The only type of role he could return to would be one which is indoors doing office-based duties if such could be accommodated within the business."*
- (d) *"Due to safety issues the only type of role he could return to would be one which is indoors and office-based duties."*
- (e) *"As mentioned there are safety issues regarding him returning to his substantive role and in my opinion this is likely to remain in the longer term."*
- (f) *"I would have concerns regarding him working unsupervised and unsupported as a lone worker for long periods of time including working overnight."*
- (g) *"If he could be accommodated in an alternative role which is indoors and office based, then a phased return to work plan starting with half his contractual hours for the initial two weeks and if found to be coping, his hours could gradually be increased over the subsequent 2 - 3 weeks back to his regular hours."*

33 Dr Gupta offered the opinion that the claimant was likely to meet the relevant criteria to be regarded as a disabled person under EqA (this is not controversial). She also suggested that support may be available through RNIB -

but this recommendation was very much in the context of the claimant returning to an office-based indoor role as recommended.

34 In his witness statement, and in his evidence before us, the claimant challenges the accuracy of Dr Gupta's report and her conclusions. But, there is no evidence of the claimant having challenged the report at the time despite being sent this by Dr Gupta in advance of the report being submitted to the respondent. Further, in subsequent discussions with the respondent, the claimant did not challenge Dr Gupta's report and neither did he consult his GP to indicate that the OH report was somehow erroneous.

35 On 4 January 2019, the claimant attended a Stage 2 Long Term Sickness Absence Meeting. The meeting was conducted by Ms Aujla and Mr Baldwin. After the meeting, the claimant was provided with a copy of the note and did not challenge its accuracy. The note of the meeting records the claimant agreeing that he was unable to return to BASS or to his Support Officer role; and that his option was to find another role within the respondent's organisation which would be more suitable. The claimant was advised that, if no suitable alternative role was available, then there was a strong possibility of his dismissal on grounds of ill-health.

36 Entirely consistent with what is recorded at the meeting, there follows in our Hearing Bundle a Redeployment Questionnaire purporting to have been completed by the claimant setting out the parameters of alternative roles which may be suitable. In his evidence before us, the claimant denies completing such a questionnaire and states that the signature purporting to be his is false. The manager's signature appearing on that document is that of Mr Baldwin - the claimant's line manager in whom he retained considerable confidence throughout. (It was Mr Baldwin who the claimant selected to accompany him at later meetings.) On the basis of the claimant's evidence before us, we find it highly implausible that Mr Baldwin would be party to the fabrication of such a document; and, on balance, we are satisfied that the document was completed and signed by the claimant. Certainly, this would be consistent with the recorded outcome of the Stage 2 Meeting - the focus now was on the possibility of redeployment to a suitable role.

37 By a letter dated 11 January 2019, the claimant was invited to attend a Stage 3 Long-Term Sickness Absence Review Meeting. Because the claimant had reached Stage 3, there was now the possibility that he may be dismissed on ill-health grounds. This was explained in the letter; and, for this reason, the Meeting was to be conducted by Mr Clark. Mr Clark was supported by Ms Abigail. The meeting was fixed for 5 February 2019.

38 On 23 January 2019, the claimant lodged a grievance. The thrust of the grievance was that the respondent was not taking adequate steps to make reasonable adjustments to allow the claimant to continue working; and he was concerned at the indication which he had been given that he may be facing dismissal. The claimant suggested that he should manage a single property in Coventry which he would visit twice each week and spend the rest of the week completing administrative duties. The claimant specifically requested the opportunity to discuss this at the forthcoming Stage 3 Meeting.

39 In advance of the Meeting, the claimant contacted Mr Clark and asked if he could be accompanied at the Meeting by his brother-in-law. Mr Clark repeated what the claimant had already been told that the respondent's policy was that he could be accompanied by a work colleague or a trade union representative - as the claimant's brother-in-law was neither of these his attendance would not be permitted. The claimant explained to us that the reason for his specific request to be accompanied by his brother-in-law was that his brother-in-law had an understanding of how Sickle-Cell Disease affected him. For reasons of his own, which we do not understand, the claimant did not explain this to Mr Clark. It transpired that in fact the claimant was perfectly comfortable being accompanied by his line manager Mr Baldwin (who did accompany the claimant at his later appeal meeting). However, the claimant was reluctant to ask Mr Baldwin to attend the Stage 3 Meeting with him because Mr Baldwin himself had only recently returned to work after a period of sickness. Again, none of this was explained to Mr Clark who may have been willing to reschedule or delay the meeting for Mr Baldwin's attendance. (No objection was raised by anyone as to Mr Baldwin's companionship and on that basis we do not query it. But arguably he was not an appropriate companion because it was Mr Baldwin who had conducted the Stage 2 Meeting.)

40 Also in advance of the Meeting, the claimant contacted Ms Vicky Tanday - Senior In-House Recruitment Consultant who provided assistance to him in identifying suitable redeployment opportunities. Ms Abigail also spoke to Mr Lee Jones - Recruitment Manager and asked him to consider what vacancies there may be which were suitable for the claimant. Mr Jones provided details of two possible redeployment opportunities: Service Charge Project Manager and Support Coordinator.

41 We accept Ms Abigail's account of the meeting: -

- (a) The claimant confirmed that his conditions of Sickle-Cell Disease and Retinitis Pigmentosa were permanent conditions which would not improve. He reported that the condition with his knee was improving and had not deteriorated. (The claimant's evidence before us was that his knee condition was fully recovered by this time.)

- (b) The claimant agreed that it would be appropriate for his grievance of the 23 January 2019 to be considered at this meeting.
- (c) Mr Clark referred back to the OH Report from Dr Gupta. The claimant confirmed the position that it was no longer viable for him to return to his role as a Support Officer.
- (d) The claimant indicated that he would consider alternative employment in the geographical areas of Leamington Spa; Coventry; Stratford-upon-Avon; Warwick; and possibly, Birmingham.
- (e) Mr Clark indicated that he had considered the claimant's proposal to work solely from Coventry. However, this was not operationally viable. Neither did the BASS service have sufficient administration work for the claimant to redeploy as a full-time administrator.
- (f) Mr Clark discussed the possibility of alternative roles with the claimant including specific consideration of the Service Charge Project Manager identified by Mr Jones. Other vacant roles were also discussed. The claimant accepted that redeployment into an alternative role was the only way he could return to work.

42 Although the respondent's general procedure would be for a final decision to be made at a Stage 3 meeting, Mr Clark decided to postpone any decision as to the claimant's future to allow more time for alternative roles to be considered. The claimant was advised that if alternative employment could not be found he would be invited to a further Stage 3 meeting on a date to be fixed and notified to him.

43 After the meeting, Mr Clark wrote to the claimant confirming what was discussed and sending him copies of notes taken by both himself and Ms Abigail. The letter confirmed that the claimant had agreed to his grievance being incorporated into the Stage 3 procedure.

44 Mr Clark then liaised with Mr Tony Munro who was the Hiring Manager for the Service Charge Project Manager post. Mr Clark wished to ensure that the claimant was interviewed for that role as soon as possible and he agreed to defer the second Stage 3 meeting until the outcome of the interview was known. The recruitment process for that role required candidates to complete a two-part practical test specifically to demonstrate their competency using Microsoft Excel. The claimant was invited to sit the test before any other candidate; but, prior to completing the test, the claimant informed Mr Munro that he wished to withdraw from the recruitment process and did not wish to be considered for the role.

45 In the weeks following the meeting, Mr Clark and Miss Abigail maintained liaison with the claimant about possible alternative roles. His attention was specifically drawn to the role of Development Analyst in Birmingham for which the claimant was unsuccessful at interview; and to an IT Consultant role. By the

time of the second Stage 3 Meeting, Ms Abigail had compiled a significant list of roles which had been drawn to the claimant's attention - most of which he did not pursue as he did not consider them suitable. In our judgement it is clear that the claimant did not fully engage with the process it appears to have been his position that the obligation was on the respondent to find him an alternative with no corresponding obligation on him to be proactive.

46 The second Stage 3 meeting was convened on 13 March 2019. Again, we accept Ms Abigail's account of the meeting. She produced notes which were signed by the claimant as an accurate record. The claimant had agreed that he was unable to return to his substantive post as a Support Officer; the focus of the meeting therefore was to review the position in relation to suitable alternative roles. By this date the claimant had been absent from work for almost 7 months.

47 At the outset of the meeting, the claimant produced a further fit note from his GP dated 13 March 2019. The fit note indicated that the claimant had been examined by his GP the previous day that he was absent from work due to Sickle-Cell Disease/Retinitis Pigmentosa. It stated that the claimant may be fit to return to work taking account of the following advice: -

- (a) A phased return to work.
- (b) Amended duties
- (c) Workplace adaptations

The fit note then contain the following narrative: -

*"James knee and ankle pains have largely settled and his mobility has improved since last summer but his underlying issues with the potential of sickle-cell crisis remains - please refer to the occupational health document provided by Dr Suzanne Gupta with which I concur. I agree that he should be found office-based work that is appropriate to his experience and he should commence a phased return from 1 March 2019 to full-time over several weeks."*

48 The claimant also handed over a letter dated 12 March 2019 from Ms Vicki Johnson - Employment Adviser RNIB. The letter explained that Ms Johnson is available to assist both the claimant and the respondent in attempts to retain the claimant in employment. The letter enclosed a fact sheet about Access to Work; and stated that Access to Work "*can provide some excellent technology as well as human support*" to enable the claimant to carry out his role.

49 At the meeting, the claimant stated that he was very concerned about his future and that he did not wish to lose his job. Mr Clark was sympathetic but referred to the medical evidence both from Dr Gupta and from the claimant's GP

which clearly indicated that it was not possible for the claimant to continue in his role as Support Officer. The claimant acknowledged that he had been encouraged to consider alternative vacancies within the respondent's organisation, but he felt that the available opportunities were unsuitable. The claimant indicated that he had received assurances from Ms Johnson that RNIB would provide him with a full-time driver. Mr Clark decided to adjourn the meeting to enable him to contact Ms Johnson and explore what was available. During the adjournment both Mr Clark and Ms Abigail attempted to contact Ms Johnson but there was no response.

50 When the meeting resumed, Mr Clark advised that it had not been possible to speak to Ms Johnson. Ms Abigail noted that even if a driver could be provided the medical evidence went beyond the question of driving to work or even driving within the working day. The evidence suggested that "*the only type of role that the claimant could be considered fit for was one which was mainly indoors in an office-based environment*". At the conclusion of the meeting, Mr Clark advised that he would attempt to speak to Ms Johnson before making a final decision.

51 It is quite clear from Ms Abigail's evidence, and evident from the documents, that both Ms Abigail and Mr Clark tried many times without success to contact Ms Johnson. On 14 March 2019, Mr Clark emailed Ms Abigail he indicated that he wanted confirmation that RNIB would "*fund 'all' of the costs involved [of providing a driver] for an indefinite period*". Mr Clark suggested in his email that if such was the case then once the arrangements were in place the claimant could resume working in his Support Officer role.

52 In response to emails from Ms Abigail, Ms Johnson provided another Fact Sheet about Access to Work and made reference only to RNIB assisting with referrals. Clearly any assistance which might be available would only be provided by Access to Work and not by RNIB. Despite an indication that she would do so, Ms Johnson never contacted Ms Abigail as requested.

53 Ms Abigail then made direct contact with Access to Work. She was informed that any assistance would be dependent on an individual making an application; there was no guarantee that funding for a driver would be provided; nor any specific commitment as to the timescale which would be involved in processing any application; it was also confirmed that funding would not be permanent but would be for a fixed period after which a further application would have to be made. It was clear to Ms Abigail that the type of assistance envisaged would be the funding of taxis to enable the claimant to get to work and possibly to travel once within the working day.

54 Having considered the information which was available both from RNIB and Access to Work Mr Clark made his decision which was to terminate the claimant's employment on ill-health grounds. His reasoning, was worked through in consultation with Ms Abigail as follows: -

- (a) The medical evidence from Dr Gupta and Dr Watt (the claimant's GP); indicated that it was not viable for the claimant to return to his role as a Support Officer. The medical evidence advised that the claimant could only return to work in an office-based role with appropriate adjustments. If the claimant was to return to his role as a Support Officer, it would likely compromise both his own safety and that of service users.
- (b) The claimant accepted that his condition was degenerative and would not improve over time. The claimant had repeatedly accepted in meetings that he could not return as a Support Officer.
- (c) Mr Clark gave consideration to whether any adjustments could be made to the claimants return to work as a Support Officer. Mr Clark had investigated the claimant's suggestion of working at a single property or in an administrative role but these suggestions were not operationally viable - and there was no administrative vacancy in BASS anyway.
- (d) Mr Clark considered the possibility of a driver being provided either by RNIB or Access to Work. He eventually concluded that the provision of a driver would not address the issue; the claimant would still be employed effectively in a field-based role whereas he needed to be in a permanent office-based environment. Only in such an environment could other workplace adjustments be considered.
- (e) Mr Clark was satisfied that all reasonable attempts have been made to secure an alternative role. Nothing was available which the claimant considered suitable.

55 Mr Clark's decision was communicated to the claimant in a letter dated 19 March 2019. The claimant was advised that his employment would terminate on 20 March 2019; but that he would receive 12 weeks payment in lieu of notice together with a payment for all accrued and untaken annual leave. The claimant was advised of his right of appeal.

56 On 22 March 2019, by a letter incorrectly dated 22 April 2019, the claimant submitted an appeal. His sole ground of appeal was that the respondent had failed to make reasonable adjustments to his working conditions which would have allowed him to fulfil all of his job requirements. Ms Clydesdale was appointed as the appeal officer. It is the respondent's policy that appeal hearing should be heard by an employee who is at least the same grade as the person taking the original decision. As a Regional Manager, Ms Clydesdale was the same grade as Mr Clark; but she did not work in the same area as the claimant and had only met him on one previous occasion at a group training session.



57 The appeal hearing took place on 30 April 2019. The claimant attended accompanied by Mr Baldwin. Ms Clydesdale conducted the meeting supported by Ms Ella Mpambe - Employee Relations Specialist and Ms Vivienne Kodila – HR. The claimant amplified his grounds of appeal: -

- (a) He felt that he had not been offered sufficient support to find alternative employment.
- (b) He felt that he had been set up to fail in his application for the Service Charge Project Manager vacancy as he did not have the relevant experience.
- (c) He acknowledged that the OH Report dated 6 November 2018 had stated that he was not able to return to work in his role as a Support Officer and that there was little to no prospect of an improvement in this condition.
- (d) He claimed that he had been dismissed two days before he was due to be approved for a personal driver funded by the RNIB. He maintained that the personal driver was still available to him who could drive him between properties.
- (e) He felt that the respondent had taken a decision to dismiss him before exploring all potential adjustments and alternatives.
- (f) The claimant was concerned that, as long ago as the Stage 2 meeting, Ms Aujla had stated that the claimant would be dismissed. He therefore felt that everything which followed had been prejudged.
- (g) During the appeal hearing, the claimant presented a copy of the letter from Dr Nicole to Dr Watt dated 5 September 2018. This is the letter in which Dr Nicole had agreed with Dr Watt's earlier recommendation that the claimant should seek ill-health retirement. The appeal meeting was the first time that the respondent had seen a copy of that letter.

At the conclusion of the meeting, Ms Clydesdale indicated that she wished to carry out some further investigations before reaching a decision.

58 On 16 May 2019, Ms Clydesdale spoke to Ms Johnson to discuss the case. She established that it was not true that the claimant had been dismissed just two days before being allocating a support driver. He had apparently been dismissed two days before what would have been an initial meeting with Ms Johnson as to what support may be available. (Mr Clark and Ms Abigail had not been told of such a meeting being imminent.) No driver had been allocated but there was the possibility of making an application for a driver via Access to Work.

59 Later that day, Ms Clydesdale wrote to the claimant with the outcome of the appeal. She was satisfied that Mr Clark's decision was correct: that the claimant should be dismissed on the grounds of ill-health. Ms Clydesdale explained her reasoning as follows: -

- (a) She was satisfied that the claimant could not return to his role as a Support Worker in the BASS service. The medical evidence presented by Dr Gupta and Dr Watt (which was now supported by the previously unseen letter from Dr Nicole) confirmed this. The claimant was only safe return to work in an office-based role.
- (b) Ms Clydesdale was satisfied that the claimant had been given every opportunity to apply for suitable vacancies within the respondent's organisation.
- (c) There was in fact no truth in the assertion that the claimant had been dismissed just two days before the allocation of a driver.
- (d) In any event, Ms Clydesdale concluded that the allocation of a driver would not be a reasonable adjustment in the circumstances. Such provision would not resolve the fundamental issue. The medical evidence suggested that the claimant was not safe working alone with service users and that his doing so presented unacceptable risks both to himself and to them. This was not merely a problem with mobility or getting to and from the properties. The claimant needed to be employed in an office-based environment. A driver did not resolve this issue.
- (e) Further, even if a driver was available, Ms Clydesdale felt that there were insurmountable obstacles. The respondent could not engage third-party drivers (such as taxis) to transport the claimant to the properties occupied by service users. This would involve a breach of confidentiality as to the locations of those properties. Driving duties would have to be undertaken by a bespoke driver who had been security checked and cover would need to be in place in case of illness or annual leave.
- (f) It had been right for Ms Aujla to ensure from an early stage that the claimant was aware that a possible outcome of the process could be his dismissal. She did not accept that anything thereafter was prejudged; and, of course, Miss Aujla was not involved at Stage 3.

60 There were some developments which occurred after the claimant's dismissal and after his appeal upon which we should comment: -

- (a) The claimant reported to Ms Johnson the outcome of his appeal on 20 May 2019. Ms Johnson wrote to the claimant setting out her opinion. Frankly we find this letter was a most unhelpful intervention. Ms Johnson comments on matters of which she has an inadequate understanding; in particular, the respondent's security and confidentiality requirements.
- (b) On 8 July 2019, Ms Julia Benson of RNIB Legal Services wrote to the respondent requesting information about the respondent's policies and about the process which had been followed leading to the claimant's dismissal. Although the letter was addressed to Miss Clydesdale, it was passed to Ms Abigail for a response. Ms Abigail responded to Ms Benson

- on 10 July 2019 indicating that she could provide the information requested but needed evidence of the claimant's consent. She also enquired as to the capacity in which Ms Benson was writing; it was unclear whether RNIB Legal Services had been retained by the claimant as his legal advisers. Nothing further was heard.
- (c) On 16 August 2019, Dr Watt wrote to the respondent expressing his concern at the claimant's dismissal and seeking to retract somewhat from the opinion expressed in the fit note presented by the claimant on 13 March 2019. Dr Watt now stated that had he been aware of the possibility of a driver being provided to the claimant he would have advised the respondent to pursue this route rather than certifying that the claimant required office-based employment. Dr Watt does not explain why the provision of a driver, which was immaterial to the question of whether the claimant was office-based, would have made any difference.
- (d) In connection with new employment with Warwickshire County Council (an office-based role), the claimant did make an application for support from Access to Work. He was successful and receives a grant towards the cost of transport. The grant comprises a contribution of £17.50 for each return journey by taxi from the claimant's home to his office; the cost of each return journey is £20; the claimant is left to make a contribution of £2.50.

## **The Law**

### **61 The Equality Act 2010 (EqA)**

#### **Section 4: The protected characteristics**

The following characteristics are protected characteristics

age;  
disability;  
gender reassignment;  
marriage and civil partnership;  
pregnancy and maternity;  
race;  
religion or belief;  
sex;  
sexual orientation.

#### **Section 13: Direct discrimination**

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

#### **Section 15: Discrimination arising from disability**

- (1) A person (A) discriminates against a disabled person (B) if
  - (a) A treats B unfavourably because of something arising in consequence of B's disability, and
  - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

### **Section 20: Duty to make adjustments**

- (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
- (2) The duty comprises the following three requirements.
- (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- (7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

### **Section 21: Failure to comply with duty**

- (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
- (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
- (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

**Section 39: Employees and applicants**

- (2) An employer (A) must not discriminate against an employee of A's (B)—
- (a) as to B's terms of employment;
  - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
  - (c) by dismissing B;
  - (d) by subjecting B to any other detriment.
- (5) A duty to make reasonable adjustments applies to an employer.

**Section 136: Burden of proof**

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
- (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
- (5) This section does not apply to proceedings for an offence under this Act.
- (6) A reference to the court includes a reference to—
- (a) an employment tribunal;

62 **The Employment Rights Act 1996 (ERA)**

**Section 94: The Right not to be unfairly dismissed**

- (1) An employee has the right not to be unfairly dismissed by his employer.

**Section 98: General Fairness**

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
  - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it—
- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
  - (b) relates to the conduct of the employee,
  - (c) is that the employee was redundant, or
  - (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
- (4) .....where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
  - (b) shall be determined in accordance with equity and the substantial merits of the case.

### 63 **Decided Cases**

**Nagarajan v London Regional Transport [1999] IRLR 572 (HL)**

**Villalba v Merrill Lynch & Co [2006] IRLR 437 (EAT)**

If a protected characteristic or protected acts had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence. Discrimination and victimisation may be conscious or sub-conscious.

**High Quality Lifestyles Limited –v- Watts [2006] IRLR 850 (EAT)**

**Aylott –v- Stockton on Tees Borough Council [2010] IRLR 994 (EAT)**

In order to establish direct discrimination, it is not sufficient for the claimant to show that his treatment was on the grounds of his disability. It has to be established that the treatment was less favourable than the treatment which

would have been afforded to a comparator in circumstances that are “not materially different” There are dangers in attaching too much importance to constructing a hypothetical comparator and to less favourable treatment as a separate issue. If a claimant is dismissed on the ground of disability then it is likely that he will be treated less favourably than a hypothetical comparator, not having the particular disability, would have been treated in the same relevant circumstances,

**Ladele –v- London Borough of Islington [2010] IRLR 211 (CA)**  
**JP Morgan Europe Limited –v- Chweidan [2011] IRLR 673 (CA)**

There can be no question of direct discrimination or discrimination arising from disability where everyone is treated the same.

**Bahl –v- The Law Society & Others [2004] IRLR 799 (CA)**  
**Eagle Place Services Limited –v- Rudd [2010] IRLR 486 (CA)**

Mere proof that an employer has behaved unreasonably or unfairly would not, by itself, trigger the transfer of the burden of proof, let alone prove discrimination.

**Igen Limited –v- Wong [2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

**Madarassy v Nomura International Plc [2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant’s evidence of discrimination.

**Rihal –v- London Borough of Ealing [2004] IRLR 642 (CA)**

**Anya –v- University of Oxford [2001] IRLR 377 (CA)**

**Shamoon –v- Chief Constable of the RUC [2003] IRLR 285 (HL)**

**R –v-Governing Body of JFS [2010] IRLR 186 (SC)**

In a case involving a number of potentially related incidents the tribunal should not take a fragmented approach to individual complaints, but any inferences should be drawn on all relevant primary findings to assess the full picture. Any inference of discrimination must be founded on those primary findings. Where there is no actual comparator a better approach to determining whether there has been less favourable treatment on prescribed grounds is often not to dwell in isolation on the hypothetical comparator but to ask the crucial question “why did the treatment occur?” In deciding whether action complained of was taken on grounds of race a distinction is to be drawn between action which is inherently racially discriminatory and that which is not; to establish that the action was taken on racial grounds in the former case motive or intention of the perpetrator is not relevant - in the latter it is relevant.

**Laing –v- Manchester City Council [2006] IRLR 748**

In reaching its conclusion as to whether or not the claimant has established facts from which the tribunal *could* conclude that there had been unlawful discrimination the tribunal is entitled to take into account evidence adduced by the respondent. A tribunal should have regard to all facts at the first stage to see what proper inferences can be drawn.

**Morse –v- Wiltshire County Council [1999] IRLR 352 (EAT)**

A tribunal hearing an allegation failure to make reasonable adjustments must go through a number of sequential steps: It must decide whether the provisions of [EqA] impose a duty on the employer in the circumstances of the particular case. If such a duty is imposed it must next decide whether the employer has taken such steps as it is reasonable all the circumstances of the case for him to have to take.

**Smith –v- Churchills Stairlifts plc [2006] IRLR 41 (CA)**

The test is an objective test; the employer must take "such steps as it is reasonable to take in all the circumstances of the case". What matters is the employment tribunal's view of what is reasonable.



**Tarbuck –v- Sainsbury’s Supermarkets Limited [2006] IRLR 664 (EAT)**

There is no separate and distinct duty of reasonable adjustment on an employer to consult the disabled employee about what adjustments might be made. The only question is objectively whether the employer has complied with his obligations or not. If the employer does what is required of him then the fact that he failed to consult about it, or did not appreciate that the obligation even existed, is irrelevant. It may be entirely fortuitous and unconsidered compliance but that is enough. Conversely if he fails to do what is reasonably required it avails him nothing that he has consulted the employee.

**Project Management Institute –v- Latif [2007] IRLR 579 (EAT)**

In order for the burden of proof to shift to the respondent, the claimant must not only establish that the duty to make reasonable adjustments has arisen but also that there are facts from which it can reasonably be inferred that it has been breached.

**Environment Agency –v- Rowan [2008] IRLR 20 (EAT)**

An employment tribunal considering a claim that an employer has discriminated against an employee by failing to comply with the duty to make reasonable adjustments must identify:

- (a) the provision criterion or practice apply by or on behalf of the employer, or
- (b) the physical feature of the premises occupied by the employer, and
- (c) the identity of non-disabled comparators, and
- (d) the nature and extent of a substantial disadvantage suffered by the claimant.

Unless the tribunal has gone through that process it cannot go on to judge if any proposed adjustment is reasonable.

**DWP –v- Alam [2010] ICR 665 (EAT)**

**Wilcox –v- Birmingham CAB Services Limited [2011] EqLR 810 (EAT)**

The duty to make adjustments is not engaged unless the employer knows (or ought to know) of both the disability and the substantial disadvantage.

**Royal Bank of Scotland –v- Ashton [2011] ICR 632 (EAT)**

Before there can be a finding that there has been a breach of the duty to make reasonable adjustments an Employment Tribunal must be satisfied that there was a provision criterion or practice that placed the disabled person, not merely at some disadvantage viewed generally but, at a disadvantage that was

substantial viewed in comparison with persons who are not disabled. In this case an attendance policy which applied equally to all employees but which provided for a degree of “flexing” in the case of an employee who was disabled or suffered from a chronic or long-term underlying condition could not be said of itself to be a provision criterion or practice which placed the disabled person at a substantial disadvantage.

**RLCH –v- Dunsby [2006] IRLR 351 (EAT)**

There is no absolute rule that an employer must ignore “disability related” absence.

**Gallop -v- Newport City Council [2013] EWCA Civ 1583 (CA)**

When addressing questions of disability, disadvantage and the duty to make adjustments, the employer must exercise its own judgement based on all information reasonable available. It is not acceptable simply to rely on medical opinion.

**Wilson –v- Post Office [2000] IRLR 834 (CA)**

Categorisation of the true reason for a dismissal under Section 98(1) and (2) ERA is a question of legal analysis the and a matter for the tribunal to determine.

**Taylor –v- Alidair Limited [1978] IRLR 82 (CA)**

In a capability dismissal the correct test of fairness is whether the employer honestly and reasonably held the belief that the employee was not competent and whether there was a reasonable ground for that belief.

**Lynock –v- Cereal Packaging Limited [1988] IRLR 510 (EAT)**

in determining whether to dismiss an employee with a poor record of sickness absence and employers approach should be based on sympathy understanding and compassion. Factors which may prove important include: the nature of the illness; the likelihood of the illness recurring; or of some other illness arising; the length of the various absences and the periods of good health between them; the need of the employer to have its work done; the impact of the absences on those who work with the employee; the adoption and exercise of a policy in connection with absence due to sickness; the importance of a personal assessment in the ultimate decision; and the extent to which the difficulty of the situation and the position of the employer have been explained to the employee. A disciplinary approach, involving warnings, is not appropriate in a case of intermittent sickness

absence - but the employee should be cautioned that the stage has been reached when it has become impossible to continue with the employment.

**Polkey –v- AE Dayton Services Ltd. [1987] IRLR 503 (HL)**

In a case of incapacity, an employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to improve and show that she can do the job.

**Iceland Frozen Foods v Jones [1982] IRLR 439 (EAT)**

**Post Office –v- Foley & HSBC Bank plc –v- Madden [2000] IRLR 827 (CA)**

It is not for the tribunal to substitute its own view but to consider whether the respondent's decision came within a range of reasonable responses by a reasonable employer acting reasonably.

**Sainsbury's Supermarkets Limited –v- Hitt [2003] IRLR 23 (CA)**

The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed.

**The List of Issues**

64 The claimant produced a List of Issues in advance of the trial. Whilst not necessarily accepting that everything on the list was necessarily in issue, the respondent did not demure from the List which also represented an accurate summary of how the claimant put his case. Inevitably, the List was subject to degree of refinement once the Hearing was under way. We set out below the List as it was by the time Mr Frew came to make his closing submissions: -

***Unfair Dismissal***

- (a) Was capability the reason for dismissal?
- (b) Did the respondent follow a fair procedure?
- (c) Did the respondent establish the true medical position of the claimant?
- (d) Did the respondent establish the prospects of the claimant returning to his role of Support Officer or at all?
- (e) Was the dismissal reasonable in the circumstances (did the respondent have a genuine belief that ill-health was the reason for the dismissal, did the respondent have reasonable grounds for its belief and did the respondent carry out a reasonable investigation)?
- (f) Was the dismissal discriminatory in the circumstances (Section 39 EqA)?

***Direct Discrimination***

- (g) Did the respondent treat the claimant less favourably than the respondent treats or would treat others because of his disability?
- (h) The claimant relies on a hypothetical comparator.
- (i) Did the respondent act upon an incorrect presumption that the claimant was incapable of carrying out his role particularly because of his impaired vision?

***Discrimination Arising from Disability***

- (j) Did the respondent treat the claimant unfavourably because of something arising in consequence of the claimant's disability?
- (k) The claimant relies upon the unfavourable treatment are being taken through the process leading to his dismissal without material consideration of reasonable adjustments and his dismissal.
- (l) The claimant identifies that the "something arising" in consequence of his disability is his inability to drive.
- (m) Can the respondent show that the treatment of the claimant was a proportionate means of achieving a legitimate aim?

***Failure to Make Reasonable Adjustments***

- (n) Was the claimant placed at a substantial disadvantage by the respondent's PCP of personally driving to carry out his contractual duties? duties?
- (o) Does the respondent accept that it knew, or ought reasonably to have known that the claimant was firstly, disabled; and secondly, likely to be placed at a substantial disadvantage because of his disabilities.
- (p) Would the following adjustments be firstly, reasonable; and secondly, ameliorate the claimant's disadvantage?
  - (i) Consult with interested parties such as RNIB and access to work properly.
  - (ii) Enable the claimant to carry out his contracted role without the need for personal driving and with a driver.
  - (iii) Be accompanied by a companion of his choice (who need not be a work colleague or a Trade Union Representative) at formal/informal meetings related to the potential dismissal of the claimant.
  - (iv) Not to dismiss.

## ***The Claimant's Case***

### *Unfair Dismissal*

65 The claimant does not accept that the reason for his dismissal was the permitted reason of capability. He maintains that he was dismissed because he was disabled; that the respondent made unjustified assumptions as to his ability to carry out his role satisfactorily without proper investigation or adequate evidence upon which to reach such a conclusion. In closing submissions Mr Frew candidly acknowledged that this was not the strongest element of the claimant's case.

66 Even if the reason for the claimant's dismissal was the respondent's genuine belief that he was incapable of carrying out his duties, this was not a reasonable belief following an adequate investigation. By the time of the claimant's dismissal the report from Dr Gupta was four months old. The position should have been reassessed in the light of support potentially available from RNIB.

67 In any event, inadequate efforts were made to secure an alternative role.

68 The decision to dismiss was therefore outside the range of reasonable responses.

### *Direct Discrimination*

69 See Paragraph 65 above.

### *Discrimination Arising from Disability*

70 The claimant maintains that the fundamental obstacle to his continuing in his role as a Support Officer was his inability to drive. This is the "something arising" from his disability. Ultimately the claimant was dismissed because of his inability to drive and, accepting that the respondent had a legitimate aim of meeting the requirements of its MOJ contract, and providing a safe and satisfactory service to its service users, the claimant's dismissal was not proportionate because there was the alternative of allowing him to continue in his role with the support of a driver.

### *Failure to Make Reasonable Adjustments*

71 It is the claimant's case that the PCP was the requirement for personal driving. As the claimant had lost his driving licence due to his disability, clearly such a PCP would place him at a substantial disadvantage. However, following

proper consultation with RNIB and/or Access to Work the adjustment could have been made to provide the claimant with a driver.

72 Regarding Paragraph 64(p)(iii) above, it is necessary for the claimant to identify an alternative PCP – namely, the respondent's policy of allowing a companion who must be a work colleague or trade union representative. Mr Frew acknowledges that the respondent was not aware that this restriction placed the claimant at a substantial disadvantage. The claimant's case is that the respondent *ought* to have been aware by making enquiries of the claimant as to why he wished his brother-in-law to attend.

### ***The Respondent's Case***

#### *Unfair Dismissal*

73 Mr Graham submits that on the evidence we can easily conclude that the sole reason for the claimant's disability was the respondent's genuine belief that on grounds of ill-health he was no longer capable of safely undertaking his role as a Support Officer. The suggestion that the claimant was dismissed because he was disabled or because of any false assumptions made in that regard does not bear scrutiny. The respondent had been aware of the claimant's disabling medical conditions for many years but had taken no steps to terminate his employment. Even when the claimant lost his driving licence, immediate steps were taken to alleviate any disadvantage - by altering the geographical locations of the claimant's properties; paying his expenses to travel by public transport; and (perhaps questionably) allowing family members to drive the claimant where necessary.

74 The respondent reached its conclusion as to the claimant's inability to carry out his duties only after receiving medical advice from Dr Gupta; later confirmed by the claimant's GP; and, by the time of the appeal, further confirmation was available from Dr Nicole.

75 Extensive searches were made in an attempt to identify a suitable alternative role for the claimant. He was prioritised in the selection process for the Development Analyst role; but the claimant withdrew from the process. The respondent cannot be responsible for the claimant's failure to meaningfully engage.

76 In the circumstances, the decision to dismiss was within the range of reasonable responses.

*Direct Discrimination*

77 See Paragraph 73 above.

*Discrimination Arising from Disability*

78 The respondent's case is that, as argued, the claimant's case is fundamentally misconceived. The claimant was not treated unfavourably (dismissed) because of his inability to drive; he was dismissed because, on medical grounds, he could not safely perform his duties working alone as a field-based officer. His medical conditions required that he should have office-based work and appropriate workstation adjustments. The respondent's case is that the question of a driver a "*red herring*". Accepting that the claimant's inability to perform his duties arose as a consequence of his disability, the respondent accepts that the claimant was treated unfavourably in that he was dismissed for something arising from his disability. However, the respondent argues that such action was clearly justified. It had a legitimate aim of properly meeting its obligations under the MOJ contract; and providing services in a way which was safe to both service users and to the claimant. As the claimant could not provide the services safely his dismissal from that role was entirely proportionate.

79 Mr Graham accepts that it may not have been proportionate to dismiss the claimant absent a genuine and sufficient search for an alternative role. The respondent's case is that an exhaustive search was undertaken but no alternative role was available.

*Failure to Make Reasonable Adjustments*

80 Again, the respondent's case is that, as argued, the claimant's case is misconceived. There was no PCP requiring "*personal driving*"; indeed, when the claimant first lost his driving licence his employment continued in such a way that personal driving was not essential. The PCP applied by the respondent was the requirement to be able to carry out the role of Support Officer safely: safely for both the claimant and service users.

81 Having regard to the medical evidence, the respondent concluded that the claimant could not carry out that role safely. It accepts therefore that the PCP identified above placed the claimant at a substantial disadvantage and created an obligation to make such adjustments as were reasonable to avoid the disadvantage. The only adjustment which has been contended for by the claimant is the provision of a driver. The respondent's case is that the provision of a driver would not avoid the disadvantage as the claimant could not safely undertake the duties of a field-based officer. There were no adjustments available which could create such a safe environment for the claimant. The

respondent therefore considered the alternative of redeploying the claimant elsewhere; but no roles were available.

82 Regarding the claimant's choice of companion, the claimant simply asked to be accompanied by his brother-in-law. In evidence before the tribunal, the claimant explained that the principal reason for such a request was Mr Baldwin's unavailability for the Stage 3 meeting. There is no evidence to suggest that, by reason of his disability, claimant was at a disadvantage being represented by a work colleague or a trade union representative. Even if that were the case, the claimant did not explain to the respondent the reason for his request and there is no basis upon which the respondent should be fixed with such knowledge.

## **Discussion & Conclusions**

### ***Unfair Dismissal***

#### **The Reason for the Dismissal**

83 Without hesitation, we find on the evidence that the sole reason for the claimant's dismissal was the respondent's genuine belief that he could no longer safely undertake the duties required of a Support Officer. Because of his medical conditions, and in particular his diminished eyesight, it was not safe for the claimant to visit service users alone and especially during the hours of darkness. It was unsafe both for the claimant and for the service users. The respondent's belief was that, because of his medical conditions, the only safe working environment for the claimant would be office-based. For the avoidance of doubt, we are satisfied that the claimant was not dismissed simply because he was no longer able to drive.

#### **The Reasonableness of the Respondent's Belief**

84 In our judgement, the respondent's belief was soundly grounded on the available evidence: firstly, the report of Dr Gupta dated 6 November 2018; secondly, the repeated acknowledgement by the claimant that he was unable to carry out his duties; and finally, the opinion of Dr Watt dated 13 March 2019.

#### **The Investigation**

85 In our judgement, the respondent carried out as much investigation as was necessary. We reject the claimant's assertion that Dr Gupta's report was out of date by March 2019. It was only four months old and the relevant medical conditions namely Sickle-Cell Disease and Retinitis Pigmentosa had not improved and were not expected to. Furthermore, the opinion of Dr Watt was fully up-to-date and entirely in agreement with Dr Gupta. By the time of the



claimant's appeal, the respondent also had available the opinion of Dr Nicole. She, of course, was suggesting that the claimant should retire on ill-health grounds.

86 It is suggested that the investigation was inadequate because of a failure to explore in detail the support available through RNIB and/or Access to Work. In our judgement, this argument is misconceived. The evidence shows that such further investigation would only address the issue of driving - but it was not the inability to drive which was the principal concern; it was the inability to carry out the duties of a Support Officer.

### The Range of Reasonable Responses

87 As to whether the decision to dismiss fell within the range of reasonable responses, our judgement is that it would not have done so if the respondent had not made a genuine and thorough search for redeployment opportunities. But we are satisfied that such a search was made; every encouragement was given to the claimant; and regrettably, the claimant failed to engage.

88 On the question of the possible provision of a driver, we are satisfied that throughout the Stage 1, Stage 2 and the first Stage 3 meetings the claimant himself accepted that he could no longer undertake the Support Officer role. It was only at the second Stage 3 meeting that he (because of encouragement given by Ms Johnson) held out the possibility that he could continue if a driver was provided. In this regard, the claimant was in our judgement being quite unrealistic: driving was not the issue; the issue was working alone, attending service users homes alone, sometimes during the hours of darkness and often at short notice. Medical evidence supported the respondent's conclusion that field-based duties were no longer suitable for the claimant who properly needed an office-based role.

89 There is a suggestion from Mr Frew that the email from Mr Clark to Ms Abigail dated 14 March 2019 indicated that Mr Clark was satisfied that if a driver could be provided then the claimant could resume work as a Support Officer – and that it was therefore outside the range of reasonable responses to dismiss until the possibility of a driver had been further investigated. We do not find that to be the effect of the email. The email form part of an ongoing discussion between two colleagues at a time when a final decision was being formulated. At best, it was a preliminary view for discussion purposes. The evidence is clear: that, upon further consideration, Mr Clark concluded that the provision of a driver would not address the fundamental issue of whether or not the claimant could properly and safely undertake his duties as a support officer.

90 Mr Frew also relies heavily on the risk assessment carried out on 18 June 2018 when, despite the loss of his driving licence, the claimant was permitted to continue in his role of Support Officer. The argument is that, once the claimant was ready to return to work, he should have been permitted to do so notwithstanding his inability to drive. This argument runs contrary to the previous argument regarding the potential availability of a driver. And contrary to the argument that the claimant was dismissed because of a requirement for personal driving. The simple fact is that the claimant was not at any time fit to return to work. Throughout the relevant period his GP certified that he was unfit for work other than in an office-based role. The claimant himself agreed throughout that he could not undertake his Support Officer duties. More importantly, decisions taken on the 18 June 2018 were on the basis of information known at that time. When the decision to dismiss was taken respondent also had available the medical evidence from Dr Gupta and Dr Watt together with the claimant's own views as to his capability.

### ***Disability Discrimination***

#### Direct Discrimination

91 In our judgement, the claimant's claim that he suffered direct discrimination is totally without merit. The respondent knew of the claimant's medical conditions for many years before embarking on the process leading to his dismissal. When the claimant lost his driving licence, adjustments were made to his role to ensure that he could continue working. The principal factor leading ultimately to the claimant's dismissal was not the fact of his disability or any stereotypical assumptions made by the respondent but the medical evidence which the respondent considered together with the claimant's own views as to his position after an absence of seven months.

92 In our judgement, the claimant did not suffer any less favourable treatment. We are quite certain that an employee who was unable to continue to fulfil the role of Support Officer for a reason other than disabling medical conditions, would also have been dismissed if no alternative role could have been found.

#### Discrimination Arising From Disability

93 It is undoubtedly the case that the claimant's disabling medical conditions were the reason that he became unfit to carry out the duties of a Support Officer. And, it was because he was unfit that he was ultimately dismissed. Dismissal, and the process leading thereto, is unfavourable treatment. It therefore follows that the claimant was treated unfavourably for a matter arising from disability - namely his inability to undertake the required duties.

94 However, in our judgement, in the circumstances of this case, the unfavourable treatment was objectively justified. The respondent's legitimate aim was proper compliance with its obligations under its contract with MOJ and the necessity to deliver services safely for both its employees and its service users. The unfavourable treatment would not be objectively justified unless the respondent had properly considered alternatives to dismissal - including making adjustments (see below); or looking for an alternative role for the claimant. We are satisfied that the respondent conducted an exhaustive search for an alternative role but nothing suitable was available.

#### The Failure to Make Reasonable Adjustments

95 The claimant could no longer deliver the required services safely. In our judgement no adjustments to his Support Officer role could have rendered it safe for him to do so. The provision of a driver would not have addressed the principal concern: the claimant would still have been left working alone in a field-based role visiting service users at their homes; often during the hours of darkness; and often at short notice. As the provision of a driver would not have avoided the disadvantage caused by the claimant's disability then it must follow that the provision of a driver was not a reasonable adjustment.

96 We have reached the conclusion that the provision of a driver was not a reasonable adjustment without the necessity to consider the practical difficulties of providing a driver. The claimant's needs as a Support Officer could never have been met simply by providing funding for taxis. It would have required a bespoke driver; who had been cleared for security purposes. The likelihood is that two drivers would have been required so as to ensure cover in the case of illness; annual leave; or other absences.

#### The Burden of Proof

97 We have considered the provisions of Section 136 EqA. In respect of each strand of the claimant's disability discrimination claim, our judgement is, that the claimant has not established before us facts from which we could reasonably conclude that disability discrimination of any type has occurred. The burden of proof has not at any stage shifted to the respondent.

98 For the reasons we have set out above, we find that the claimant was fairly dismissed; his claim for unfair dismissal is not well-founded and is dismissed. We also find that, at no material time, did the respondent act towards the claimant in breach of Section 39 EqA. The claimant's claims for direct disability discrimination; discrimination for a matter arising from disability; and the failure to make adjustments are accordingly dismissed.

99 We record that, in reaching the conclusions we have set out above, we did consider the documents detailed at Paragraph 60 above. Ms Jonsson's opinion was of no assistance - not least because she purported to express her opinion about matters which were outside her knowledge or experience; namely, the respondent's requirements for security and confidentiality. The exchange between Ms Benson and Ms Abigail was of no assistance: Ms Benson's letter posed a number of questions; however, she did not provide any evidence of authority from the claimant for Ms Abigail to respond; neither did she make it clear in what capacity the questions were being asked. Finally, Dr Watt's apparent change of opinion expressed in August 2019 (some five months after the claimant's dismissal) clearly had no relevance. If Dr Watts and expressed the opinion in March 2019 that the provision of a driver would be of assistance, then clearly that would have had some relevance. But, in March 2019, Dr Watt's expressed the opinion that the claimant needed to work in an office-based environment.

Employment Judge Gaskell  
26 November 2020