Neutral Citation Number: [2026] EAT 54

Case No: EA-2024-000852-NK

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1st May 2026

Before:

THE HONOURABLE MR JUSTICE SOOLE

Between:

MR JACK TRUMAN

Appellant

- and –

(1) SPL POWERLINES UK LIMITED
(2) NETWORK RAIL INFRASTRUCTURE LIMITED
(3) EXPRESS MEDICALS LIMITED

Respondents

Susan Chan (acting pro bono, instructed by Morris Legal (Solicitors) Ltd) for the **Appellant**
David Hay KC (instructed by Sentinel Law Limited) for the **First Respondent**
Catherine Urquhart (instructed by Eversheds Sutherland (International) LLP) for the **Second Respondent**
Patrick Tomison (instructed by Anthony Gold Solicitors LLP) for the **Third Respondent**

Hearing dates: 11 and 12 December 2025

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JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION

The claimant was diagnosed with genetic haemochromatosis, an incurable condition whose primary symptom is chronic pain, especially in the joints. In 2022 he was prescribed medical cannabis to help manage his symptoms. Following a successful career in the rail industry, he applied that year to the First Respondent (Powerlines) for a job with a safety-critical role in the industry. This required him to pass a drug and alcohol (D&A) test in accordance with a policy imposed by the Second Respondent (Network Rail). The policy terms provided for a 'fail' of the test to be recorded as a 'pass' if the Medical Review Officer was satisfied that there was a legitimate medical need for the quantity of the substance found. The test was carried out by the Third Respondent (Express Medicals), which gave him a 'fail'. In consequence he did not get the job and was banned by Network Rail from working in rail industry safety-critical work for 5 years. A review and an attempt to appeal were each unsuccessful.

The claimant brought disability discrimination claims, pursuant to ss.15 and 20 EqA, against Powerlines and Network Rail. As against Express Medicals, he claimed pursuant to ss.111 and 112 EqA that it had instructed, caused or induced Network Rail to discriminate against him and/or knowingly helped it to do so.

The ET held that, if the policy had been correctly applied, the 'fail' should have been recorded as a 'pass'. However each of the ss.15 and 20 claims failed on various grounds. In doing so the ET held amongst other things:

(1) Network Rail was for the relevant purposes a 'qualifications body' within the meaning of ss.53/54 EqA;

(2) Network Rail had applied a 'competence standard' within the meaning of s.53(7);

(3) For the purposes of the s.20 claims, the claimant was not put to a substantial disadvantage in comparison with persons without his disability;

(4) If Network Rail had been liable, Express Medicals would in principle have been liable pursuant to s.111(2); and for that purpose the relationship between it and Network Rail was such that it was in a position to commit a basic contravention in relation to Network Rail (s.111(7)). The claim under s.112(1) was dismissed.

The EAT:

(1) Dismissed the claimant's appeal on the s.53(7) 'competence standard' issue;

(2) Allowed the claimant's appeal on the s.20 'substantial disadvantage' issue as against Network Rail and remitted it to the ET for reconsideration; but dismissed the appeal as against Powerlines;

(3) Dismissed Network Rail's cross-appeal on the ss.53/54 'qualifications body' issue;

(4) Dismissed Network Rail's cross-appeal on two perversity challenges;

(5) Allowed Express Medicals' cross-appeal that the condition in s.111(7) was not satisfied.

MR JUSTICE SOOLE:

1. This is an appeal by the Claimant against the decision of the Employment Tribunal (ET) at Sheffield (Employment Judge James, Mrs J Lee and Mr D Fields) dated 25 June 2024 whereby his claims of disability discrimination against the Respondents were all dismissed; together with contingent cross-appeals by the Second and Third Respondents. For convenience the parties will be referred to respectively as Mr Truman, Powerlines, Network Rail and Express Medicals.

2. Mr Truman had a successful career in the rail industry until July 2022. That career came to an end when he failed a drug and alcohol (D&A) test, because he was taking prescribed medical cannabis to manage the pain caused by a disability, haemochromatosis. Powerlines is an independent overhead line electrification provider, operating within both the mainline heavy rail sectors and the mass transit sectors. Network Rail owns, repairs and develops the railway infrastructure in Great Britain; and works under licence to the Office of Road and Rail (ORR), the overall regulator for the rail network. Express Medicals is an Occupational Health Provider whose specialities include D&A testing within the rail industry. It is authorised by the Rail Safety and Standards Board (RSSB) to carry out medical testing in relation to railway workers.

3. The appeal and contingent cross-appeals raise a number of difficult issues of law, in particular as to the interpretation of ss.53/54 and 111/112 Equality Act 2010 (EqA). The potential importance of these issues is only enhanced by the challenging terms of the opening paragraph of the ET's judgment: '*This claim has been an exceptionally difficult and complex one to decide. Whilst the tribunal has not upheld any of the claimant's claims, as pleaded, the tribunal believes that the claimant has suffered an injustice. For the reasons which are set out below, the tribunal has concluded that the claimant should be able to work in a safety critical role in the rail maintenance industry, just as* [a] *person taking opiate based medication would be allowed to do, subject to a risk*

assessment and monitoring...The tribunal members hope that this decision will help persuade those involved to re-visit that decision and allow the claimant to continue in his chosen career.' In all the circumstances, it is necessary to set out the background and findings in some detail.

Mr Truman's condition and treatment

4. Mr Truman was diagnosed with genetic haemochromatosis in 2018. There is no cure for this condition. The primary symptom is chronic pain, especially in the joints. All the Respondents concede that, by reason of this condition, he is disabled within the meaning of the EqA. Mr Truman has tried opiate medication for the pain his condition causes, but because of their addictive properties does not want to take opiates long-term. He therefore applied to a Harley Street clinic to participate in a study regarding the medical use of cannabis for pain relief. Following the consultation a letter dated 8 April 2022 from Dr Mohammed Sajad stated that the consensus from the Multi-Disciplinary Team was that he would benefit from a trial of medical cannabis. Details of the prescription were provided. The letter stated that the clinic '*...will only prescribe for indications where there is clinical evidence. Due to the lack of high-level research, our recommendation to start medical cannabis treatment may fall outside professional body and national guidance. Through your participation in the UK Medical Cannabis Registry, you are contributing to the increasing evidence base to support medical cannabis treatments for a variety of conditions…Most of the medicines we prescribe are unlicensed controlled schedule 2 medicines.*'

5. Mr Truman took up the offer and since April 2022 has been prescribed medical cannabis under the brand name Adven EMT1 and EMT2 to help manage his symptoms. He takes EMT1 nightly between 7 and 8 pm and EMT2 just before going to sleep. DVLA advised him not to drive or operate heavy machinery if he feels impaired. A letter from the clinic in February 2023 stated that Mr Truman had been compliant with the regular monitoring appointments; and that he reported great

improvement in his symptoms since starting treatment and had not reported any side effects or impairment.

Medical regulatory guidance

6. The Medicines and Healthcare Products Regulatory Agency (MHRA) has prepared a document titled 'The supply, manufacture, importation and distribution of unlicensed cannabis-based products for medicinal use [CBPM] in humans 'specials''. This required reporting of all adverse reactions from the use of CBPMs, including reports of failure of efficacy. Given the limited safety data that was currently available on the products, the MHRA would be conducting enhanced vigilance activities to support their safe use. These obligations were placed on any person selling or supplying 'specials'; manufacturers, importers, distributors and also the specialist prescribing doctor.

Railway regulatory guidance

7. The RSSB produces guidance and standards for those operating in the rail industry. A position statement dated 27 May 2020 from its Occupational Health Specialist Advisory Group (OHSAG) on rail workers' use of medicinal cannabis and cannabis oil included: '*Some prescribed medicinal cannabis treatments may also contain THC. Only medicinal cannabis products licensed or approved for off-licence use by the UK Medicines and Healthcare products Regulatory Authority (MHRA) can be in the legal possession of the patient they were prescribed to. Possession of cannabis prescribed for someone else is illegal and will be treated in the same way as possession of recreational forms of cannabis. Some medicinal cannabis treatments may have undesirable side effects or may be detectable in drug screening tests, as is the case with other medicines. Existing policies and procedures can be applied just as they would be in the case of other medicines that are also drugs of abuse, for example opiates…*

…Employers and their occupational health (OH) providers should be aware that licensed medicinal

cannabis may increasingly be prescribed in the future, albeit to a small number of patients with significantly disabling conditions. Normal drug and alcohol policies and procedures will be sufficient and can be applied in the usual way.'

… Rail employees considering using CBD oil or other unlicensed preparations should discuss this with their doctor in the first instance. If you work in a safety critical role you have additional responsibilities for the safety of others and must consider this if you decide to use a CBD oil food supplement as even trace amounts of THC may impair your performance and may be detectable in drugs tests.

… RSSB and OHSAG have reviewed the use of CBD oil and agree that employees must consider the risks and benefits of this like they do for other food supplements. Essentially, the responsibility to remain free from impairment lies with the individual employee.'

8. The RSSB Guidance on Medical Fitness for Railway Safety Critical Workers includes:

'*D4.4 Many medicines that can impair performance in the initial stages may be well tolerated after a period of time and dose adjustment. Also it should be noted that medicines might alleviate or overcome some of the effects of illness that would otherwise cause impairment at work, for example pain or mood disturbance. … …D.6.4 However many medicines are known to produce unwanted effects in certain circumstances but not in every case. It would not be reasonable to simply prohibit their use and it may amount to disability discrimination to do so. Therefore some form of individual assessment is required in these cases.*'

Network Rail policies

Level 1

9. Network Rail's policy '*Drugs and Alcohol NR/L1/OHS/051 Policy (Level I)*' states that '*This Network Rail standard is mandatory and shall be complied with by Network Rail and its contractors*

if applicable from 05 March 2016'. It defines a '*candidate*' as: '*A person who requests or seeks employment with Network Rail or a contractor'.* Mr Truman would have been classed as a candidate at the material time. Powerlines was a '*contractor*' within the relevant definition.

10. The section of the Level 1 policy which set out the process for employees or contractors who fail a D&A test provided:

'***4.7 Employees or contractors who fail a drugs and alcohol test.***

4.7.1 When any employee tests positive following drugs and alcohol testing, a disciplinary procedure shall be initiated by Network Rail (or the contractor for their employees).

4.7.2 Where an employee or contractor:

a. Fails a drugs or alcohol test; and

b. has applied or is applying for PTS competence; and/or

c. is certified or applying for certification to carry out safety critical work;

the certification/competence shall be revoked and they shall:

i. for five years from the date of the drug and alcohol test, not be eligible to carry out any work as an employee or contractor which requires PTS certification or is designated as safety critical work;

ii. after five years, pass a drug and alcohol test before they can carry out safety critical work or obtain PTS certification; and

iii. *have any Sentinel card issued cancelled, and return the Sentinel card to Network Rail immediately.*

4.7.3 Test results shall be notified to managers of the Sentinel scheme and recorded on the Sentinel database.'

11. The appeal process under the policy includes:

'*4.8 Appeals process*

4.8.1 Employees and contractors may appeal against positive results of a drugs and alcohol test.

4.8.2 The appeals process is separate from any disciplinary procedure which the employee or contractor is subject to…

…4.8.5 An appeal may be submitted to the Managers of the Sentinel Scheme, providing that the appeal is in accordance with the following:

a. is supported and submitted by the sponsor within 30 days of confirmation of the positive result. Any appeal after this shall not be considered. Sponsors shall conduct their own internal investigation within this time frame;

b. the person who has had their competency removed shall only submit appeals through their sponsor.'

12. A '*sponsor*' is defined under the policy as '*An employer which is registered with the Sentinel scheme and takes responsibility for the training, assessment and briefing activities associated with the competences held by its employees, as required by the scheme.*'

Level 2 policy

13. Network Rail has a separate and also mandatory Level 2 Policy. This includes: '*5.1.3 Candidates who hold Sentinel cards and/or will be working in safety-critical or key safety posts shall be tested for drugs and alcohol before they are permitted to undertake such work.*'

14. By section 5.1.4 the test results are to be recorded on the Sentinel database. By section 9 the medical provider, i.e. in this case Express Medicals, records the results. As to those results, sections 9.4. and 9.5 include:

'9.4.4 If the laboratory analysis reveals the presence of a drug consistent with declared and acceptable medication, this shall be reported as a 'negative' and recorded as a 'pass' result, providing the MRO is satisfied that there is a legitimate medical need for the quantity of substance used, or that such a need is likely to have existed at the time of the declared use.

… 9.5 Positive drug screen result

9.5.1 All positive laboratory analysis shall be reviewed by a MRO for confirmation of the 'positive' result. 9.5.2 Where the MRO requires further information to determine a pass or fail result, they shall interview the donor and seek further medical information from a third party.

9.5.3 A drug screen result shall be treated as 'positive' and recorded as a 'fail' result where:

a. the laboratory analysis reveals the presence of a drug above accepted cut-off levels and the MRO is satisfied that the findings are not justified by a legitimate medical need;…'

The Sentinel scheme

15. The Sentinel Scheme (Sentinel) is a mandatory scheme, controlled by Network Rail, for all safety critical roles in the rail industry. A person who passes the medical and D&A screening process is provided with an electronic identity card (a Sentinel card). This provides confirmation of basic competence and medical fitness to work on or near the national rail infrastructure. Until these events, Mr Truman had continuously held a Sentinel card since 2009, when he was 18.

Powerlines

16. Powerlines' standardised recruitment process includes compulsory D&A testing where

required. That testing is carried out by Express Medicals, mainly under the rules set down by Network Rail.

Express Medicals

17. When Express Medicals uploads results of D&A testing to the Network Rail system, it does so independently of Network Rail. Only the outcome is recorded and no further medical information is provided. Network Rail has no input into the testing prior to the report being uploaded, save that it provides guidance about testing processes and procedures.

Narrative

18. In May 2022 Mr Truman applied to Powerlines for the role of POS/AP Lift Planner. The role was primarily office based and included the planning of lifting activity on the rail network, ensuring lifting operations were checked for compliance with required regulations and to provide expert advice and guidance to the team regarding lift planning and assurance. The role did not involve the operation of heavy machinery. However it was still a safety-critical role within the industry.

19. Mr Truman was interviewed for the role on 25 May 2022. By letter dated 16 June 2022 he received a job offer commencing 18 July 2022, which was conditional on passing a medical and undergoing screening for D&A. On 22 June 2022 he submitted a completed pre-employment medical questionnaire. In this document he confirmed that he did not have any health problems or disability that might affect his safety or performance at work; did not need any adjustments to help him do the job; had taken medication, namely Adven and venesection; had used drugs in the last 12 months, namely 'prescribed medication'; and currently suffered back and neck pain, weakness in his arms and legs, and occasional joint pain due to haemochromatosis.

20. In a completed health assessment questionnaire for night workers, he stated that he was taking

drugs on a regular basis, namely 'Adven EMT1 & EMT2 – CM5'. He answered 'no' to the question whether he had any other medical condition which might affect his ability to work safely at night. In the equal opportunities monitoring form, he ticked the box to say that he considered he had a disability/long-term health condition.

21. On 28 June 2022 Mr Truman attended Express Medicals' premises in Derby. He disclosed his use of medical cannabis to the nurse (Ms North); told her that he took it for pain due to his medical condition; and showed her the prescriptions on his phone. The nurse told him that the Medical Review Officer (MRO) would contact him if further information was needed.

22. Entirely unsurprisingly, his urine sample tested positive for cannabis (THC) metabolites. These results were reviewed by Express Medicals' Drs Theron and Wilson Jones. The ET found that, when doing so, they were likely to have had before them the 'chain of custody' form which mentioned the medication Adven EMT1 and EMT2; and that doctors considering results should have such a form before them in all cases.

23. On 1 July 2022, these two doctors completed a decision form in respect of Mr Truman whose result was 'FAIL'. In the first section, completed in manuscript and signed by Dr Theron, it simply stated 'Pending' and 'Positive for Cannabis'. On the next section, headed 'Final outcome' and completed in manuscript and signed by Dr Wilson Jones it states 'FAIL' and, next to his signature, 'agreed'. The signature at the foot is that of Dr Theron. There is no reference on the form to the medication that Mr Truman had disclosed and which appeared on the chain of custody form.

24. The ET observed: '*There is no evidence before the tribunal to confirm what further information, if any, Dr Theron and Dr Wilson Jones had before them, when they recorded a 'fail'. They may have been familiar with Adven; and we take judicial notice of the fact that a simple Internet*

search would confirm that it is medical cannabis. From the information before us however we do not know what further enquiries they undertook, or what knowledge they did have at the time the decision was made. What we do know for certain is that the claimant was not contacted by either doctor, in order for him to enable him to provide further details about the circumstances in which he was taking medical cannabis, and any symptoms experienced as a result, before the decision was taken':[54].

25. On the same date, 1 July 2022, the 'fail' result was uploaded by Express Medicals to Network Rail's Sentinel system; and without any prior discussion with Mr Truman. In consequence of failing the D&A test, he was subjected to a five-year ban on working in the rail industry in any safety critical role. This ban was imposed pursuant to Network Rail's Level 1 Policy.

26. As to the appeals process, Powerlines considered that this did not give Mr Truman a right of appeal. This was because he was neither an employee nor a contractor within the meaning of the Level 1 Policy. Rather, he was a candidate for employment. Further, Powerlines was not a 'sponsor' within the relevant meaning.

27. Mr Truman only became aware that he had failed the D&A test after contacting Express Medicals on 4 July 2022. He was told by their Clinical Manager that no medical prescription existed for medical cannabis. When he explained that he did have a prescription, the Manager asked him if it was from 'a real doctor'. She also suggested that he take other medications to manage the pain from his disability.

28. On the same day (4 July) Mr Truman submitted an appeal to Powerlines against the decision. His email included that he had declared the prescribed medication (Adven) beforehand; that he took it legally and under supervision of a consultant; that he did not abuse his medication; and that he did not have any other options for pain management, as opiate-based pain medication was problematic

with long-term use.

29. Mr Truman also emailed Network Rail on 4 July, in terms which included reference to his genetic disability and that he had been legally prescribed Adven EMT1 and EMT2. The ET accepted that this was the first time that Network Rail became aware that Mr Truman was taking medical cannabis for his medical condition, a disability. On the same day he emailed Express Medicals, attaching the 8 April 2022 letter from Dr Mohammed Sajad, as referred to above.

30. On the following day (5 July 2022) Powerlines withdrew the job offer. The letter stated that the withdrawal was because the test result did not meet the terms of the contract and the requirements of the role. This withdrawal took place before the review which was due to take place later that day by Express Medicals at their weekly Clinical Review Meeting.

31. On the same day Mr Truman replied to Powerlines, stating in particular that Express Medicals had accepted the legality of the prescription but were unwilling to change their decision; he was not being provided with an appeal because this had to be done at the request of his sponsor; it was unfair to discriminate against him '*especially with a 5 year ban for medication of which I am legally prescribed for a disability without any medical report being provided that states I am incapable of working safely'*; and asking if Powerlines would appeal directly to Sentinel on his behalf.

32. On the same day Network Rail replied that it could not support appeals directly from employees or candidates and suggested that he discussed the matter with his prospective sponsor.

33. On the same day Express Medicals reviewed the case at their weekly Clinical Team Meeting. The ET heard evidence from their Chief Scientific Advisor, Mr Simon Davis and Dr Steve Malleson, a qualified MRO, as to the interpretation of the minutes of that review meeting. The ET did not find their evidence to be reliable in various respects: [66]-[69]. The ET concluded that the real reason for

the decision to fail Mr Truman, despite the evidenced need for medical cannabis, was that those working for Express Medicals had concluded that he had consumed cannabis over and above that provided on his prescription. Further, that a policy decision had been taken that, even if the positive test result was due to medical cannabis, that would result in an automatic fail for those working in the rail industry, on health and safety grounds: [70]. This conclusion was also consistent with the email from their Clinical Manager dated 5 July 2022 which included: '*Although the prescription is supplied following medical advice from your specialist, use of any substance containing THC is not permitted within Network Rail industry on the grounds of safety, even if prescribed. Therefore the result and thus the outcome remains the same*': [71].

34. Minute 6 of the same weekly Clinical Team meeting included a discussion about another worker who whose 'fail' of the D&A test had been converted to a 'pass' on proof of medical prescription. The minute included '*Impair safety at work (e.g. amphetamines, diazepam) statement on the certificate to inform management of need for risk assessment.*' It continued '*This was discussed and it was agreed that it would be valuable to add a comment to all certificates where there is a failed test but passed result due to permitted required prescription medication where the medication may have implications to vigilance and a sentence should be added that the individual requires medication that should be discussed with an appropriate manager as it may have performance implications*'. Mr Truman's claims relied on the approach taken in the 'Minute 6' case.

35. On 29 July 2022 Mr Truman was forwarded a letter from Powerlines' Mr Hext which confirmed that, in consequence of the test result, it was unable to sponsor him through the Sentinel scheme; and that, being neither employer nor sponsor, it could not lodge an appeal with Sentinel.

36. Express Medicals subsequently commissioned a report from Mr Davis dated 19 December 2022. This report quoted from a Network Rail drug and alcohol policy which included reference to

an '*acceptable medication*' ('section 15.5.5'). Mr Davis' report stated that Adven was not an approved medicine in the UK and there was no formal evidence that it relieved pain in haemochromatosis. Further the potential side effects from its psychoactive compounds were not characterised. He also found that the concentration of the THC metabolite found in Mr Truman's urine was above the levels that would be expected for medicinal cannabis alone. His opinion was that the MRO was correct to believe that the levels of cannabis metabolites in his urine were not due to medical need.

37. The ET noted that there was no paragraph 15.5.5 in the policy documents to which it had been referred and speculated that it was a reference to some previous version of the policy. The ET considered that the relevant section (9.4.4) of the applicable Level 2 policy required an answer to the question of whether '*there is a legitimate medical need for the quantity of substance used, or that such a need is likely to have existed at the time of the declared use'.* There was no reference in that policy to a requirement that the medication be '*an acceptable medication*'.

38. For the purposes of the ET hearing the parties had commissioned a joint expert report from Mrs V. Jenkins, a member of the Chartered Society of Forensic Sciences. The conclusions of the report included that the THC–COOH compounds detected in his urine purely supported past consumption of a cannabis product; the concentration was not inconsistent with his declared use; and that '*Adverse effects of cannabis could potentially impact on Mr Truman's ability to work but are not experienced by every individual and would be less severe if taken at night as Mr Truman alleges. He has not reported side effects after starting to take the cannabis products and presumably did not display any signs of impairment at his medical examination.'*

39. The ET accepted this unchallenged expert evidence which it found '*entirely persuasive*'. It was clear from Mrs Jenkins' conclusions that Mr Truman '*...could have worked safely in the role,*

with appropriate safeguards in place. These could have included a risk assessment; a requirement on the claimant to continue to self-report any adverse effects of medical cannabis; and his managers keeping a watchful eye over him and his work. The safeguards could also have included referring the claimant for specific tests to decide whether his mental functioning was impaired by medical cannabis. There is simply no evidence that it was, during the working day. The expert evidence clearly shows that by the time the claimant woke up in the morning, he was no longer impaired by the prescribed cannabis he took the evening before': [155].

40. The ET concluded that those working for Express Medicals had wrongly assumed that the amount of THC-metabolites found was because Mr Truman was using cannabis over and above that supplied through his prescription. It also appeared likely that it was using an out-of-date policy of Network Rail: [153]. If the Network Rail policy had been correctly applied, i.e. in accordance with section 9.4.4 of the Level 2 policy, Mr Truman should have passed the D&A test: [156].

The claims and the ET's conclusions

41. The Agreed List of Issues in respect of the various claims against the three Respondents were set out as Annex A to the ET judgment. For convenience that List is also appended to this judgment.

Claims against Powerlines

42. Mr Truman's claims against Powerlines were discrimination arising from disability (s.15, EqA) and failure to make reasonable adjustments (s.20, EqA). Pursuant to Issue 1, the ET held that Powerlines was Mr Truman's prospective employer for the purpose of s.39 EqA. Powerlines had made a conditional offer of employment, subject to certain conditions being met: [110].

The s.15 claim

43. As to Issue 2, the ET found that Powerlines could reasonably have been expected to know

that Mr Truman had the disability from receipt of his email of 4 July onwards.

44. As to Issue 3(a), it was conceded that Powerlines had refused to instigate or support Mr Truman's appeal to Sentinel against the refusal of a card. As to Issue 3(b), it found that Powerlines had withdrawn the job offer; and that it had done so because Mr Truman had failed the test and in consequence had his Sentinel authorisation withdrawn.

45. As to Issue 4, it was conceded that the withdrawal of the job offer was unfavourable treatment. The ET also found that the refusal to instigate or support the appeal was unfavourable treatment.

46. As to Issue 5, it was conceded that the withdrawing of the job offer was because of the identified 'something arising'. Conversely the ET held that the refusal to instigate or support the appeal was not so caused; and that the operative cause was Mr Hext's interpretation that Network Rail's policy provided Mr Truman with no right of appeal.

47. As to Issue 6, the ET agreed that the aims relied upon by Powerlines were legitimate aims. In each case, it concluded that the means of achieving those legitimate aims were proportionate.

48. There is no appeal against this dismissal of the s.15 claim.

The s.20 claim

49. Starting with Issue 9, the ET concluded that Mr Truman had not established substantial disadvantage in relation to the identified PCP. It stated: '*A prospective employee of R1, who did not have a disability, but who tested positive for proscribed drugs such as cannabis, without an evidenced medical need, would not have a Sentinel card issued/would have their authorisation withdrawn*':[128]. The ET continued that: '*In hindsight, the tribunal believes that it is the requirement to pass the D & A test that should have been the PCP, with the substantial disadvantage being that*

because he was taking medical cannabis to manage the pain caused by his disability, the claimant was at a substantial disadvantage compared to others without his disability, who did not need to take medical cannabis. That is not how the case has been argued at this hearing however, or how it is set out in the List of Issues. The List of Issues has been agreed by the parties, who are all professionally represented. The tribunal does not believe it would be fair or just in such circumstances to go behind the agreed list of issues and start re-writing the PCP at the decision stage':[129]. **Mr Truman appeals against the finding in [128].**

50. In consequence of that finding, the ET held in respect of Issue 7(b) that Powerlines could not have had knowledge of a substantial disadvantage which had not been made out: [126]. As to the other Issues it found in favour of Mr Truman on Issues 7(a) and 8: [125], [127]. In the light of its conclusion on Issue 9, it did not determine Issues 10 or 11: [130]-[131].

Claims against Network Rail

51. Mr Truman's claims against Network Rail are also pursuant to ss.15 and 20 EqA. The claims first depended upon Mr Truman establishing that Network Rail is a 'qualifications body' within the meaning of ss.53 and 54 EqA: Issue 12.

52. As to Issue 12, the ET held that Network Rail was a qualifications body. **Network Rail makes a contingent cross-appeal against that decision**.

53. As to Issues 13 and 14, the ET held that these ignored the real issue which was that of not conferring a relevant qualification: s.53(1)(c), as had originally been pleaded. It concluded that all the remaining issues under ss.53/54 should be considered on that basis: [134].

Section 15 claim

54. As to Issue 15, the ET concluded that Network Rail was applying a 'competence standard' for

the purposes of s.53(7) EqA. The ET considered that all the steps in the process were part of an assessment of overall competence to work in a safety critical role; and that that '*...the D&A screening is, like the checking of the specific training competences and the medical, directed to the question as to whether or not the claimant has the necessary physical/mental competence to work in this safety critical industry*': [135]. It disagreed with Mr Truman's argument *'...that section 53(7) is subject to the relevant respondent complying with the duty to make reasonable adjustments. Section 53 (7) makes no such proviso.*':[136]. In consequence the s.15 claim against Network Rail must fail. **Mr Truman appeals against this decision.**

55. The ET set out its conclusions on the remaining Issues under the s.15 claim as:

Issue 17: Network Rail had actual or constructive knowledge of Mr Truman's disability from receipt of his email of 4 July 2022: [138];

Issue 18: his use of Adven EMT 1 and 2 was 'something arising' from his disability of haemochromatosis: [139];

Issue 19(a) and (b): Network Rail did not make any decision to impose the ban. Rather this was the automatic consequence of Express Medicals' uploading the failed D & A test to the Sentinel system: [140], [142];

Issue 19(c): Network Rail did fail to implement a review of its decision following Mr Truman's complaint of around 4 July 2022: [143];

Issue 19(d): Network Rail did fail to permit an appeal: [144]. The ET added that, as previously noted, the '*real issue*' was whether or not Network Rail had refused the issue of a Sentinel card and imposed a five year ban: [145];

Issue 20: It was unfavourable treatment to refuse Mr Truman a Sentinel card and impose a five year ban: [146];

Issue 21: Such unfavourable treatment was because of the 'something arising', namely the

use of medical cannabis: [147];

Issue 22: Express Medicals' identified aims were legitimate. However its means – failing Mr Truman on the test with the result that he had suffered a five year ban – were not proportionate. For the reasons already given, the correct application of the policies should have resulted in Mr Truman passing the test despite the presence of THC-metabolites in his urine sample: [156]. Network Rail could be in no better position than Express Medicals: '[Network Rail] *chooses, for understandable reasons, to have other organisations carry out the D&A test. But it is* [Network Rail] *which ultimately is responsible for the refusal to issue a card and to impose a ban, due to the application of its policies. If that is because of a discriminatory decision by the medical provider,* [Network Rail] *is, in the tribunal's judgment, still responsible. If that were not the case, the claimant would be left without a remedy; since only if [*Network Rail] *is liable, can* [Express Medicals] *be liable.* [Express Medicals] *cannot be liable on its own.*': [149].

Further, the ET held that there was a less discriminatory way for Network Rail to ensure that its legitimate aim was met: namely, '*...by ensuring that* [Powerlines] *carried out the necessary risk assessment, and continued to do so throughout the claimant's employment*': [150].

56. By its contingent cross-appeal, **Network Rail appeals against these findings in paragraphs [149] and [150].**

Section 20 claim

57. As to the s.20 claim against Network Rail, the ET concluded:

Issue 23(a): it knew or could reasonably be expected to know that Mr Truman was a disabled person at the relevant time [160];

Issue 24: the ET answered '*See the conclusions above in relation to Issue 19*': [162]. Further, as with Issue 9, the real PCP was the requirement to pass a D&A test, but that had not been argued: [164].

Issue 25: As to the PCPs which had been advanced, Mr Truman had not thereby established substantial disadvantage: [162]-[165]. For similar reasons to those in Issue 9, this was because '*He was under no more of a disadvantage than another worker without a disability who tested positive for a proscribed substance and whose medical information was not passed on*': [163]. **Mr Truman appeals against the finding on substantial disadvantage**.

Issue 23(b): Network Rail therefore had no actual or constructive knowledge of any substantial disadvantage: [161].

Issues 26 and 27: In further consequence it was unnecessary to reach conclusions on the Issues on reasonable steps to avoid such disadvantage: [166-174].

Claims against Express Medicals

58. In accordance with Issue 16, the first basis of claim against Express Medicals was that it had acted as an agent of Network Rail within the meaning of s.110 EqA; see also s.109(2). In the course of the hearing, that argument was abandoned: [137].

59. Whilst the List of Issues identified direct claims under ss.15 and 20 against Express Medicals (see Issues 17-29) and the ET considered these, it followed from the abandonment of the s.110 agency argument that there was no such direct claim and that the only potential route to liability was via ss.111/112 EqA: i.e. Issues 30-32.

60. As to Issue 30, the ET stated that, had it upheld any of the claims against Network Rail, it would in principle have concluded that Express Medicals caused Network Rail to contravene the

EqA, '*...particularly in relation to any breaches which resulted from (and therefore were caused by)* [Express Medicals'] *unjustified and potentially discriminatory decision to fail the claimant on the D&A test in the circumstances of this case.*': [175]. In contrast to the provisions of s.112(1), there was no requirement under s.111 for those working for Express Medicals to have understood that their decision in relation to the D&A test was potentially discriminatory. Section 111(2) required only a '*causal connection to be made out*': [176].

61. As to Issue 31, the ET concluded, by reference to s.111(6) and the EAT decision in **NHS Trust Development Authority v. Saiger** [2018] ICR 297, that Express Medicals '*...was theoretically in a position to commit a basic contravention by knowingly helping* [Network Rail] *to commit an act of discrimination against those subjected to D&A testing. As s.111(6) makes clear, such a basic contravention does not need to have occurred, for* [Express Medicals] *to be liable under s.111 for acts committed by* [Network Rail] *as a qualifications body. However, due to our conclusion on the substantive issues, this is academic.*': [177]. **By its contingent cross-appeal Express Medicals challenges this finding.**

62. As to Issue 32, the ET accepted that Express Medicals did not act 'knowingly' within the meaning of s.112(1) EqA: [178].

The appeal and cross-appeals

63. As appears from this narrative:

(1) Mr Truman appeals against the decision under ss.53/54 EA that Network Rail had been applying a 'competence standard' when he failed its D&A test: 'the competence standard issue';

(2) Mr Truman appeals against the ET's decisions under the s.20 EqA claims against

Powerlines and Network Rail that he was not put to a substantial disadvantage in comparison with persons without his disability as a result of the PCP: 'the substantial disadvantage/comparator issues';

(3) Network Rail cross-appeals against the decision that it was a qualifications body within the meaning of ss.53/54 EA: 'the qualifications body issue';

(4) Network Rail cross-appeals against two adverse findings in the s.15 claim on the grounds of perversity: 'the perversity challenge';

(5) Express Medicals cross-appeals appeals against the decision under s.111(7) that it was in a position to commit a basic contravention in relation to Network Rail. Thus '*The ET made an error of law. Its conclusion was that being in a position to knowingly help Network Rail to commit an act of discrimination against third parties was sufficient to satisfy the requirements of s111(7)*': 'the ss.111/112 issue'.

64. It is convenient to start with Network Rail's cross-appeal on the qualifications body issue.

Network Rail cross-appeal: the qualifications body issue

65. Sections 53 and 54 EqA provide, as material:

'*53. Qualifications bodies*

(1) A qualifications body (A) must not discriminate against a person (B) –

(a) in the arrangements A makes for deciding upon whim to confer a relevant qualification;

(b) as to the terms on which it is prepared to confer a relevant qualification on B;

(c) by not conferring a relevant qualification on B.

…(6) A duty to make reasonable adjustments applies to a qualifications body.

(7) The application by a qualifications body of a competence standard to a disabled person is not disability discrimination unless it is discrimination by virtue of section 19. [i.e. indirect discrimination].

54 Interpretation

(1) This section applies for the purposes of section 53.

(2) A qualifications body is an authority or body which can confer a relevant qualification.

(3) A relevant qualification is an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitates engagement in, a particular trade or profession.

…(6) A competence standard is an academic, medical or other standard applied for the purpose of determining whether or not a person has a particular level of competence or ability.'

66. In concluding that Network Rail was a qualifications body in the circumstances of this case, the ET reasoned:

'*132…. A Sentinel card is, in the tribunal's judgement, a relevant qualification, because it is an essential* 'authorisation, approval or certification*', which is needed by any person carrying out or proposing to carry out a safety critical role in this sector of the rail industry. As a result of the refusal to issue a Sentinel Card, the claimant is not able to work in the industry he had spent most of his working life in, from the age of 19 until these events in July 2022. A Sentinel Card is needed before he can continue to do so. It is because the claimant has not been issued with one that he is prevented from working in the industrial sector of his choice. He has been banned from doing so for five years from July 2022.*

133. In reaching this conclusion, the tribunal has carefully considered the EWCA's decision in Tattari. *The Tribunal concludes that whilst a Sentinel Card is not* 'a professional qualification'*, it does amount to some* 'other approval needed to enable [the claimant] to practise a…calling or take part in some other activity*'; that calling or other activity being a safety critical role in the rail maintenance/development sector. In our judgment, the claimant's claim falls squarely into this section of Part 5 of the Equality Act 2010, rather than, for example, Parts 3 or 6. Further, in our judgment,* [Network Rail] *is not acting in this context as a 'trade organisation' within section 57*'.

67. In **Tattari v Private Patients Plan Ltd** [1998] ICR 106; [1997] IRLR 586, Dr Tattari complained that the respondent health insurer had discriminated against her by refusing to enter her name on its register of approved consultants. She was of Greek origin and training and the insurer declined to accept her Greek certificate of higher professional ability as satisfying their rules for registration. Under the provisions of s.12 Race Relations Act 1976, which are in similar terms to s.54(2) and (3) EqA, the industrial tribunal and the EAT held that the respondent did not constitute an authority or body within its meaning. In dismissing the further appeal, Beldam LJ (with whom Roch LJ and Sir John Balcombe agreed) stated in particular: '*In my judgment PPP is not an authority or body within the meaning of section 12 of the Act of 1976. I consider that the section has to be read as a whole and not construed piecemeal. The kind of bodies referred to are those similar to authorities which are empowered to grant qualifications or recognition for the purpose of practising a profession, calling, trade or activity…Thus I consider that section 12 of the Act of 1976, referring to an authority or body which confers recognition or approval, refers to a body which has the power or authority to confer on a person a professional qualification or other approval needed to enable him to practise a profession, exercise a calling or take part in some other activity. It does not refer to a body which is not authorised to or empowered to confer such qualification or permission but which*

stipulates that for the purpose of its commercial agreements a particular qualification is required.' (p.111 C, F-G).

Network Rail submissions

68. On behalf of Network Rail Ms Catherine Urquhart points to the EqA interpretation section (s.212) whereby '*trade*' '*includes any business*' and '*profession*' '*includes a vocation or occupation*'. She then points to the Explanatory Notes to the Equality Bill which gave examples of qualifications bodies as the Public Carriage Office, the British Horseracing Authority and the General Medical Council. The Notes continue: '*Also included is any body which confers a diploma on people pursuing a particular trade (for example, plumbers), even if the diploma is not strictly necessary to pursue a career in that trade but shows that the person has reached a certain standard*'.

69. Ms Urquhart then points to the DDA Code 2008, Chapter 8 'Discrimination by qualifications bodies', which under the heading '*What is a professional or trade qualification?*' includes:

> *8.5…the key feature of a qualifications body is that it confers professional or trade qualifications.…Clearly, therefore, the expression includes those qualifications etc, which are conferred solely in anticipation of furthering a particular career. However, it is also capable of including more general qualifications if attaining them facilitates engagement in a particular profession or trade and if these general qualifications are not relevant general qualifications…In order to decide whether a particular qualification is a professional or trade qualification for the purposes of the Act, it is necessary to address the following three questions: What is the qualification? What is the profession or trade? Does possession of that particular qualification make it easier to work in that particular profession or trade (rather than merely assisting general advancement in that or any other career)?*

8.6 The word "qualification" should not be interpreted narrowly – attaining a professional or trade qualification need not involve passing formal examinations or tests. In some cases, simply being a member of an organisation or body may amount to such a qualification if membership itself facilitates engagement in a particular profession or trade.

8.7 The following list (which is not intended to be exhaustive) gives examples of qualifications which would or could count as professional or trade qualifications under the Act provided that the criteria set out in paragraph 8.5 are met.' The list follows and include City and Guilds and HGV driving licences.

70. Ms Urquhart then cited **Pemberton v. Inwood** [2018] ICR 1291; [2017] ICR 929 where the EAT and Court of Appeal dismissed an appeal by the respondent bishop against the ET's finding that he was a qualifications body and that the grant of an extra-parochial ministry licence ('EPML') by him - necessary for appointment to the post of chaplain to an NHS trust – was a 'relevant qualification' within the meaning of ss. 53/54. Ms Urquhart pointed first to the ET's reference to the '*interface to the public in the context of chaplaincy*' and its description of the requirement for authorisation as '*a kite mark by the Church that the priest concerned is in all respects in good standing and thus fit to be held out to the public as a chaplain*': cited in the EAT decision at [37]. Ms Urquhart then cited the EAT's identification of certain 'guiding principles' from the case law:

'*81. Firstly, "relevant qualification" is broadly defined and is concerned not with the intention of the qualifications body but with the effect of the qualification; whether, as a matter of fact, it is needed for, or facilitates engagement in, a particular trade or profession. Thus, a national referee certificate granted by the British Judo Association was a relevant qualification as it facilitated engagement as a judo coach, regardless of the fact that the Association did not grant the certification to that end:* British Judo Association v. Petty [1981] ICR 660. *Similarly, the award of a franchise for the provision of legal services*

*could amount to a relevant qualification as it facilitated engagement – made it "*easier or less difficult*" – in the applicant's profession as a solicitor:* Patterson v. Legal Services Commission [2004] ICR 312…

82. Whilst the definition is expressed in broad terms, it remains directed to the grant of the qualification, not a requirement for that qualification by another body for the purpose of access to particular engagements under its own commercial arrangements…[Tattari] *per Beldam LJ…'*

71. Further, at [108]: '*…As made clear in* **Carter v Ahsan** [2008] ICR 82, para 18, *however, those who offer employment on the basis of a relevant qualification stand to be considered as "the public": the key point is that the body granting the qualification is not simply applying a standard for its own purposes but is signifying that the individual meets a particular standard in circumstances where others will rely on that authorisation such that it will provide or facilitate access to a particular profession.*'

72. Then the Court of Appeal at [45]: '*…the EPML amounts to an authorisation and a vouching to the public that the person in question is qualified and has a particular status within the Church of England which can be relied upon and which was arrived at by the application of particular criteria***:** Watt v. Ahsan at para 18… *As Judge Eady QC pointed out at para 108 of the Employment Appeal Tribunal judgment, the Bishop on behalf of the Church of England was not simply applying a standard for his and its own purposes. Granting an EPML signifies to the NHS trust in this case and through the trust to the public that the individual meets a particular standard and has an appropriate status… In granting an EPML a bishop is vouching that a priest has the requisite status within the Church of England for the purpose of the outward facing role which the employment in question entails.*'

73. Thus an element of the qualification had to be 'outward facing' and for the benefit of the

public. There was no such element in the present case. Absent was the necessary link between a relevant qualification and the particular trade or profession in which the applicant seeks to work.

74. Turning to the cited passage in Tattari and to the ET's reasoning in the present case at [132], Ms Urquhart submitted that the Sentinel card says nothing about engagement in a profession, trade or business. It is a type of health and safety card – a swipe card – and says nothing about the holder's ability as a Lift Planner or about the particular trade or profession. It tells only about passing medical tests**.**

75. Returning to the three questions identified in the 2008 Code, (i) the ET did not identify any trade or profession. Carrying out a safety critical role in this sector of the rail industry was not a trade or profession; (ii) the Sentinel card was not a qualification (cf.,e.g., a solicitor's practising certificate) and said nothing about the job in question; and (iii) possession of the card did not make it easier to work in the particular profession or trade. For this purpose it was necessary to distinguish between ease of access to the workplace and what the card told about the holder. It did not say anything about regulation, nor have any 'outward facing' quality.

76. At [133] the ET accepted that the Card was not a professional qualification. It was not evidence of a vocation or calling. As to enabling the holder to 'take part in some other activity', there needed to be a closer link with a trade or business than the Sentinel card demonstrated.

Mr Truman's response

77. On behalf of Mr Truman, Ms Susan Chan submitted that the language of s.54(2) and (3) should not be construed narrowly. Further, subsection (3) sets out alternative, not cumulative, requirements. As the ET found at [133], the Sentinel card is a relevant qualification, because it is an essential '*authorisation, approval or certification*' which is needed by any person who is to carry out a safety

critical role in this sector of the rail industry; and that the claim fell 'squarely' within this section of Part 5 of the EqA. As in Tattari, it amounted to some '... *other approval needed to enable* [the claimant] *to practice a…calling or take part in some other activity'*. It was clearly a trade to be a safety critical worker in the managed rail infrastructure, i.e. involved in operations which affect the rail infrastructure. The Sentinel card was an assurance to the public, including prospective employers, that the worker was physically and mentally competent to work in that trade. The card was proof of that competence. There was the necessary element of 'outface' to the public. It was difficult to imagine a closer link between Mr Truman's occupation of working in the safety critical rail industry and the Sentinel card qualification without which he cannot work therein for another 5 years. The card was more than merely something that assists general advancement in a particular career; and a paradigm example of a qualification under the EqA.

Conclusion on the qualifications body issue

78. I am not persuaded that the ET fell into error in reaching its conclusion that Network Rail is for these purposes a qualifications body.

79. First, I see no significance in the fact that a successful applicant under the Sentinel scheme receives a physical card, namely an electronic 'Sentinel card'; and reject the associated submission that this is no more than akin to a 'swipe card' which secures physical access to the national rail infrastructure. The card is both a symbol or badge of the underlying grant of entitlement (to use a neutral phrase) to work on or near the national rail infrastructure and a practical means of obtaining the necessary access.

80. Secondly, I think it clear that the job for which Mr Truman was applying fell within the statutory language of a 'trade or profession', as interpreted by s.212 whereby 'profession' includes an occupation. This is duly reflected in the authorities. Thus in **Tattari** '*to enable him to practise a*

profession, exercise a calling or take part in some other activity'(p.111F); and in **Petty** '*A complainant must show simply that the qualification facilitates his or her job prospects and that attached to such qualification is a term which is discriminatory against the sex or race of the complainant*' (p.665C). In the application of that statutory language, I consider that Ms Urquhart's argument sought unduly to confine the range of professions, vocations, trades or occupations to those which can be described in a long-established and/or simple formulation, e,g., 'solicitor' or 'plumber'. In my judgment this is contrary both to the broad statutory language and the sheer range of different forms of employment (and of their description) in the modern world. Mr Truman applied to Powerlines for the job of POS/AP Lift Planner, a job which was a '*safety critical role in the rail maintenance sector'* : [133]. Whatever its precise description, the job was at the very least a trade or occupation.

81. Thirdly, the ET was right to conclude that the grant of the Sentinel card was an '*authorisation, approval or certification*' which was needed by the any person carrying out or proposing to carry out a safety critical role in this sector of the rail industry: [132], i.e. the job for which Mr Truman was applying.

82. Fourthly, I do not accept that the grant of the card was not 'outward facing' or otherwise 'vouching' to the public Mr Truman's competence for the job. In my judgment the critical distinction is as between assessments and decisions made (i) for the benefit of the decision-maker alone and (ii) for the benefit of the public, either directly or via third parties: see Pemberton, in particular per Asplin LJ at [45] and per HHJ Eady at [108]. Any person employed in a safety critical role in the rail maintenance sector has an 'outward facing' role to the public. In granting a Sentinel card to an actual/prospective employee of a third party employer in the sector, Network Rail is not (at least, primarily) acting for its own benefit. Rather, it is vouching to the public - via the actual/prospective

employer - that the person in question meets the relevant standard of competence and/or has an appropriate status.

Mr Truman's appeal: the competence standard issue

83. As has been noted, the ET concluded that – contrary to the agreed List of Issues – the real issue in the s.15 claim against Network Rail was in respect of failing to confer a relevant qualification: s.53(1)(c): [134]. This was then applied to the question as to whether, in failing to do so, it had applied a 'competence standard' for the purposes of s.53(7).

84. In holding that it had done so, the ET first referred to Mr Truman's request for sponsorship and continued:

> '*135…At step two, the pre-sponsorship check stage, checks are made as to whether or not the claimant has specific competences, as result of completing the necessary health and safety training; has passed a medical; and has passed D&A screening. In the Tribunal's judgment, all are part of an assessment of overall competence to work in a safety critical role. The tribunal concludes that the D&A screening is, like the checking of the specific training competences and the medical, directed to the question as to whether or not the claimant has the necessary physical/mental competence to work in this safety critical industry.*
>
> *136. By virtue of section 53(7) of the Equality Act 2010 therefore, the claimant's claim could only proceed as an indirect discrimination claim. The* [Tribunal] *disagrees with Ms Chan's argument that section 53(7) is subject to the relevant respondent complying with the duty to make reasonable adjustments. Section 53(7) makes no such proviso. Unfortunately for the claimant, the claim has not been pleaded in the alternative as a s.19 claim.*'

Mr Truman's submissions

85. By this ground of appeal, Mr Truman contends that the ET '*erred in law when it concluded that* [Network Rail] *had been applying a 'competence standard' when* [he] *failed its drugs and alcohol test, for which a pass is required to be awarded a Sentinel card*'. On the contrary, '*The 'competence standard' should instead have been defined as the requirement to pass the drug test only after* [Network Rail]*'s own written policy on adjusting results for legitimate drug-based medications had been followed.*'

86. In accordance with that formulation, Ms Chan rightly drew back from any suggestion that the ability of a qualifications body to rely on s.53(7) was subject to its compliance with its s.53(6) duty to make reasonable adjustments. She duly acknowledged the distinction which is generally drawn between a competence standard and the process by which attainment of the standard is determined (see DDA 2008 Code of Practice at [8.30]); and the associated distinction between the competence standard and the duty to make reasonable adjustments: **Hart v. Chief Constable for Derbyshire** UKEAT/0403/07 per Elias J (P) at [20]: '*It follows that there is no duty to modify competence standards themselves in order to cater for, or alleviate the difficulties faced by, disabled persons, even if they cannot meet that standard because of a disability. The duty is to make reasonable adjustments which might facilitate the disabled person's ability to demonstrate that he or she has met the required standards.*'; see also **University of Bristol v Abrahart** [2024] EWHC 299 (KB) per Linden J at [174].

87. Rather, the central contention in this ground of appeal was that the ET had misidentified Network Rail's 'competence standard'. In her written argument Ms Chan contended that the relevant part of its 'competence standard' should have been identified as 'the requirement to pass the D&A test only after its written policy on adjusting results for legitimate drug-based medications had been

followed'. As the ET found, that policy had not been followed; with the consequence that Mr Truman was wrongly given a 'fail'. Network Rail having thus failed to follow its policy and duly adjust Mr Truman's result, it had not applied its competence standard. In consequence it could not rely on s.53(7) and thereby defeat the s.15 claim.

88. In her oral submissions, Ms Chan developed another argument. She described the competence which was being assessed as the medical competence to work unimpaired by drugs or alcohol; and distinguished this from the method for assessing whether that competence had been achieved. That method included the policy provisions (in particular Level 2 para.9.4.4) for the adjustment from a 'fail' to a 'pass'. Ms Chan submitted that, in circumstances where Network Rail had failed to comply with its method and make the necessary adjustment, it could not be said to have applied a competence standard within the meaning of s.53(7). She observed that, whereas the ground of appeal and its supporting written argument might be said to conflate the test with the process, this further argument distinguished them. However, in each case, the argument was founded on the core complaint that Network Rail had failed to apply its own policy.

Network Rail response

89. Ms Urquhart's central response was that this ground of appeal, however advanced, continued to confuse the identification of the competence standard with the process by which attainment of the standard was determined and the reasonable adjustments made for that purpose.

90. The position was akin to that in **Burke v. College of Law** (UKEAT/0301/10/SM) where the 'timing requirement' for the claimant's professional examination was held to be a competence standard, whose legitimate purpose was to assess the candidate's ability to work under pressure within a time-limited period. That 'timing requirement' was not susceptible to the duty of reasonable adjustment by increasing the additional time given to the disabled candidate and/or allowing him to

take the examination at home. In the present case, the competence standard included the need to pass the D&A test and was not itself susceptible to reasonable adjustment.

Discussion and conclusion on the competence standard issue

91. In my judgment, this ground of appeal does confuse the identification of the competence standard with the process by which attainment of the standard is determined and its associated adjustments; and accordingly must fail. In this case, the relevant competence standard applied by Network Rail was the achievement of a pass in the D&A test. By contrast, its policy provisions, which allowed for a 'fail' to be converted into a 'pass' in the specified circumstances, were part of the process by which achievement of that competence standard was to be determined.

92. The position can be usefully tested against an example which was considered in argument. A qualifications body requires the passing of a written examination. In order to alleviate the difficulties of visually impaired candidates, its policy for the examination process includes a requirement that such candidate be provided with a large print paper. For one reason or another, it fails to provide such paper for the candidate in question. In consequence, the candidate fails an examination which it would or might have paased.

93. In such circumstances, the competence standard which the qualifications body has applied is the passing of the examination; and to that extent it may rely on s.53(7). I do not accept that the competence standard can be defined as passing the examination in circumstances where the policy for the supply of large print paper has been carried out; with the consequence that s.53(7) cannot be relied upon. In my judgment there would be no basis to incorporate the process into the identification of the competence standard. The qualifications body has correctly 'applied' the competence standard which requires each candidate to pass the exam. In such circumstances the focus for potential remedies will include failure to make reasonable adjustments (s.53(6), applying ss.20-21) and/or

indirect discrimination (s.19).

94. In my judgment, the present case involves the same distinction. As with a policy for the supply of large print paper to the examinee, Network Rail's policy in respect of medical cannabis is an adjustment in order to facilitate the ability of those with the relevant disability to demonstrate that they have met the competence standard of passing the D&A test. Once again, potential remedies will include claims of failure to make reasonable adjustments and/or indirect discrimination.

95. Leaving aside that it falls outside the ground of appeal, I am also unpersuaded that Ms Chan's further argument fares any better. Although its form seeks to distinguish between the test and the process, its substance depends on their conflation.

Mr Truman's appeal: the substantial disadvantage/comparator issues

96. Mr Truman appeals against the decisions on the issue of substantial disadvantage as they relate to the ss.20/21 claims against Powerlines and Network Rail. There is no dispute that the ET correctly set out the relevant law at [85]-[92].

97. As against Powerlines, the ET found that it did apply the PCP of refusing to initiate or support appeals against non-issue of Sentinel cards and/or bans in relation to prospective employees: Issue 8 at [127]. That having been found, the question was whether, as a result of the PCP, Mr Truman was put to a substantial disadvantage in comparison with persons without his disability, namely in respect of '*the risk of a Sentinel card being removed or not being issued*': Issue 9. The ET concluded that Mr Truman had not established 'substantial disadvantage', because: '*A prospective employee of* [Powerlines]*, who did not have a disability, but who tested positive for proscribed drugs such as cannabis, without an evidenced medical need, would not have a Sentinel card issued/would have their authorisation withdrawn*': [128].

98. As against Network Rail, the two alleged substantial disadvantages were that *'a. that he was less likely to pass the test because medical information was not passed on; and b. that he was less likely to pass the test because medical information was not passed on and he was not able to put forward his justification for not having passed the test'* (Issue 25). On these, the ET reached the same essential conclusion as in the s.20 claim against Powerlines. Thus: '*For similar reasons as set out in relation to Issue 9 above, the tribunal concludes that the claimant has not established substantial disadvantage in relation to these PCPs. He was under no more of a disadvantage than another worker without a disability who tested positive for a proscribed substance and whose medical information was not passed on*': [163]; also [165].

Mr Truman's submissions

99. Ms Chan submits that in each case the ET erred in its identification of the appropriate comparator when considering whether Mr Truman had been put at a substantial disadvantage for the purposes of the s.20 duty to make reasonable adjustments.

100. Thus in respect of both Powerlines ([128]) and Network Rail ([163]) the ET was wrong to take as comparator a non-disabled person who tested positive for drugs. The correct comparator was a non-disabled person who took the test and passed. In that case, medical information would not have been needed. By contrast, the failure to take the disabled person's medical information into account would have resulted in failing the test.

101. In the alternative, even if the chosen comparator was appropriate, the ET should have held that the disabled person was at a substantial disadvantage. This was because the disabled person who tested positive had a legitimate medical reason for taking the drug so as to treat the disability; whereas the non-disabled person who tested positive did so because of illicit recreational use, i.e. without legitimate medical reason. The disabled person would suffer substantial comparative disadvantage.

In his case the refusal of the Sentinel card would be despite his pre-declared and legitimate need for the medication; whereas the non-disabled person would have failed the test because of his illicit recreational use.

102. Further, authority demonstrated that in the context of the s.20 duty, the comparator group did not need to be the same or nearly the same as the disabled person's circumstances; and the fact that both groups might suffer disadvantage did not mean that the duty did not arise, as the PCP might "bite harder" on the disabled person. Thus in **Sheikholeslami v. University of Edinburgh** [2018] IRLR 1090, Simler J (P) stated at [48]-[49]: '*It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question as the employment tribunal appears to suggest at para [200] (repeatedly emphasising the words 'because of her disability'). For this reason also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances…The fact that both groups are treated equally and that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability.*'

103. The words *'bites harder'* are derived from the decision of the Court of Appeal in **Griffiths v.**

Work and Pensions Secretary [2015] EWCA Civ 1265; [2017] ICR 160, per Elias LJ at [58]; cited by the ET at [88]. See also **Pipe v. Coventry University Higher Education Corporation** [2023] IRLR 745 per Eady J (P) at [123]-[125].

Powerlines submissions

104. On behalf of Powerlines, David Hay KC pointed first to the limited terms of the alleged PCP in the s.20 claim against it; namely '*refusing to initiate or support appeals against non-issue of Sentinel cards and/or bans in relation to prospective employees*': Issue 8. In consequence the sole adjustment advanced by Mr Truman was '*instigating or supporting an appeal on* [his] *behalf*': Issue 10. This contrasted with the four PCPs alleged in the s.20 claim against Network Rail, which included failure to take account of medical information: Issue 24(a) and (b). He submitted that the appeal wrongly sought to apply those four PCPs to the s.20 claim against Powerlines: see Appeal Grounds at paras. 23-25.

105. Mr Hay duly acknowledged that s.20 imposes the less demanding 'bite harder' test than that required where other forms of disability discrimination are in play (cf.ss.13,19,23); as the ET had noted at [88]. He submitted that the ET was plainly entitled to conclude that the PCP of refusal to initiate or support appeals by prospective employees who had failed D&A screening did not give rise to a substantial disadvantage for the disabled person as against the non-disabled person. There was no basis for the ET to conclude that the identified PCP, i.e. the refusal to initiate or support appeals, bit harder on the disabled than the non-disabled. Where the PCP was in respect of an appeal against failure of the D&A test, the proposed comparator of a non-disabled person who passed the test made no sense: for in that case, the question of appeal would not arise.

Network Rail submissions

106. On behalf of Network Rail, Catherine Urquhart focussed in particular on the asserted PCPs in

respect of failure to take into account all relevant medical information, i.e. Issue 24(a) and (b); cf. (c) and (d) which related to reviews and appeals. In those circumstances the ET was right to adopt the comparator which it did; and to conclude that a non-disabled person who has taken a proscribed substance and whose medical information was not passed on was no less disadvantaged than a disabled person such as Mr Truman. She added that no comparator had been proposed to the ET by Ms Chan and that the distinction drawn between recreational users and users through medical need had been raised for the first time in the appeal.

Conclusion on substantial disadvantage/comparator issue

107. Given the difference between the identified PCPs as against Powerlines and Network Rail, it is of particular importance to consider the two cases separately.

108. As against Powerlines, the sole PCP is in respect of refusal to initiate or support appeals against the non-issue of Sentinel cards and/or bans in relation to prospective employees. In those circumstances, I see no basis for a comparator of a non-disabled person who has passed the D&A test. For such a person, the question of an appeal does not arise.

109. In considering this challenge, the position is complicated by the formulation of the Issue in terms which identified the potential disadvantage as '*the risk of a Sentinel card being removed or not issued.*' In its decision on the Issue (at [128]), the ET duly focussed on that risk and in effect concluded that the non-disabled comparator would be in the same position.

110. The problem with the terms of the identified Issue is that a PCP of refusal to support or initiate an appeal presupposes that the Sentinel card has been removed or not issued. In consequence I do not understand how the identified potential disadvantage could result from the PCP. The refusal of a Sentinel card had already occurred. The Issue did not identify a comparative substantial disadvantage

from the refusal to support or initiate an appeal: cf. Issue 25(b) as it relates to Network Rail. In these circumstances I am not persuaded that the ET fell into error in its approach or could have reached any other conclusion on the Issue.

111. As against Network Rail, I see no error in the ET's chosen comparator of a non-disabled worker who tested positive for a proscribed substance. Set against alleged disadvantages that Mr Truman was '*less likely to pass the test because material information was not passed on*' (Issue 25(a); and its elaboration in (b)), I see no basis for the suggested comparator of a non-disabled worker who had passed the test. Further, it is evident from its reference to Griffiths at [88] that the ET must have had in mind the 'bites harder' test.

112. However, it is, with respect, unclear as to how the ET reached its conclusion that Mr Truman was under no more of a disadvantage than the chosen comparator in relation to the alleged PCPs, in particular as to (a) and (b), i.e. in respect of failing to take into account all relevant medical information. The brief reasoning at [163] and [165] does not elaborate on what sort of medical information might be passed on and/or be relevant to the prospects of the non-disabled worker who had failed the test because of recreational use of cannabis. Nor is the application of the 'bites harder' test expressly considered. I do not consider the absence of comparative disadvantage to be self-evident. On the contrary, it seems well arguable that failure to take account of all relevant medical information would bite harder on the candidate with a medical need for cannabis than the candidate who is a recreational user.

113. All that said, before deciding on the consequence of this conclusion, it is necessary to consider a further matter. The issue of substantial disadvantage only arises if and to the extent that Mr Truman has established that Network Rail applied one or more of the four PCPs alleged within Issue 24. However it is not clear to me that the ET in its consideration of Issue 24 did find that any such PCPs

had been applied.

114. This is because, when answering Issue 24 at [162] the ET simply states '*See the conclusions above in relation to Issue 19.*' However, whilst the four sub-issues in Issue 19 were in substantially similar terms to those in Issue 24(a)-(d), they related to the s.15 claim and thus were not advanced as PCPs. On the face of it, the answers to Issues 19(a) and (b) may be said to provide no support for the finding of PCPs under Issue 24(a) and (b). As to the positive answers to Issues 19(c) and (d), they may be said to amount to no more than one-off decisions which provide no basis for a finding of PCPs: cf. Ishola v. Transport for London [2020] IRLR 368 which the ET had noted at [89] in its legal summary. Further, the ET at [164] repeated its earlier finding that the real but unpleaded PCP in the case was the requirement to pass the D&A test. Conversely, in its decision at [163] the ET considered the issue of substantial disadvantage '*in relation to these PCPs*'.

115. This question was not the subject of debate at the appeal hearing: the focus was on the issue of substantial disadvantage. I have considered whether the effect of the ET's reasoning on Issue 24 is that they did not find Network Rail to have applied any of the alleged PCPs; with the consequence that no purpose would be served by remitting Issue 25 to the ET for reconsideration. However in all the circumstances I have concluded that the findings on Issue 24 are unclear; and that Issues 24 and 25 should be remitted to the ET for reconsideration in the light of this judgment. In the light of its decisions on those Issues, the ET may or may not need to reconsider its answer on Issue 23 and to provide answers to Issues 26 and 27.

Express Medicals' cross-appeal: the ss.111/112 issue

116. Express Medicals' cross-appeal challenges the ET's conclusion on Issue 31. This held that, within the meaning of s.111(7), Express Medicals was '*in a position to commit a basic contravention in relation to*' Network Rail; namely by acting in breach of s.112(1). The ET reasoned at [177] that

'*According to the judgment in the* Saiger *case,* [Express Medicals] *was theoretically in a position to commit a basic contravention by knowingly helping* [Network Rail] *to commit an act of discrimination against those subjected to D&A testing. As s.111(6) makes clear, such a basic contravention does not need to have occurred, for* [Express Medicals] to *be liable under s.111 for acts committed by* [Network Rail] *as a qualifications body. However, due to our conclusion on the substantive issues, this is academic.*' Saiger is **NHS Trust Development Authority v. Saiger** [2018] ICR 297.

117. Sections 111-112 provide, as material:

'*111 Instructing, causing or inducing contraventions*

(1) A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 112(1) (a basic contravention).

(2) A person (A) must not cause another (B) to do in relation to a third person (C) anything which is a basic contravention.

(3) A person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention.

… *(5) Proceedings for a contravention of this section may be brought –*

(a) by B, if B is subjected to a detriment as a result of A's conduct;

(b) by C, if C is subjected to a detriment as a result of A's conduct;

(c) by the Commission.

(6) For the purposes of subsection (5), it does not matter whether –

(a) the basic contravention occurs;

(b) any other proceedings are, or may be, brought in relation to A's conduct.

(7) This section does not apply unless the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B.

(8) A reference in this section to causing or inducing a person to do something includes a reference to attempting to cause or induce the person to do it.

(9) For the purposes of Part 9 (enforcement), a contravention of this section is to be treated as relating –

(a) in a case within subsection 5(a), to the Part of this Act which, because of the relationship between A and B, A is in a position to contravene in relation to B;

(b) in a case within subsection 5(b), to the Part of this Act which, because of the relationship between B and C, B is in a position to contravene in relation to C.

112 Aiding contraventions

(1)A person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 111 (a basic contravention).

…(9) For the purposes of Part 9 (enforcement), a contravention of this section is to be treated as relating to the provision of this Act to which the basic contravention relates.'

Express Medicals submissions

118. Mr Tomison submitted that the purpose of s.111(7) was to circumscribe the reach of s.111, so that liability is only imposed where A has some sort of power, influence or authority over B. Thus **Sami v. Avellan** [2022] EAT 72 where Michael Ford QC, sitting as a deputy judge of the High Court, stated:

'*19. The effect of s.111(7) is to circumscribe the reach of s.111. Unless the relationship between A and B is such that A, the person giving the instruction or causing or inducing the breach, can commit discrimination under the EqA in relation to B - for example, A is*

the employer of B and so potentially liable to B under s.39 EqA - the section is not triggered.

…41…Not only must A instruct, cause or induce B to discriminate against C, the third party; the relationship between A and B must entail that A is in a position to discriminate against B under the Act.

42. According to the Explanatory Notes to s.111(7), which are a legitimate aid to interpretation, 'the section only applies where the person giving the instruction is in a relationship with the recipient of the instruction in which discrimination, harassment or victimisation is prohibited'. An obvious example is where A, the person giving the instructions or inducing the contravention of the Act, is the employer of B. The purpose of the provision is, presumably, only to impose liability on A where A has some sort of authority, influence or power over B, exemplified by circumstances in which B is an employee of A's (contrast s.112, which contains no such restriction).[1] *Reinforcing that interpretation is the fact that B, and not only the third party who is the victim of the contravention (C), may potentially bring proceedings under s.111(5) if he or she is subject to a detriment.*'

119. Mr Tomison duly points to those Explanatory Notes (para.365) and to the EHRC's Code of Practice which uses similar words and continues: '*This will include employment relationships, the provision of services and public functions, and other relationships governed by the Act*': para.9.22. He submits that the proper meaning of s.111(7) is that a claimant must establish a relationship between A and B in which A could discriminate, harass or victimise B under the Act. Whilst the purpose of the subsection might be described in the language used in Sami – '*where A has some sort*

[1] '*…Although the reference to s.112(1) in s.111(1) is rather obscure, the effect of s.111(7) means that A must be in a position knowingly to help discrimination under the Act against B.*'

of authority, influence or power over B' - that was not the test to be applied. In order to satisfy s.111(7), it was necessary to identify a specific relationship under a specific provision and Part of the Act.

120. The question then arose as to whether one such relationship was provided by s.112(1), whereby '*A person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 111 (a basic contravention)*'. This was because s.111(1) defines 'basic contravention' so as to include anything which contravenes s.112(1).

121. As one interpretation of the interplay between s.111(7) and s.112(1) Mr Tomison returned to Sami, where the judge observed that '*Although the reference to s.112(1) in s.111(1) is rather obscure, the effect of s.111(7) means that A must be in a position knowingly to help discrimination under the Act against B'*: footnote to the parenthesis in [42].

122. Mr Tomison submitted that the ET was wrong to hold that s.111(7) was satisfied on the basis that Express Medicals was '*...theoretically in a position to commit a basic contravention by knowingly helping* [Network Rail] *commit an act of discrimination against those subjected to D&A testing*'. This conclusion took no account of two requirements of s.111(7). First, that there is a 'relationship' between A and B which places A in the relevant position. Secondly, that such position is to commit a basic contravention '*in relation to B*'.

123. As to the first point, the basic contravention in s.112 did not depend on any underlying 'relationship' between A and B. It required no more than that A had knowingly helped B to do anything which constituted one or more of the specified basic contraventions. As to the second, '*in relation to B'* meant 'against B'; and s.112 did not involve A committing a basic (or any) contravention against B. Therefore s.112 had no application to s.111(7).

124. Alternatively, the application of s.112 to s.111(7) was confined to circumstances where the relationship between A and B was such that A was in a position knowingly to help a third party to commit a basic contravention against B: see again Sami in the footnote observation. That was not this case.

125. Nor did the observations in Saiger provided any support for the ET's conclusion. In stating at [117] that '*...I can see no reason why one corporation cannot knowingly help another to commit "a basic contravention" (and to my mind it is significant in this context that section 112 is within the definition of "a basic contravention" for the purposes of section 111)*', HHJ Hand's reference to 'another' could only be to a third party whom A helps to commit a basic contravention against B; cf. the later footnote in Sami.

126. The ET was also wrong to rely on s.111(6)(a). This related only to proceedings brought pursuant to s.111(5).

127. Mr Tomison concluded that the overall effect of the ET's decision was wrongly to circumvent (i) the 'relationship' requirement of s.111(7) and (ii) the 'knowingly' ingredient of s.112(1).

128. Mr Tomison made clear that, given the disagreement in the authorities on the point, he was not advancing his appeal on the primary basis that one corporate body could not discriminate against another: cf. **EAD Solicitors LLP v Garry Abrams** [2016] ICR 380; Saiger at [117]; Sami at [43]; **W v. Highways England** [2025] IRLR 407 at [61].

Mr Truman's response

129. In response, Ms Chan's central submission was that the words '*in relation to B*' in s.111(7) do not mean '*against B*'. Thus the subsection does not require that the relationship between A and B is such that A is in a position to commit a basic contravention against B as victim. It extends to the

position where the pre-existing relationship between A and B is such that A is in a position to commit the basic contravention of knowingly helping B to commit a basic contravention against a third party: see the combined effect of s.111(1) and s.112(1). In many cases, that relationship may be one of employer and employee, but that was only one example. In this case, the relationship between Express Medicals and Network Rail included that Express Medicals was an approved tester for Network Rail's Sentinel card and thereby mandated to operate under its D&A Level 2 policy; and that Network Rail was almost entirely dependent on Express Medicals' pass/fail results which it uploaded onto the Sentinel system, even though Network Rail had the power to revisit its refusal and ban decisions.

130. The ET was thus right to conclude that Express Medicals was '*…theoretically in a position to commit a basic contravention by knowingly helping* [Network Rail] *to commit an act of discrimination against those subjected to D&A testing*'; and by its use of the word 'theoretically' to point to s.111(6): [177]. This argument was not inconsistent with the use of the word 'against' in Saiger (at [117]) and Sami (at [41] and the footnote to [42]). That use of language reflected the facts and circumstances of the particular cases and had no wider significance. As Sami made clear, the critical question was whether the relationship was such that A (Express Medicals) had some authority, influence or power over B (Network Rail); an interpretation reinforced by the fact that s.111(5)(a) permitted claims to be brought by B where it had suffered detriment as a result of A's conduct. In the present case, Express Medicals clearly had such authority influence or power over Network Rail.

Discussion and conclusions on ss.111/112

131. Section 111(1)-(3) sets out three statutory torts[2] whereby A must not instruct/cause/induce another (B) to do in relation to a third person (C) anything which contravenes any of the EqA provisions – each '*(a basic contravention)*'- which s.111(1) identifies. Thus any such '*basic*

[2] Bailey v. Stonewall Equality Ltd [2025] ICR 46 at [92].

contravention' will be carried out by B, not A. Further the specified contraventions include breach of s.112(1). Thus, subject to satisfaction of the other provisions of s.111, A may be liable for instructing/causing/inducing B to act in breach of s.112(1).

132. Section 111(5)(a)-(c) then identifies those who may bring '*Proceedings for a contravention of this section…*'. Accordingly any such proceedings are confined to claims against A (by B, C or the Commission) which allege breach of one or more of the statutory torts in s.111(1)-(3). Thus s.111(5) has no application to a claim against A which alleges breach of the distinct statutory tort in s.112(1).

133. Section 111(6) then applies '*for the purposes of subsection (5)*' and provides that '*it does not matter whether – (a) the basic contravention occurs;…*' In my judgment this means that, for the purposes of a claim against A for breach of one of more of the statutory torts in s.111, it does not matter whether or not B has in fact committed the 'basic contravention' in question. Thus, e.g., if A's employee B brings a s.111(5)(a) claim against A which alleges that A has - to B's detriment - instructed (s.111(1)) or attempted to cause (s.111(2) and (8)) or attempted to induce (s.111(3) and (8)) him to commit a 'basic contravention' against C, it is irrelevant that B did not comply with the instruction or that otherwise A's attempt to cause/induce was unsuccessful. Likewise, if C has been subjected to detriment and brings a claim pursuant to s.111(5)(b).

134. In my judgment, for the purposes of this appeal the critical feature of s.111(6)(a) is that its reference to '*the basic contravention'* is to the basic contravention identified within s.111, namely one committed (or not) by B in consequence of conduct by A. Conversely, it does not refer to a 'basic contravention' committed by anyone else; and in particular does not refer to the s.112(1) statutory tort which s.111(1) includes in its identification of the 'basic contraventions'. A claim against A for breach of s.112(1) is made pursuant to that section, not s.111; and to found such a case it is of course

necessary to establish that A did knowingly help B to commit a basic contravention falling within the specified provisions.

135. I turn to s.111(7). In my judgment its words '*in relation to B*' mean 'against B'. That is the evident meaning of '*in relation to C'* in s.111(2)-(3): see also the Explanatory Notes for s.111 at [363]: '*This section makes it unlawful for a person to instruct, cause or induce someone to discriminate against, harass or victimise another person, or attempt to do so*'. In s.111(7) the same meaning of 'against B' is consistent with the evident statutory purpose that s.111 '*…only applies where the person giving the instruction is in a relationship with the recipient of the instruction in which discrimination, harassment or victimisation is prohibited*': Explanatory Notes at [365]; see also Sami at [41]-[42] and the like use of 'against' in Saiger at [117]. I do not accept that the use of the word 'against' in those cases merely reflected the facts in the cases.

136. Thus the question is whether the relationship between Express Medicals and Network Rail was such that Express Medicals was in a position to commit a basic contravention against Network Rail. The wording of Issue 31 unfortunately omitted the necessary reference to the relationship between the parties; and the ET made no express reference to that aspect.

137. I find it difficult to see how the language of s.111(7) can have any application to the provisions of s.112(1). True it is that s.111(1) includes breach of s.112(1) as a 'basic contravention' and thereby provides a notional link to s.111(7). However (i) breach of s.112(1) does not depend on there being any form of underlying 'relationship' between A and B. Subject to the defence in s.112(2), breach involves no more than A's knowing provision of help to B; and (ii) on its face, s.112(1) does not involve the commission of any contravention by A against B.

138. As to the latter point, I do not, with respect, see how s.111(7) can potentially engage s.112(1)

on the basis identified in Sami at the footnote to [42], namely that that A is in a position knowingly to help someone discriminate under the EqA against B. On the face of it, s.112 is concerned with A helping B to discriminate against another; not with A helping another to discriminate against B. Not least in a statutory provision which includes a criminal offence (s.112(3)-(4)), it is difficult to see how the ambit of s.112(1) can be enlarged in this way. Further, the example takes no account of the 'relationship' element in s.111(7).

139. All that said, for the purposes of this case it is unnecessary to reach a definitive conclusion on this statutory puzzle. On any view, there is no basis to conclude that the relationship between Express Medicals and Network Rail was such that Express Medicals was in a position to give knowing help to a third party to commit a basic contravention against Network Rail; nor did the ET so find.

140. I conclude that the ET's reasoning at [177] cannot be sustained. If and insofar as Express Medicals had the theoretical ability to be in a position knowingly to help Network Rail commit an act of discrimination against those subjected to D&A testing, that did not meet the requirements of s.111(7). Nor does s.111(6) have any application to that question.

141. In my judgment the observations in Saiger also provide no support for the ET's reasoning. The focus of HHJ Hand's discussion at [117] was the submission that s.111(7) cannot apply as between corporations. In his reference to s.112 and the ability of one corporation to give knowing help to another, the judge was not considering the question which arises in this case.

142. Accordingly Express Medicals has no liability for any contravention by Network Rail.

Network Rail cross-appeal: the perversity challenge

143. Network Rail brings a perversity challenge in respect of two findings of the ET. In doing so, Ms Urquhart duly acknowledges the high hurdle which such challenges face: **Yeboah v. Crofton**

[2002] EWCA Civ 794 per Mummery LJ at [93].

144. The first challenge is to the ET's conclusion, in respect of the s.15 claim, that Network Rail was responsible for the refusal to issue a Sentinel card and for the decision to impose a ban. Thus at [149]: '[Network Rail] *chooses, for understandable reasons, to have other organisations carry out the D&A test. But it is* [Network Rail] *which ultimately is responsible for the refusal to issue a card and to impose a ban, due to the application of its policies. If that is because of a discriminatory decision by the medical provider,* [Network Rail] *is, in the tribunal's judgment, still responsible. If that were not the case, the claimant would be left without a remedy; since only if [*Network Rail] *is liable, can* [Express Medicals] *be liable.* [Express Medicals] *cannot be liable on its own.*'

145. Ms Urquhart then points to the ET's finding at [19] that '*When a company such as* [Express Medicals] *uploads results of D&A testing to the* [Network Rail] *system, it does so independently of* [Network Rail]. *Only the outcome is recorded, and no further medical information is provided.* [Network Rail] *has no input into the D&A testing, prior to the report being unloaded, say that it provides guidance about testing processes and procedures*'. In the light of that finding, she submits that it was inconsistent and perverse then to conclude that Network Rail was responsible for the refusal to issue a card and the decision to impose a ban.

146. Ms Urquhart acknowledged that Network Rail's Level 1 policy stated that *'This* [Network Rail] *standard is mandatory and shall be complied with by* [Network Rail] *and its contractors if applicable from 05 March 2016.*' However the policy did not state that Network Rail had responsibility for its medical service provider (i.e. Express Medicals)'s implementation of the policy. Nor did it have the authority to oblige its medical service provider to change its mind.

147. Further the suggestion that Network Rail could have supported an appeal ignored the ET's

finding from the evidence that exceptionally an appeal could be considered from a candidate but only if their prospective employer supported it; which was never going to happen because of Powerlines' interpretation of the policy: [38].

148. The ET's reasoning that Mr Truman would otherwise be left without a remedy amounted to an expression of sympathy for Mr Truman rather than a tenable reason for holding Network Rail to be responsible. The conclusion had come as a surprise and without argument to that effect.

149. The second challenge is to the ET's immediately consequent finding at [150] that there was a less discriminatory way for Network Rail to ensure that its legitimate aim was met: namely, '*...by ensuring that* [Powerlines] *carried out the necessary risk assessment, and continued to do so throughout the claimant's employment. This is similar to the course of action* [Express Medicals] *recommended in relation to the worker referred to in minute 6 of the minutes of the 5 July 2022 meeting*'.

150. Ms Urquhart submits that the point was not raised by the ET or the parties during the hearing and has no evidential basis. It was not suggested that Network Rail had the authority to impose such a requirement on another party; nor did it have such authority. Further, the position was not similar to that of the worker referred to in minute 6. In that case the declared medication 'fail' was changed to a 'pass' on proof of prescription and *'Impair safety at work (e.g. amphetamines, diazepam) statement on the certificate to inform management of need for risk assessment.'* The minute continues that '*This was discussed and it was agreed that it would be valuable to add a comment to all certificates where there is a failed test but passed result due to permitted required prescription medication where the medication may have implications to vigilance and a sentence should be added that the individual requires medication that should be discussed with an appropriate manager as it may have performance implications.*' The suggestion was thus to add a comment to the certificate. It

was not suggested that one party should order another party to do something. In the absence of submissions or supporting evidence the ET had no basis to make the finding which it did.

Mr Truman's response

151. In response to the first challenge, Ms Chan submitted that there is no perversity or inconsistency in the conclusion that Network Rail is liable for the failure to implement its own policy and consequent refusal of a Sentinel card and imposition of the five year ban. Further, and as the ET found, it did have the option of supporting an appeal ([124], [144]) or of reviewing the ban ([140], [143]), but failed to do so.

152. As to the second challenge, Ms Chan submitted, with support from her written closing submissions below, that the argument identified and upheld at [150] had been raised below. The ET was right to describe the identified 'less discriminatory way' of achieving Network Rail's legitimate aim as '*similar*' to the course of action which was recommended in minute 6. There was no basis to challenge that conclusion.

Conclusions on perversity challenge

153. I am not persuaded that either perversity challenge meets the heavy burden which authority imposes in respect of such appeals.

154. As to the first challenge, I agree that, standing on its own, it would not be enough to justify the decision that Mr Truman would otherwise be left without a remedy. However, on a fair reading of the decision, that is an additional comment rather than the critical aspect of the reasoning. By virtue of the terms of its policies, Network Rail was ultimately responsible for the refusal to issue a card and to impose a ban. The fact that it chose to delegate the task of carrying out the tests in accordance with its policies to a third party (Express Medicals) was simply a matter of its own practical arrangements

for performance of its policies. Whether the testing was carried out by itself or a third party, in either case Network Rail was responsible for the result; in this case the refusal of a card and the imposition of the ban.

155. As to the second challenge, I am satisfied that the point of comparison with the case of another worker (as per 'Minute 6') was clearly raised in the evidence and submissions on behalf of Mr Truman. Further I consider that the ET was fully entitled to conclude that there was a sufficient similarity between the two cases and which justified the conclusion that there was the identified less discriminatory way for Network Rail to ensure that its legitimate aims were met.

Summary of conclusions

156. Mr Truman's appeal on the 'competence standard issue' is dismissed.

157. Mr Truman's appeal on the 'substantial disadvantage/comparator issue' is dismissed as against Powerlines; but allowed as against Network Rail. Issues 24 and 25 are remitted for reconsideration in accordance with this judgment, together with consequent determination of Issues 26 and 27 if appropriate.

158. Network Rail's cross-appeal on the 'qualifications body issue' is dismissed.

159. Network Rail's cross-appeal on the 'perversity challenge' is dismissed.

160. Express Medicals' cross-appeal on the 'ss111/112 issue' is allowed.

Case Number: 1805815/2022

ANNEX A – AGREED LIST OF ISSUES

FIRST RESPONDENT

Section 39(1)(a), EqA

1. Was R1 the Claimant's (C) employer or prospective employer for the purposes of section 39 of the Equality Act 2010 (EqA)?

Section 15, Discrimination arising from disability

2. Did R1 know, or could R1 reasonably be expected to know, that C had the disability at the relevant time?

3. Did R1 do any of the following:

   a. refuse to instigate or support C's appeal to Sentinel against the refusal of a card?

   b. withdraw its job offer to C?

4. If so, was that unfavourable treatment of C in terms of section 15 EqA?

5. If it was unfavourable treatment, was this because of something arising in consequence of C's disability? The 'something arising', which C relies upon, is his prescribed use of Adven ETMT1 & 2.

6. Can R1 show that this was a proportionate means of achieving a legitimate aim? R1 relies upon the following legitimate aim?

   The legitimate aim relied upon by R1, that any unfavourable treatment was a proportionate means of achieving a legitimate aim, is ensuring that individuals performing safety-critical roles are fit and able to do so.

   The legitimate aims relied upon by R1 are: (i) the maintenance of regulated Health & Safety standards; and (ii) compliance with the Regulatory framework as directed, implemented, and enforced by R2.

Section 20, Failure to make reasonable adjustments

7. Did R1 know, or could R1 reasonably have been expected to know, that:

   a. C was a disabled person in terms of section 6 EqA at the relevant time?

   b. C was likely to be placed at a substantial disadvantage relied upon by C at paragraph 9 below?

8. Did R1 apply the PCP of refusing to initiate or support appeals against non-issue of Sentinel cards and/or bans in relation to prospective employees?

9. If it did, was C put to a substantial disadvantage in comparison with persons without his disability as a result of the PCP? The particular disadvantage C relies upon is the risk of a Sentinel card being removed or not being issued.

10. If the C was at a substantial disadvantage and R1 knew of C's disability and substantial disadvantage, what steps was it reasonable for R1 to have

to take to avoid that disadvantage? The step identified by C is instigating or supporting an appeal on C's behalf.

11. Did R1 fail to take that step?

SECOND and THIRD RESPONDENTS

Section 53 and 54, EqA

12. Was R2 a qualification body as defined in sections 53 and 54(2) and (3) EqA?

13. If so, did R2:

    a. fail to take account of full medical information relating to C and his disability before deciding whether to issue or refuse a Sentinel card?;

    b. fail to take account of full medical information relating to C and his disability before deciding whether to impose a ban?

    c. fail to implement a review of its decision following C's complaint of around 4 July 2022? or

    d. apply a policy that prevents appeals being brought by prospective employers or employees of the decision to issue or refuse a Sentinel card and/or impose a ban?

14. If R2 did do any of those things, were they arrangements made for deciding whether to confer a relevant qualification, or terms on which R2 was prepared to confer a relevant qualification?

15. If R2 did do any of those things, was it by doing so applying a competence standard for the purposes of section 53(7) EqA? This question applies to the section 15 EqA claim only.

Sections 109 & 110 EqA

16. Was R3 an agent of R2 for the purposes of sections 109(2) and 110 EqA?

Section 15, Discrimination arising from Disability

17. Did R2 and/or R3 know, or could R2 and/or R3 reasonably have been expected to know, that C was a disabled person at the relevant time?

18. Is the C's use of Adven ETMT1 and 2 something arising from the C's alleged disability of hemochromatosis?

19. Did R2 and/or R3:

    a. fail to take account of full medical information relating to C and his disability before deciding whether to issue or refuse a Sentinel card?;

    b. fail to take account of full medical information relating to C and his disability before deciding whether to impose a ban?.

    c. fail to implement a review of its/their decision following C's complaint of around 4 July 2022? or

    d. fail to permit an appeal by prospective employers or prospective employees against any decision with regard to issuing or refusing Sentinel cards and/or imposing a ban?

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20. If it/they did, was that unfavourable treatment of C?

21. If so, was this because of something arising in consequence of C's disability? The 'something arising', which C relies upon, is his prescribed use of Adven ETMT1 & 2.

22. Can R2 and/or R3 show that any unfavourable treatment was a proportionate means of achieving a legitimate aim? The legitimate aim relied upon by R2 is ensuring that individuals performing safety-critical roles are fit and able to do so. The legitimate aims relied upon by R3 are: (i) the maintenance of safety standards; and (ii) the application of the policies of R2.

Section 20, Failure to make reasonable adjustments

23. Did R2 and/or R3 know, or could R2 and/or R3 reasonably be expected to know, that:

    a. C was a disabled person at the relevant time?; and

    b. C was likely to be placed at a substantial disadvantage from a PCP applied by R2 and/or R3?

24. Did R2 and/or R3 apply these PCPs:

    a. Issuing or refusing Sentinel cards without taking into account all relevant medical information?;

    b. Issuing bans without taking into account all relevant medical information?;

    c. Not conducting or ensuring a review of its decisions with regard to issuing or refusing Sentinel cards and/or imposing bans?;

    d. Not permitting appeals by prospective employers or prospective employees against its decisions with regard to issuing or refusing Sentinel cards and/or imposing bans?

25. If the answer is 'yes' to any of the above, was C put to a substantial disadvantage in comparison with someone without C's disability as a result of the PCP(s)? C relies upon the following disadvantages for each PCP:

    a. that he was less likely to pass the test because medical information was not passed on; and

    b. that he was less likely to pass the test because medical information was not passed on and he was not able to put forward his justification for having not passed the test.

26. If the C was at a substantial disadvantage and R2 knew of C's disability and substantial disadvantage, what steps was it reasonable for R2 to have to take to avoid that disadvantage? The steps identified by C are:

    a. Ensuring all medical information has been obtained and considered before acting on the test result.

    b. Conducting or enabling review of its decision with regard to issuing or refusing Sentinel cards and/or imposing bans.

c. Ensuring prospective employers and/or prospective employees can appeal its decision with regard to issuing or refusing Sentinel cards and/or imposing bans.

27. Did R2 fail to take those steps?

28. If the C was at a substantial disadvantage and R3 knew of C's disability and substantial disadvantage, what steps was it reasonable for R3 to have to take to avoid that disadvantage? The steps identified by C are:

a. Ensuring all medical information has been obtained and considered before registering a test result.

b. Carrying out a proper investigation into all the medical information and its implications for the individual carrying out the role.

c. Ensuring proper discussion with the individual and the accredited laboratory takes place before registering a result.

d. Ensuring its review process is properly actioned in the event of a complaint by an individual who has failed the drug test.

29. Did R3 fail to take those steps?

Sections 111 and 112, EqA

30. Did R3 instruct, cause or induce R2 to contravene the EqA in relation to C in the manner set out above for the purposes of section 111 EqA?

31. Was R3 in a position to commit a 'basic contravention' in relation to R2?

32. If R3 did not cause or induce R2, did R3 knowingly help R2 to contravene EqA in the manner set out above for the purposes of section 112 EqA?

Remedy

33. C is seeking a declaration and compensation.

34. What if any financial losses has any discrimination caused C, and has C taken reasonable steps to mitigate any such losses?

35. What if any injury to feelings has any discrimination caused C and what compensation should be awarded for that?

36. Should interest be awarded and if so, how much?