Case Number: 1805815/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Truman	v	R1 SPL Powerlines UK Limited R2 Network Rail Infrastructure Limited R3 Express Medicals Ltd

Heard at: Sheffield **On**: 29 and 30 April, 1, 2 and 3 May 2024

Before: Employment Judge James
Mrs J Lee
Mr D Fields

Representation

For the Claimant: Ms S Chan, counsel

For the Respondents: R1 – Mr D Hay KC, counsel
R2 – Miss C Urquhart, counsel
R3 – Mr P Tomison, counsel

JUDGMENT

(1) The claims for breach of s.15 Equality Act 2010 against the first respondent are not upheld and are dismissed.
(2) The claims against the first respondent for failure to make reasonable adjustments (ss.20 and 21 Equality Act 2010) are not upheld and are dismissed.
(3) The claims for breach of s.15 Equality Act 2010 against the second respondent are not upheld and are dismissed.
(4) The claims against the second respondent for failure to make reasonable adjustments (ss.20 and 21 Equality Act 2010) are not upheld and are dismissed.
(5) The claims against the third respondent under ss.111 and 112 Equality Act 2010 are not upheld and are dismissed.

REASONS

Opening remarks

1. 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 person taking opiate based medication would be allowed to do, subject to a risk assessment and monitoring. Up until July 2022, the rail industry had provided the claimant with a successful and rewarding career. That career was effectively ended when the claimant failed a drug and alcohol test, due to him taking prescribed medical cannabis to manage the pain caused by a disability, haemochromatosis. 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.

The issues

2. The agreed issues which the tribunal had to determine are set out in Annex A.

The proceedings

3. Acas Early Conciliation took place between 26 and 28 September 2022. The claim form was issued on 27 October 2022. The claimant makes claims of disability discrimination.

4. A preliminary hearing took place on 9 February 2023 before Employment Judge Frazer. The respondent's application for a strike out and deposit orders was refused. A final hearing was listed, and related case management orders made. A hearing was also listed on the issue of disability.

5. A further preliminary hearing for case management purposes took place on 25 October 2023 before Employment Judge Davies. By that stage, although the issue of disability had been conceded, the final hearing could not proceed because of the difficulties experienced by the parties in finding, agreeing and instructing an appropriate medical expert on a joint basis. The final hearing was relisted to the current dates and further case management orders were made.

The hearing

6. The hearing took place over five days. Evidence and submissions on liability were dealt with on the first four days. Judgment was reserved.

7. The tribunal heard evidence from the claimant; for the first respondent, from Chris Hext, Group Safety and Services Director; for the second respondent, from Deborah Mary Edmonds, Director of Occupational Health and Wellbeing; and for the third respondent, from Mr Simon Davis, PhD, their Chief Scientific Advisor and Dr Steve Malleson, a qualified Medical Review Officer. There was an agreed hearing bundle of 775 pages. Two further pages were added during the hearing, by agreement.

Findings of fact

Disability

8. The claimant was diagnosed with genetic Haemochromatosis in 2018. There is no cure, with the primary symptom being chronic pain, especially in the joints. The respondents have conceded that the claimant is disabled under the Equality Act by virtue of this condition.

Medical cannabis

9. The claimant has tried opiate medication for the pain his condition causes. He does not want to take opiates long term because of their addictive properties. He is aware that Naproxen, another drug offered, can cause stomach ulcers. He therefore applied to Sapphire Medical Clinics, based in Harley Street, London, to participate in a study regarding the medical use of cannabis for pain relief.

10. Following a consultation on 8 April 2022, the claimant received a letter from a Dr Mohammed Sajad, of Sapphire Medical, regarding a trial of medical cannabis. His letter confirms:

> *Your case has been discussed by our Multi-Disciplinary Team (MDT) of consultants. The consensus from the MDT is that you would benefit from a trial of medical cannabis. The details of your prescription are included in this letter. Please read below for information about the next steps. …*
>
> *Sapphire 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.*

11. The claimant took up the offer. Since April 2022, he has been prescribed medical cannabis under the brand name Adven EMT1 and EMT2 to help manage his disability-related symptoms. He takes 0.1 to 0.2 millilitres nightly. He takes Adven EMT1 between 7pm and 8pm and Adven EMT2 just before going to sleep. DVLA advised him not to drive or operate heavy machinery if he feels impaired.

12. The aim is that patients on cannabis treatment take a dose to improve their symptoms but should not be impaired. The tribunal notes the content of a further letter from Dr Sajad dated 28 February 2023 which states:

> *Jack has been compliant with his regular follow-up appointments at least once every three months, which are required to monitor his cannabis treatment and progress. He reports great improvement in his symptoms since starting treatment and he has not reported any side effects or impairment.*

13. 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 in*

humans 'specials'. At page 17, in relation to the reporting of adverse drug reactions, it is stated:

> *For CBPMs the MHRA requires reporting of ALL suspected adverse reactions (serious and non-serious, whether the product is licensed or unlicensed), including reports of failure of efficacy. Given the limited safety data that is currently available on the products, the MHRA will be conducting enhanced vigilance activities to support their safe use.*
>
> *These obligations are placed on any person selling or supplying "specials", not only manufacturers, importers and distributors but also the Specialist doctor prescribing the unlicensed CBPMs where appropriate. An adverse reaction means a response to a medicinal product which is noxious and unintended.*

The rail industry and the respondents

14. For entirely understandable reasons, the rail industry is highly regulated. Health and safety underpins all recruitment, appointments, training, planning and operations.

15. The first respondent is an independent overhead line electrification provider. The company operates both within the mainline heavy rail sectors and the mass transit sectors.

16. The second respondent owns, repairs and develops the railway infrastructure in England, Scotland and Wales; some 20,000 miles of track. It works under licence to the Office of Road and Rail (ORR), the overall regulator for the rail network.

17. The Third Respondent is an Occupational Health Provider, specialising in conducting both medicals and drug and alcohol (D&A) testing within the rail industry. It is authorised to carry out medical testing in relation to workers in the railway industry in Great Britain by the Rail Safety and Standards Board (RSSB).

18. The first respondent's recruitment process is standardised and consistent. Compulsory drugs and alcohol testing always forms part of that process where required. That testing is carried out by the third respondent, mainly under the rules set down by the second respondent.

19. When a company such as the third respondent uploads results of D&A testing to the Network Rail system, it does so independently of the second respondent. 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 uploaded, save that it provides guidance about testing processes and procedures.

Application for the role of POS/AP Lift Planner

20. In May 2022 the claimant applied to the first respondent for the role of POS/AP Lift Planner. We accept the claimant's evidence that the role was primarily office based and his duties included the planning of lifting activity on the rail network, ensuring lifting operations were checked for compliance to required regulations and to provide expert advice and guidance to the team regarding lift planning and assurance. The role did not require the claimant to operate heavy machinery.

21. We prefer the evidence of the claimant on this point, to that of Mr Hext. The tribunal heard much from Mr Hext about his experience in the rail industry, regardless of that evidence being of marginal relevance to the questions put to him in cross examination. We found as a tribunal that Mr Hext would often not meet questions put to him head on. By way of a typical example, the following exchange took place.

    Q. Arrangements in which protect employee – if procedures discriminatory or not followed, [is that not] not a concern of yours? [The employee] Could be banned for 5 years? A. Do not believe this industry operates in a discriminatory fashion at all.

22. The claimant was interviewed for the role on 25 May 2022. He received a conditional job offer by letter dated 16 June 2022, which he signed and returned on 20 June 2022. The proposed start date was 18 July 2022. The offer was conditional on the claimant passing a medical; and undergoing screening for drugs and alcohol.

23. As part of the application process for the role, the claimant completed a pre-employment medical questionnaire, which he submitted on 22 June 2022. He confirmed in the form in answer to question 2 that he did not have any health problems or disability that may affect his safety or performance at work. He was asked if he needed any adjustments to help him do the job – he confirmed not. He was asked if he had taken medication - he answered yes, Adven and venesection.

24. The claimant was asked if he had used drugs in the last 12 months – he answered: 'yes, prescribed medication'. In answer to a question about any current problems, he stated that he suffers with back and neck pain, weakness in his arms and legs and other problems. He was asked to give details and stated that he suffered occasional joint pain due to haemochromatosis.

25. The claimant also completed a health assessment questionnaire for night workers. That asks at paragraph f) if he was taking any drugs, prescribed or otherwise, on a regular basis. He answered 'yes', and provided the details as 'Adven EMT1 & EMT2 – CM5'. He was asked at paragraph i), if he had any other medical condition which might affect his ability to work safely at night, to which he answered 'no'?

26. In the equal opportunities monitoring form, the claimant ticked the box to say that he considered he had a disability/long-term health condition. He also ticked the box to say that he would 'prefer not to say' what the effect of the condition was on him.

27. The requirement for a medical and D&A screening are compulsory requirements for registration with The Sentinel Scheme (Sentinel). The Sentinel Scheme is controlled by Network Rail. This is a mandatory scheme for all safety critical roles in the rail industry. For all we have found that the role is mainly office based, the role offered to the claimant is still a safety critical role.

28. A person who passes the medical and D&A screening process, is provided with an electronic identity card (a Sentinel card). The issue of a Sentinel card proves confirmation of basic competence and medical fitness to work on or

near the national rail infrastructure. Until these events, the claimant had continuously held a Sentinel card since 2009, when he was 18.

Network Rail's policies

29. Network Rail's *Drugs and Alcohol NR/L1/OHS/051 Policy* (Level 1) states on page 3 under the heading 'Compliance':

> *This Network Rail standard is mandatory and shall be complied with by Network Rail and its contractors if applicable from 05 March 2016.*

30. The scope of the policy is set out in section 2 which reads:

> *2.1.1 This policy:*
>
> *a. sets out the drugs and alcohol principles for all employees and contractors working on Network Rail infrastructure;*
>
> *b. includes requirements and guidance for drug and alcohol testing and breaches of the policy.*

31. Definitions are dealt with in section 3. A candidate is defined as:

> *A person who requests or seeks employment with Network Rail or a contractor.*

The claimant would have been classed as a candidate at the relevant time.

32. A contractor is defined as:

> *Any contractor, subcontractor, agency employee or other person engaged under a contract of service to work for or on behalf of Network Rail, excluding domestic services. Where the contractor is a company, this includes all employees or agency workers (whether permanent or temporary) of that company working on behalf of Network Rail.*

It is not in dispute that the first respondent is a contractor, within this definition.

33. A sponsor is defined 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.*

34. Section 4.7 sets out the process for employees or contractors who fail a drugs and alcohol test:

> ***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.

35. Section 4.7 is to be contrasted with section 9.10 of the Level 2 Policy (which is also said to be mandatory), which relates to candidates who fail an alcohol test at pre-employment testing. It says:

9.10 Candidate who fails an alcohol test at pre-employment testing

9.10.1 Where a candidate who has applied for a Sentinel competence and/or certification to carry out safety critical work fails an alcohol test they may be:

a. appointed to a post which does not require PTS certification and is not designated as a safety critical work post, subject to confirming that they will comply with Network Rail's Drugs and Alcohol policy; or

b. considered for employment in a post which requires PTS certification or is designated as safety critical work in the future, subject to passing a drugs and alcohol test and satisfying that the previous positive result was not an indication of habitual and continuing misuse of alcohol.

36. The appeals process is in section 4.8 of the Level 1 Policy. It reads:

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.

37. It is the first respondent's position that the effect of these provisions is that the claimant did not have a right to an appeal. The first respondent would support an appeal, for an existing employee who was challenging a drug and alcohol test; but would not support an appeal for a candidate. Further, it is

the first respondent's position that a candidate such as the claimant is not classed as a contractor for the purposes of these provisions, nor is the first respondent to be classed as a sponsor. It is only if the relevant tests are passed, and the Sentinel card is issued (and therefore the conditions under which employment is offered are met), that the first respondent would accept that it becomes the sponsor under these policies.

38. This was essentially the position adopted by Network Rail prior to the hearing. Miss Edmonds did slightly resile from that position before the tribunal in evidence, by saying that exceptionally, an appeal could be considered from a candidate, but only if their prospective employer supported that. That was never going to happen in this case, because of the interpretation applied to this section of the policy by the first respondent, as set out in the above paragraph. We shall consider this interpretation of the Level Policy in the conclusions.

39. During the hearing, Miss Edmonds gave evidence to the effect that during 2022, there were some 60,000 applications for a Sentinel card. About 700 failed the drugs test; 22 failed the alcohol test. We accept those figures.

40. The Level 2 Policy (as noted above, also mandatory) states at 5.1.3:

> *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.*

41. Paragraph 5.1.4 provides that test results are to be recorded on the Sentinel database. Section 9 provides that it is the medical provider (i.e., in this case, the third respondent) which records the result.

42. The relevant parts of 9.4 and 9.5 (relating to test results) read:

> *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 drugs 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;*

RSSB Guidance

43. The Rail Safety and Standards Board (RSSB) produces guidance and standards for those operating in the rail industry to follow. An extract from the RSSB website states:

> *Rail Industry Standards (RISs) define functional or technical requirements to be met in circumstances where the management of the railway system does not need a Railway Group Standard (RGS). RISs are railway-specific standards: they contain requirements applicable to subsystems, or they set out rules about how subsystems should be operated or managed.*
>
> *RISs benefit the industry by removing the need for companies to develop and maintain their own (company) standards in the areas covered by RISs. For the GB mainline operators and infrastructure managers, the Statement of National Regulatory Provisions (SNRP) and licences under the Railway Act 1993 require compliance with applicable RISs. If licence holders are unable to comply with a RIS, they may identify and use an equally effective alternative to achieve the purpose of the RIS, after consultation with those who are likely to be affected.*

44. On 27 May 2020, the RSSB published a position statement from its Occupational Health Specialist Advisory Group (OHSAG) on the use of medicinal cannabis and cannabis oil by rail workers, in which it is stated:

> *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 for. 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 CBO 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.*

45. The RSSB Guidance on Medical Fitness for Railway Safety Critical Workers states:

> *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.*
>
> *…*
>
> ***D.7 What can employers do?***
>
> *D.7.1 In order to ensure operational safety and to comply with legal requirements each employer will have procedures to control the risks associated with the use of medicines in the workplace. These may include:*
>
> > *a) A requirement for employees to report the use of medication to a responsible person.*
> >
> > *b) A process for deciding which duties the individual can be assigned to and any additional arrangements.*
> >
> > *c) Access to expert advice concerning the effects of medicines in relation to work on the railway.*
> >
> > *d) Arrangements for regular review*
> >
> > *e) Provision of training and information for managers and employees*

46. Rail Industry Standard RIS-8070-TOM issue two dated March 2022 deals with Drugs and Alcohol Testing for Safety Critical Workers. The document:

> *'provides transport operators with the industry agreed standard testing safety critical workers for drugs and alcohol. It contains requirements and guidance on drugs and alcohol policies, testing, support for staff and testing methods'.*

47. The document sets out a series of requirements; the rationale and guidance for those requirements are prefixed by the letter 'G'. The relevant sections read:

> ***3.3 Confirmation of a positive test result***
>
> *3.3.1 A Medical Review Officer shall confirm a 'positive result' after discussion with the individual tested and the accredited laboratory.*
>
> *3.3.2 Transport operators shall treat a refusal to be tested for drugs and alcohol to be the same as if the individual had a 'positive result'.*
>
> *3.3.3 Transport operators shall inform the person leading an investigation of the finding of any relevant test for drugs and alcohol, including refusals to test.*
>
> ***Rationale***

G 3.3.4 The result of the drug testing procedure may have consequences for the future employment of the individual tested. Therefore, a discussion is necessary to establish whether there is a legitimate medical explanation for using the drug or the quantity of the drug detected.

G 3.3.5 Gathering evidence is crucial to an investigation. The result of drugs and alcohol tests form part of the evidence and help investigators establish causes of adverse events. …

G 3.3.10 The MRO determines whether there is a legitimate medical need when the presence of drugs is detected in a test. The MRO does not regard as a 'positive result' the detection of medicine disclosed by an individual, providing:

a) The medicine was disclosed before the test sample was collected;

b) There is a legitimate explanation for the use and quantity of the medicine that has been detected; and

c) The individual declared the use of the medicine to their manager before performing safety-critical tasks.

48. Annex A to RIS-8070-TOM provides this guidance on testing, including for cannabis:

G A.2.1 Tetrahydrocannabinol (THC) is the main psychoactive component of cannabis. Other cannabinoids include cannabidiol (CBD).

G A.2.2 Typical workplace drug tests look for THC and its metabolites, the compound responsible for the 'high' associated with cannabis.

G A.2.3 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 for. Possession of cannabis prescribed for someone else is illegal and is treated in the same way as possession of recreational forms of cannabis.

G A.2.4 Some medicinal cannabis treatments may have undesirable side effects or may be detectable in drug screening tests, as with other medicines. Existing company policies and procedures apply, just as they would be with other medicines that are also drugs of abuse, like opiates. See G 3.3.10.

G A.2.5 CBD and cannabis-based products are available without prescription, but their origin, quality and content are unknown and may contain THC, which could be detected by drugs testing. As a result, they may be illegal, potentially dangerous and have consequences for employment.

<u>The claimant's D&A test</u>

49. On 28 June 2022, the claimant attended the third respondent's premises in Derby. He disclosed his use of medical cannabis to the nurse he saw, Tricia North. The claimant told Ms North that he took the medical cannabis for pain due to his medical condition, which is a disability. The claimant showed the prescriptions, which could be viewed on his phone, to Ms North. She noted the name of the medication, but told him she did not need a copy. Ms North

told the claimant that the Medical Review Officer (MRO) would contact him if further information was needed.

50. At page 457 of the bundle is the 'chain of custody' form. Although the medication Adven EMT1 and EMT2 is mentioned, there is no specific reference to disability or to medical cannabis, Similarly, on the documents prepared by the laboratory that tested the sample, which show the result of the test on page 459/461, there is no mention of such information in the comments section.

51. Entirely unsurprisingly, the claimant's urine sample tested positive for cannabis (THC) metabolites.

52. On 1 July 2022 these lab results were reviewed by Drs W J Theron and A Wilson Jones, who work for the third respondent. The tribunal finds that they are likely to have had the chain of custody form when they considered the results, which named the medication being taken by the claimant, as noted by Ms North. The tribunal accepts that doctors considering results should have a chain of custody form before them in all cases.

53. There is no reference on the decision form completed by Dr Theron to the medication that the claimant is taking, which is noted on the chain of custody form and which the claimant had disclosed prior to the test taking place. It simply states 'Pending. Positive for Cannabis. FAIL'.

54. 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.

55. The 'Fail' result was uploaded to the second respondent's Sentinel system on 1 July 2022, the same date. There was no discussion with the claimant prior to that document being uploaded. The consequence of the failure to pass the D&A test is a five-year ban on the claimant working in the rail industry in any safety critical role.

Attempts to challenge the ban

56. The claimant only became aware that he had failed the D&A test after contacting the third respondent himself on 4 July 2022. He spoke with Ms Vaida Valuckaite, their Clinical Manager. He was told no prescription existed for medical cannabis. When he explained that he did have a prescription, Ms Valuckaite asked him if it was from 'a real doctor'. She also suggested to him that he take other medications instead, to manage the pain which his disability causes.

57. The claimant submitted an appeal against the decision the same day, in an email to Toni Kirby, of the first respondent. He told Ms Kirby:

I've been informed by the Medical provider that I have failed the DOA. However I did declare this beforehand as I am on a prescribed medication which goes by the brand name Adven. This is basically a legal cannabis medication.

I understand there is a stigma attached to such medication however I take this legally, under supervision of a consultant and with the approval of a medical panel. I do not abuse my medication but due to my genetic disability I do not have any other options for pain management as opiate based pain medication is problematic over long term use.

I have taken this issue up directly with Sentinel and Express Medical providing medical evidence in the form of a doctors letter, which I have also attached to this email. I can get further evidence at your request.

58. The claimant also emailed the second respondent on 4 July, using their Health and Wellbeing email address. His email states:

I recently undertook a Pre Screening DOA Test and was recently told I had failed this test due to identification ofTHC.

I currently have a genetic disability called Haemochromatosis. There exists no cure with my primary symptoms being pain especially in my joints.

I've begun receiving treatment after delays during the pandemic, however I was advised my symptoms may not subside. The only remedy I was offered was short term pain relief as long term use of Naproxen and Opiates aren't a viable option.

I've been legally prescribed a medication called Adven EMT 1 and EMT 2. These cannabis based medications. One being an oil and the other the flower. There are rigorous controls for this prescription, my case was put before a panel of medical professionals and accepted however ***I am being told by the DOA medical provider, Express Medical, that no legal prescription exists in the UK and I should probably take something else****.* [ET's emphasis]

However I was told beforehand, by the nurse who administered the tests, that I would simply have to provide the evidence from my doctor upon the result of the DOA as it was declared before the test.

I've attached a letter from Dr Mohammed Sajad who is my consultant. If you require any further evidence I will be happy to provide it.

59. The tribunal accepts that this is the first time the second respondent became aware that the claimant was taking medical cannabis for his medical condition, a disability.

60. He also emailed the third respondent on 4 July 2022, stating:

Attached is a Doctors note for the prescription of Adven EMT 1 & 2. [ET note – this is the letter from Dr Sajad of May 2022]

I am submitting evidence for DOA screening EMLA 020731.

I was told this would be requested and reviewed by medical professionals. However I am now being told by your representatives that no legal prescriptions exist and have now received a 5 year ban via Sentinel.

If this evidence does not suffice I can provide copies of prescription notes from the Pharmacy that provides the medication.

I understand there is a stigma attached to this medication and many misconceptions around legal cannabis prescriptions but I feel it is unfair to discriminate against those with genetic conditions.

In response to your advice that I should take other medications, my only option is to suffer silently since my consultant advised me that even with monthly venesections my symptoms are permanent. Long term opiates will cause addiction along with a long list of serious side effects and long term use of anti-inflammatories causes additional stress on the liver (in addition to iron overload from Haemochromatosis) and can cause ulcers.

Withdrawal of job offer by R1

61. On 5 July 2022, the claimant's job offer was withdrawn by the first respondent, before the review which was due to take place later that day by the third respondent had taken place, at their weekly Clinical Review Meeting.

I hope you are well, based on the information we have been provided by Sentinel and Express Medicals, please see the attached letter to advise of the withdrawal of the offer of employment with SPL Powerlines UK Ltd, as this result does not meet the terms of the contract and the requirements of the role.

62. The claimant replied the same day as follows:

I've received further contact from EM and Health and Wellness (sentinel appeals body). Express Medical have accepted the legality of the prescription but are unwilling to change their decision.

Health and Wellness are unable to provide me with an appeal as this must be done at the sponsors request.

I don't believe it is fair to discriminate against me, 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.

Would SPL be able to appeal this directly to Sentinel on my behalf? I am willing to undertake any health exam within reason at my own cost in order to set minds at ease and resolve this situation.

63. The second respondent replied to the claimant on 5 July 2022 as follows:

Thanks for getting in touch and it sounds extremely difficult a condition for you to manage. Unfortunately we cannot support appeals direct from employees or candidates. We would suggest contacting your prospective Sponsor to discuss with them, if not already done so, and provide them with all evidence you can.

Review by R3

64. The third respondent reviewed the claimant's case at their weekly Clinical Team Meeting on 5 July 2022. The notes of the meeting record at point 6:

6. **DOAs and SC working**. - *Declared medication fail test but 'pass" result because proof of prescription. Impair safety at work (e.g. amphetamines,*

diazepam) statement on the certificate to inform management of need for risk assessment. 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.

65. According to minute 11, a discussion also took place about four individual cases. The note relating to the claimant records:

> *EMLA - 020731 JT - + for prescribed cannabis (THC). Discussed at some length with SD input and agreed policy that any positive cannabis test will be a fail result providing it meets all the necessary chain of custody etc. Prescription medication containing THC is not relevant in this situation and does not affect the outcome.*

66. The tribunal heard evidence at this hearing from Mr Davis and Mr Malleson as to what this minute meant. Their evidence to the tribunal was that the 'etc' was a reference to the distinction between licensed and unlicensed cannabis medication. While the tribunal did not doubt the honesty of the witnesses on this point, the tribunal did not find that evidence credible. The reasons for not doing are as follows.

67. First, this distinction is not made in their evidence in chief for this hearing. The issue of Adven being unlicensed was not raised until this hearing. Second, in December 2022, as will be seen below, Mr Davis produced a report for Mr Malleson, as a result of these Employment Tribunal proceedings being issued. Even so, in that report, the distinction is not between licensed and unlicensed, but to Adven not being 'approved'. Third, as is also clear from the content of the December 2022 report below, Mr Davis appeared to conclude that the level of THC-metabolite found in the claimant's urine sample could not be explained by the use of medical cannabis alone. In particular, the report states:

> *In my opinion, it is correct for the medical review officer to believe that the levels of Cannabis metabolites in the urine are not due to medical need.*

68. Again, before this tribunal, Mr Davis disputed that the 'fail' result was based on him concluding that the claimant had taken anything other than medical cannabis. In light of the words set out in the December 2022 report, as quoted above, the tribunal does not find that denial to be credible either.

69. Fourth, in the December 2022 report justifying the decision to fail the claimant on the drugs test, because of cannabis being detected, Mr Davis quotes a Network Rail policy, which the tribunal has not been shown during this hearing. It appears that an out of date or incorrect policy was being quoted. The guidance quoted emphasises the importance of concluding that the quantity of substance found in the sample is consistent with '*legitimate and evidenced medical need',* and for the reasons given above, the tribunal has concluded that Mr Davis and his colleagues thought otherwise. The distinction is also made between 'acceptable medication' and 'unacceptable medication'. This is not consistent with Network Rail's Policy, or the RSSB guidance quoted above, particularly the OHSAG guidance note and Annex A to RIS-8070-TOM.

70. For all of these reasons, the tribunal concludes that the real reason for the decision to fail the claimant, despite the evidenced need for medical cannabis, was that those working for the third respondent had concluded that the claimant had consumed cannabis over and above that provided on his prescription; and that a policy decision has been taken by them, 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. That is, the tribunal concludes, the most likely interpretation of the words used in the minute.

71. It is also consistent with the content of an email sent to the claimant by Ms Valuckaite on 5 July 2022, informing him:

> *Please see response from our Occupational Health Physicians.*
>
> *'We discussed this case in detail during our clinical meeting with our chief medical officer Dr Steve Malleson. 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'.*

Reference by R2 to an investigation

72. On 6 July 2022, the claimant was told by the first respondent they would contact him, after seeking advice and clarity on the situation. On 11 July 2022 he was told that the first respondent had asked for clarification of the decision and the matter was under investigation by Network Rail. He was told that the first respondent will be in contact once they had any update.

73. On 11 July, the claimant was told by Ms Kirby that the first respondent was seeking clarification and would update the claimant once they were able.

74. On 12 July 2022 the first respondent emailed the second respondent, enclosing a 'report' from Mr Hext, which amounts to a basic timeline only. That was forwarded by Kris Jeffrey, Miss Edmonds' predecessor, to the Health and Wellness email address with a reply to Mr Hext stating:

> *Thank you. I have shared with our inbox for purposes of reviewing as part of the appeals process.*
>
> *Team – this case has previously been submitted to the inbox and I believe we were awaiting further information, please see attached. If further information is required, please advise Chris who is included in this email.*

75. The claimant chased up the position with the first respondent on 19 and 21 July. He received a reply from Ms Kirby on 22 July, in which she informed him that as Network Rail had not yet responded to the enquiry that was sent over in which they advised they would investigate, she was unable to update the claimant until they clarified their decision.

76. The claimant heard nothing further until 29 July 2022, when Ms Kirby emailed the claimant enclosing a letter from Mr Hext, which said:

> *I am writing to you with regard to the results of your pre-employment drugs and alcohol screening which unfortunately resulted in a positive result. I appreciate your disappointment in having the offer of employment withdrawn on that basis.*

You have been notified already that as you failed to meet the requirements to complete the terms of your application of employment, consequently the offer of employment with SPL Powerlines UK has been withdrawn.

The role you applied for is classified as a safety critical role and therefore, meeting the pre-employment requirements is mandatory to proceed.

The consequence of the positive drugs screening is that we are unable to sponsor you through the Sentinel scheme.

As we are neither the employer nor sponsor, we cannot lodge an appeal with Sentinel.

You may wish to challenge your results with the screening company (Express Medicals) and then decide on how you wish to proceed with Sentinel. The Company has no control over this screening process and decision.

As far as SPL Powerlines UK are concerned unfortunately this concludes the matter.

Report of Mr Davis – 19 December 2022

77. The tribunal was provided with a copy of a report of Mr Davis dated 19 December 2022 of the third respondent [502-5]. He was asked by his manager, Mr Dan Hegarty to produce the report. We assume this is in response to the issue of tribunal proceedings by the claimant. In the report, Mr Davis quotes 'section 15.5.5 of the Network Rail drug and alcohol policy as follows:

15.5.5 If laboratory analysis reveals the presence of a drug consistent with declared and acceptable medication/substances, this shall be reported as a 'negative' and recorded as a 'pass' result on the Sentinel database by the medical provider. The Medical Review Officer (MRO) shall first be satisfied that there is a legitimate and evidenced medical need for the quantity of medication/substance used, or that such a need is likely to have existed at the time of the test.

78. Mr Davis continues:

I do not believe this section is valid in Mr Truman's case for two reasons:

1. Section 15.5.5 refers to an "acceptable medication". ADVEN is not an approved medicine in the UK, and there is no formal evidence that the drug relieves pain in Hemochromatosis. Also, the potential side effects from the psychoactive compounds within the drug are not characterised.

2. There is no evidence that the drug is manufactured or distributed in accordance with UK pharmaceutical requirements. These regulations are in place to ensure a correct dosage, consistency of product, and quality.

3. Section 15.5.5 also states, "The medical review officer shall first be satisfied that there is a legitimate and evidenced medical need for the quantity of medication /substance used". The concentration of the THC metabolite found in Mr Truman's urine was ">500 ng/mL". This is above the levels that would be expected for medicinal Cannabis use alone. The median concentration of 97 medical Cannabis users was reported as 0.5 ng per ml (range <0.39 to 407.6 ng/ml) (Gilman et al. 2021). This is an order of magnitude lower than observed in Mr Truman's urine.

In my opinion, it is correct for the medical review officer to believe that the levels of Cannabis metabolites in the urine are not due to medical need.

79. The tribunal is confused by the reference by Mr Davis to paragraph 15.5.5. The tribunal has not been referred to any document with that paragraph number. It may be a previous version of Network Rail's policy that Mr Davis is referring to. We simply do not know. The tribunal notes that the Network Rail policy that applied at the time states at 9.4.4 that the question that Mr Davis should have asked is 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 is no reference in this policy to a requirement that the medication be 'an acceptable medication'.

Report of Mrs V Jenkins

80. There is also before the tribunal a report of Mrs V Jenkins, who was instructed on a joint basis by the parties to this claim. Mrs Jenkins is a Member of the Chartered Society of Forensic Sciences (MCSFS) and a Member of the Expert Witness Institute (MEWI). The relevant sections of her report state:

5.1 … [T]he effects from one 'joint' are usually felt almost immediately, maximising within 20 to 30 minutes and then slowly decreasing over the next 3-4 hours, although there are reports of the effects lasting considerably longer.

5.2 … (THC) is the major active constituent of cannabis and is largely responsible for the effects of the drug. The exact duration of effects will depend on the amount of cannabis used in each 'joint' and the number of 'joints' smoked (or the quantity ingested).

5.3 The appearance of people who have used cannabis is often similar to that produced by alcohol. It produces a sense of well-being or euphoria, which is often accompanied by feelings of relaxation and drowsiness. Nausea is a common side effect and cannabis may cause distortion of space and time, impaired co-ordination and judgement and memory disturbances. In addition, it often causes characteristic bloodshot eyes, a dry mouth and increased appetite. Tolerance builds up with regular use of cannabis, so an experienced user will show far less effect for a given dose of cannabis than an occasional user.

5.4 As with most drugs, the exact effects of cannabis on an individual are difficult to predict. They will depend on the amount of drug consumed, the person's character, their tolerance to the drug and the immediate environment in which the drug is taken. …

6.8 [The claimant's] treating physician may be able to provide further comments specifically regarding benefits of cannabis in other patients suffering from the condition. Of significance to this case is that Mr. Truman reports benefit from taking the specific cannabis products prescribed and reports that they are well tolerated. …

[Mrs Jenkins was asked to comment on the level of THC-COOH in the sample provided by the claimant in the D&A test]

6.17 The compound detected in this case (THC-COOH) is an inactive metabolite of THC (tetrahydrocannabinol). THC itself is only present in trace amounts in urine, so THC-COOH detection is used as confirmation that THC has been ingested in the past. THC-COOH has a long half-life and will therefore remain in the body for a long time and accumulate with regular daily use. …

6.20 There is a vast range of THC-COOH urine concentration in the above case with the upper end being not dissimilar to Mr. Truman's concentration despite the maximum daily dose in this study being 25 mg. Although it is not possible to predict Mr. Truman's likely urine THC-COOH concentration as a result of his consumption, a urine THC-COOH in excess of 500 ng/ml would not in my opinion be inconsistent with his declared usage. …

6.22 Is the Claimant's prescription of Adven ETMT1 and 2, a recognised and/or licensed medication for use in treating pain associated with haemochromatosis?

6.23 Cannabis based products for medicinal use (CBPMs) such as Adven EMT1 and EMT2 prescribed by specialist doctors are unlicenced medicines and therefore prescribed as 'specials'. Doctors on the GMC specialist register can prescribe such products and NICE guideline states that "They should have a specialist interest in the condition being treated".*

6.24 The Government has defined a CBPM as "a preparation or other product, other than one to which paragraph 5 of part 1 of Schedule 4 applies, which

a) Is or contains cannabis, cannabis resin, cannabinol or a cannabinol derivative (not being dronabinol or its stereoisomers),

b) Is produced for medicinal use in humans; and

c) 1) Is a medicinal product,

2) Or is a substance or preparation for use as an ingredient of, or in the production of an ingredient of, a medicinal product".

6.30 … could the recorded level of THC have impaired the Claimant's ability to carry out the role safely and if so, in what respects? …

6.33 The medical notes provided to me support Mr. Truman tolerating the medications well without side effects. Mr. Truman has also been for a medical whilst taking the prescribed cannabis products and whilst I have not been provided with any notes from this medical, the fact that he passed would indicate that no obvious physical or psychological effects that would preclude him working were apparent. …

6.34 Subject to the above, … would any adjustments be recommended to the role to remove or reduce any impairment that arises from the Claimant's use (as per the dosage level found in the test results dated 29 June 2022 and 1 July 2022) of Adven ETMT1 and 2?

6.35 As long as Mr. Truman continues to take the products at night and at a dose that relieves his symptoms without causing adverse effect, there would be no need to make and [sic] adjustments to the role.

81. The conclusions of the report are as follows:

> ***7. CONCLUSIONS***
>
> *7.1 Mr. Truman has been prescribed cannabis products for the treatment of symptoms of his haemochromatosis. He had in the past tried other medications without benefit.*
>
> *7.2 As expected, Mr. Truman has failed a urine drug test as a result of taking this medication. He declared the use of this medication prior to the test. The compound detected is inactive and purely supports past consumption of a cannabis product. Based on one study, it was deemed that Mr. Truman's urine test was not compatible with his declared use.*
>
> *7.3 It is not possible to interpret urine drug testing results and for this reason the expert panel who agreed the drug driving limits for a number of drugs including cannabis did not attempt to provide limits in urine (it is still necessary to also provide evidence of impairment in cases where urine rather than blood samples have been tested). As Mr. Truman declares higher THC usage than the patients in the study referred to by the MRO and more recent consumption than some of the participants, in my opinion, his urine THC concentration would not be inconsistent with his declared use. It is not possible to predict impairment based on a urine THC-COOH concentration.*
>
> *7.4 Cannabis could potentially help treat Mr. Truman's symptoms of chronic joint pain and could also potentially help with treatment of symptoms of anxiety and depression. He may therefore have been more able to work when taking the medication than if his condition was left untreated.*
>
> *7.5 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.*

Relevant law

Discrimination arising from disability (section 15)

82. Section 15 Equality Act 2010 reads:

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

83. In a disability discrimination claim under section 15, an employment tribunal must make findings in relation to the following:

83.1. The contravention of section 39 of the Equality Act relied on – in this case either section 39(2)(d) - detriment.

83.2. The contravention relied on by the employee must amount to unfavourable treatment.

83.3. It must be "something arising in consequence of disability"; for example, disability related sickness absence.

83.4. The unfavourable treatment must be because of something arising in consequence of disability.

83.5. If unfavourable treatment is shown to arise for that reason, the tribunal must consider the issue of justification, that is whether the employer can show the treatment was "a proportionate means of achieving a legitimate aim".

83.6. In addition, the employee must show that the employer knew, or could reasonably have been expected to know, that the employee or applicant had the disability relied on. Knowledge that the something arising led to the unfavourable treatment is not however required.

See the decisions of the EAT in *T-Systems Ltd v Lewis UKEAT0042/15* and *Pnaiser v NHS England [2016] IRLR 170 (EAT)*.

84. According to Harvey's encyclopaedia of Employment Law [Division L.3.A(4)(d), at paragraph 377.01]: 'As stated expressly in the EAT judgment in *City of York Council v Grosset* ***UKEAT/0015/16*** *(1 November 2016, unreported)*, the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the ET was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the ET. The Court of Appeal in *Grosset* (***[2018] EWCA Civ 1105, [2018] IRLR 746***) upheld this reasoning, underlining that 'the test under s 15(1)(b) EqA is an objective one according to which the ET must make its own assessment'.

Reasonable adjustments (sections 20 and 21)

85. Section 39(5) of the Equality Act 2010 imposes a duty on an employer to make reasonable adjustments.

86. Section 20 provides that where a provision, criterion or practice (a PCP) applied by or on behalf of an employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable to have to take in order to avoid the disadvantage. The same duty arises where the substantial disadvantage arises from a failure to provide an auxiliary aid or a physical feature of premises.

87. Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated in recognition of their special needs.

88. In *Environment Agency v Rowan 2008 ICR 218* and *General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4,* the EAT gave general guidance on the approach to be taken in the reasonable adjustment claims. A tribunal must first identify:

    (1) the PCP applied by or on behalf of the employer;

    (2) the identity of non-disabled comparators; and

    (3) the nature and extent of the substantial disadvantage suffered by the claimant in comparison with those comparators.

    Once these matters have been identified then the Tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified. The question is whether the PCP 'bites harder' on the claimant (Griffiths v Secretary of State for work and Pensions [2017] ICR 150 at #58. There just needs to be a prospect of the step alleviating the substantial disadvantage; there does not need to be not a 'good' or a 'real prospect' - *Leeds Teaching Hospital NHS Trust v Foster [2011] UKEAT/0552/10 at #17.*

89. A PCP must be more than a one-off act. In *Ishola v Transport for London* [2020] IRLR 368, Simler J held:

> *The words 'provision, criterion or practice' are not terms of art, but are ordinary English words. They are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words 'act' or 'decision' in addition or instead. As a matter of ordinary language, it was difficult to see what the word 'practice' added to the words if all one-off decisions and acts necessarily qualify as PCPs.*

90. The test of reasonableness imports an objective standard. The Statutory Code of Practice on Employment 2011 published by the Equalities and Human Rights Commission contains guidance in Chapter 6 on the duty to make reasonable adjustments. Paragraph 6.28 sets out some of the factors which might be considered in determining whether it is reasonable for an employer to have to take a particular step in order to comply with the duty to make reasonable adjustments. These include whether taking the step would be effective in preventing the substantial disadvantage, the practicability of the step, the cost to the employer and the extent of the employer's financial and other resources.

91. As for knowledge, for the S.20 EQuA duty to apply, an employer must have actual or constructive knowledge both of the disability and of the disadvantage which is said to arise from it (EQuA para 20, Schedule 8).

92. During their employment, a claimant does not need to suggest any adjustments, for the duty to arise – see Royal Bank of Scotland plc v Ashton [2011] ICR 632. However, when it comes to the tribunal proceedings, a tribunal will only consider the reasonable adjustments that have been suggested by the claimant and which form part of an agreed list of issues - Newcastle City Council v Spires UKEAT/0334/10.

Qualifications bodies – ss 53 and 54 Equality Act 2010

93. Section 53 provides:

> *(1) A qualifications body (A) must not discriminate against a person (B)—*
>
> *(a) in the arrangements A makes for deciding upon whom 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. …*
>
> *(2) A qualifications body (A) must not discriminate against a person (B) upon whom A has conferred a relevant qualification—*
>
> *(a) by withdrawing the qualification from B;*
>
> *(b) by varying the terms on which B holds the qualification;*
>
> *(c) by subjecting B to any other detriment.*
>
> *(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.*

94. The material parts of Section 54 provide:

> *(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.*

95. Harvey's encyclopaedia gives the following examples of qualifications bodies:

95.1. *British Judo Association v Petty* ***[1981] IRLR 484***, ***[1981] ICR 660***, *EAT*: In judo, at least at the higher levels, men fight men, and women fight women; there is no mixed competition. Referees are unpaid. Mrs Petty, herself a Second Dan, was a top-level referee. There is no limitation on the face of her referee's certificate, issued by the BJA, and she had refereed in the men's national competition in 1977. One of the BJA's officials said he thought it improper to have a woman referee for a men's national competition and she had not been invited back to that sort of competition since. Held: (1) The question was not whether the BJA issued a referee's certificate for the purposes of facilitating engagement in the profession (a subjective test), but whether the certificate did in fact facilitate

engagement (an objective test); and this certificate did because although the qualification was not necessary for her current job, the certificate would be likely to enhance her future job prospects. (2) There was a 'formidable' argument that any discrimination was not in the certificate (for the BJA had issued an unrestricted certificate), but in the failure to invite Mrs Petty to officiate at the men's competition (and that, it was argued, was not within **SDA 1975 s 13**); but in the end the EAT thought the argument 'too refined and subtle': by s 13(3)(*a*) authorisation included 'approval', and the substance of the matter was that the BJA had either issued a limited certificate, without saying so (and that would be contrary to s 13(1)(*a*)); or else, having issued an unlimited certificate, they had varied the terms upon which she held it (contrary to s 13(1)(*c*)). (3) The discrimination was actionable without proof of actual loss. (4) Section 44 (participation in sport) afforded no defence: it applied to competitors, not referees. …

95.2. *Pemberton v Inwood, former acting Bishop of Southwell and Nottingham* ***[2017] IRLR 211****, EAT*; ***[2018] EWCA Civ 564***, ***[2018] IRLR 542***: If empowered to confer a relevant qualification – within the **EqA 2010 s 54(3)** – the bishop was, it was agreed, a 'qualifications body' for the purpose of the **EqA 2010 s 53**. In this case an 'Extra Parochial Ministry Licence' – which was needed by Rev Pemberton in order to be able to take up a post conditionally offered to him, as a hospital chaplain – was found to be a relevant qualification. The EAT held that '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.' This judgment was upheld by the Court of Appeal, Asplin LJ holding that 'I can also find no error of law in the EAT's treatment of the issue of whether the EPML is a "relevant qualification." It is clear that the EPML was a condition of the employment on offer. It was needed for, or, at the very least, would have facilitated the appointment and it is common ground that the position of Chaplain…'. (The licence was not granted in this case – see para **[656]**.)'

96. In the case of *Tattari v Private Patients Plan Ltd* ***[1997] IRLR 586***, ***[1998] ICR 106,*** Dr Tattari complained that the respondent had discriminated against her by refusing to enter her name on a register of approved consultants. This meant that individuals covered by the respondent's insurance seeking private medical treatment could not use her as a specialist. She was of Greek origin and training, and the respondents declined to accept her Greek certificate of higher professional ability as satisfying their rules for registration. Dr Tattari unsuccessfully sought to rely on dicta in *British Judo Association v Petty* ***[1981] IRLR 484***, ***[1981] ICR 660***, *EAT* (dealing with the equivalent provision in the **SDA 1975**) and on Community rules relating to the free movement of persons in support of her broad interpretation of s 12.

97. The fact that an organisation or body has the power to confer, by its approval, substantial professional or commercial advantages on an individual in his job does not, per se, mean that it will be a qualifying body for the purposes of the legislation. In Tattari, the Court of Appeal held that that **RRA 1976** s 12 was to be read as referring to the kind of bodies similar to authorities which are empowered to grant qualifications or recognition for the purpose of practising a profession. LJ Bedlam held at 23:

> *Thus I consider that s.12, referring as it does 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.*

98. The EAT considered the meaning of 'competence standard' in *Burke v The College of Law* ***UKEAT/0301/10***, *[2011] EqLR 454*. Mr Burke, a student suffering from multiple sclerosis, was given a number of reasonable adjustments for his Legal Practice Course exams at the College, including 60 per cent extra time. Mr Burke argued he should have been given more additional time and permission to sit the exams at home. The EAT held that the College's requirement that students take exams within set time periods was a competence standard for the purposes of the definition in **DDA 1995** s 14A(5) (which is very similar to the **EqA 2010** definition). The evidence in the tribunal suggested an extension of time beyond 100% of the original exam would have changed the nature of the examination process. The EAT held that there is a difference between 'giving a candidate some extra time, such that the nature of the examination (and competency standard) is maintained, and giving such an amount of extra time so that the examination is no longer testing what it is intended to test (in this case the ability to work under time pressure).' Although the case was appealed, the Court of Appeal in *Burke v The College of Law* ***[2012] EWCA Civ 37***, *[2012] EqLR 279* did not consider the question of competency standards and the EAT decision remains good law on that matter.

Section 111 Equality Act 2010

99. Section 111 EqA 2010 provides:

> *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.*
>
> .....

(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.

100. In *NHS Trust Development Authority v Saiger [2018] ICR 297,* , the EAT held that both A and B can be corporate entities for the purposes of **S.111**. It saw no reason why one company cannot commit a 'basic contravention' against another. It relied on the fact that a 'basic contravention' is defined as including the prohibition in **S.112** against knowingly helping a contravention (see '**Aiding discrimination**' below). A company can, in principle, aid another company to commit a contravention against a third person under **S.112**. Therefore, in the EAT's view, a company can also be liable under **S.111** if it instructs, causes or induces another company to commit a contravention against a third person.

101. HHJ Hand held at 117:

I reject Mr Reade's argument that section 111(7) means that the section cannot apply as between corporations. I see no reason why one company cannot commit "a basic contravention" against another. In particular, 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).

Section 112 Equality Act 2010

102. S112 Equality Act 2010 provides:

(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).

....

(5) 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.

103. The 'knowledge' requirement is essential and a tribunal should make clear findings on it before imposing liability under this section on an individual: *Sinclair Roche & Temperley v Heard [2004] IRLR 763, EAT* (applying the RRA 1976 case of *Hallam v Avery [2001] IRLR 312, HL*).

Burden of proof

104. Under s136, if there are facts from which a Tribunal could decide, in the absence of any other explanation, that person A has contravened the provision concerned, the Tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.

105. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The Tribunal can consider the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

106. The Court of Appeal in Madarassy, a case brought under the Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. LJ Mummery stated at paragraph 56:

Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'

107. Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in Hewage v Grampian Health Board [2012] IRLR 870 at para 32:

They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

Conclusions

108. In arriving at the following conclusions on the issues before the Tribunal, the law has been applied to the facts found above. The Tribunal will not repeat every single fact, in order to keep these reasons to a manageable length. The issues are dealt with in turn.

109. In reaching our conclusions, we have considered the burden of proof under the Equality Act 2010.

FIRST RESPONDENT

Section 39(1)(a), EqA

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

110. We conclude that R1 was the prospective employer, and it is the provisions of 39(1) of the Equality Act 2010 that are applicable. R1 made a conditional offer of employment, subject to certain conditions being met.

Section 15, Discrimination arising from disability

Issue 2 - did R1 know, or could R1 reasonably be expected to know, that C had the disability at the relevant time?

111. Based on the findings of fact above, we conclude that R1 could reasonably have been expected to know that C had the disability from receipt of the claimant's email of 4 July onwards.

Issue 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?

112. This is made out on the facts and is conceded by R1.

Isse 3 b. withdraw its job offer to C?

113. This is also made out on the facts. On 5 July 2022, R1 withdrew the job offer because the claimant failed the D&A test and his Sentinel authorisation had subsequently been withdrawn.

Issue 4 - if so, was that unfavourable treatment of C in terms of section 15 EqA?

114. Regarding 3.a., it is argued by Mr Hay KC that because the claimant did not have a right of appeal under R2's Level 1 D&A Policy, there was no unfavourable treatment. We will come onto the question below, as to whether or not the claimant should have been allowed to appeal to R2. We consider that potentially goes to the question of justification, rather than the question as to whether or not it was unfavourable treatment. The Tribunal concludes that not instigating or supporting an appeal to R2 was unfavourable treatment.

115. Regarding 3.b., it is conceded that the withdrawal of the job offer was unfavourable treatment.

Issue 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.

116. In relation to a., the appeal, we note that the evidence of Mr Hext as to why an appeal was not submitted was somewhat contradictory. The tribunal has the following notes of Mr Hext's evidence on this issue:

    116.1. [R1] would not bother following up [an appeal] if not an employee and they fail the test. That is then out of your hands

    116.2. [The rail] industry still has an issue with D&A, no distinction if person has legitimate need for it, no. If someone working and unwell, send to OH adviser and OH decide what to do about it. When comes to specific drugs, cannabis prohibited, [and] cocaine.

    116.3. If go for D&A screening and fail it, no comeback on that and not going to appeal for someone not employed by you.

    116.4. Q. That is not what this standard says - it says medical cannabis should be treated in same way as medical opiates? A. You saying, if cannabis, no further discussion. Cannot get Sentinel certificate for person who fails test on cannabis.

    116.5. Q. Why not consider making representations – for C – he has a legal prescription, up front at all times, why not make representations for a review of a fail? A. Because he failed on cannabis. Prohibited on rail standards. … If it is cannabis, that is that.

    116.6. Mr Hext says there is no right of appeal for someone in the position of the claimant. [And he would not want to do that]. The Judge

asked Mr Hext to explain why not. Mr Hext replied: They fail test pre-employment, that is as far as you are going to go with it. You are not the employer, not the sponsor, it is a failure. [Note – the sections in square brackets have been slightly amended/expanded to make more sense, but nevertheless accurately reflect the note taken.]

117. Whilst it is clear from these answers that Mr Hext, wrongfully in the tribunal's view, took the view that a fail of the D&A test because of cannabis would lead to an automatic fail, the Tribunal concludes that reasoning was secondary on the facts of this case. The tribunal is satisfied that the operative reason for Mr Hext not supporting an appeal was because of his interpretation of Network Rail's policy that because the claimant was not an employee and had failed the test, he had no right to an appeal. That decision would have been made by Mr Hext, regardless of whether the test was failed due to cannabis being detected, or some other drug. The wording of the 29 July 2022 letter reflects that position. The tribunal notes that the fact that the D&A test was failed due to cannabis is not mentioned at all in that letter.

118. In relation to b., the withdrawal of the job offer, R1 concedes that the necessary causal connection is established.

Issue 6 - can R1 show that this was a proportionate means of achieving a legitimate aim?

119. 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.

120. The tribunal agrees that these are legitimate aims.

Not supporting or instigating an appeal – 3a

121. Strictly speaking, it is not necessary to consider this issue in relation to the appeal, but for the sake of completeness justification is still considered. In light of the wording of the policy, the tribunal concludes that it is understandable that ultimately R1 decided that it could not instigate an appeal itself. It was not formally the sponsor of the claimant, prior to the pre-employment checks being undertaken and passed. Under the strict wording of the policy, the claimant had no right to an appeal. The tribunal concludes that was unfair to the claimant, in the circumstances that he found himself in. But it is Network Rail's policy, and it is for Network Rail to remedy that, not R1. The tribunal hopes that Network Rail will consider this and change the policy, particularly in light of what is said below.

The withdrawal of the job offer – 3b

122. The Tribunal concludes that the withdrawal of the job offer was not necessary for the purpose of ensuring individuals performing safety critical roles are fit and able to do so or for the maintenance of regulated health and safety standards. We will set out further below our reasoning in that regard – see Issue 22.

123. Nevertheless, we consider that the withdrawal of the job offer was a proportionate means of achieving compliance with the regulatory framework as directed, implemented and enforced by R2. R1 did not have any other option in the circumstances. We conclude that the decision to withdraw the

job offer on 5 July 2022 was somewhat hasty, given the representations made by the claimant and the possibility of an appeal/review being considered by R2. Ultimately however, R1 had no choice, in light of the withdrawal of the Sentinel card, to withdraw the job offer. R1 could not employ the claimant in a safety critical role, once that authorisation had been removed. It was not in R1's gift to change that. Regardless of Mr Hext's views in relation to the failing of a D&A test because of cannabis (which we wholly disagree with, again for the reasons set out below), R1 could not employ the claimant without a Sentinel card.

124. In light of that decision, R1's hands were tied, save for supporting an appeal. Even then, in light of R2's interpretation of section 4.8 of the policy, there was in effect nothing R1 could do to force R2 to accept an appeal, even if they had wanted to. The email from Kris Jeffrey to the Health and Wellbeing team shows that at one stage, Ms Jeffrey had asked the relevant team at Network Rail to contact Mr Hext if further information was required, in relation to an appeal. There was no evidence before us that any such contact was made; and there was no further contact between R2 and the claimant at all, after that point. R2 appears to have left it to R1 to let the claimant know there was no right of appeal. R1 did so in the 29 July 2022 letter.

Section 20, Failure to make reasonable adjustments

Issue 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?

125. Yes, from 4 July 2022 - see above.

Issue 7 b. C was likely to be placed at a substantial disadvantage relied upon by C at paragraph 9 below?

126. For the reasons set out below, we do not consider that the substantial disadvantage has been made out; so R1 could not have had knowledge of it.

Issue 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?

127. Yes. R1 does not/would not support appeals from prospective employees because both R1 and R2 believe that the Level 1 Policy does not allow for that.

Issue 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.

128. We conclude that the claimant has not established substantial disadvantage in relation to the PCP above. 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.

129. 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.

Issue 10 - if 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.

130. It is not necessary to consider this issue, in light of the conclusion regarding issue 9.

Issue 11 - did R1 fail to take that step?

131. Again, it is not necessary to consider this issue, in light of the conclusion above regarding issue 9.

SECOND and THIRD RESPONDENTS

Section 53 and 54, EqA

Issue 12 - was R2 a qualification body as defined in sections 53 and 54(2) and (3) EqA?

132. The Tribunal concludes that R2 is a qualification body as defined in section 53 Equality Act 2010. 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, R2 is not acting in this context as a 'trade organisation' within section 57.

Issue 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?*

Issue 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?

134. We conclude that the way these issues are put ignores the real issue here, which is not conferring a relevant qualification – see s.53(1)(c) Equality Act 2010. This was how the issue was originally pleaded – see page 22 of the bundle. Counsel for R2 fairly concedes in paragraph 26 of her closing submissions that the above matters, broadly speaking, concern the refusal of a Sentinel Card and a five year ban. The tribunal concludes that is not really about arrangements or terms at all, as set out in the list of issues, but the refusal of a relevant qualification. The tribunal very much appreciates Miss Urquhart's approach to this issue. The tribunal considers it appropriate that the remaining issues in this section of the List of Issues be considered on the basis of the underlying issue. We are satisfied that the way the case is argued, by R2 – see for example paragraphs 59 to 67 of Miss Urquhart's closing submissions – covers the real issue in the case. This is in contrast to the way the reasonable adjustments claim was put and responded to by R1.

Issue 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

135. The tribunal notes the contents of page 465 of the bundle, concerning the claimant's request for sponsorship. 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 claimant 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, and nor has the tribunal heard relevant evidence or submissions on any indirect discrimination claim. Issues 17 to 22 do not therefore strictly speaking need to be considered but the tribunal will, for the sake of completeness, do so below, in case its conclusions on Issue 15 are held to be wrong.

Sections 109 & 110 EqA

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

137. The tribunal notes that this issue is no longer being pursued by the claimant and therefore no conclusion needs to be reached about it.

Section 15, Discrimination arising from Disability

Issue 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?

138. The tribunal concludes that R2 had actual or constructive knowledge of the claimant's disability from receipt of his email of 4 July 2022 onwards. The tribunal concludes that R3 had actual or constructive knowledge of disability from 28 June, when the claimant told Ms North about his disability (see the facts section above). That should have been passed on to others working for R3, who performed the necessary tests/assessment, whether or not it was.

Issue 18 - is C's use of Adven EMT1 and 2 something arising from C's alleged disability of hemochromatosis?

139. Yes, undoubtedly it is.

Issue 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?

140. R2 in effect did not make any decision before the ban was imposed. It was the automatic consequence of R3 uploading the failed D&A test result to the Sentinel system. Despite initial indications to the contrary, R2 decided not to re-visit the ban; but there was no further decision as such.

141. As for R3, it did not make a decision as such to refuse a Sentinel Card – rather, that was the inevitable consequence of the decision to fail the claimant on the D&A test. R3 would only be liable under s.111 or 112 (assuming those sections apply – see below), if R2 is. The same observation applies to the next three issues too.

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

142. The tribunal reaches the same conclusion as at 19 a. above.

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

143. R2 did fail to do so, despite Kris Jeffery appearing to have put steps in place which were then not followed up. As a matter of fact, R3 did review the decision to 'fail' the claimant on 5 July.

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?

144. R2 did fail to permit an appeal. R3 had nothing to do with that decision.

145. However, as noted above in relation to issue 14, the real issue is whether or not R3 refused the issue of a Sentinel card and imposed a five year ban.

Issue 20 - if it/they did, was that unfavourable treatment of C?

146. Bearing in mind the above, we conclude that refusing the claimant a Sentinel card and imposing a five year ban was unfavourable treatment

Issue 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.

147. Again, on the basis that the real issue in the case is refusing to issue the claimant with a Sentinel card and imposing a five year ban, this was because of the something arising, namely the use of medical cannabis.

Issue 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?

148. Given our conclusion in relation to issue 15, we will not deal with this issue in the same detail we would otherwise have provided, since for the reasons given in relation to issue 15, this claim cannot succeed.

149. In relation to R2, we conclude that the legitimate aim relied on is a legitimate aim in the context of this safety critical sector. Whilst we consider that the primary responsibility for the claimant not being issued with a Sentinel card was the decision of R3, which we will turn to in due course, we would nevertheless have concluded that R2 could not escape liability under s.15 as a result. R2 chooses, for understandable reasons, to have other organisations carry out the D&A test. But it is R2 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, R2 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 R2 is liable, can R3 be liable. R3 cannot be liable on its own.

150. Further, the tribunal concludes that there was a less discriminatory way for R2 to ensure the legitimate aim was met. That is, by ensuring that R1 carried out the necessary risk assessment, and continued to do so throughout the claimant's employment. This is similar to the course of action R3 recommended in relation to the worker referred to in minute 6 of the minutes of the 5 July 2022 meeting. This reasoning will be developed further in relation to R3.

151. In relation to R3, the tribunal concludes that the aims relied on are legitimate aims. However, failing the claimant on the D&A test with the result that he has suffered a five year ban was not in our judgment a proportionate means of achieving these aims.

152. First, in relation to the maintenance of safety standards, the tribunal reiterates that this aim could and should have been met by treating the claimant's use of medical cannabis in the same way as a positive test would have been treated for opiates or amphetamines, where those opiates/amphetamines are being taken in line with a legitimate medical prescription/need. Again, see minute 6 of the 5 July 2022 minutes.

153. For the reasons set out in the facts section above, we have concluded that those working for the third respondent failed the claimant on the D&A test because they wrongly assumed that the amount of THC-metabolite found was because the claimant was using cannabis over and above that supplied through his prescription. Further, from the report of Mr Davis of December 2022, it appears on the balance of probabilities that R3 was using an out of date or incorrect policy of R2.

154. Under paragraph 9.4.4 of the Level 2 policy, R3 was required to consider whether or not it could be '*satisfied that there is a legitimate medical need for the quantity of substance used'.* Instead, the minute shows that R3 took a policy decision to fail any worker who tested positive for cannabis metabolites, regardless of legitimate medical need.

155. The tribunal has based its conclusion on the unchallenged expert evidence of Mrs Jenkins which the tribunal found entirely persuasive. No other expert evidence was before the tribunal. It is clear from the conclusions of Mrs Jenkins that the claimant 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.

156. In addition, the tribunal is reinforced in its view by the guidance of the RSSB, as quoted above [see paragraph 69]. Bearing in mind that guidance, the tribunal concludes that paragraph 9.4.4 should have resulted in the claimant passing the D&A test, despite the presence of THC-metabolites in the urine sample. Since Adven, although 'off-licence', had been approved for use by the MHRA, the positive test should have been treated in the same way as the presence of opiates for a legitimate medical use. The tribunal concludes that the attempt by R2 and R3 to justify their decision, after the event, by drawing a distinction between licensed and unlicensed medicines does not stand up to scrutiny; and ignores the clear and persuasive guidance produced by the RSSB.

157. As for the second legitimate aim, the tribunal would have concluded that the treatment was not a proportionate means of achieving that aim, because, on the basis of the tribunal's findings of fact, R3 applied the policy incorrectly, or applied the wrong one; and in a discriminatory manner.

158. Notwithstanding the tribunal's conclusion in relation to justification, the claimant's section 15 claim against R2 and R3 must necessarily fail as a result of our conclusion on Issue 15.

159. Had the claim been argued in the alternative as an indirect discrimination claim, the tribunal would have had to grapple with the justification defence in that context and make any further necessary findings of fact. That is not however the way the case has been argued before us, and it would therefore be inappropriate for the tribunal to speculate as to what its decision may have been, had that been the case.

Section 20, Failure to make reasonable adjustments

Issue 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

160. See Issue 17 above – yes.

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

161. For the reasons set out below, the tribunal concludes that the claimant did not suffer a substantial disadvantage in relation to any of the PCPs relied on.

Issue 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?

162. See the conclusions above in relation to Issue 19.

Issue 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

163. 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.

164. As also noted above in relation to Issue 9, the real PCP in this case appears to the tribunal to be a requirement to pass a D&A test, which the claimant was disadvantaged by, because he was more likely to fail due to his use of medical cannabis. Just as we have concluded in relation to R1 however, as the claim has not been pursued or argued before us on that basis, the tribunal does not consider it fair or just to reformulate the issue at this stage.

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.

165. See the conclusion at 25 a. above. The same reasoning applies.

Issue 26 - if 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.

166. As a result of our conclusion on issue 25, it is not necessary to reach any conclusions as to whether or not these were reasonable steps.

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

167. See above.

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

168. See above.

Issue 27 - did R2 fail to take those steps?

169. See above.

Issue 28 - if 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.

170. Again, as a result of our conclusion on issue 25, it is not necessary to reach any conclusions as to whether or not these were reasonable steps. In any event, R3 could not be primarily responsible, given its relationship to R1, R2 and the claimant. See Issue 16 above.

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

171. See above

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

172. See above

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

173. See above

Issue 29 - did R3 fail to take those steps?

174. See above.

Sections 111 and 112, EqA

Issue 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?

175. Had the tribunal upheld any of the claimant's claims against R2, the tribunal would in principle have concluded that R3 caused R2 to contravene the Equality Act, particularly in relation to any breaches which resulted from (and therefore were caused by) R3's unjustified and potentially discriminatory

decision to fail the claimant on the D&A test in the circumstances of this case.

176. Unlike the position under section 112, there is no requirement in relation to section 111 for those working for R3 to have understood that their decision in relation to the D&A test was potentially discriminatory. Were that a necessary component, section 111 could have no application in the case of s.15 unfavourable treatment, or indirect discrimination, where the person causing the other to discriminate did not consciously realise that its decision would have a discriminatory affect. In the tribunal's judgement, all that is required for a case to succeed under s.111(2) is for a causal connection to be made out. It would have been made out in this case in the circumstances described.

Issue 31 - was R3 in a position to commit a 'basic contravention' in relation to R2?

177. According to the judgment in the *Saiger* case, R3 was theoretically in a position to commit a basic contravention by knowingly helping R2 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 R3 to be liable under s.111 for acts committed by R2 as a qualifications body. However, due to our conclusion in relation to the substantive issues, this is academic.

Issue 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?

178. The tribunal understands that the important distinction between section 111 and section 112 is that in the latter case, R3 must have known that the effect of its decision to fail the claimant on the DNA test was discriminatory. The tribunal accepts that R3 did not know that was the case. That is evident from Mr Davis's report of 19 December 2022, in which it is suggested that no discrimination has taken place. Whilst we have concluded that, differently pleaded, the facts established above could, in theory at least, have amounted to discrimination under s.19, we are satisfied that those who made the decision at the review meeting on 5 July 2022 did not realise that disability discrimination against the claimant was the probable outcome.

Employment Judge James

Employment Judge James
North East Region

Dated 25 June 2024

Sent to the parties on:

25 June 2024

For the Tribunals Office

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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?

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?