

IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT GLASGOW

**Judgment of the Employment Tribunal in Case No: S/4100394/2016 Heard at
Glasgow on the 6th, 7th, 8th, 9th September 2016**

**Employment Judge: J G d'Inverno, QVRM, TD, VR, WS
Members: Mr G Doherty
Mr E Borowski**

Mr J Thurgood

Claimant
Represented by:-
Mr R Wood,
Communication Workers
Union

British Telecommunications plc

Respondent
Represented by:-
Mr J Brockbank, Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

(FIRST) The Majority Judgment of the Tribunal is that the claimant's complaint of discrimination is dismissed.

(SECOND) The Majority Judgment of the Tribunal is that the claimant's complaint of unfair dismissal is dismissed.

Employment Judge: Joseph d'Inverno
Date of Judgment: 08 May 2017
Entered in Register: 09 May 2017
and Copied to Parties

REASONS

1. This case called for a Final Hearing of 4 days' duration at Glasgow on 6th September 2016 at 10.30 am. Both parties enjoyed the benefit of representation; for the claimant Mr Thurgood, Mr Wood of the Communication Workers Union and for the Respondent Company, British Telecommunications plc, Mr J Brockbank, Solicitor.

Matters Agreed and Conceded

2. In the course of Case Management Discussion, conducted at the outset of the Hearing, the following matters were confirmed:-
- a) The claimant's representative confirmed that the claimant accepted that he was dismissed for reason of ill health capability, that is for the reason asserted by the respondent. Parties' representatives accordingly confirmed there was no longer any issue before the Tribunal as to the reason for dismissal.
 - b) The respondent's representative conceded, for the purposes of the Hearing, that at the material times, that is in the period from on or about 17th December 2014 up to and including the Effective Date of Termination 26th December 2015, the claimant was a person possessing the protected characteristic of disability, by reason of his medical condition of anxiety and depression, for the purposes of section 6 and section 20 of the Equality Act 2010.
 - c) The claimant's representative confirmed that the claimant's previously intimated complaint of direct discrimination in terms of section 13 had been withdrawn and was no longer a complaint requiring determination by the Tribunal at Final Hearing.

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- d) The respondent's management of the claimant's ill health capability and their ultimate decision to dismiss him for that reason, were subject to and were conducted and taken in reliance upon the respondent's policies, procedures and managerial guidance "Managing Changing Capabilities, Enabling Workplace Adjustments" et seq and terms of which are produced at **numbers 3-10 pages 30-54** of the Joint Bundle.
- 10
- e) That the claimant was continuously employed by the respondent from 27/11/2006 until 26/12/2015 on which latter date he was dismissed, following the expiry of an 8 week notice period and for reason of ill health capability.
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- f) The Effective Date of Termination of the claimant's employment ("EDT") was 26/12/2015.

The Issues

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3. The following were identified, confirmed and recorded by the Tribunal as the Issues requiring investigation and determination by the Tribunal at the Final Hearing.

(First) Whether the respondent's admitted dismissal of the claimant, for the accepted reason of ill health capability:-

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- (a) falls to be regarded in terms of section 98(4) of the Employment Rights Act 1996 as fair, as is asserted by the respondent;

or alternatively, as is asserted by the claimant,

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- (b) as unfair by reason of the respondent failing to allocate to the claimant on a permanent basis work which, as at the Effective Date of Termination of his employment was being carried out in the respondent's Dumfries stores on an agency basis, the same being work which, in the

claimant's assessment he was capable of doing and which, further in the claimant's assessment, would have met the outcome requirements of the respondent's MCC Part B (EWR) Policy.

5 **Breach of Duty to make Reasonable Adjustments**

3.2 **(Second)** Whether in the period from 17th December 2014 up to and including the EDT of 26th December 2015, the respondent:-

10 a) Applied to the claimant a provision, criterion or practice ("PCP") being the requirement that Customer Service Engineers discharge the full duties of the appointment outwith the telephone exchange including amongst others; attending at customers' premises, and duties located
15 underground and in public locations, and which PCP placed the claimant at a significant disadvantage, because of his disability, in comparison with others who were not so disabled.

20 b) Whether, in the same period, the respondent failed in a duty, assertedly arising in terms of section 20 of the Equality Act 2010 to make such adjustments, (to take such steps in relation) to the application of the PCP as it would be reasonable for it to take in order to prevent it from having that
25 effect including in particular:-

- by failing to allow the claimant to continue, on a permanent basis, to be employed in the appointment of Customer Service Engineer but on the bases that he carry out only (FTTC)8 Fibre To The Cabinet Work and to create such a full time permanent post by extracting and centralising such
30 work from all other engineers across the Borders

Region, on an ongoing basis for the claimant and in a sufficient quantity to support the employment of a full time individual engineer; and, thus,

5 did the respondent discriminate against the claimant in terms of section 21(1)(b) of the 2010 Act.

Documentary Evidence

10 4. Parties lodged a Joint Bundle of Documents **1-136** to which two additional documents, **(29A)** and **137**, were added at the commencement of the Hearing and to some of which, reference was made in the course of evidence and submission.

Oral Evidence

15 5. Parties' representatives were agreed that the respondent would lead. In the course of the Hearing the Tribunal heard evidence on oath or affirmation from the following witnesses:-

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For the respondent

- Mr Fraser Reid, the respondent's then acting Senior Operations Manager and the Dismissing Officer
- Mr Matthew Gott, Chair of the Internal Appeal Hearing

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For the claimant

- Mr J Thurgood, the claimant.

Findings in Fact

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6. On the oral and documentary evidence presented, the Tribunal made the following essential Findings in Fact.

7. The claimant was continuously employed by the respondent from 27/11/2006 until 26/12/2015, latterly in the role of Customer Service Engineer. That role requires engineers to fulfil a number of duties and perform a number of tasks outwith the exchange including variously, but not exhaustively, the performance of tasks in street located junction boxes, underground, on elevated locations which involves climbing, and in customers' premises; and the completing of fibre optic cabling links to customer supplies known as "Fibre To The Cabinet" or ("FTTC8"). Such FTTC8 work for which an allocation of 30 minutes time per task would normally be made, forms a relatively small part, perhaps in the region of 10%, of the daily duties and tasks which a Customer Service Engineer requires to carry out.

Managing Changing Capabilities

8. The respondent operates a Capability Management Procedure previously known as "Managing Changing Capabilities" or ("MCC"). The MCC Procedure aims to support and retain employees in gainful employment including those who have developed a disability and or long term health condition or whose existing condition worsens. The main aim of the MCC process, as stated at **J30**, is to enable the individual to resume, or continue in, productive work within their existing role and or team. The Procedure is divided into two stages "Part A" and "Part B". Part A initially seeks to continue to accommodate an employee in their then current position by considering, and if appropriate, by implementing reasonable adjustments (including seeking advice from various external bodies, including amongst others "Reemploy" and Occupational Health practitioners). Deployment into Part B is only considered where Part A has proved, either in the assessment of the employee or of the employer, not to be possible. The primary focus of the MCC procedure is upon retention of an employee in his or her pre-existing roles.
9. Part B, into which an employee is deployed when the conclusion is reached, either by the employer or the employee, that it is no longer possible to sustain the employee in his then current or original position notwithstanding adjustments,

includes searching for an alternative role within the respondent's organisation and allows for employees to be matched on the respondent's vacancy system as priority candidates. Thus, should any post which the respondents have advertised internally as available, match any Part B employee then, if any Part B employee apply for the post, the respondents were and are in use to determine whether any of the Part B applicants are to be offered the post before opening it to applications from non MCC candidates.

10. The priority accorded to MCC Part B candidates in respect of vacancies was such that they not only obtained prior visibility and intimation of all vacancies but, in the event that one or more of them was successful in achieving an interview for the vacancy, that process was carried through to conclusion and, if a suitable candidate identified, the post filled by the MCC Part B candidate, all before non MCC candidates would have any awareness of the existence of the positions or the opportunity to apply for them. Thus, an MCC Part B candidate might successfully obtain such an appointment in circumstances where in open competition he would not do so because in open competition a more suitable candidate might be identified and preferred.

11. At a point in time after which the claimant had first entered the MCC procedure the Parts A and B of the procedure were respectively renamed "Enabling Work Through Adjustment" ("EWA") and, "Enabling Work Through Redeployment" ("EWR"). For the purposes of continuity, however, the procedures will continue to be referred to, hereinafter, as MCM Part A and MCM Part B.

12. As at the EDT, which was 26/12/2015, the claimant's contracted role was that of a "Customer Service Engineer" within the respondent's Operating Division or 'Line of Business' known as "Openreach". He was contracted to a 36 hour working week. At the time when the claimant originally became an employee of the respondent, by reason of a TUPE transfer, his contracted role was that of an "Online Customer Adviser" working from a call centre. In or around October 2014 the claimant was deployed from the role of Online Customer Service Adviser into

the role of Customer Service Engineer through the operation of an “MCC Part B redeployment”.

- 5 13. On 3rd January 2012 the claimant had commenced a 49 day sickness absence due to depression. That sickness absence and the impact of the claimant’s condition of depression on his ability to function in his role of Online Customer Adviser, resulted in Occupational Health referrals, workplace assessments and mutually agreed adjustments under MCC Part A aimed at sustaining the claimant in his then existing role. That circumstance pertained for some 20 months.
10 Those adjustments substantially involved the claimant working offline and not functioning directly as an Online Customer Adviser.
14. In or around August 2013 the respondents determined that the claimant could not be sustained long term in that role on those adjusted light duties, given the
15 impact upon the respondent’s business needs.
15. In consequence, the claimant, with his agreement, commenced an internal redeployment job search under the MCC Part B procedure. During the currency
20 of the job search period the claimant remained on full salary although on his adjusted light duties. The respondents continued to support the claimant for a further period of a year during which he continued the internal job search process.
16. On or around 24th July 2014 the claimant applied for and was successful in
25 securing a role as a Customer Service Engineer within the respondent’s line of business known as “Openreach”. The claimant moved to that role, through the operation of a second MCC Part B re-deployment, and commenced his duties as a full time Customer Service Engineer on 13th of October 2014. The role is one which normally requires engineers to work substantially on their own.
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17. The claimant completed the training for the new job role and began a month of “buddying” with a more experienced engineer, by way of a phased entry to the role. The claimant found he was unable to undertake the normal duties required

of a Customer Service Engineer which involve an engineer, amongst other things, attending customers' premises, something which the claimant stated after a period of time he was unable to do.

5 18. It was theoretically possible for the respondents to have extracted from across
the Borders region all the FTTC8 work which from time to time was allocated to
contractors, with a view to seeking to add it to the FTTC8 work which had on a
temporary basis been manually allocated to the claimant, all with a view to
seeking to create a role, or alternatively, seeking to create a role from that work in
10 itself. Such an outcome, however, was not in the respondent's assessment
practicable, nor, in their assessment, would it result in an effective and economic
method of addressing the requirements of the business; the same for a number
of reasons including:-

15 (a) The fact that a significant proportion of the contracted out work was
not comprised of sole tasks but rather, required the contracted
engineers to also carry out other tasks including tasks which the
claimant was not capable of carrying out.

20 (b) The work in question was distributed over a large geographical area
and allocating it to a single employee would result in increased and
uneconomic travelling times.

25 (c) A sole employee carrying out all such work would be unable to
meet the requirements of the customers in terms of morning or
afternoon appointments on any day.

30 (d) Insofar as any element of the temporary work carried out by the
claimant was FTTC8 work which would otherwise have been
automatically allocated to in-house engineers but was manually
extracted from them in order to make it available to the claimant,
that work would also not be available to be used as "filling in" work

for those engineers in respect of their morning and afternoon schedules.

5 (e) The work would require to be manually extracted from the automatic work assessment and assignments system and permanently pinned to exclude it from that system. It would thereafter require, on an ongoing basis, to be manually allocated to the claimant, all of which would result in increased human resource requirements which would not result in effective and productive work from the claimant's point of view or economically viable delivery from the respondent's business perspective.

10 (f) There were no other examples of a permanent role subject to the same limitations as those applicable to the claimant namely that the engineer could only carry out FTTC8 work.

15 (g) It would not constitute "regular and effective service" for the purposes of an MCC Part B outcome.

20 (h) The demand for utilisation of contractors to carry out FTTC8 work at the material times changed and continues to change on a day to day basis and is frequently confirmed at only the commencement of a particular day. Accordingly the use of contractors in respect of FTTC8 work, which in the majority is linked to other tasks, best suits the business interests of the respondent.

25 (i) It is implicit in the Part B job search that the respondents will accept non regular and ineffective service, but only for a limited period of time.

30 (j) In the case of the claimant, that position of non regular and ineffective service had been supported by the respondents over a continuous period of three years and ten months across two

appointments and also, in the case of the latter period and of the appointment from which the claimant was dismissed, over an extended job search period of six months.

5 (k) During those periods, the short term assignment not only rendered the claimant's service ineffective but also adversely impacted upon the efficiency and effectiveness of his fellow employees who, on the one hand, required to pick up the other duties which he was unable to do and, on the other, were deprived of some of the FTTC8 work
10 which by reason of it being allocated to the claimant was not available to them to fill up their morning or afternoon programmes.

(l) The proposed level of restriction was not capable of being managed automatically. Although FTTC8 could be allocated manually that
15 had an adverse impact of increased physical human resources being expended in the Work Control Teams and the Diagnostic Teams, with associated increased costs.

(m) In the reasonable consideration of the respondent it did not
20 represent a practical permanent solution, that is to say it did not represent a viable MCC Part B outcome. It was separately a temporary assignment which could not be continued indefinitely it having already been continued for an extended period of 3 months prior to the decision to dismiss the claimant; and thereafter for a
25 further period of two months during which, despite job searching being continued throughout, no suitable permanent role was identified as available.

19. In consequence, the claimant was allocated to restricted duties on a temporary
30 basis, in terms of MCC Part A, to allow the position to be reviewed.

20. The claimant was referred to a further OHS assessment in January 2015. In terms of the OHS Report dated 20th January 2015 the OHS advice provided to

the respondent was that the claimant was fit to carry out the full role of a Customer Service Engineer as long as he was provided with extra Line Manager support and afforded brief breaks between jobs if he experienced difficulties.

- 5 21. The claimant confirmed his agreement in respect of the proposed adjustments and a plan was put in place in terms of MCC Part A whereby the claimant would buddy with another engineer for two further weeks and then build up to full duties over a four week period but subject to the recommended adjustments, including breaks, which the respondents put in place.
- 10 22. On or around 4th March 2015 the claimant experienced an anxiety attack and contacted his Line Manager making it clear to him that he no longer felt able to carry out the role of Customer Service Engineer, even with the continuation of the adjustments already in place. The claimant was thereafter absent for a period of
- 15 six days due to ill health.
23. On 9th March the claimant's Line Manager visited him at home. In the course of the meeting the claimant reiterated that he was at that time not fit and in his assessment would at no time in the future be fit, to undertake the role of
- 20 Customer Service Engineer, even with the recommended adjustments made.
24. The respondent sought further Occupational Health advice receiving two further reports respectively dated 2nd and 10th April 2015. That advice concurred in the assessment that the claimant's condition was likely to continue to cause further
- 25 issues in the role going forward.
25. Having considered the Occupational Health advice and in light of the claimant's own views regarding his lack of fitness for the role, the respondent, with the claimant's agreement, moved the claimant back onto the MCC Part B process
- 30 (job search).
26. The claimant's Line Manager held a one to one meeting with the claimant on 15th June 2015 to confirm that he would be supported in the job search process

going forward. The claimant's Line Manager further implemented the adjustment plan and Line Manager support for the claimant whilst he was undertaking his job search. These adjustments included restricted duties and weekly meetings. The claimant was made aware of all of the respondent's support services at the one
5 to one meeting of 15th June 2015 and at which meeting the claimant, for his part, confirmed that he was comfortable completing his own "Enable" referral form as he had been through the process before. The claimant duly completed his form passing it to his Line Manager on 18th June. The claimant's Line Manager processed and forwarded the form to Enable, the third party adviser, the following
10 day on 19th June 15.

27. In light of the fact that the claimant had already been through a Part B process of the full six months duration the respondents initially allocated a period of three months to the second Part B job search process. In the event, the second job
15 search was extended to a period in excess of six months continuing up until the Effective Date of Termination of the claimant's employment, including throughout the Appeal period, and during which periods the claimant continued to be supported by the respondents on restricted duties and to receive his full pay.

20 **The MCC Resolution Meeting and Dismissal**

28. After a period of four months the respondent invited the claimant to an MCC resolution meeting which took place on 20th October 2015. The letter inviting the claimant to the meeting included the advice that one possible outcome might be
25 the termination of the claimant's employment. The claimant was accompanied at the meeting by Mr Peter Jamieson, an officer from the Communication Workers Union ("CWU"). At the meeting the claimant and his representative were afforded the opportunity to present/bring to the attention of the Chair, Mr Reid any matter of concern. The claimant did so focusing, amongst other things what he
30 identified as a two week or thereby delay in receiving his Enable Report. He also raised a query regarding the carrying out of work by contractors. He also stated, based upon the six days of job shadowing of the Dumfries Storeman's

appointment which he had carried out in July 2015, that he felt that that was a job which would suit him were it to become available.

5 29. As at the date of the (Dismissal Hearing) the claimant's previous temporary assignment to the discharge of FTTC8 duties only from within the Customer Services Engineering Team had ceased. In July of 2015 the claimant, at his request had been allowed to job shadow for six days in the Dumfries store. As at the date of the Internal Appeal Hearing the claimant had commenced a second period of job shadowing in respect of the Dumfries job and which continued in the
10 second half of November, with a view to job trialling all aspects of the role, albeit that in commencing that second period of job sharing the respondent made clear and the claimant was aware that there was no guarantee that a permanent post/job opportunity would exist, or emerge from it.

15 30. Following the resolution meeting of 20th October 2015, Mr Reid investigated, amongst other matters, the situation in relation to the Dumfries Storeman's post. He was advised that there was no guarantee that the post would become available and separately no guarantee that it would be regarded as a permanent post if it were to be vacated by its present incumbent nor that it would be
20 advertised for the purposes of the MCC Part B process. Let it be assumed that a permanent position had become available in the Dumfries store, there was no guarantee that the claimant would have been successful in obtaining that appointment. While he had job shadowed in the role for a period and had himself formed the opinion, at or about the time of his dismissal, that he would be able to
25 discharge the duties of the role, he had never functioned in the role on his own and no formal assessment of his suitability to discharge the full duties of the role had been made by the respondents, as opposed to the claimant himself forming a view of the suitability of the role for himself. Following his further consideration of matters Mr Reid determined to terminate the claimant's employment.

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31. By letter dated 29th October 2015, Mr Reid wrote to the claimant informing him of his decision to terminate his employment on the grounds of impaired capability due to ill health. By that time, the claimant had been unable to carry out the full

5 duties of a substantive role within the respondent's organisation, either as an Online Adviser or as a Customer Service Engineer since 3rd January 2012, that is for a period in excess of three years and ten months. During that period, the claimant had been supported by the respondent under the MCC process including the carrying through of the MCC Part B job search process on two occasions. In taking the decision to dismiss the claimant Mr Reid was satisfied, in the circumstances, that a fair and appropriate process had been followed and that the claimant had been given every reasonable opportunity and support in the search for an alternative role during the job searches. While accepting that the respondent did use contractors at times of large demand to cover work the geographic location of which did not efficiently fit into the employed engineers' work schedules, that use was, in the respondent's and in Mr Reid's assessment, necessary to meet their customer service requirements. The variable and short timescales within which such work was frequently identified was such that Mr Reid was satisfied that the use by the respondents of contractors had not had and did not have a direct impact on the claimant's chances of securing an alternative role. The claimant was dismissed with eight weeks' notice, his last day of employment being ultimately identified as 26th December 2015 up until which date the respondents continued to support the claimant in a search for a suitable alternative permanent role. Had a suitable alternative permanent appointment been identified during the claimant's notice period the respondents would have rescinded the notice of dismissal which had been given to him.

25 32. As part of the continuing job search the respondent supported the claimant in a further period of job trialing in the Dumfries store.

The Appeal against Dismissal

30 33. The claimant was afforded and exercised a right of appeal against Mr Reid's decision to dismiss him. The Appeal Manager was Mr Matthew Gott, one of the respondent's General Managers. The Appeal Hearing proceeded on the 26th of November 2015.

34. On the 16th of November 2015, in advance of the Appeal Hearing set down for 26th/11/2015, the claimant sent to Mr Gott the Internal Appeal Officer a written statement of the points which he wished to discuss/have considered at Appeal. A copy of the same is produced at **J365**. The claimant was accompanied to the Appeal meeting by a CWU representative. In advance of the meeting the claimant submitted a written summary of the points which he wished to be considered at Appeal. These, together with the points made by him orally at the Appeal Hearing were considered by Mr Gott.
35. The Appeal meeting proceeded in offices located above the Dumfries store. On arrival in the building on the day of the meeting, the claimant learned that the incumbent of the Dumfries storeman appointment, which he had been job shadowing, had in fact secured and accepted an alternative role and that the storeman's role in Dumfries was, at that point, being carried out by a contractor agency worker who was in the process of being trained on the job. At the Appeal meeting, the claimant specifically focused for Mr Gott the question of whether he might be moved into that position displacing the contractor. Mr Gott undertook to investigate that matter.
36. Following the Internal Appeal Procedure, the Appeal Officer made specific inquiry of the relevant senior Manager with responsibility for, amongst others, the Dumfries store, identifying that at the time of the Internal Appeal Hearing it was being filled by an Agency Company. He indicated to the Manager that although he was not in a position to know whether the appointment was a permanent appointment suitable to the claimant's restricted capabilities, it appeared, at that time, to represent the only potential post that might fit that category. He inquired as to whether, and if so when, the post might be expected to be being advertised as an internal vacancy on the internal website. The responsible Manager informed the Appeal Officer that the role and the job was not going to be available on a long term basis. She also informed the Appeal Officer, for the same reason, that job shadowing of the role, which had hitherto proceeded with her consent should now cease.

37. In the course of his inquiry he noted that, by email dated 3rd November (**J351**) Carmel Deaton the relevant Senior Manager, while agreeing that the claimant be invited to resume a four week job shadow of the Dumfries post with a view to trialling every aspect of the job, had made clear that there could be no guarantee that a permanent post would exist/would become available in respect of which the claimant could make application. Following further investigation and by email dated 4th December, Carmel Deaton confirmed;

- that there was no likelihood of a post becoming available in the Dumfries store for MCC B purposes and,
- that agency contractors were being used to perform the duties of the role at that time because the store, amongst others; was being looked at in terms of the respondent's net work optimisation programme.

38. Mr Gott, shortly thereafter, spoke at the telephone with Ms Deaton. In the course of that telephone conversation Ms Deaton made clear, for reasons explained in the course of the conversation, that there was no prospect of a permanent post becoming available at the Dumfries store. Mr Gott was, in the circumstances, reasonably entitled to accept that communication of the position and to reach that conclusion. He also considered that there was no present prospect of another store's position becoming available in the Borders area.

39. Both as at the date of the Hearing which resulted in the claimant's dismissal and as at the date of the Internal Appeal Hearing, while the claimant, for his part had formed and communicated to the respondent the view that he felt that the storeman duties in the Dumfries store, previously carried out by a Mr Jacobsen, were well suited to his restricted capability, the respondent, for its part, had not formed a view on whether the claimant was suited to the post. That is to say the respondent had not formed a view as to whether the claimant would be capable of discharging the full duties of the post and could be sustained permanently in it with the support of reasonable adjustment in the event that it were to become available as a permanent post for MCC Part B purposes.

40. In the period from the date of the Appeal Hearing up to and including the Effective Date of Termination that is a further period of some ten weeks, the status of the work being carried out in the Dumfries store on an agency basis did not change. Following the earlier incumbent of the post moving to another post the Dumfries store post was not, at any time prior to the claimant's dismissal, a permanent post for the purposes of MCC Part B redeployment. The Appeal Officer was not of the view that the claimant should displace the worker supplied by the Agency Company on a further short term assignment in the Dumfries store for an indeterminate period. The costs of training the agency worker had already been incurred and the agency worker's training had been completed. While the claimant had job shadowed the role for a period of time, and although he had expressed the view that he considered that the role was one suitable to him, that was not an assessment which had been yet made by the respondent who considered that in order to make it, a further Occupational Health referral would be necessary.
41. The purpose of short term assignments under the MCC procedure is to allow the employee to gain experience and skills relevant to the potential permanent posts/post. As at the time of the Internal Appeal Hearing the Dumfries Storeman's post was not a permanent post for the purposes of MCC Part B, nor was there any prospect of it ever becoming so, nor of any similar post becoming available in the Borders Region.
42. Mr Gott wrote to the claimant on 8th December 2015 informing him that his decision was to reject the claimant's Appeal. Having fully considered the claimant's claims he had found that the decision to dismiss was both procedurally fair and, in his assessment the correct decision in the circumstances.
43. In considering and in taking the decision to dismiss the claimant and in considering and confirming that decision on internal appeal, the decision maker's both at first instance and at appeal relied upon and applied the terms of the respondent's applicable policy both:-

(a) in relation to “agency roles” and in relation to when the same constitute permanent resolution paths, through the displacing of agency workers to secure permanent vacancy positions and;

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(b) in relation to **Short Term Assignments (STA’s)** which, along with Projects are short term and do not “*stop the clock*”, as opposed to Secondments which do “*stop the clock*” and during both of which an individual should continue to search for a permanent resolution.

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44. The relevant elements of the respondent’s policy were summarised at **J241** and **J242** in an email of advice from the respondent’s HR Department (Williams) to the claimant’s Manager Mr Barry Leddie. The applicability and effect of those aspects of the policy were explained by Mr Leddie to the claimant at the one to one meeting which proceeded with him on the 15th of June some four months before the MCC resolution meeting at which the decision to dismiss him was taken. Mr Leddie’s explanation to the claimant is recorded at **J245**. The claimant was aware, before the meeting at which the decision to dismiss him was taken of the difference, in terms of the effect upon such a potential decision, between being already in or being placed in a further short term assignment which would not operate to postpone or delay the process of MCC resolution which ultimately led to his dismissal, on the one hand, of identifying either a Secondment or permanent position for which he could apply and secure, either at large or by means of a permanent resolution path of displacing an agency worker from a permanent position, which on the other hand, would have the effect of respectively interrupting and stopping the MCC resolution process and of avoiding his dismissal.

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45. Only permanent positions had the capability of constituting a successful MCC Part B outcome or a permanent resolution path through the displacement of agency workers. Short Term Assignments were not capable of representing either. At no time prior to the taking of the decision at first instance to dismiss the claimant and or the internal appeal decision to uphold the dismissal and following

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its previous occupant Mr Jacobson's vacation of the role, which following its vacation by Mr Jacobson was filled by an agency worker, was the vacated position of storeman at the Dumfries depot, a permanent position or one capable of constituting a permanent resolution path through displacement of agency worker. Throughout that period it only had the potential, and subject to all other things, regarding suitability etc, being equal to constitute a Short Term Assignment. The respondents accordingly were under no obligation to displace the agency worker from that position in order to make it available to the claimant as a further short term assignment. Even had they been in a position to and had chosen to do, so their doing so would not have prevented the decision taken, in October of 2015, to dismiss the claimant nor the decision subsequently taken on appeal to uphold the dismissal.

Findings in Fact and in Law

15 (Discrimination)

The Tribunal, by majority, found in fact and in law that:-

- 20 46. the respondent was under no obligation, in law including in terms of the operation of its MCC Part A and or Part B procedure, to create a post for the claimant tailored to the limitations which were imposed upon his capability, either by his own declaration and or by Occupational Health advice received in relation to his disability and its effect upon his capability.
- 25 47. The respondent's decision not to create such a post was a decision in the circumstances pertaining, was a decision which they were reasonably entitled to take.
- 30 48. In the circumstances pertaining, the creation of such a post did not constitute a step which it was reasonable for the respondents to have to take in terms of section 20(3) of the Equality Act 2010.

49. The respondent's failure to create such a post for the claimant did not constitute discrimination in terms of section 21(2) of the Equality Act 2010.

50. The complaint of discrimination in terms of section 21(2) of the Equality Act 2010
5 falls to be dismissed.

Findings in Fact and in Law

Unfair Dismissal

10 51. The Tribunal unanimously held that in the conduct of the meeting which led to the claimant's dismissal and in the conduct of the Appeal process, the respondents followed a fair procedure during which the claimant was afforded reasonable opportunity to bring forward and express any points which he wished to be taken into account.

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By majority, the Tribunal found in fact and in law:-

52. that the respondent was under no obligation, in law including in terms of the MCC procedure, in the circumstances pertaining, to displace the agency worker from
20 the Dumfries store role and to put the claimant into that position on a further short term assignment.

53. that in not displacing the agency worker and in deciding, in the circumstances pertaining, to dismiss the claimant, the respondent acted reasonably. The
25 respondent, in so deciding, acted within the band of reasonable responses available to a reasonable employer.

54. that the respondent's admitted dismissal of the claimant, for the potentially fair reason of ill health capability, falls to be regarded as fair in terms of section 98(4)
30 of the Employment Rights Act 1996 and the claimant's complaint of unfair dismissal falls to be dismissed.

Submissions for the Claimant

55. For the claimant Mr Wood founded upon the respondent's policies and procedures, **documents 3-10** inclusive in the Bundle, and upon the obligations
5 which he submitted these imposed upon the respondent.

56. Mr Wood drew the Tribunal's attention to the following matters:-

10 a) The policy at **J30** emphasised that its primary aim was to enable individuals such as the claimant who develop a disability or long term health condition, or whose existing condition worsens, to resume or continue in productive work within their existing team or unit or line of business.

15 b) and that it further recognised that capability changes experienced by individuals might be temporary, permanent or progressive and that the respondents accepted that they must do everything practicable to retain individual skills and abilities even if their capability changes and that their line managers must take all reasonable steps to retain people
20 who develop health conditions or disability during the course of their employment with BT,

25 c) that at **page J36 paragraph 5** short term assignments were recognised where it was provided in relation to "STAs (Short Term Assignments)" – "your job search doesn't stop if you agree to an STA you are allowed a percentage of time to continue your search for jobs. Although this is good for gaining experience and skills in jobs you may wish to go for, you need to keep in mind and make sure the STA will benefit you".

30 d) That at **J52 document 10** "A Guide to Making Workplace Adjustments"; the respondents advised individuals conducting job

searches under the MCC process, such as the claimant, to make reference to the information available regarding agency displacement.

5 e) That in the letter informing him of his dismissal, dated 29th October 2015 (**J341**) the claimant was advised that during the period of his eight weeks notice, that is the period between 31st October 2015 and 26th December 2015, he should continue with his job search right up until the last day of his employment.

10 57. Against the above background Mr Wood submitted that the respondents had been under an obligation to make up or create a permanent role for the claimant within the Open Reach Division as a Customer Services Engineer

- 15
- by adjusting the requirements of that role by restricting them to doing Fibre To The Cabinet 8 connection work only,
 - removing that work or a sufficient quantity of it from other engineers; and,
 - 20 • by centralising it with the claimant in sufficient quantity such as to constitute a full employment.

25 58. The claimant, having learned on 20th October 2015 that the then occupant of the Dumfries storeman's role intended to move to another appointment and that the role was, in consequence being filled by an agency worker that on the following day he had contacted his own Manager asking him in turn to make contact with the Manager with responsibility for the Dumfries storeman's appointment and to find out what the plans were for the role.

30 59. Following that initial contact the claimant had himself made contact with the relevant Manager Barry Dunnery indicating that if the role were to become available he would be interested in it either on a temporary basis until the role

could be advertised on a permanent basis when he could apply for it or on a permanent basis.

5 60. In the alternative, Mr Wood submitted that, as at the date of his internal appeal, the former occupant of the Dumfries storeman's role having moved to another appointment and that role being fulfilled by an agency worker, that role should have been viewed by the respondents as a potential MCC Part B resolution i.e. a permanent resolution path both in terms of their own policy and generally, and that they should have displaced the agency worker from it, placed the claimant in 10 the position even if only on a temporary or short term basis thus avoiding the need to dismiss him and allowing him further time to continue with his job search.

15 61. While accepting that both as at the date of the initial decision to dismiss him and as at the Effective Date of Termination of his employment the Dumfries storeman's appointment had not become available as a permanent post, Mr Wood submitted that the respondents could and should nevertheless have displaced the agency worker and placed the claimant in that appointment even as a short term assignment, if by doing so they could have continued his employment, avoided his dismissal and facilitated a continuing job search on his 20 part.

25 62. Mr Wood submitted that in failing to do so and in deciding to dismiss the claimant, the respondents had acted unreasonably. He submitted that their decision did not fall within the band of reasonable responses available to a reasonable employer. In short, he submitted that, in the circumstances presented, no reasonable employer would have failed to place the claimant in the Dumfries storeman's role on a short term assignment basis and thus, that no reasonable employer in the circumstances would have decided to dismiss the claimant.

30 63. In summary, Mr Wood invited the Tribunal to hold that the respondents had discriminated against the claimant in terms of section 21(2) of the Employment Rights Act 1996 by failing to create for him on a permanent basis a full time Service Engineer's role in which the duties which the claimant required to carry

out were restricted only to the Cabinet 8 connection work. And, separately that the respondent's decision to dismiss the claimant for the potentially fair reason of ill health capability fell to be regarded, in the circumstances, as unfair in terms of section 98(4) of the Employment Rights Act 1996.

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Submissions for the Respondent

64. Mr Brockbank for the respondent relied upon the respondent's policies, procedures and managerial guidance produced at **documents 3 to 10 and pages 30 to 54** inclusive of the Joint Bundle in compliance with the terms of which he submitted the respondent had managed the claimant's ill health capability and had taken the decision to dismiss him at first instance and on internal appeal had taken the further decision to uphold the dismissal.

65. For the respondent Mr Brockbank referred the Tribunal to the following cases:

1. **East Herefordshire District Council (Appellant) v K Boyten (Respondent) [1977] IRLR 347** at paragraph 7
2. **The Post Office (Appellant) v Marney (Respondent) [1990] IRLR 170** at paragraph 23
3. **Westminster City Council (Appellant) v CABJA (Respondent) [1996] IRLR 399** at paragraph 29
4. **London Ambulance Service NHS Trust (Appellant) v Small (Respondent) [2009] IRLR 563** at paragraph 47
5. **W Devis and Sons Limited v Atkins [1977] 3 all ER 40** at page 41(i)

6. **Taylor (Claimant/Respondent) v OCS Group Limited (Respondents/Appellants) [2006] IRLR 613** at paragraphs 60 and 61
- 5 7. **Orr (Appellant) v Milton Keynes Council (Respondent) [2011] IRLR 317** at paragraph 64;
8. **Salford NHS Primary Care Trust (Appellant) v Mrs A F Smith (Respondent) UKEAT/0507/10/JOJ** at paragraph 6 of the
10 summary and paragraphs 59 to 65; and
9. **Polkey (Appellant) v A E Dayton Services Limited (Respondents) [1987] IRLR 503** at paragraphs 17 and 18.

15 66. Under reference to the above cases and to the matters in respect of which the Tribunal has subsequently made Findings in Fact at paragraph 18 above, Mr Brockbank submitted that the creation of a tailored full time permanent role for the claimant as a Customer Service Engineer within the Open Reach arm of the business, but with duties restricted only to the carrying out of Fibre To The
20 Cabinet connection work by extracting and removing that work from other Service Engineers from across the Borders region on an ongoing basis and in sufficient quantity to employ a full time Service Engineer, was not an adjustment which, for the purposes of section 20(3) of the Equality Act 2010 it was reasonable for the
25 respondents to have to make to avoid the disadvantage which the claimant was placed at by the application by the respondents of a PCP of requiring Customer Service Engineers employed in permanent roles, to carry out the full duties of that role.

(a) Mr Brockbank submitted that the respondents were under no
30 obligation in law whether under statute or otherwise to create such a post.

- (b) That the respondents were not required by the terms of their own policies and procedures, to create such a post in the circumstances pertaining.
- 5 (c) That, separately and in any event, the claimant had not at any point prior to his dismissal asked the respondent to make such an adjustment on a permanent basis but rather had himself advised the respondents that he did not consider himself capable nor did he consider that at any time in the future he would be capable, of
- 10 carrying out the duties of a Customer Service Engineer even with the adjustments, recommended by the Health and Safety Adviser having been put in place and being maintained; and
- (d) that the move of the claimant to a MCC Part B job search
- 15 from the post of Customer Service Engineer had been made with his consent and at his request.
67. In consequence the claimant had thereafter been maintained in that role on a short term assignment basis only while proceeding with a job search under MCC
- 20 Part B procedure.
68. In the circumstances Mr Brockbank submitted that the Tribunal should hold that the claimant had not established discrimination and that the complaint of discrimination in terms of section 21(2) of the 2010 Act should be dismissed.
- 25
69. In relation to the complaint of unfair dismissal Mr Brockbank agreed with Mr Wood's submissions:-
- that the primary focus and purpose of the respondent's policy was, wherever practicable, to sustain the individual in their original
- 30 permanent post through supporting them by the implementation of reasonable adjustments.

- that Part A of the respondent's MCC policy was focused on achieving that.
- That it was only when in the assessment either of the respondent or of the individual employee it was not possible to do that that the employee was moved to the Part B job search phase.

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70. Mr Brockbank submitted that in managing the claimant's ill health capability and in ultimately dismissing him, the respondent had followed a fair procedure and had separately followed and complied with the requirements of their own policy which in his submission incorporated a fair procedure. He further submitted that; under that policy, on its proper construction, the respondent was under no obligation nor was it under any such obligation in law, to create a permanent post where one did not exist or where one no longer existed as an alternative to dismissing the respondent at the conclusion of a reasonably conducted MCC Part B procedure.

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71. While individuals might be placed in short term assignments in the periods during which the MCC Part B job search were proceeding, short term assignments did not represent a satisfactory MCC Part B outcome. Nor could an employer be reasonably expected to extend such a short term assignment indefinitely or to place an employee in further short term assignments indefinitely, as an alternative to dismissal.

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72. In relation to the displacement of agency workers, such a course of action was, he submitted, one which would be compliant with the respondent's policy but only where the displacement was from a permanent post and in circumstances where an MCC Part B candidate had been assessed as suitable for that post (with adjustments if assessed as applicable) and where the candidate could be allocated the post, that is to say in the event of there being more than one MCC B applicant the particular individual being the preferred applicant. In short, displacement of agency workers was only appropriate and or indicated by the

policy where it represented a permanent resolution path to securing a permanent vacancy position for an MCC Part B candidate.

5 73. On the evidence presented, Mr Brockbank invited the Tribunal to hold that at no time prior to the Effective Date of Termination of the claimant's employment had the above conditions been fulfilled. At no time prior to the ETD and following upon the previous incumbent's vacation of the Dumfries storeman's post, had the post been a permanent post, nor a post which had been made available for potential filling by MCC Part B candidates. Separately, and in any event, the
10 claimant's suitability for the post had not been positively assessed by the respondent, albeit that the claimant for his part had formed a view that the post would suit him. Even had the post become available, which it did not, there was no guarantee that the claimant would have secured it.

15 74. The only basis upon which the post could have been potentially available to the claimant on displacement of the agency worker, was as a further short term assignment. Such a course of action, had it been open to the respondents and followed by them, would not have had the effect, in the circumstances, of interrupting or stopping the MCC Part B process and of avoiding the claimant's
20 dismissal.

25 75. Given the claimant's adamant assertion that, even with adjustments, he would never be fit to fulfil the duties of the permanent role of Service Engineer and given that the claimant had been supported for a period of almost four years on full salary and on light duties/short term assignments and in continuing job searches over extended periods, Mr Brockbank submitted that the respondent did not act unreasonably in deciding to dismiss the claimant. Likewise, on appeal, having further investigated and confirmed that the Dumfries post was not
30 anticipated to become a permanent post available to MCC Part B candidates, in deciding to uphold the dismissal had not acted unreasonably.

76. In Mr Brockbank's submission the decision to dismiss the claimant was one which fell within the band of reasonable responses available to a reasonable employer.

5 77. In inviting the Tribunal to hold that the respondent's dismissal of the claimant fell to be regarded as fair, in terms of section 98(4) of the Employment Rights Act and to dismiss the complaint of unfair dismissal, Mr Brockbank reminded the Tribunal that it would err in law if it were to substitute its own decision for that of the employer.

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The Applicable Law

78. The complaint of discrimination advanced by the claimant was one said to have arisen in terms of section 21(2) of the Equality Act 2010 and arising out of an alleged and accepted duty incumbent upon the respondents, in terms of section 20(3) of the 2010 Act.

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79. Sections 20(3) and section 21(2) of the Equality Act 2010 provide as follows:-

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"20 Duty to make adjustments

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(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. .

(4)

“21 Failure to comply with duty

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(1) *A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*

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(2) *A discriminates against a disabled person if A fails to comply with that duty in relation to that person.*

(3)

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80. The complaint of unfair dismissal was one advanced in terms of section 98(4) of the Employment Rights Act 1996 it being a matter of concession and agreement between the parties that the claimant had been dismissed for the potentially fair reason of ill health capability.

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81. **Section 98(4)** of the Employment Rights Act 1996 provides as follows:-

“98

(1) ...

(2) ...

(3) ...

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(4) [where] the employee has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

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(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.”

The Tribunal’s Majority Reasoning and Determination (Discrimination)

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82. On the evidence presented and Findings in Fact made the Tribunal was satisfied by majority (one member dissenting) that the creation by the respondents of a permanent Customer Service Engineer role for the claimant, in which his duties were restricted only to the carrying out of Fibre To The Cabinet 8 connection work would not, in the circumstances have constituted, a reasonable adjustment for the purposes of section 20(3); nor that doing so would that have constituted, in terms of the respondent’s policy and procedure, a relevant MCC Part B outcome in that creating and sustaining the claimant in employment in such a permanent role would not constitute “regular and effective service” for the purposes of an MCC Part B outcome.

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83. The Tribunal concluded by majority that the respondent’s failure to create such a post for the claimant, in the circumstances pertaining, did not constitute a breach of the obligation incumbent upon the respondent in terms of section 20(3) of the Equality Act 2010 and thus, did not constitute discrimination in terms of section 21(2) of the Equality Act 2010. The claimant’s complaint of discrimination is dismissed by majority of the Tribunal.

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The Tribunal’s Majority Reasoning and Determination (Unfair Dismissal)

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84. The Tribunal held by majority (one member dissenting) that the respondent’s dismissal of the claimant, for the accepted potentially fair reason of ill health capability, fell to be regarded as fair, in terms of section 98(4) of the Employment Rights Act 1996. On the evidence presented and the Findings in Fact made the majority were satisfied that the respondent was under no obligation in law including under and in terms of its MCC policy, to create a permanent role which matched the claimant’s capabilities as an alternative to his dismissal.

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85. The majority further held that the respondent was under no obligation in law including under and in terms of its MCC policy either at the time of the decision at first instance to dismiss and or the decision on appeal to uphold the dismissal or, at any point in the intervening period;

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- to place the claimant in an alternative or further short term assignment as an alternative to dismissal.

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- Or specifically to displace the agency worker from the Dumfries storeman's role in order to place the claimant in that role (on a short term assignment basis).

86. At the point of dismissal the respondent had sustained the claimant on full salary; in previous permanent roles but on adjusted light duties and on full salary on short term assignments during Part B job searches, for a period of almost four years. As at the Effective Date of Termination the claimant's supported and extended Part B job searches had not identified a permanent role for which his reduced capabilities suited him and which could be secured by him into which he could be deployed. Although the displacement of agency workers in favour of MCC Part B candidates is a measure indicated under the policy, it relates to circumstances in which the role from which displacement occurs is a permanent role leading to a permanent MCC Part B solution. That was never the case in respect of the Dumfries storeman's post nor, upon the reasonable inquiry of the decision makers made at the relevant times, was there any likelihood of that position arising in the near future, nor upon reasonable inquiry was there any prospect of a similar post within the Borders region becoming available on a permanent basis.

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87. Had the respondents decided, either at the time of taking the decision to dismiss at first instance or at the time of the internal appeal against that decision, to displace the agency worker and to place the claimant in that position they could and would only have done so as a further short term assignment which action

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would not have interrupted or delayed the MCC resolution process and meeting which ultimately led to the claimant's dismissal.

5 88. The majority were satisfied that the respondents did not act unreasonably in the circumstances, by treating the potentially fair reason of the claimant's capability, in the particular circumstances in respect of which the Tribunal has made Findings in Fact, as a sufficient reason for dismissing the claimant. The majority were unable to conclude that in the circumstances no reasonable employer would have decided to dismiss the claimant. The majority concluded that the 10 respondent's decision to dismiss the claimant was a decision which fell within the band of reasonable responses available to a reasonable employer. The majority were satisfied that the respondents had followed a fair procedure and in addition had separately complied with the requirements of their own policy. The majority determined that the dismissal was in the circumstances "fair" in terms of section 15 98(4) of the Employment Rights Act 1996 and that the claimant's complaint of unfair dismissal fell to be dismissed.

**The Minority Reasoning
(Unfair Dismissal)**

20 89. The dissenting member considered that the inability of the respondent's witnesses, in the course of the Hearing before the Tribunal, to refer the Tribunal sufficiently expressly to the particular provisions of the respondent's policy in compliance with which the respondent asserted they had managed the claimant's 25 ill health capability and had considered and reached a decision to dismiss him, was such as to result in a restriction of the respondent's right to found, at the Hearing before the Tribunal, upon the applicable provisions of their policy.

30 90. The dissenting member further considered, let it be assumed that the respondents were entitled to found upon their policy, that it may still be that the policy itself was discriminatory in identifying the displacement of agency workers as appropriate or required action only from permanent roles and in circumstances where doing so would represent a permanent resolution path for

the MCC Part B candidate by their securing the permanent positions from which the agency worker was displaced. The member further considered separately, let it be assumed that an employee who found himself in a position of redundancy could remain in a temporary assignment indefinitely, that a policy of treating persons affected by disability differently would be discriminatory.

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91. The dissenting member was unclear, on a consideration of the oral and documentary evidence, whether as was asserted by the respondent, the effect of the policy was such that the displacing of the agency worker from and the placing of the claimant in the Dumfries storeman's role on a non-permanent basis (that is on the basis of a Short Term Assignment) would or would not have had the effect of stopping or interrupting the MCC resolution meeting and process which led to the claimant's dismissal.

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92. In the dissenting member's reasoning the policy relied upon by the respondents placed upon them an unqualified obligation to always displace agency workers (that is both from short term assignments and permanent roles without distinction) in favour of an MCC(B) employee facing the possibility of dismissal and, that in those circumstances, the respondent, in failing or declining to do so as an alternative to dismissing the claimant, had acted unreasonably.

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The Minority Reasoning (Discrimination)

93. Under reference to a report of the case **G4S Cash Solutions (UK) Limited v Powell** – IDS brief (1055), a case not cited or relied upon by either party at hearing and on which the Tribunal was not addressed the dissenting member considered that in the circumstances of the present case it was not unreasonable to expect the respondents to sustain the claimant indefinitely in effective employment on full salary as an alternative to dismissing him and that their failure to do so constituted a breach of duty to make adjustments (to take such steps as were reasonable in the circumstances to take in order to prevent the claimant being disadvantaged), in terms of section 20 of the Equality Act 2010.

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- 5 94. Under reference to the same case the dissenting member considered that the respondent's failure to create a permanent Customer Service Engineer role, at an earlier stage in the MCC process for the claimant, that being a role in which the claimant's duties would be restricted to the extent that he only required to carry out Fibre To The Cabinet 8 connection work, also constituted a breach of a section 20 EqA 2010 obligation.
- 10 95. Of the thirteen reasons advanced by the respondent in respect of which Findings are made at paragraph 18, (a) to (m) above, and in the context of the size of a business such as BT and the resources available to it, the dissenting member found unconvincing the reason recorded at paragraph 18(e) namely, the requirement, and consequential result associated with such an action, for increased human resource in ongoing manual reallocation of the FTTC8 work.
- 15 96. Finally, the dissenting member considered that the respondent was under an obligation, in law including in terms of its own policy, to consider the creation of other permanent roles which might be suitable to the claimant's restricted capabilities, that is to say roles other than that of a Customer Service Engineer with substantially restricted duties, working in its Open Reach arm.
- 20 97. For the above reasons, the dissenting member considered that in the circumstances pertaining, that the respondent's decision to dismiss the claimant fell outwith the band of reasonable responses available to a reasonable employer resulting in the decision to dismiss being unfair in terms of section 98(4) of the ERA 1996; That is that circumstances in which the claimant had been unable to carry out the full duties of a substantive role within the respondent's organisation, either as an Online Adviser or as a Customer Service Engineer, for a continuous period in excess of three years and ten months, during which period he had been supported by the respondent on light or temporary duties and full pay over two extended job search periods but had been unable to identify any available permanent role to which his restricted capabilities suited him, were circumstances
- 25 30 in which no reasonable employer would have decided to dismiss the claimant.

98. On the same reasoning, the dissenting member also considered the complaint of discrimination by reason of breach of duty to make adjustments had been established.

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Employment Judge: Joseph d'Inverno
Date of Judgment: 08 May 2017
Entered in Register: 09 May 2017
and Copied to Parties

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