EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A R Wilson	v	Network Rail Infrastructure Limited

Heard at: Leeds **On**: 11, 12, 13 and 14 July 2022

Before: Employment Judge A James
Mr. K Lannaman
Ms. N Downey

Representation

For the Claimant: In person, assisted by Mr K Wilson

For the Respondent: Ms L Harris, counsel

JUDGMENT

(1) The claims for unfair dismissal (s.94 Employment Rights Act 1996), and disability discrimination (ss.15 and 20 Equality Act 2010) are not upheld and are dismissed.

REASONS

The issues

1. The issues which the tribunal had to determine are set out in Annex A. The reasonable adjustments issues were refined by the tribunal during the hearing since it appeared to the tribunal, having heard the evidence presented up to that point, that the PCP in particular, had not been correctly identified. Ms Harris did not raise any objections to the re-formulation of the reasonable adjustments claim. The changes made are shown as deletions/under-lined additions.

The proceedings

2. Acas Early Conciliation took place between 5 August and 18 August 2021, following the claimant's dismissal on 11 May 2021. The claim form was

submitted on 16 September 2021. The claimant originally brought claims of unfair dismissal, disability discrimination and notice pay.

3. A preliminary hearing for case management purposes took place on 23 November 2021. A lengthy discussion took place about the issues raised by the claimant's claim. The claim for notice pay was withdrawn and was subsequently dismissed. Relevant orders were made, including in relation to the issue of disability, which at that stage was contested by the respondent. A further case management hearing was arranged.

4. By the time of that hearing on 4 March 2022 before Employment Judge Drake, the disability issue had been admitted. The final hearing was listed, to deal with liability only. The issues were identified and related orders were made.

The hearing

5. The hearing took place over four days. Evidence on liability was dealt with on the first three days. At the beginning of the fourth day, submissions were heard from both parties. Given the time when submissions were concluded, judgment was reserved.

6. The tribunal heard evidence from the claimant, and for the respondent from Gary Costello, Senior Programme Manager; Maria Dravnieks, Redeployment Co-ordinator; Andrew Lucas, Infrastructure Maintenance Engineer; and David Morgan, Infrastructure Maintenance Delivery Manager. There was an agreed hearing bundle of 913 pages.

7. Reasonable adjustments were agreed with the claimant at the start of the hearing. The claimant was allowed to take more frequent breaks, as and when required. He was assisted by his son, Mr G Wilson. Guidance was given to the claimant about how the hearing would progress, with reading-in time, evidence from witnesses, and submissions. The claimant was reminded of this as the hearing progressed, so he knew what to expect. and when. Counsel for the respondent provided her written submissions to the claimant at 9 am on 14 July, to give the claimant time to consider them before giving his submissions verbally. He requested an extra 30 minutes to do so, which was granted, with the hearing subsequently starting half an hour later on the last day.

Findings of fact

Works Delivery Manager role

8. The claimant was employed by the respondent as a Works Delivery Manager. Works Delivery Managers report to Project Managers, who report in turn to the Senior Programme Manager. The claimant's employment commenced on 21 January 2014.

9. Clause 17.11 of the claimant's contract of employment states:

17.11 GENERAL POLICIES AND PROCEDURES

You are expected to familiarise yourself and act in accordance with all Network Rail Policies, Procedures and Rules. The policies are available on the Intranet in the Employee Handbook.

10. The Job Description includes the following key accountabilities:

10.1. manage and direct the Works Delivery team in line with resourcing and budgetary levels;

10.2. manage the development of individuals and their performance … ;

10.3. adhere to company policies and procedures, … and

10.4. discharge the duties assigned to Network Rail as a Construction, Design and Management (CDM) Contractor.

Redeployment Policy

11. The Redeployment Policy and Procedure provides:

1.2 Principles

- *Network Rail will seek suitable alternative employment opportunities for employees who are at risk of redundancy or who are unable to continue in their current role due to disability/ill-health….*
- *If more than one displaced employee is potentially suitable for a vacancy then they will be interviewed and the selection decision will be based on the best match.*
- *Employees who are on maternity leave and are at risk of redundancy will be given priority over other displaced employees in being offered a suitable alternative role.*

1.3 Responsibilities …

Hiring managers will consider a redeployee who meets the suitability criteria (see 2.2 Finding suitable alternative work) before any other internal or external candidates. Where a redeployee is not suitable, feedback must be provided to them on request, which may be at any stage during the recruitment process.

2.2 Finding suitable alternative work

Where a vacancy arises the resourcing team will search the redeployment pool prior to any form of recruitment advertising being launched. The resourcing team will contact the employee to ascertain their suitability and interest in the role and provide this information to the hiring manager.

When considering the employees suitability for a role the following criteria may be taken into account:

- *Their skills and experience and how this matches with what is required for the new role or could match following a period of training within a reasonable timescale.*
- *Their current role and band.*
- *Their current job location and home location.*
- *The band and requirements of the new role.*
- *Their performance over the past two years.*

A line manager can directly appoint a redeployee unless there is more than one identified as a match. If there is more than one, they will be interviewed competitively.

12. The respondent's Disability in the Workplace Guidance states:

Given our scale and size we would be expected to look proactively at redeployment beyond the team, department or depot the disabled employee works in. We would also be expected to invest in the technology needed to support flexible working as a reasonable adjustment. …

Redeployment

If an individual can no longer fulfil their current role, even after reasonable adjustments have been made, it may be an adjustment to redeploy them into another role with or without suitable adjustments.

Once you have found a suitable role for the employee, they should be transferred directly into the role. They should not undergo any kind of competitive interview or recruitment process because being redeployed is their reasonable adjustment. Employees should not be asked to find an alternative role or apply for other posts in these circumstances.

The main element to take into account is that when an employee is redeployed because they can no longer do their current job due to their disability, then redeploying them is an adjustment and should be treated in the same way as any other reasonable adjustments …

The important thing to remember when assessing if a role is suitable for the employee to be redeployed into (and vice versa) is to ensure that none of the barriers they face in their current role are replicated in the role that they are being redeployed into. For example, if the employee faces barriers because their current role involves a lot of travelling, then you should ensure that the new role does not require the employee to travel extensively or if it does, can you reasonably adjust this part of the job?

13. The Talent Redeployment (FAQ) document states:

What is a suitability conversation?

A suitability conversation is an informal meeting between a hiring manager and a redeployee to assess whether a vacancy is a suitable alternative position for the redeployee. Redeployees should be considered for vacancies prior to advertising and ahead of any other internal or external applicants. During the suitability conversation, the hiring manager will establish if the commutable distance is reasonable and what the current band of the redeployee is. The conversation will then focus around establishing what skills and experience the redeployee has and whether their skills and experience match the essential requirements of the new vacancy. The hiring manager must consider what reasonable training could be given to the redeployee to make their skills and experience match the essential requirements of the new vacancy.

What if there is more than one redeployee being considered?

Employees on maternity, adoption or shared parental leave and at risk of redundancy will be given priority over other redeployees (including disabled employees) in being offered suitable alternative roles. If

employees on maternity, adoption or shared parental leave are not considered a suitable match for the vacancy other redeployees should then be considered. If there is more than one redeployee potentially considered a suitable match for the vacancy, rather than holding a suitability conversation, the hiring manager should carry out a capability-based interview between the redeployees using Network Rail's standard interview templates to assess whether either redeployee is a suitable match to the vacancy.

14. A suitability meeting is therefore a conversation between a hiring manager and a redeployee to assess their overall suitability for the role against the essential criteria. This includes reviewing their transferable skills and experiences, qualifications, strengths, and areas for development. The respondent tries to ensure that anyone appointed to a role (regardless of redeployee status) is able to perform in that role. This needs to be established before an offer of appointment can be made. The purpose of a suitability meeting is the same as an interview insofar as both are done to assess the candidate's suitability for the role.

15. The respondent maintains a redeployment register which resourcers check prior to roles being advertised. The intention of the policy is that if an employee is deemed suitable by a resourcer, they will be considered before other candidates. Redeployees are however only appointed if considered suitable. They are not appointed automatically. Links to career coaching and outplacement services are also provided; together with assistance with updating CVs and practising interview or presentation techniques, if required or requested.

16. Once an employee of the respondent has been designated as a redeployee, they should have a flag noted against their name on the system to show that. The redeployment team then runs a daily report to show all redeployees with a flag against their name so that the respondent can provide appropriate support and ensure that the redeployees are treated in line with the policy.

17. The Equality, Diversity and Inclusion Policy and Procedure was included in the bundle but no particular sections were referred to in the hearing or put to witnesses and no parts of the policy are therefore reproduced in this judgment.

Breakdown in working relationships

18. The claimant experienced difficulties in working relationships with the members of his team during 2017. He commenced disciplinary proceedings against some staff over time sheet issues. The disciplinary action taken was subsequently over-turned on appeal. That caused difficulties upon the return of those staff to his team. An issue then arose over an alleged failure by the claimant to train a member of staff properly. An investigation ensued. Disciplinary charges were not pressed but the claimant's Salary Pay Review was adversely affected.

19. All of these issues adversely affected the claimant's mental health. He reported high levels of stress in late 2017.

20. On 26 March 2018 the claimant had a one to one meeting with his then manager Kyle Law. The claimant was moved from his role as WDM and told to work at the Darlington stores where he would take the lead in organising

other departmental managers to help in the transition to a Network Rail super stores depot. The temporary role commenced on 9 April 2018.

21. The claimant was subsequently told that he was rated as 'Significant Performance Improvement Required' (SPIR), for the purposes of the pay award. The claimant raised grievances in August 2018, including about the SPIR rating. That part of his grievance was upheld due to the correct process not being followed.

22. The claimant returned to his substantive role in Leeds on 4 September 2018 following a period of sick leave due to torn ligaments in his right knee. Members of staff were called into the office to discuss the alleged toxic atmosphere within the team. The claimant's supervisor said he did not want to discuss those issues with the claimant present. The claimant was highly stressed and anxious and walked out of the meeting. He was subsequently diagnosed with severe depression and anxiety.

23. The claimant subsequently commenced a lengthy period of sickness absence on 6 September 2018. Interviews with the claimant and relevant witnesses to the claimant's grievances took place during his absence.

Appointment of Mr Costello as Welfare Manager

24. Mr Costello was appointed as the claimant's Welfare Manager in December 2018. The claimant was informed of this on 10 January 2019. It was agreed that the claimant would no longer deal directly with Mr Law.

25. The claimant's grievance was partially upheld on 22 February 2019 as noted above. Nevertheless, the claimant remained aggrieved about how he felt he had been treated. He also remained seriously unwell. During his sickness absence, the claimant attempted suicide on three occasion, resulting in hospital admissions on each occasion.

26. On 1 April 2019 the claimant's contractual sick pay ran out. The respondent subsequently decided to extend it by three months' half pay.

27. On 3 June 2019, claimant wrote to Rob McIntosh as a 'last resort' regarding his ongoing concerns about how, in his view, he had been treated.

Return to work meetings and involvement of Occupational Health

28. The claimant attended a return to work meeting on 6 June 2019. This was followed by an Occupational Health meeting on 10 June 2019, which advised

> *- A clear process regarding his return to work is required, as this will assist in reducing the impact from his symptoms. I would advise he does not return to work at Leeds, as this is likely to be detrimental to his health. An alternative work location is recommended, ideally closer to Mr Wilson's home. He is willing, and I would support, a role at a lesser grade if this would allow him to work closer to home and return to work.*
>
> *- On return to work a phased, supportive return is recommended …*

29. The claimant attended a welfare meeting on 19 June 2019. It was agreed that the claimant would work at a new location. It was also agreed that the claimant would not have any direct reports and his line management structure was changed on a permanent basis to Mr Costello.

30. On 20 June 2019, the claimant's work email account was temporarily disabled due to him complaining that he was in a very fragile mental state and contact with work via email was adversely affecting him.

31. The claimant attended a further Occupational Health meeting on 24 July 2019. Amongst other things this confirmed:

> *In my opinion Mr Wilson is fit to return to work but requires a clear process regarding his return as this will assist in reducing any further stress and anxiety that he may experience, if he has not been given clear guidance on his role and place of work.*
>
> *Management may wish to consider the long commute he has been undertaking and find him work near to home. Mr Wilson feels he is unable to manage a team and would be willing to undertake a role of less responsibility.*
>
> *I would recommend when Mr Wilson returns to work he is supported in a reduction to his hours and days, where he can then gradually build up to his full contractual hours. Given the length of time he has been away from the business he would be best supported by being buddied or doing some shadowing so that this will help build his confidence over a 4-6 week adjustment.*

Return to work plan

32. The claimant attended a further welfare meeting on 25 July 2019. A return to work plan was arranged. It was agreed that the claimant would work in a temporary stores role at Raven House in Gateshead, closer to his home address. The aim of the return to work plan was that the claimant would return to his role in Leeds if possible. The return to work was to be taken in stages. A return to the WDM role was still on the table; but if a return to the WDM role was not possible, an alternative role was to be discussed. This is reflected in the notes of the meeting which record:

> *Say at Christmas, you and OH confirm that you are not able to do your substantive job, we would be looking at redeployment. As you have been classed as having a disability, rather than an interview, you would have a suitability meeting, so you would be given priority. I appreciate that it is difficult not thinking about the future, but we need to be taking little steps at a time. The first thing we need to focus on is the phased return to work, getting you back to work. There will be constant discussions, so we won't be in a position at Christmas and say, right this is what is happening. Gary and I are here to support you and to help you. This is a big step back to work. We will have discussions with you on what is going to be best for you.*

33. On 6 August 2019 the claimant commenced a phased return, based at Raven House in Gateshead. It was arranged that he would not be lone working. The salary for a stores role is normally £20,00 to £25,000. The claimant however remained on his full salary of approximately £48,000 until his dismissal.

34. The claimant attended another Occupational Health meeting on 16 September 2019. The report noted:

> *The long term prognosis is good, however the rate at which Mr Wilson will recover from his episode of ill mental health is unknown. Mr Wilson has*

experienced quite debilitating symptoms in terms of his mental health, and has required a significant level of input from mental health services to assist in his recovery. With continued support from management, a return to the full remit of his role is likely, however this will undoubtedly take longer than average due to the severity of his symptoms experienced.

35. The claimant attended a further welfare meeting on 25 September 2019. He confirmed that he agreed with the contents of the OH report and that he was '*more than happy with the lack of responsibility in the role*' at that point.

36. The claimant attended a further Occupational Health meeting on 30 October 2019. In relation to the questions asked by the respondent, the report noted:

What is the time scale to allow Anthony to return to his substantive role as WDM Leeds - Unfortunately, I cannot commit to an exact timescale that Mr Wilson will recover to a point where he can return to Leeds. The psychological impact on Mr Wilson if posted back to Leeds prior to a full recovery, may have a detrimental effect on his health.

Is Anthony fit for any role - Yes, Mr Wilson's mental health decline appears to be rooted to historical incidences within his role in Leeds. Mr Wilson is likely to cope well in another role, not based in Leeds.

Is his condition improving since he return to work - In general his condition has improved slightly as he is less exposed to stress in his current position. Mr Wilson remains at risk of self destructive behaviours, which appear to be triggered by anxieties surrounding his current situation at work.

Commencement of redeployment process

37. The claimant attended a welfare meeting on 27 November 2019. The claimant's union representative confirmed that the phased return had succeeded in getting the claimant back into a normal working pattern. At that meeting the claimant confirmed:

There is no way on this earth I am going back to Leeds.

Mr Costello responded:

I will sort out the Leeds bit, take that off the table.

38. This mutually agreed decision enabled Mr Costello to advertise for the WDM role on a permanent basis. It was agreed that the respondent would use the claimant 'to best advantage' (UBA) while attempts were made to find a suitable alternative role for him. It was agreed that steps would be taken to start the redeployment process following the next meeting in February 2020. In the meantime the claimant would continue to work in the Newcastle stores. The claimant confirmed that he would not want a purely office-based role but nor did he want to be outside 40 hours a week.

39. On 7 January 2020, the claimant commenced a brief period of further sickness absence for continued mental health issues and general stress related anxiety.

40. The claimant attended another welfare meeting on 7 February 2020, the main purpose of which was to discuss the redeployment process. The claimant was to remain classed as UBA. Pay protection was discussed. The period of pay protection under the policy is two years. The claimant expressed concern

about that. He suggested three years because he felt that the respondent was to blame for the position he was in. Mr Costello agreed to speak with HR about that. The claimant also stated: '*any jobs under £30,000 are a waste of time',* meaning that he would not consider such roles. The outcome letter confirmed the above; as well as the fact that the claimant had suffered some relapses with his mental health over recent weeks, not '*related to any issues at work'*. The claimant requested he be re-deployed to a role with no responsibility for managing staff. As usual, a follow-up letter was sent.

41. The claimant attended a welfare meeting on 12 March 2020. He was informed that the redeployment team would be contacted. He confirmed that he had not done anything to progress the redeployment process himself. The respondent confirmed that the claimant would be kept on his current salary in the UBA role. Two years pay protection would start from the date he was formally re-deployed, but the respondent would not extend pay protection beyond that. The claimant complained that the redeployment team should have been in touch with him but had not been. Mr Costello stressed that the claimant needed to be proactive himself.

42. Following the meeting, the outcome letter confirmed:

> *During the meeting we confirmed the elements of the Redeployment policy that apply to you, and that once successfully appointed into a role, you will receive two year's pay protection on your current salary.*
>
> *We discussed the support the Redeployment team can offer you, and agreed to register you with their services.*
>
> *We explained that most roles would require the use of a computer, and that the pool computer at Raven House is available for your use.*

43. On 17 March 2020 the claimant was placed on the redeployment register. On 31 March 2020, the Claimant was provided with details of the workshops and other tools offered by Network Rail's redeployment team. These related to CV improvement, interview skills and preparation for redeployment. The claimant did not take up those opportunities. Ms Dravnieks told the claimant it was still important for him to search the vacancies register and apply for any roles that he considered suitable.

44. On 1 April 2020 the claimant's email account was re-activated. Ms Dravnieks emailed the claimant asking for his answers to various questions to enable that to happen. For example, as to what roles he would like to be considered for, the geographical locations he would consider, a list of his transferable skills etc. Ms Dravnieks chased the claimant for that on 9 April 2020. An issue was noted regarding the reactivation of the claimant's email account which was still to be fully resolved.

45. The claimant was sent weekly lists of vacancies. He was also sent the monthly talent redeployment newsletter, which contains articles about job searching and updates from around the business, to keep redeployees fully appraised of the business updates so that they were able to utilise those in their job search.

Continuation of redeployment process

46. The claimant attended an Occupational Health meeting on 5 May 2020. He reported that he was self-isolating at home with his wife due to her having an

underlying medical condition, which created a risk during the Covid-19 pandemic. The claimant was said to be unfit for work and should not have access to the Network Rail intranet as his health '*is too vulnerable at present'*. A report was to be requested by Occupational Health from his GP.

47. The claimant attended a further Occupational Health meeting on 1 June 2020. The report was inconclusive as a report from his GP had not been received.

48. The claimant subsequently attended an Occupational Health meeting on 8 July. It was noted that the Claimant could not undertake track-side duties due to osteoarthritis in his right knee. Further, he did not want any management responsibilities. This meant that the Claimant could only be redeployed into roles less senior than his substantive role (which was a Grade 4B), but he would still be entitled to 2 years' pay protection. A phased return to work was recommended.

> *Tony is permanently unable to return to his role as a Works Delivery Manager. His ability to work in another role trackside would be limited by his difficulty with walking, kneeling, squatting or climbing, so he isn't suitable for an S&T, track-maintenance or off-track maintenance job. However, he is physically and mentally fit for a safety-critical role such as crossing inspection for example, where he wouldn't have to walk far from an access point, though it would be sensible that he didn't work alone for the time being. He should be able to work shifts. All the above would be subject to renewing relevant competencies.*
>
> *Off-track, he is suitable to work in an office environment, though he hasn't used a computer for about two and a half years so would need refresher training. He has also managed the Stores work satisfactorily. He is able to drive alright, including a Company vehicle, and thinks that he could commute for up to about forty-five minutes each way by car.*

49. The claimant attended a welfare meeting on 14 August 2020. At this meeting, the Claimant confirmed that the OH report was correct and confirmed that he was happy to start receiving work emails again. It was agreed that full-time office based and management roles were not suitable for the claimant and he did not want to be redeployed into such roles. For the same reasons, a planner role would not be suitable. The claimant accepted during the hearing that such a role would be too stressful too, as plans often changed at the last minute and had to be started from scratch. It was greed that a Store Controller role would be suitable, or a Crossing Keeper role. It was agreed that Darren Lord would be contacted as he was struggling to recruit to the latter roles. It was agreed that shadowing opportunities would be arranged. The claimant was however warned that if re-deployment was not possible, ill health severance would be progressed.

50. During September 2020 the claimant undertook shadowing duties. On 1 September 2020, he shadowed a Health and Safety Advisor in Newcastle. The person in that role was back-filling for the role-holder who was on secondment. The claimant also spent one day shadowing in a Level Crossing Manager role. The first time this shadowing opportunity was arranged, it had been cancelled due to a car not being made available. It was re-arranged for a later date and the claimant confirmed he was interested in taking up such a role.

51. On 3 September 2020, Ms Dravnieks explained to the claimant that it was important that he review the vacancy list himself. She also noted that resourcers reviewed this list and suggested suitable positions, which they could only do if the Claimant's CV was reflective of his skills. On 8 September 2020 the claimant provided his current CV.

Ill health severance process and dismissal with notice

52. On 15 October 2020 the claimant attended the first ill health severance meeting, following an invite to the meeting by a letter dated 6 October 2020. The claimant was informed that no final decision had been made but that he was likely to be placed on 26 weeks notice 'quite soon, given that you have been UBA for over a year now'. He was told that the redeployment support and shadowing would continue for the duration of the notice period. And that if a role became available he would be put on a trial period and the notice would be paused during that period.

53. The outcome letter following that meeting, sent on 19 October 2020, confirmed that no suitable positions had been secured. The claimant was invited to a further meeting on 10 November.

54. On 10 November 2020 the claimant attended his second and final ill health severance meeting. His dismissal was confirmed. He was given 6 months' notice of termination of employment. The Claimant was encouraged to continue to seek alternative roles and, if one was found, the notice would be revoked. Written notice was provided on the same day and the claimant was given 10 days to appeal. The claimant was told that he need not carry out any work during his notice period.

Appeal against dismissal/grievance

55. On 21 December 2020 the claimant appealed against his dismissal (this was later confirmed as a grievance on 11 January 2021, after the respondent noted that the appeal had been submitted late). The appeal letter argued:

> *After discussing Tony's case with a TSSA full time official we would like to point out that we do not believe Network Rail has fully exhausted all opportunities at it's disposal to facilitate Reasonable Adjustments under the Equality Act 2010.*

56. A welfare meeting took place on 28 January 2021. In this meeting, the Claimant confirmed that he was still receiving vacancy lists, but that the roles were mostly trackside, which the Claimant could not take up due to his knee problems. The Claimant again confirmed that he did not want to return to Works Delivery. The roles the claimant was still looking to be re-deployed into were Level Crossing Manager, Crossing Keeper and Stores Controller. These were agreed as the priorities for re-deployment. It was noted:

> *CR There has been one [crossing keeper] vacancy, but it was given [to] somebody who was stood off, they had redeployee status as off summer last year [sic] so they were offered it in the first instance and accepted the post. We need to keep an eye out for any further that may appear.*

Level Crossing Manager vacancies

57. On 2 February 2021, the Claimant noted to the redeployment team that he was interested in applying for two Level Crossing Manager roles, one in

Thirsk and one in York. He was advised to apply through Oracle 'as normal'. Ms Dravnieks emailed Erin Gray of the re-deployment team to confirm that the claimant wanted to apply for the position and asked them to make the hiring manager aware and ensure they were following the redeployment process. On 4 February 2021 the claimant applied for the Thirsk LXM role.

58. On 24 February 2021 an email was sent to the claimant about an interview for the role of Level Crossing Manager (LXM) based at Thirsk. The letter stated:

> *We are pleased to inform you that you have been selected to attend an interview for the role of IRC2205540 – Level Crossing Manager*
>
> *The interview will take place on 4th March 2021 at 11.00 am. The interview will be conducted online via Microsoft Teams conference call. Nearer the time, the Hiring Manager will send you the link to the Teams Invite. Please see attached document for further information.*

59. On 2 March 2021 the claimant sent an updated CV and job preferences to the re-deployment team.

60. On 3 March 2021 an email was sent by Darren Lord, the hiring manager for the Thirsk LXM role, to LNE Resourcing. He pointed out that the respondent had not followed the redeployment policy:

> *HR have not applied clause 2.2 in the redeployment policy for redeploying Tony Wilson (subject to agreed criteria) to this vacancy before it was advertised so the full articles of the redeployment procedure do not apply as there are now other candidates through the normal advertising of the vacancy.*
>
> *However, Tony will be given the same and equal opportunity as the other candidates in the interview process.*

61. The claimant attended what was now a competitive interview for the LXM interview (rather than a suitability interview) on 4 March 2021. Three other people were interviewed for the role. None of them were redeployees.

62. During the hearing, the tribunal heard evidence from Mr Morgan about the level Crossing manager role duties. The tribunal accepts the evidence of Mr Morgan that this is a highly pressured role. On occasion, there would be a requirement to walk down the railway track in order to check all matters relevant to that level Crossing. It is an essential part of the LXM role to manage risk, arising from level crossings, over a wide geographical area. Those in the role usually work alone. Post holders have to liaise with numerous stakeholders, such as local councillors, farmers, and the general public. Plans are made which often need to be changed at the last minute, (as with a Planer Role). Controller of Site Safety (COSS) and Individual Working Alone (IWA) certification is required.

63. In his Disability Impact Statement, the claimant records the following matters in support of his argument that he had a disability:

> *Persistent difficulty concentrating, forgetfulness remembering things, I have left paid for shopping trolly's and walked out of the shop, and with a full trolly having not paid for it in the shop and walked off. Staff have come after me to help. I have also left money in the cash machine. I stop mid-sentence as I cannot remember what I was going to say.*

Sleep disturbances insomnia or sleeping too much.

I don't look after myself or shower, if I do my wife has to supervise me when shaving as I may harm myself.

If I feel like I may be able to cook I am supervised with sharp knifes, these are all locked away in a metal box which my wife only has access. My wife issues me my medication twice a day

64. The Tribunal notes that the claimant told us tribunal that those references were to the past, not to the situation at the time he was looking to be redeployed. However, the disability impact statement does not reflect that, as those matters are not expressed in the past tense.

65. The tribunal was also referred to a decision of the Social Entitlement Chamber decision dated 25 March 2021. This determined that the claimant was entitled to a Personal Independence Payment (PIP) from 15 August 2019 to 14 August 2022. The decision confirmed that the claimant needed social support to engage with other people. He also needed supervision or assistance to either prepare or cook a simple meal.

Grievance process/dismissal

66. On 4 March 2021 the claimant attended a meeting with Mr Lucas to discuss his grievance. At this meeting, the Claimant reported that the redeployment team had only assisted him with shadowing and alleged that redeployment itself would be a reasonable adjustment, rather than being placed on the redeployment register. Mr Lucas noted that it was up to the individual to work with the redeployment team to identify suitable vacancies as it is important that the employee is interested in and qualified for the vacancy. The claimant commented that there had been no suitable roles on the vacancy list, but for two LXM roles. He had applied for the Thirsk one. The claimant told Mr Lucas about the issue with the interview that day. He complained that the redeployment process had not been followed. The role had been advertised more widely, as the redeployment team had not flagged it up as a possible job for him. So he had been put through a competitive interview process.

67. The claimant was provided with the grievance outcome in person by Mr Lucas on 15 April 2021. This concluded that there had been no evidence of a recruitment freeze; that Network Rail had applied the Redeployment Policy appropriately; and that there were no additional adjustments that Network Rail should have implemented. Mr Lucas therefore rejected the grievance.

68. On 20 April 2021, Ms Dravnieks emailed the Claimant to again offer her assistance with updating his CV or supporting him to make job applications.

69. On 22 April 2021, the Claimant replied to Ms Dravnieks to note that he had been unsuccessful with his application for the Thirsk Level Crossing Manager role and asked for feedback.

70. On 23 April 2021, Ms Dravineks emailed the claimant to say that it was important that his CV was up-to-date as the redeployment team would not put the Claimant forward for roles which appeared unsuitable. Ms Dravnieks reiterated her advice that the Claimant should attend CV and other workshops, which he had failed to do previously.

71. On 23 April 2021, Ms Dravnieks emailed the Resourcing team regarding the claimant's concern that the redeployment policy had not been followed. She stated:

> *I wanted to forward the attached to you as Tony doesn't believe the redeployment policy was followed by the hiring manager. As you can see in the below chain we did notify you that Tony was a redeployee and asked you to liaise with the hiring manager so he would consider Tony under the redeployment policy (which it doesn't sound like has happened from Tony's email).*
>
> *If it would be helpful for me to go over any aspect of the redeployment policy or process with the team please do let me know as it's important we ensure that we're advising hiring managers and asking them to follow the process where appropriate.*
>
> *I would be really grateful if you can check with Darren to see if he can provide full feedback for Tony and remind him of the policy that he's meant to follow.*

72. On 23 April 2021, Caroline Reah, of HR, confirmed that the Claimant had withdrawn an application for a role in Northampton due to the location. The claimant had been confused about the geographical location – he thought it was more local to him. It would not have been suitable.

73. A welfare meeting took place on 27 April 2021. Following the meeting, a letter was sent to the claimant confirming that if the attempts to redeploy him were unsuccessful, his employment would end on 11 May.

74. The claimant was provided with a written grievance outcome on 29 April 2021. The claimant's grievance was rejected. The respondent maintained that they had carried out their duties under the Equality Act 2010, and followed the redeployment process properly.

75. The claimant appealed the grievance outcome on 5 May 2021. The grounds of the appeal were that:

    75.1. the investigation did not take account of the recruitment freeze caused by the Putting Passengers First (PPF) initiative;

    75.2. the Claimant had not declined any suitable roles as identified by OH;

    75.3. the Claimant was not aware of any permanent adjustments being made; and

    75.4. the investigation didn't identify any permanent adjustments.

76. On 7 May 2021, MD emailed Ms Reah as follows:

> *With Reasonable Adjustment cases the Redeployees HR/Line Manager normally support them further by sending local vacancies to them but this is not something we have sight of. However, I will amend the entry in the Talent Redeployment Register to ask resourcers to contact Tony via phone in the first instance if they think he might be a match to one of their roles. [Note – due to de-activation of his account due to [ending dismissal]*

77. The claimant's employment ended on 11 May 2021 on the grounds of ill health.

Grievance appeal meeting

78. On 18 May 2021, the claimant attended a grievance appeal meeting. He was provided with an outcome the same day. The appeal was in affect a review of the original decision, not a complete re-hearing.

79. Mr Morgan wrote to the claimant with the outcome of the grievance appeal on 18 May 2021. The appeal was rejected for the following reasons:

    79.1. the Claimant was removed from his substantive role following OH advice and that it was not appropriate to make adjustments to the Claimant's substantive role as he would not be returning. As a result, redeployment was pursued as a reasonable adjustment.

    79.2. there was no formal recruitment freeze and the positions identified as suitable alternative positions were not affected by PPF.

    79.3. Mr Morgan believed that the Claimant had been offered adequate support to be redeployed, including shadowing opportunities, regular welfare meetings, invitations to employability workshops (which the Claimant did not attend), and remaining employed throughout his notice period to allow him time to find redeployment.

80. On 22 June 2022, Darren Lord sent an email to Jill Pollard which stated:

    Found the email trail below. Basically HR redeployment team missed the boat on this one, the vacancy was advertised and a shortlist and interviews dates sent out (12/02/21) before the redeployment team could get in (received the email from Karen Thornton team 3rd March a full month after this was flagged up) and received no guidelines on redeployment. I did however offer tony a full interview despite this as far as I am aware he was not formally put forward as redeployed.

    The redeployment team and recruitment advisors did not correctly follow 2.2 of the redeployment policy where they should have put Tony Wilson forward before the vacancy was advertised.

    As for Tony's suitability for the role, he performed very poorly in the interview scoring only 26 and was prompted on many questions especially the technical ones. He quite clearly did not prepare for the interview or researched the role and some of his NTS answers where poor.

    Additionally in the teams interview he did not prepare sufficiently, he was in his kitchen with people moving around in the back ground and he was getting distracted and clearly struggled with the questions. The impression we had was that Tony thought this was only a formality thus acted in that vein.

    If this was formally held as a suitability meeting I still do not think Tony would have progressed past this as he would still have to have some core skills and NT skills to align to the requirement of the role which he did not. For me his behaviours was also a big factor in our decision.

Relevant law

Unfair dismissal

81. The legal issues in an unfair dismissal case are derived from section 98 of the Employment Rights Act 1996. Section 98(1) provides that it is for the employer

to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g. conduct, or capability or for some other substantial reason.

82. Section 98(4) provides:

> *… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case*.

83. The reasonableness of the dismissal must be considered in accordance with s.98(4). In a capability dismissal case, relevant factors may include, whether occupational health advice was sought and followed; whether relevant policies were followed; whether there was adequate consultation with the employee prior to dismissal; and whether there were reasonable efforts to find suitable alternative employment.

84. In deciding whether it was reasonable for the respondent to dismiss the claimant for that reason, case law has determined that the question is whether the dismissal was within the so-called 'band [or range] of reasonable responses ('the range'). 'The range' does not equate to a perversity test. See *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, [1983] ICR 17 at 24-25*; *Foley v Post Office [2000] ICR 1283 at 1292D – 1293C*, per Mummery LJ, with whom Nourse and Rix LJJ agreed.) The Employment Tribunal must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. Instead, the Tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which '*a reasonable employer might have adopted'*. An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process (*West Midlands Co-operative Society Ltd v Tipton* [1986] 1 AC 536)) and not on whether in fact the employee has suffered an injustice. (The logical conclusion of which is that a Tribunal might consider that the dismissal was unjust, but was nevertheless 'fair'.

85 The range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from their employment for a conduct reason. The objective standards of a reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed, including the investigation (*Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA*).

86 In reaching their decision, tribunals must also take into account the Acas Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to

follow a provision of the Code does not however in itself render them liable to any proceedings.

Disability discrimination

Burden of proof

87 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.

88 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.)

89 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.'

90 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.

Disability (section 6)

91 A person has a disability if she has a mental or physical impairment; which is long term (i.e. has lasted 12 months or more or is likely to do so); and has a substantial adverse effect on her ability to carry out normal day to day activities (S.6 and Schedule 1 Equality Act 2010). The term 'normal day to day activities' includes the ability to participate in professional working life.

Discrimination arising from disability (section 15)

92 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.

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

93.1 The contravention of section 39 of the Equality Act relied on – in this case either section 39(2)(c) – dismissal; or (d) - detriment.

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

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

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

93.5 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".

93.6 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)*.

94 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)

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

96 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.

97 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.

98 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. In First Group plc v Paulley [2017] UKSC 4, [2017] IRLR 258, Lord Neuberger held there has to be a "real prospect" that the step "would have made a difference".

99 There is no obligation on an employer to create a post specifically, which is not otherwise necessary, merely to create a job for a disabled person: Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664. Nor is there an obligation to avoid dismissal by placing a disabled person into a role that the employer does not believe that they can perform: Wade v Sheffield Hallam University UKEAT/0194/12.

100 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*.

101 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.

102 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).

Conclusions

103 Having found the relevant facts, and set out the relevant law, we turn to our conclusions in relation to the issues before us. We do not repeat every single fact, in the interests of keeping these reasons to a manageable length.

Unfair dismissal

*Was the Claimant dismissed for a potentially fair reason pursuant to section 98(2)(b) of the Employment Rights Act 1996 (**ERA**), namely capability?*

104 The tribunal concludes that the reason for the claimant's dismissal was capability. Because of the issues that arose in 2017 and 2018, and the claimant subsequent long-term sickness absence, he was not able to return to his role as WDM. Attempts at redeployment were not successful. Having determined that there is a potentially fair reason for the dismissal, we now turn to the fairness of that dismissal.

Did the Respondent act reasonably in treating the Claimant's capability as a sufficient reason for dismissing the Claimant; was dismissal within the range of reasonable responses?

105. The tribunal concludes that the claimant's dismissal was fair in all of the circumstances. The claimant had not been able to carry out his substantive role for three years. He had been paid his salary for the substantive role during that period, apart from a relatively brief period when he was on sickness absence. There was a delay of about six months in referring the claimant to Occupational Health, but Occupational Health advice was obtained and followed at regular intervals from June 2019 onwards. Efforts were made to redeploy the claimant, in line with that advice. Unfortunately, those efforts were not successful.

106. Due to the claimant's preferences regarding salary, the nature of the role (i.e. no management of staff), geographical mobility, and the restrictions in the claimant's physical mobility due to his right knee osteoarthritis, the range of roles which it was possible to redeploy the claimant into was quite narrow.

107. The tribunal did question why an individual was slotted into a crossing keeper role in January 2021, rather than the claimant being interviewed for that role together with the other redeployee. It may be that due to the wording of the redeployment policy, those in a redeployment situation because of redundancy are treated as a priority over redeployees due to a disability. The respondent would be well advised to update its policy, to make it clear that priority is only given to those on maternity leave, not to others. The claimant did not however lead any evidence in relation to the crossing keeper role and nor was it specifically referred to in the list of issues. It was not explored in cross examination. In those circumstances, whilst questions remain over that issue, the tribunal is not satisfied that the latter has been explored sufficiently

in evidence for us to be able to come to any firm conclusion in relation to that role.

108. As for stores controllers, no such roles were available during the redeployment period. As for health and safety role, whilst we note that the claimant did shadow an individual in such a role, again, there was no formal vacancy during the redeployment period.

109. Finally, in relation to the LXM role, the tribunal concludes, on the basis of the evidence given by Mr Morgan of the hearing, the evidence contained in the disability impact statement of the claimant and the content of the Social Entitlement Chamber decision from March 2021, that even if the claimant had been given a suitability interview, which he should have been, he still would not have been redeployed into that role. Accepted that one of the reasons he did not want to take on a planning role was because of the stress associated with that role; the tribunal concludes, on the basis of the evidence, that the level crossing manager role would if anything, have been even greater. Given the claimant's continuing ill health issues, the tribunal is satisfied that the respondent would not have considered it appropriate to redeploy the claimant into such a high risk role, during the redeployment period. The claimant And not able to find a suitable alternative role. He restricted the

110. In all these circumstances therefore, the Tribunal concludes that it was reasonable to dismiss the claimant at that time for that reason.

Discrimination arising from disability (Equality Act 2010 section 15)

Noting that the "something arising" is the Claimants ill health absence and incapacity from undertaking his employment as a works delivery manager, and also noting that the act of unfavourable treatment is the dismissal, can the Claimant establish that the Respondent treated the Claimant unfavourably?

111. A dismissal amounts to unfavourable treatment.

Did the Respondents treat the Claimant as aforesaid because of something arising in consequence of the disability?

112. The claimant could not carry out his substantive role because of his disability. The claimant was dismissed because it was not possible to redeploy him into another role. The dismissal was therefore because of something arising in consequence of the claimant's disability.

Can the Respondents show that the treatment was a proportionate means of achieving a legitimate aim?

113. The tribunal accepts that the respondent had a legitimate aim as follows:

> *The respondent has to support staff on long term sickness so far as reasonable, managing staff absences to facilitate a return to work with regular and sustained attendance, and considering termination where absence can no longer reasonably be supported. The Respondent requires a stable workforce and employees who are capable of attending work and carrying out duties that are valuable and meaningful to the Respondent. In short, it is a legitimate aim for an employer to aim for consistent attendance at work.*

114. The Tribunal further concludes that the Claimant's dismissal was a proportionate means of achieving that aim. An employer cannot be required to employ someone indefinitely, when they are no longer able to carry out their role in circumstances where there is no alternative vacancy. The Claimant was given the option of to returning to his substantive role. When it became clear that was not going to happen, the claimant was given a reasonable opportunity to find an alternative role. After nine months, no suitable alternative role had been found and the claimant was dismissed on six months notice, during which he was not required to work and efforts continued to find alternative employment. Unfortunately those efforts were not successful. Whilst the claimant should have been offered a suitability interview for the Thirsk LXM role, the tribunal has concluded that even if he had been, that role would not have been suitable at that time.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

Did the Respondent have the following PCPs: employees of the respondent who cannot carry out their substantive role and who cannot be redeployed to a suitable role within a reasonable period of time are dismissed under the capability (ill health) process.

115. The tribunal concludes that the respondent did have this PCP.

Did the PCP(s) put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability? The substantial disadvantage is that due to his mental health disability, the claimant was not able to return to his substantive role in Leeds and was limited in the roles he could be re-deployed into due to the need to limit the potential commute; mainly office-based roles were impracticable; as were roles involving the line management of staff. In such circumstances the claimant was more likely to be dismissed.

116. The Tribunal accepts that the PCP put the claimant at this disadvantage. this substantial disadvantage.

Did the Respondent know, or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

117. The tribunal concludes that the respondent was or should have been aware of this disadvantage. The advice which was sought and obtained from Occupational Health made that obvious.

What steps could have been taken to avoid the disadvantage? The claimant argues that the step to be taken was a ring-fenced suitability interview for any potential roles, not a competitive interview process

118. The tribunal concludes that it would have been reasonable to offer the claimant a ring fenced suitability interview for the LXM role. Under the terms of the policy, where there are other redeployees, the claimant was entitled under the policy to a competitive interview with other redeployees only. On the basis of the facts found, it was only the LXM role that the claimant was entitled to a suitability interview for. That was the only role available during the relevant period.

119. The claimant was not offered to a ring fenced suitability interview. Instead, he was invited to a competitive interview, with others who were not redeployees. However, the tribunal has concluded that in any event the claimant would not have been appointed to the role as it was not suitable. In those

circumstances, there weas not a real prospect that the adjustment would have alleviated the substantial disadvantage. The claimant would still have been dismissed. On that basis, the claim fails in any event.

Breach of Contract

Are the policies referred to contractual? The Policies in question are the Harassment Policy, the Redeployment Policy, and the Equality, Diversity, and Inclusion Policy.

120. The Tribunal was not referred to the harassment policy all of the equality diversity and inclusion policy during the hearing. In those circumstances we are any concerned with the redeployment policy. The tribunal concludes that, taking the redeployment policy as a whole, it was not contractual. Alternatively, the parts of the policy quoted above were not contractual – they did not give rise to enforceable contractual rights.

121. The Tribunal would add however that regardless of whether the policy is contractual, the terms of the policy still need to be respected and a failure to follow it without good reason could, in different circumstances to the claimant's, be highly relevant to claims of unfair dismissal or disability discrimination.

Did the Respondents breach the Claimant's contract of employment by failing to follow the policy as mentioned above

122. There was no breach of contract in these circumstances.

If yes, is the Claimant entitled to any compensation in respect of such breach that is not otherwise covered by any compensation that he may be entitled to claim as part of the other complaints?

123. Not applicable.

Jurisdiction

Were the claims or any part of them submitted outside of the applicable time limit in respect of each of the Claimant's complaints?

124. Given our above conclusions, it is not necessary to consider the question of time limits.

Employment Judge James
North East Region

Dated 26 September 2022

ANNEX A - AGREED LIST OF ISSUES

1. **Jurisdiction**

   1.1 Were the claims or any part of them submitted outside of the applicable time limit in respect of each of the Claimant's complaints?

   1.2 If so, do all of the alleged acts or omissions to which the Claimant refers in his ET1 claim forms constitute part of a chain of continuous conduct which ended with the applicable time limit of the claims being submitted?

   1.3 if not, would it be just and equitable for the Tribunal to extend time to hear that part of the claims which relate to the acts or omissions which occurred outside of the applicable time limit?

2. **Unfair dismissal**

   2.1 Was the Claimant dismissed for a potentially fair reason pursuant to section 98(2)(b) of the Employment Rights Act 1996 (**ERA**), namely capability?

   2.2 If the Respondent cannot show that the Claimant was dismissed for capability, can the Respondent show that the Claimant was dismissed for some other substantial reason, pursuant to section 98(1)(b) ERA?

   2.3 Did the Respondent act reasonably in treating the Claimant's capability as a sufficient reason for dismissing the Claimant, in that:

      2.3.1 Did the Respondent form a genuine belief that capability was the reason for dismissal?

      2.3.2 Did the Respondent have reasonable grounds for that belief?

      2.3.3 Did the Respondent form that belief based on a reasonable investigation in all the circumstances?

      2.3.4 Was the dismissal within the range of reasonable responses?

3. **Discrimination arising from disability (Equality Act 2010 section 15)**

   3.1 Noting that the "something arising" is the Claimants ill health absence and incapacity from undertaking his employment as a works delivery manager, and also noting that the act of unfavourable treatment is the dismissal –

      3.1.1 Can the Claimant establish that the Respondent treated the Claimant unfavourably?

3.1.2 Did the Respondents treat the Claimant as aforesaid because of something arising in consequence of the disability?

3.2 Can the Respondents show that the treatment was a proportionate means of achieving a legitimate aim?

4. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

4.1 A "PCP" is a provision, criterion, or practice. Did the Respondent have the following PCP~~s~~:

~~4.1.1 The requirement for the claimant to work in a particular role which was unsuitable, being his original role as works delivery manager in Leeds?~~

~~4.1.2 the practise of interviewing external and internal candidates for vacancies on the same basis without applying the redeployment policy.~~

4.1.3 employees of the respondent who cannot carry out their substantive role and who cannot be redeployed to a suitable role within a reasonable period of time are dismissed under the capability (ill health) process.

4.2 Did the PCP(s) put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability? The substantial disadvantage is that due to his mental health disability, the claimant was not able to return to his substantive role in Leeds and was limited in the roles he could be re-deployed into due to the need to limit the potential commute; mainly office-based roles were impracticable; as were roles involving the line management of staff. In such circumstances the claimant was more likely to be dismissed.

4.3 Did the Respondent know, or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

4.4 What steps could have been taken to avoid the disadvantage? ~~The Claimant suggests that the respondents should have applied the redeployment policy and not require him to attend a competitive interview process;~~ The claimant argues that the step to be taken was a ring-fenced suitability interview for any potential roles, not a competitive interview process

4.5 Did the Respondent fail to take those steps?

5. **Remedy for discrimination**

5.1 What financial losses has the discrimination caused the Claimant?

5.2 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

5.3 If not, for what period of loss should the Claimant be compensated?

5.4 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

5.5 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

5.6 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

6. **Breach of Contract**

6.1 Are the policies referred to contractual? The Policies in question are the Harassment Policy, the Redeployment Policy, and the Equality, Diversity, and Inclusion Policy.

6.2 Did the Respondents breach the Claimant's contract of employment by failing to follow the policy as mentioned above

6.3 If yes, is the Claimant entitled to any compensation in respect of such breach that is not otherwise covered by any compensation that he may be entitled to claim as part of the other complaints?