EMPLOYMENT TRIBUNALS

Claimant: Mr P Nelson

Respondent: Northumberland County Council

Heard at: Newcastle Civic Centre **On:** 10, 11 and 12 October 2022
1 November 2022
(in Chambers)

Before: Employment Judge Martin
Ms D Newey
Ms D Winship

REPRESENTATION:

Claimant: In person (supported by his wife, Mrs J Nelson)
Respondent: Ms A Rumble (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaint of unfair dismissal is not well-founded and is hereby dismissed.

2. The claimant complaint of disability discrimination is also not well-founded and is hereby dismissed.

REASONS

Introduction

1. The claimant gave evidence on his own behalf. Ms A Hately (previously Station Manager now Fire Support services), Mr G McMorran (Group Manager of Learning and Development, Northumberland Fire and Rescue Service) and Mr J McNeill (Assistant Chief Fire Officer) all gave evidence on behalf of the respondent.

2. The Tribunal were provided with a bundle of documents marked Appendix 1.

The Law

3. The law which the Tribunal considered was as follows:-

4. Section 98(1) of the Employment Rights Act 1996:

> "In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show:-
>
> (a) The reason (or, if more than one, the principal reason) for the reason; and
>
> (b) That it is a reason falling within subsection (2)."

5. Section 98(2) Employment Rights Act 1996:

> "A reason falls within this subsection if it –
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do."

6. Section 98(4) Employment Rights Act 1996:

> "The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

7. Section 15(1) Equality Act 2010:

> "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."

8. Section 15(2) Equality Act 2010:

> "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."

9. Section 20(1) Equality Act 2010:

"Where this Act imposes a duty to make reasonable adjustments on a person…a person on whom the duty is imposed is referred to as A."

10. Section 20(2) Equality Act 2010:

"The duty comprises the following three requirements:

Section 20(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 is reasonable to have to take to avoid the disadvantage."

11. Section 21(1) Equality Act 2010:

"A failure to comply with the first requirement is a failure to comply with the duty to make reasonable adjustments."

12. Section 21(2) Equality Act 2010: "A discriminates against a disabled person if A fails to comply with that duty in relation to that person."

13. The Equality and Human Rights Commission Code of Practice on Employment 2011, in particular paragraphs 6.23 and 6.28 provide:

"6.23 The duty to make adjustments requires employers to take such steps as is reasonable to have to take in all the circumstances of the case in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case?

6.28 The following are some of the factors which may be taken into account when deciding what is a reasonable step for an employer to have to take:

Whether taking any particular steps would be effective in preventing the substantial disadvantage;

- The practicality of the step;
- The financial and other costs of making the adjustment;
- The extent of the employer's financial or other resources;
- The type and size of the employer."

14. Paragraph 6.29 states: "Ultimately, the test of the reasonableness of any step an employer may have to take is an objective one and will depend on the circumstances of the case."

15. In the case of **Alidair v Taylor [1976] IRLR 420** the EAT held that in a case of dismissal for capability the employer has to show that it has reasonable belief

that the employee was incapable and there were reasonable grounds to sustain that belief.

16. The Tribunal were also reminded of the case of **Iceland Frozen Foods V Jones 1982 IRLR 439** where the EAT held the function of an Employment Tribunal is to determine in the particular circumstances the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. If so the dismissal is fair ; if it outside the band it is unfair. the dismissal

17. In the case of **Hardy and Hansons PLC v Lax [2005] IRLR 1565** the Court of Appeal held that:

"The principle of proportionality requires the Tribunal to take account of the reasonable needs of the business, but at the end of the day it was for the Tribunal to make its own judgment as to whether or not the step taken was 'reasonably necessary'. It is not enough that the view is one which a reasonable employer could take."

18. In the case of **McCulloch v ICI [2008] IRLR 846** the Court of Appeal set out a four stage test to determine justification, in that:

(1) The burden of proof was on the respondent;

(2) The Tribunal must be satisfied that the measures must correspond to a real need…are appropriate with a view to achieving the objectives pursued and are necessary to that end;

(3) The principle of proportionality requires an objective balance be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it;

(4) Finally, it is for the Employment Tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measures and to make its own assessment of whether the former outweigh the latter.

The Issues

19. The issues to be determined in this case are largely set out in the Order made on 8 February 2022 as follows:

20. In relation to the complaint of unfair dismissal, the Tribunal had to consider the reason for dismissal. The respondent relies upon capability.

21. As the reason is pleaded as capability the Tribunal had to consider whether the respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. In particular, the Tribunal had to consider whether the respondent genuinely believed the claimant was no longer

capable of performing his duties; they had adequately consulted the claimant; and carried out a reasonable investigation including finding out about the up-to-date medical position, and consider whether the respondent could reasonably be expected to wait any longer before dismissing the claimant.

22. The Tribunal also had to consider whether the respondent had followed a fair procedure and whether dismissal was within the range of reasonable responses open to the employer.

23. In relation to the complaint of disability discrimination, the Tribunal noted that, during the course of these proceedings, the respondent conceded that the claimant did suffer from a disability as defined under section 6 of the Equality Act 2010 at the time of the events the claim is about.

24. In relation to the complaint of discrimination arising from disability, the Tribunal had to consider whether the respondent treated the claimant unfavourably by dismissing him. It then had to consider what was the "something arising" in consequence of the claimant's disability. The "something arising" relied upon was the loss of the claimant's Group 2 licence.

25. The Tribunal had to consider whether the unfavourable treatment was because of "something arising" in consequence of the claimant's disability.

26. The Tribunal also had to consider whether the respondent knew or could reasonably have been expected to know that the claimant had a disability.

27. None of those issues were in dispute by the time the case proceeded to hearing.

28. The final issue that the Tribunal had to consider was whether the treatment was a proportionate means of achieving a legitimate aim. The legitimate aim relied upon by the respondent was to have appropriately qualified driver training instructors. The Tribunal had to decide:

    (1) whether the treatment was an appropriate and reasonably necessary way to achieve those aims;

    (2) whether they could have done something less discriminatory instead; and

    (3) how the needs of the claimant and the respondent should be balanced.

29. In relation to the complaint of a failure to make reasonable adjustments, the Tribunal had to consider whether the respondent knew or could reasonably have been expected to know that the claimant had a disability.

30. The Tribunal had to consider whether the respondent had a provision, criterion or practice ("PCP"), being the requirement for driver training instructors to have a Group 2 licence.

31. Did that PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability?

32. Did the respondent know, or could it reasonably have been expected to know, that the claimant was likely to be placed at the disadvantage?

33. What steps could have been taken to avoid the disadvantage? The claimant suggests: 1) allowing him to continue doing parts of his job that did not require a Group 2 licence; and/o r2) finding him suitable alternative work.

34. Was it reasonable for the respondent to have to take those steps?

35. Did the respondent fail to take those steps?

Findings of Fact

36. The respondent is a large Local Authority covering a wide area in the North East of England.

37. The claimant was employed by the respondent as a Driving Training Instructor. The claimant had previously worked as a fireman for over 30 years before retiring from the Fire Service. He worked for the respondent for 11 years.

38. The respondent's health and wellbeing policy is set out at pages C146-C191 of the bundle. Page C151 sets out the role of Occupational Health in assisting managers in the provision of medical advice to establish effective management of sickness absence. At page C155 it notes the advice and support to be provided by Occupational Health under the policy.

39. The policy then sets out the review process. It refers to a number of review meetings, being review meeting 1 through to the final review meeting, as is noted at pages C15-C161 of the bundle.

40. At the final review meeting it notes the potential actions that might be considered, which include redeployment, where it is considered that the employee is suitable for another existing post with or without reasonable adjustments, and dismissal.

41. Reasonable adjustments are referred to in the policy at page C166. It refers to where an employee's condition is considered as a disability as defined under the Equality Act 2010. It refers to a manager considering what adjustments could be made to the role, and notes that adjustments should be for a set period of time and reviewed.

42. Page C166 also looks at health capability where it is noted that, where an employee is unable to fulfil their current role (despite any reasonable adjustments that could be made) and is considered as having a disability as defined under section 6 of the Equality Act 2010, consideration should be given to finding suitable alternative employment (redeployment). It notes that the manager should consult with the employee and Occupational health and consider if it is possible and/or likely to be able to redeploy the employee into an alternative post (subject to a post being available). It also notes that redeployment should be discussed with the employee. It states that a manager should consider what adjustments may need to be made to an alternative role to consider whether it is suitable. It says that opportunities for redeployment

should be looked at within the service area, but where this is not possible, opportunities should be explored across the council in line with the redeployment policy (page C166).

43. The policy also looks at terminating contracts of employment, including ill health retirement, as noted at page C167 of the bundle.

44. In the appendices to the policy, reference is made to making reasonable adjustments (C182). It notes that where an employee is disabled for the purposes of the Equality Act 2010 the respondent is under a duty to make reasonable adjustments. It goes on to state that where there are no reasonable adjustments that can be made to enable the employee to carry out their existing role, the respondent is obliged to redeploy the employee if this is reasonable in the circumstances. It says that, in cases where alternative employment is considered, they are under an obligation to consider reasonable adjustments to the alternative role when the employee, Occupational Health and the organisation are assessing whether the role is suitable. It sets out a non-exhaustive list of potential reasonable adjustments that should be considered in relation to the existing role and any alternative posts identified. These include various arrangements including making adjustments to premises, allocating some of the work to another person, alternative work to fill in existing vacancy, altering hours, assigning a person to a different place of work, providing training or requiring/modifying equipment (pages C182-C183).

45. The respondent's ill health guide is at pages C192-C207 of the bundle. The criteria for retirement on ill health is set out at C193 where it states that the employee must be permanently incapable of doing their current job and not immediately capable of carrying out any type of gainful employment.

46. The respondent's redeployment policy is at pages C208-C220. At page C210 it notes that medical redeployment is when an individual is deemed unfit for the foreseeable future or permanently unfit to fulfil the essential duties of their role but medical advice indicates that they may be fit for an alternative position. It also notes that the policy covers where a reasonable adjustment may be considered under the Equality Act 2010.

47. The policy provides that employees themselves must actively participate in the search for redeployment opportunities (C212).

48. Medical redeployment is set out at C213 and is considered to be where an individual is at a relevant stage of the health and wellbeing policy and where redeployment has been recommended by Occupational Health and where redeployment is an alternative to dismissal on the grounds of medical capability.

49. The policy states that medical redeployment should be considered before any meeting is held where dismissal is a potential outcome. The individual should go on the "at risk" register immediately following the receipt of Occupational Health advice that redeployment should be explored (C213). The process is set out at pages C215 and C216.

50. The claimant suffered a heart attack in 2016. He then suffered a number of cardiac arrests in 2018 and was subsequently fitted with a defibrillator. Whilst the claimant was still employed by the respondent, Occupational Health did not acknowledge that the claimant had a disability, although the claimant was referred by Occupational Health onto the redeployment register as part of the process. The respondent did make reasonable adjustments and followed the procedure on medical redeployment.

51. The respondent accepted during the course of these proceedings that the claimant was disabled for the purposes of section 6 of the Equality Act 2010.

52. The claimant was employed (as indicated) as a Driving Training Instructor. An essential requirement of his role was having to hold a Group 2 licence (page 85 of the bundle). The claimant accepted that was an essential requirement for his role.

53. The claimant was off sick following his heart attack in November 2016 until March 2017. At that time his Group 2 licence was temporarily revoked. It was revoked subject to him undertaking a test.

54. A phased return to work was arranged for the claimant. He returned to work under that phased return to work in May 2017.

55. The claimant undertook the test to obtain his Group 2 licence back in 2017. It was not clear from his evidence exactly when he obtained the licence back. He initially suggested it was on his return to work in March 2017, although he did not return until May 2017. He then suggested that it was towards the end of the year of 2017. He said in evidence that he had only had his licence back for a few months before his further cardiac arrests.

56. In March 2018 the claimant suffered from four cardiac arrests and was subsequently fitted with a defibrillator.

57. The claimant was absent from work from March 2018 until the end of September 2019. His Group 2 licence was permanently revoked in September 2018.

58. In October 2018 the respondent asked the claimant to undertake other duties for which he did not require the Group 2 licence.

59. The main element of the claimant's role was to undertake the LGV training. He required a Group 2 licence for that role. Accordingly, the claimant was unable to undertake that training. The claimant accepted and did not contest that was effectively the main part of his role. He also accepted that he could not undertake that element of his role. The LGV courses ran over a number of weeks.

60. The claimant said that he was able to undertake the EFAB, which was the refresher course for the LGV drivers. That course was a shorter course which ran over a few days. The respondent had some concerns about the claimant undertaking that training as he was unable to do the demonstration with the blue lights. The respondent said some drivers had little experience of driving with blue lights which was not contested. The respondent also expressed concerns about if anybody was

unable to drive the vehicle as part of that course because the claimant would be unable to return the vehicle and take over the driving of that vehicle. The cliamant said he was never aware of a situation where that happened, which was not contested by the respondent. The claimant did continue to undertake a number of those refresher courses which were of much shorter duration. Those courses were run on a more ad hoc basis than the LGV courses. They were only run for those drivers who had passed the LGV course and undertaken driving for a period of time undertaking the role.

61. The claimant was also able to undertake forklift training and Hook training courses and refresher courses for both of those courses. The respondent says that those courses were fairly limited and of short duration. The respondent also said those courses were only required as and when and very much on an ad hoc basis. They said those courses would only amount to a few courses over the course of a year, which was largely not contested by the claimant.

62. The claimant said that he also undertook winter driving courses for Northumberland County Council. The respondent said that those winter training courses were no longer bring run because they did not have the appropriate trading arm to run those courses legally.

63. In October 2018 the claimant was, as part of his adjusted role, only undertaking the ad hoc training courses - forklift, hook and the various refresher courses. He was not able to undertake any of the LGV training courses. The claimant said that he also undertook some trailer training, but again the respondent said these courses were very limited.

64. The respondent says that their main requirement was to run the LGV training courses. They said in evidence that they had a substantial backlog of those courses and a need for those courses because they constantly had to run those courses to increase their workload of Fire Service personnel to drive Fire Service engines. They said there was a substantial turnover of staff on a regular basis.

65. The respondent says that by the time they were looking at the dismissal of the claimant they had a substantial backlog for those courses. They required 24 LGV drivers to be trained.

66. In December 2018 the respondent's Occupational Health advisers had noted that the claimant, as a result of having been fitted with a defibrillator, was no longer allowed to drive a Group 2 vehicle and had his licence revoked by the DVLA (page C94). It was noted by Occupational Health that the claimant could not carry out the duties as outlined in his job description which required a Group 2 licence for both instruction on large goods vehicles and emergency response driving (page C95).

67. In March 2020 the UK went into lockdown due to COVID-19. The claimant was classified as clinically vulnerable, so he was deployed to work from home during this period. He did however undertake some driving as required, for example delivering PPE.

68. In August 2020 the claimant was involved in an incident at home whereby his defibrillator was activated. At the time he was advised not to drive any vehicle for four weeks.

69. The claimant was referred to the respondent's Occupational Health advisers at the beginning of September 2020, following his period of sickness absence in September 2020 (C96 and C97). Occupational Health notes that the claimant does not drive the fire appliances and has not taught on them for a number of years as a result of his condition and DVLA guidance.

70. The claimant was referred back to Occupational Health upon his return to work in October 2020. He was reviewed by Occupational Health at the beginning of November 2020. It was noted that he had been on adjusted duties since his defibrillator had been fitted. It was noted that (as per the previous Occupational Health report) that the claimant was not legally able to drive vehicles requiring a Group 2 licence, because the latter had been permanently revoked by the DVLA. Dr Dang noted that, if the adjustments could not continue to be sustained by the respondent, the claimant may be eligible for medical redeployment (pages C100C101).

71. The claimant was invited to a review meeting at the end of November 2020. This was to discuss the claimant's circumstances and the Occupational Health report. The meeting was arranged because of the claimant's recent absence pursuant to the provisions of the health and wellbeing policy.

72. The respondent wrote to the claimant following that meeting in early December 2020. That letter is at pages C103-C104. It was noted that the claimant had a defibrillator fitted following four cardiac arrests in March 2018, wherein his Group 2 vehicle licence was permanently revoked by the DVLA. As a result he could not carry out his duties which required a Group 2 licence namely large goods vehicles and emergency response vehicles. It was also noted that adjustments had been made to enable the claimant to carry out instruction on other vehicles where he did not require a Group 2 licence and others were then undertaking his duties in relation to training requiring a Group 2 licence. The respondent stated that they could no longer sustain the adjustments, because of the impact on the Service. A review meeting was to be held to discuss matters further. At that time the claimant was to be placed on the redeployment Register.

73. A review meeting was arranged for January 2021. However, it was then discovered that the claimant had not been placed on the redeployment Register. That review meeting was then delayed.

74. In January 2021 and February 2021, the Country went back into lockdown due to ongoing issues relating to the Pandemic. The claimant was working from home during this period, but was again undertaking driving duties.

75. The claimant's defibrillator was triggered again following a driving job in January 2021. This followed a delivery he was undertaking on behalf of the respondent. The claimant was then told in January 2021 that he was not going to be able to drive any vehicle for six months.

76. The claimant went on sick leave from January 2021, because he was unable to get to work. It should be noted during this period the Country was still completely in the throws of the Pandemic; public transport was not necessarily being used regularly, as many people were still working from home during this period.

77. In March 2021 the claimant was invited to a further review meeting due to his ongoing sickness absence (page C109).

78. The claimant told the respondent at that time that he was unlikely to be able to return to work in the next 6-8 weeks. He remained off sick.

79. The claimant was then referred back to Occupational Health in March 2021. At that time the respondent asked Occupational Health whether the claimant might be eligible for ill health retirement, as at that time he was unable to drive any vehicle (page C110).

80. Occupational Health then provided a report indicating that the claimant was still unable to do his full role because of the revocation of his Group 2 licence. They said they had not been able to obtain any further information with regard to his Group 1 licence (page C111).

81. The claimant was then invited to a further review meeting scheduled to take place on 12 May 2021.

82. The respondent obtained a further Occupational Health report on 5 May 2021 (pages C114-C115). In that report Occupational Health confirmed that the claimant was unfit to drive a Group 2 vehicle, which is contractually required to do for his job, and noted that reasonable adjustments could not be maintained. The report stated that the situation with regard to his Group 1 licence was unclear. Occupational Health understood that at present the claimant could not drive to work.

83. On 20 May 2021 the claimant emailed the respondent indicating that he had been told that he was fit to drive. He told them he should not have been told that he could not drive under a Group 1 licence. He said that he would be looking to return to work. By that stage the claimant had been off work for the last 3½ months on sick leave.

84. The review meeting took place on 12 May 2021. The respondent's Occupational Health report was discussed.

85. The respondent wrote to the claimant following that meeting (pages C118-119 of the bundle). At the time of the meeting, it was unclear whether the claimant was in fact able to drive any vehicle, although he subsequently confirmed he could in fact now drive his vehicle and could return to work. The respondent noted that the claimant still remained unable to drive a Group 2 vehicle. They were concerned that the reasonable adjustments that had been put in place could not continue to be maintained. They therefore invited the claimant to attend a final review meeting in early June 2022.

86. Prior to the final review meeting, Ms Hately had requested Mr Peter Tulley, the claimant's immediate line manager, to put together a breakdown of the additional costs of utilising the casual driver to undertake the various training courses due to the claimant's absence and lack of his Group 2 licence. The document, which was produced is at pages C233-C234. Mr Tulley did not give evidence to this Tribunal. The evidence of the respondent witnesses was a little unclear in relation to this document. However it does appear that the respondent spent over £23,000 on engaging the services of a casual driver from June 2016 to April 2021 to undertake the LGV courses over this period, with the same driver undertaking a much small number of other training courses over the same period. During this period there was only a very short period when the claimant could undertake driving a Group 2 vehicle. It is not exactly clear of when that that period was but it was sometime between March 2017 until March 2018, although based on the claimant's evidence, it is understood it was likely to be November/ December 2017 – March 2018. That document at pages 223-224 shows that the respondent did not incur much in the way of costs in engaging a casual driver over that period; particularly if, as it appears likely, that was approximately a 3/4 month period.

87. The claimant attended the final review meeting. He was unaccompanied. The final review meeting was conducted by Mr Gary McMorran. The notes of the meeting are at pages C120-C130.

88. At the meeting, Ms Hately outlined the current position and the process which had been followed. She explained that because the claimant's Group 2 licence had been permanently revoked, he could no longer drive LGV vehicles, which was a key part of his role and an essential requirement for the role. She identified that the respondent had made adjustments to enable the claimant to deliver other driving courses, but that position could not be sustained. She said that the respondent had a shortfall of 24 LGV drivers and they needed to now train up these drivers, which was not sustainable, as the claimant was unable to undertake this role. She explained that the claimant had been added to the redeployment Register. The claimant was given the opportunity to ask her any questions and to put forward his case.

89. The claimant suggested he could undertake the admin side of the role. It was explained that there was in fact an Admin Assistant. In his evidence, the claimant seemed unaware of such a person. The respondent said there was an admin assistant called Karen in the office

90. The claimant also suggested that he could swap roles with Peter Tulley. The respondent said that Mr Tulley was responsible for the managerial and administrative function. Mr Tulley worked full time and the respondent said that Peter Tulley's role was three bands higher than the claimant. They said that swapping their roles was viable option.

91. The claimant also suggested that he could focus on other courses, for example winter driving courses for the Northumberland Council. In evidence to the Tribunal, the respondent said that they were unable maintain running those courses because they needed to set up legal trading arm in order to do so. They therefore said they were not legally entitled to continue to run those courses for the Council.

92. The claimant also explained at that final meeting that he was undertaking a number of different training roles, which were also required. He said he was undertaking forklift and Hook courses as well as refresher courses. He said that he was effectively doing his role sufficient to keep him busy. He suggested that the LGV driving was only 10% of his job and he was effectively doing 90% of his role.

93. In evidence to the Tribunal, the respondent indicated that the claimant was doing no more than 30%-35% of his role because the other roles (forklift training, hook training, and refresher courses, including doing the EFAB refresher courses, were still only ad hoc courses and not the essential part of the claimant's role.

94. The claimant did not ever stage during the course of the proceedings suggest that the LGV courses were anything other than a key element of part of his role, although he did suggest during both the disciplinary hearing and appeal hearings that he was effectively doing 90% of his role, even though he could not undertake the LGV courses.

95. The respondent says that the forklift and other courses were only required about three or four times a year.

96. A discussion also took place at the final review meeting about the redeployment Register. The claimant said that nothing had come up on the redeployment Register, but he also indicated that he had not really been looking for anything. In evidence to the Tribunal, the claimant admitted that he did not really think it would come to redeployment.

97. In his evidence to the Tribunal, the claimant had initially indicated that there had been a discussion about possible driving jobs and he had not been offered any driving jobs. The claimant was re-examined by his wife about this matter. He then acknowledged that any discussion about driving jobs did not take place at the final review meeting. In his evidence, the claimant accepted that he had never raised the question of any alternative driving jobs at final review meeting or indeed at the appeal hearing. Indeed the claimant did not raise any issue about redeployment or other alternative employment at the final review meeting.

98. The meeting was then adjourned. Mr McMorran then reconvened the meeting to advise the claimant that he was to be dismissed from his role with notice. The final date of his employment would be 22 August 2021, which would include 11 weeks' notice. He confirmed that the claimant was to remain on the "at risk" register for that period in order to have the opportunity to look for other suitable alternative employment during his notice period. The reason given for the claimant's dismissal was that the claimant was unfit to drive a Group 2 vehicle, which he was contractually required to do for his role, and that the reasonable adjustments currently in place could not be maintained. Mr McMorrow noted that there was an increasing demand for the respondent to deliver LGV driving instruction courses, which the claimant was unable to do because he no longer had a Group 2 licence. Mr McMorran noted that the claimant suggested undertaking other duties like administrative duties and alternative driving courses, but he did not consider that was the priorities within the department at that time. He noted the claimant was employed to hold a Group 2 licence and to

undertake instructions on LGV courses which he could no longer do. The claimant was advised of his right to appeal (page C130).

99. The respondent wrote to the claimant following the meeting to confirm his dismissal. That letter is at pages C131-C132. In the letter the respondent noted that the claimant was unfit for the foreseeable future to drive a Group 2 vehicle which was contractually required for his job role. It also noted that the reasonable adjustments in place could not continue to be maintained. Mr McMorran confirmed that the claimant was being dismissed because of increasing driving training demands within the department for LGV training courses and the claimant's inability to support the delivery of that training due to him not having a Group 2 licence. In the letter, he said that he had considered potential other alternatives, including administrative duties and alternative aspects of driver training, but there were no alternatives available. He also noted that the possibility of adjustments being made under the Equality Act 2010 had been considered and the possibility of redeployment to a suitable position. He confirmed that he did not think there was any possible adjustment that existed at the time which would enable the claimant to continue in his current post and that he would remain on the “at risk” register during his notice period so that he could seek suitable alternative employment. In the letter Mr McMorrow confirmed that there were no suitable alternatives posts within the department. The claimant was given the right of appeal.

100. In his evidence to the Tribunal Mr McMorran, who was the Head of the department, said that he had considered if there were any positions in the department. He said he would have been aware of any positions, but was not aware of any positions that the claimant could undertake.

101. The claimant appealed against his dismissal. His letter of appeal is at page C134 of the bundle.

102. The claimant was asked to provide some further details about his appeal which are set out at page C258 of the bundle. In that letter the claimant suggested that he felt he had been brushed aside due to a medical problem. He went on to say that he was doing 90% of his contract. He also referred to taking on part of the administrative side allowing Peter Tulley, the other person in the department, to instruct on the LGVs. In reference to alternative employment, the claimant said that he had not been offered anything. He then went on to indicate that, for three years he had been doing his current role, and that his medical condition had not changed. He said that he had offered to do other work within the Service, but had been refused. The claimant said that he had received no offer of redeployment from the council or any redundancy package or any retirement proposal (page C258).

103. The appeal hearing took place on 29 July 2021. The appeal hearing was conducted by Mr James McNeill, the Assistant Chief Fire Officer. The claimant was provided with support from a colleague.

104. During the course of the appeal hearing, a discussion took place about the number of courses which were being run by the claimant as part of the adjustments. The claimant indicated that he was undertaking 90% of his role, and that the only thing

he could not do was teach the learner drivers. He said that he could undertake the refresher course and could do training on cars and trailers, forklift training, hook training and other refresher courses. He also indicated that he was going to retire in March 2022, and that he could assist with training up anyone who was going to take over.

105. At the appeal hearing, there was a discussion about the amount of time the claimant was undertaking to do his job having lost his Group 2 licence. The claimant said he was doing 90% of his job; whereas the respondent said the claimant was doing about 35% of his job, the equivalent of about one day a week. This was because the courses the claimant was delivering were infrequent and much shorter courses. There was a discussion about the number of those courses which were delivered. It was noted that the claimant had delivered three during that time period. The LGV courses were accepted to be longer courses and there was a substantial requirement for these courses to be undertaken. There was a backlog of 24 new drivers needing to be trained at that time.

106. There was also a discussion about the redeployment register. The claimant did not suggest that he had applied for or seen any vacancies, nor did he indicate that there were any jobs that he thought he ought to have been considered for, including any driving jobs or any other types of jobs. The only jobs the claimant was offered were jobs as care assistants, one of which was in Consett, which was therefore too far to drive in any event. He did not consider them to be suitable alternative employment, with which the Tribunal concur.

107. The dismissal was upheld. The claimant's appeal was dismissed. The respondent did not consider the reasonable adjustments could be maintained, but did think that there needed to be some clarification with regard to redeployment and to consider whether the claimant could be considered for any full-time positions and whether any job share might be appropriate (page C268).

108. The respondent wrote to the claimant following the appeal hearing on 5 August 2021 to confirm that the appeal was dismissed and the decision to dismiss was upheld. That letter is at pages C269-C272 of the bundle.

109. The respondent concluded that it was not practicable to allow the claimant to remain in his employment as there were insufficient duties for him to be able to undertake. They noted that he had been on the "at risk" register for over five months and that no suitable alternative employment had been identified. In the appeal letter, however, Mr McNeill noted that full-time opportunities had automatically been discounted and no consideration was given to whether they might be able to be worked on a part-time basis. He he had therefore agreed that any such vacancies would be forwarded to the claimant during the remaining notice period.

110. No evidence was led by either party indicating that any such vacancies did arise during the period of the claimant's notice period.

111. In evidence to the Tribunal, Mr McMorran and Mr McNeill indicated that Occupational Health had not suggested that the claimant was disabled, but they both

said that reasonable adjustments had been considered. They did acknowledge that they had not specifically considered reasonable adjustments with regard to any redeployment. He was placed on the register in accordance with the criteria in his job, which accorded with the respondent's redeployment register, which included medical redeployment. Both Mr McMorrow and Mr McNeill, when pressed on the matter by the Tribunal, indicated that they would have liaised further with HR to consider reasonable adjustments if there were any suitable alternative roles that needed to be considered under the redeployment opportunities. However, no possible jobs were raised by either the claimant or anyone in the respondent about a role that might, with adjustments, be considered suitable alternative employment. 112. In his evidence, the claimant was unclear when he got his Group 2 licence back on a temporary basis in 2017. It appeared from his evidence to be for a few months before he had his further cardiac arrest in March 2018.

113. In his evidence, the claimant said that at the time he was dismissed, he would only have had another 7 months until his retirement in March 2022. Although the respondent's witnesses all acknowledged that the claimant had mentioned retiring, they said he had never formally approached them about retiring. He put nothing in writing to that effect, which the claimant did not dispute.

114. In evidence, the respondent said that, in October 2018, the respondent made adjustments to the claimant's role, whereby they arranged for another casual driver to undertake the LGV training courses which required Group 2 licences which the claimant was unable to do, and the claimant then did some other training courses.

115. The claimant said in evidence that he was able to undertake forklift and hook training courses and refresher courses. He accepted that those were usually of 1-3 days duration and were infrequent. The claimant was unable to undertake the LGV training courses which he did not dispute was a key element of his role. He also said that he could do the EFAB refresher training courses, although he could not do the LGV course. He acknowledged that he was not able to do the demonstration, which the respondent suggested may be a problem as he would not be to demonstrate the blue lights, which they said many drivers were not necessarily experienced in using; the latter was not disputed by the claimant.

116. After the claimant was dismissed, he worked his notice. During that period, he was working one day a week, which was effectively 30% of his time. That was consistent with the costs incurred to employ an additional driver (page C233).

117. In evidence, the respondent said that the winter services courses which the claimant and others had previously been undertaking could not continue and had been stopped by this stage. This was because they were being undertaken for the wider County Council and the respondent was unable to run these courses without having set up a legal trading arm to do so.

118. The claimant still maintained in evidence to the Tribunal that he was undertaking 90% of his role whilst he was doing his adjusted duties, however he produced no evidence in support of that contention.

119. The respondent's witnesses all said that the claimant was only doing about 30%-35% of his role with the adjustments. They referred to the fact that the courses were shorter and not as frequent. They also referred to the need for 24 drivers to be trained on LGV training course at the time of the claimant's dismissal, as they then had a backlog of 24 LGV drivers who needed to be trained up, which they maintained was their priority.

120. The respondent's witnesses also all said in evidence said that the claimant's suggestion for him to undertake Mr Tulley's role was not practicable or realistic because Mr Tulley was in a more managerial role; a Band 8, whereas the claimant's role was a Band 5 and Mr Tulley worked full-time, whereas the claimant worked part time.

Submissions

121. The respondent's representative filed written submissions which were presently orally.

122. The respondent's representative conceded that the claimant was disabled and that knowledge was not an issue in these proceedings. She also conceded that there was less favourable treatment by the respondent in dismissing the claimant because of the loss of his Group 2 driving licence. She submitted the respndent had a legitimate aim for qualified training driving instructors, and that dismissal was a proportionate response in the circumstances of the case.

123. The respondent's representative also accepted that the requirement for driving training instructors to have a Group 2 licence did put the claimant at a substantial disadvantage in comparison with somebody without the claimant's disability. She submitted that the steps which the respondent took were reasonable and that they did not fail to take reasonable steps to avoid the disadvantage. The respondent's representative also submitted that the dismissal was fair.

124. The claimant submitted that his dismissal was unfair. He said that the respondent failed to consider redundancy, retirement, or even ill health retirement.

125. The claimant also submitted that he was disabled. He said that the respondent had failed to acknowledge that he was disabled and treat him accordingly. He said that he was discriminated against both on the grounds of a failure to make reasonable adjustments and for discrimination arising from his disability.

Conclusions

126. This Tribunal finds that the claimant was dismissed for capability, namely relating to a qualification being the revocation of his Group 2 licence. Capability is a fair reason for dismissal under section 98(2) of the Employment Rights Act 1996.

127. This Tribunal accepts that the respondent did reasonably believe that the claimant was incapable of undertaking the role because his licence had been revoked. The claimant himself accepted that the Group 2 driving licence was an essential requirement for his job description. The claimant also accepted that he was unable to

do part of his role, namely undertake the LGC driving courses. The claimant did not contest that was effectively a key component of his role.

128. This Tribunal finds that the respondent did consult with the claimant about these matters. There were a number of review meetings with the claimant when he was given the opportunity to put forward his case. The Tribunal also notes that the respondent undertook a reasonable investigation into the matter through those review meetings and obtained medical evidence throughout, including up-to-date medical evidence, in May 2021, which confirmed that the revocation of the Group 2 licence was permanent.

129. The Tribunal accepts that the respondent could not wait any longer as they knew that the removal of the Group 2 licence was permanent. Therefore there would be no benefit in waiting any longer before taking action to dismiss the claimant.

More significantly the respondent also had a requirement to train up a backlog of 24 drivers, who needed to undertake the LGV training course.

130. Accordingly, the procedure adopted by the respondent was a fair procedure. No specific issue has been raised by the claimant with regard to the procedure adopted by the respondent.

131. Accordingly, the Tribunal consider that dismissal was within the range of reasonable responses open to this respondent having noted the case of **Iceland Frozen Foods Ltd v Jones**.

132. The respondent accepted, somewhat belatedly, that the claimant was disabled by way of a physical impairment in relation to his heart condition.

133. The respondent acknowledged that they treated the claimant unfavourably by dismissing him. They also accept that the loss of the claimant's Group 2 licence was “something arising” in consequence of the claimant’s disability, namely because of his cardiac arrests he was fitted with a defibrillator and had his Group 2 licence permanently revoked. The respondent accepts that the claimant’s dismissal was because of the loss of his Group 2 licence. The respondent also conceded that they did know and that they would reasonably have been expected to know that the claimant was disabled.

134. Therefore the real issue for the Tribunal was justification. The legitimate aim relied upon by the respondent was the requirement to have appropriately qualified driving training instructors, who could effectively train the team in Fire Services in the County Council. That is a legitimate aim.

135. The respondent led evidence, which was not contested, was that they had a backlog of 24 drivers who needed to be put on LGV training courses. That was in order to provide a proper Fire Service.

136. The Tribunal balanced the respondent’s needs to provide this vital service to the community against the impact (which was substantial) on the claimant of dismissal. On balance, taking account of the cases referred to above, this Tribunal consider that

the respondent's approach in dismissing the claimant was a proportionate response in all the circumstances of the case; taking account of the need that the respondent had to provide the courses and ensure that they had suitably trained and qualified drivers to maintain the Fire Service within the County Council.

137. The respondent had a provision, criteria, practice or requirement (a PCP) for training instructors to have a Group 2 licence. The respondent accepts that that PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability.

138. The respondent also conceded that they knew or could reasonably have been expected to know that the claimant had a disability and would have been likely to be placed at the disadvantage.

139. This Tribunal accepts that the respondent did take reasonable steps to avoid that disadvantage by allowing the claimant to continue doing parts of his job which did not require a Group 2 licence for a substantial period of time. Indeed they allowed him to undertake other driving activities and arranged for other driving instructors, including engaging a casual driver, to undertake the LGV training courses after the claimant lost his Group 2 licence permanently in March 2018. Accordingly, they made adjustments to his role for a period of in excess of three years. The claimant was unable to undertake the LGV training courses which he did not dispute was a key element of his role

140. The Tribunal do not consider that it would have been reasonable for the respondent to have continued to make those adjustments either indefinitely or on a permanent basis.

141. By the time of the claimant's dismissal, the respondent had a backlog of 24 drivers who they required to undertake LGV training courses; which training the claimant was unable to provide because he did not have a Group 2 licence. The claimant suggested that the adjustments would only be in place for a few more months as he intended to retire in March 2022, but he has not produced any documents showing that he had informed the respondent in writing of his intention to do so at that time.

142. The Tribunal accept that, although the claimant could run the EFAB refresher courses, there was an issue bearing in mind that he was not able to undertake the demonstration, which was a problem because he was not able to demonstrate driving under blue lights, which many of the drivers lacked experience in and therefore that demonstration was important. The EFAB courses were also of shorter duration.

143. Although the claimant was able to undertake the refresher courses (despite not being able to do the demonstration), the respondent could not run refresher courses without ensuring that they had sufficient LGV drivers who had undertaken the training in the first instance.

144. This Tribunal finds that the claimant was only undertaking 30%-35% of his role and not 90% of his role. Effectively, the claimant had adjusted the claimant's role in that regard.

145. The Tribunal prefer the respondent's evidence in that regard. The number of courses which the claimant was undertaking were shorter, ad hoc and were only undertaken a few times a year. They were not not necessary in the same way as the LGV courses. The Tribunal note that the main part of the role was the provision of LGV training courses, which the claimant was unable to provide.

146. The Tribunal also accept the respondent's evidence that they were unable to provide any other courses which they had previously undertaken, namely the winter services courses for Northumberland County Council, because they did not have the legal trading arm in order to do so.

147. The Tribunal have also taken into account the documentary evidence produced by the respondent, namely details of the costs which the respondent had incurred (as set out at pages 233-234) of employing a casual driver to undertake those courses which the claimant was unable to provide. That figure corresponds with about 30% of the claimant's role. It is consistent with the respondent's assertion that the claimant was only undertaking about 30% of his role, which is also consistent with the fact that he only worked one day a week during his notice period.

148. The tribunal went on to consider whether or not the respondent had taken reasonable steps to find the claimant suitable alternative employment.

149. We accepted Mr McMorran's evidence that there were no jobs within the department in which the claimant was working. McMorrow was the Head of the Department. The claimant never suggested any possible roles, other than as discussed at the final review meeting and appeal hearing. No other suggestions were made by him during the course of these proceedings.

150. The Tribunal had to consider whether or not the respondent had gone far enough in looking for suitable alternative employment for the claimant within the wider Northumberland County Council. The claimant was placed on the redeployment register with set parameters as per his job and the part-time nature of his role. This accorded with the respondent's policy. However, it was not clear that anyone was being proactive in seeking any potential suitable jobs for the claimant which might have been able to have been adjusted for him. The claimant himself, however, was not engaging at all with the process, which was clear from his evidence. The managers who were responsible for the process were not actively reviewing it, but were relying on HR (from whom we did not hear during the course of these proceedings). The managers themselves, Mr McMorran and indeed Mr McNeill who heard the appeal, acknowledged that they did not actively address their minds as to whether or not possible adjustments could have been made to any potential alternative work, although it has to be acknowledged that they did not actually need to do so in practice, because no suitable post was identified by anyone.

151. The Tribunal reminded itself that the burden of proof in discrimination claims is on the claimant. When we considered whether it was reasonable for us to have expected the respondent to have taken any additional steps in relation to adjustments to the redeployment register, we asked ourselves what steps they could have taken which would have been reasonable. The difficulty we were left with was that there was no evidence produced before us to show that there were any roles which might have been capable of being adjusted in any manner to accommodate the claimant. In that regard the claimant did not refer to any roles which he suggested might have been suitable alternative employment which may have required some adjustments. Although the claimant at one stage in his evidence referred to driving roles, he accepted that he had never raised the question of any driving jobs with the respondent, either at the final review meeting when he was dismissed or on appeal.

152. We note that there was an adjustment made to potentially reviewing full time roles during the appeal process. That establishes that the respondent was considering reasonable adjustments, even though in theory the dismissing manager appeared to be of the view at that time, based on Occupational Health advice, the claimant was not disabled, but he nevertheless did make some adjustments.

153. In considering the evidence, we were left with the fact that no evidence was produced before us by either the claimant or the respondent that, during that period, there were any full time roles which could be adjusted. Indeed, that limited evidence suggests that no such roles were available to enable any reasonable adjustments to be considered. The respondent's policy on redeployment indicated that consideration should be given to adjustments to any roles identified, but no roles were identified. Accordingly, the Tribunal does not consider it would have been reasonable for the respondent to have taken any additional steps, particularly as the claimant has failed to identify what additional steps could have been taken in that regard.

154. Therefore, for that reason we do not consider that it would have been reasonable for the respondent to have taken any further steps and made any further adjustments in relation to the redeployment process and in seeking suitable alternative employment for the claimant. We consider that they did not fail to take any such steps, but that they took the steps which were reasonable in that regard.

155. For those reasons the claimant's complaint of disability discrimination is not well-founded and is hereby dismissed.

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Employment Judge Martin

Date: 28 November 2022