



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr C Pinnegar

v

London Underground Limited

Heard at: Watford (by CVP/in person)

On: 4-7 October 2021

Before: Employment Judge Alliot

Members: Mrs A Brown

Mr P Miller

Appearances

For the Claimant: Ms Amanda Hart (Counsel)

For the Respondent: Ms Eleanor Wheeler (Counsel)

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

“This has been a remote hearing not objected to by the parties. The form of remote hearing was part CVP. A face to face hearing was not held because it was not practicable and no-one requested the same.”

JUDGMENT

The judgment of the tribunal is that:

1. The claimant’s claim of discrimination on the grounds of disability is well founded.

REASONS

Introduction

1. The claimant was employed as an Assistant Technician on 19 August 2007. He became a Train Maintainer in October 2014 and was “TUPE” transferred to the respondent in 2018. By a claim form presented on 17 February 2020, the claimant presents claims of disability discrimination (section 15 Equality Act 2010) and failure to make reasonable adjustments (sections 20 and 21

Equality Act). At the time of the claim form the claimant remained employed by the respondent although he was subsequently dismissed on 21 August 2021.

The issues

2. The agreed list of issues is as follows:

- “1. The claimant (“C”) is employed by the respondent (“R”) as a Train Maintainer. He has worked for the respondent since 19 August 2007 and his employment is continuing,
2. C has presented claims to the employment tribunal under sections 20/21 and 15 of the Equality Act 2010 (“EA”) for disability discrimination.

Disability (section 6 EA)

3. C relies on the injury to his right arm and shoulder sustained in an accident at work on 10 May 2016. The accident left C with limitations in the movement, strength and endurance in his right arm and shoulder as well as difficulties with the grip of his right hand.
4. It is now accepted by R that C is a disabled person within the meaning of section 6 EA.

Breach of duty to make reasonable adjustments (section 20/21 EA)

5. Did R apply a provision, criterion or practice to C in that they were required to be fully fit for work and able to carry out all his work duties in order to be able to continue in his role as a Train Maintainer (“the PCP”)?
6. If R did apply the PCP to C, did it cause him a substantial disadvantage due to his disability compared to non-disabled employees?
 - (a) The substantial disadvantage is C’s inability to carry out his full work duties because of his disability and the restrictions placed upon him by Occupational Health because of it;
 - (b) the comparators relied on by C are non-disabled Train Maintainers employed by R who are able to carry out their full work duties.
7. If so, did R know, or could R reasonably have been expected to know, that C was likely to be placed at that disadvantage?
8. If so, did R take such steps as were reasonable to avoid the disadvantage? C contends it would have been reasonable for R to take the following steps:
 - (a) Accepting C continuing in his role as Train Maintainer performing approximately 80-90 per cent of his work duties;
 - (b) transferring some of his work duties to other staff so as to enable C to continue in his role as a Train Maintainer;

- (c) allowing C to complete his full agreed return to work programme and risk assessment before making any decision on whether he should be redeployed;
- (d) allocating C lighter duties in place of any heavier duties he cannot undertake due to his disability;
- (e) allowing/accepting C working as part of a team where other team members could be allocated duties he cannot undertake whilst he carries out duties they cannot undertake (due to lacking the required competencies).

Disability arising from disability (section 15 EA)

9. Was C treated unfavourably by R through:
- (a) R commencing the deployment process on 18 November 2019 even though C was only part of the way through his 16-week phased return to work and/or when a full risk assessment had not been completed;
 - (b) R through Mr David Kelly, Depot manager, on 3 December 2019 threatening C with dismissal if he did not accept medical redeployment;
 - (c) R offering the role of Customer Service Assistant on 23 December 2019 which they must have known he could not accept given the post's requirement for a Safety Critical Licence.
10. C's case is that the unfavourable treatment was because of something arising in consequence of his disability, namely,
- (a) His inability to carry out his full work duties as a Train Maintainer;
 - (b) the restrictions placed on his work duties by Occupational Health due to his disability and/or their assertion that his condition required these restrictions was unlikely to improve;
 - (c) his inability to hold a Safety Critical Licence due to his disability and/or the medication he is taking as a consequence of his disability.
11. Did R treat C unfavourably because of the above?
12. Can R show that any unfavourable treatment of **R** was a proportionate means of achieving a legitimate aim? R relies on legitimate aims including ensuring the welfare of its employees, the running of an efficient service and the business interest of employing individuals who can carry out the majority of their role?

Jurisdiction

13. Were the complaints of discriminatory conduct alleged by C which pre-date 20 September 2019 part of a continuing act for the purposes of section 123(3)(a) EA 2010, the last of which was in time?
14. Alternatively, is it just and equitable under section 123(1)(b) EA 2010 for the tribunal to grant an extension of time as regards the complaints of discriminatory conduct alleged by the claimant prior to 20 September 2019?

Remedy

15. If C's claim succeeds, what is the appropriate remedy:
 - (a) Declaration and/or
 - (b) compensation and/or
 - (c) Recommendation.”

The law

3. Ms Hart has helpfully provided a summary of the relevant law which is agreed by Ms Wheeler. I record that we have read it and taken it into account. The same is not repeated here.

The evidence

4. We have been provided with a bundle running to 1,159 pages. We have also been provided with a chronology and cast list document, an “Information on Work Instructions” document and a schedule of loss. We had witness statements and heard evidence from the following:
 - 4.1 The claimant
 - 4.2 Mr Justyn Okolo, RMT Union Health and Safety Representative.
 - 4.3 Mr David Kelly, Depot Manager for the Cockfosters Depot on the Piccadilly Line.
5. Lastly, we had written closing submissions from Ms Hart.

The facts

6. The claimant sustained personal injury to his right arm and shoulder in an accident at work on 10 May 2016.
7. Based on documents provided by the claimant in respect of his impairment to his shoulder, the respondent concedes that the limitations in the movement of his arm and shoulder, the strength and endurance of the arm and shoulder as well as difficulties with his grip satisfy the definition of disability under the Equality Act 2010.
8. The claimant had nine months off work after the accident in May 2016. He returned to work in February 2017 employed on light duties. He was office based and his days and hours worked slowly increased over time. By October 2018 he had returned to full time hours.
9. An Occupational Health Referral Report dated 27 July 2018 indicates that at that time he was subject to restrictions on his work. The following is recorded:-
 - “3. Mr Pinnegar is currently restricted to Area A, can these restrictions be lifted to enable Mr Pinnegar to carry out his office-based duties more efficiently?

Given Mr Pinnegar's statement that he has had no significant side-effects from his current pain killers in the last 18 months, I would suggest that he be allowed in Area A but this would be secondary to a daily risk assessment by the manager. I recommend that he doesn't use any power tools, is not allowed in the pits or allowed to do any safety critical duties."

10. We have been provided with three relevant guidance and policy documents of the respondent.

11. Firstly, we have a Risk Assessment Guidance document. This states: -

"General

The purpose of the risk assessment review is to enable the employing manager to make a valid decision regarding the control measures necessary to prevent or adequately control additional health and safety risks to staff when they have a medical condition.

Risk assessment

The risk assessment review must consider the individual's specific needs and restrictions. The review form is used to identify additional hazards as a result of the individual's medical condition. To carry out a suitable and sufficient assessment of risk the assessor must:

...

- Observe the member of staff undertaking the duties usually required of them."

12. Secondly, we have the "Procedure for managing employees designated as working on light duties". This states:-

"The procedure exists to provide a framework within which to help and encourage employees to be able to return to full duties. The employee may for a short period of time be used on alternative or light duties, and this will be clearly discussed in detail by the line manager. However, if all options have been fully exhausted then the company reserves the right to refer the employee to the 13 week medical redeployment process.

...

Procedure

The company recognises it has a responsibility towards employees who become unable to continue to carry out their jobs for medical reasons. The following principles for medical redeployment will therefore, apply:-

...

- iii. If there is little or no change in the medical condition or medication anticipated for the foreseeable future and this is confirmed by OH having considered all reasonable adjustments, then the line manager in consultation with HR may have no alternative other than to deal with the employee through the 13 week medical redeployment process."

13. Thirdly, we have the “13 Week Redeployment Procedure”. This states:-

“Where an individual becomes unfit to continue in his/her substantive role due to medical incapacity, and providing he/she has been deemed fit by their GP to undertake alternative duties, the company would make the individual one job offer before embarking on any redeployment/medical termination process.”

14. Prior to his accident the claimant was a Train Maintainer at the Cockfosters Depot. He worked on the “Life Extension Team”. There were two such teams, each consisting of 12 individuals. There are a total of 8 teams of Train Maintainers at the Depot, totalling approximately 90 employees.

15. The claimant is/was right hand dominant.

16. By the end of 2018 the claimant had completed most treatment for his injuries and his recovery had plateaued.

17. During the course of 2019 the claimant had raised with his line manager, Mr Peter Riley, and Mr David Kelly his possible return to work as a Train Maintainer. To that end the claimant, in conjunction with Mr Riley, prepared a document outlining the tasks he considered he was physically able to do. This document states:-

“Carl is very keen to continue his rehabilitation and wants to try returning to a Train Maintainer’s role. Carl has thought about this very carefully and has drafted a plan of how he proposes to do this. Carl has also [as] part of rehabilitation asked to return to his team and shift pattern as part of this plan.”

18. The document then goes on to identify a range of tasks that the claimant thought he would be able physically to undertake. The document requests the lifting of the restrictions of “no operation of machinery” and “restriction of no pit working” to be lifted. It is a comprehensive document describing not only the tasks to be undertaken but providing photographic evidence of how the tasks could be accomplished. In addition, it contemplated adjustments to the tools to be used. At that stage a 16 week phased, resumption of train maintainer duties was being suggested.

19. On 10 January 2019 a physiotherapy report was sent to Mr Riley. This states:-

“On examination there was minimal change to movement nor arm function, however, Carl reports to be managing his symptoms better with his current medication and feels that he is doing more at work. Carl’s limitations with respect to arm movement, strength and endurance have not changed significantly, therefore overhead work, heavy work, work requiring a firm grip, and repetitive/high-speed tasks with the right arm are not appropriate for him.

From a musculoskeletal perspective, based on progress seen so far, there is unlikely to be any significant change to Carl’s arm function, and therefore ability to carry out duties in the short to medium term.”

20. We observe and find that from the very outset it was crystal clear that the claimant’s medical limitations could be considered as permanent.

21. Also on 10 January 2019, a restrictions review meeting was held with the claimant, Mr Riley, and Mr Kelly. Mr Kelly is recorded as saying as follows:-

“DK explained the end goal was to get CP back to normal duties (Train Maintainer). The next steps are to look at how long it would take if some of the restrictions were to be lifted. Could CP get back to 80% at the start and improve to 100% - work as a team, no lone working.

22. The next steps were to send the claimant to OH and to ask them to consider lifting the restrictions based on the 16 week plan to return to full Train Maintainer duties. The following was recorded:-

“DK highlighted depending on **LUOH** report and progress, redeployment may be a possibility. However this is not the road either DK or CP want to go down.”

23. In January 2019 the referral was made to Occupational Health. This recites as follows:-

“Carl has seen significant improvement since being back at work.

He has gradually increased his working hours to full 35 hours a week, however his restrictions are still in place mainly due to his medication.

The attached documentation proposes a 16 week plan for Carl to return to full Train Maintainer duties subject to Occupational Health review.”

24. The following questions are posed:-

“

- Do you support the attached plan and proposed return to full Train Maintainer duties.
- If the attached plan is not supported, when do you believe Carl will be able to return to full Train Maintainer duties. If so over what timeframe?
- If Carl is not fit to return to full Train Maintainer duties and the plan is not supported, what timeframe is he likely to return to any duties? If restrictions apply, how long will these restrictions be in place?”

25. Dr S Jina of OH reported on 7 February 2019 as follows:-

“I saw Mr Pinnegar for an assessment in my clinic today... As you have been advised previously (by the Physiotherapy Team at Occupational Health), overhead work, heavy work, work requiring a firm grip and repetitive/high speed tasks with the right arm would not be appropriate.

Furthermore, Mr Pinnegar takes a combination of medications, which are all known to be restrictive. He does also clearly report drowsiness.

Mr Pinnegar would therefore be fit for work with limitations as follows:-

- No work in which drowsiness could affect his own safety or that of others.

- No overhead work, heavy work, work requiring a firm grip or repetitive/high speed tasks with the right arm or tasks requiring strength.

You have sent us some detailed information regarding specific machinery and have asked for his restrictions from operation of machinery and working in pits to be lifted.

The way forward would be for you to do a risk assessment, bearing in mind the limitations as outlined above, in order to assure yourself whether it would be safe for Mr Pinnegar to perform the tasks you require and in areas you require (and establish a safe system of work, if feasible).”

26. Following on from the OH recommendations, Ms Louise Long (HSE Manager Fleet) undertook a risk assessment with the claimant in April 2019. The risk assessment recites the OH restrictions and is a comprehensive document based on observation of the claimant doing various tasks. It is clear to us and we find that it was always contemplated that the risk assessment would be reviewed and expanded as appropriate. The risk assessment states:-

“Off the original plan the tasks listed are to be looked at later into Carl’s return as unable to see undertaken on day others are not suitable tasks to be undertaken now:

None available to review.

Side bearers

Small brake pipes

Future tasks to build on as part of

Spiders

Motor leads

Dump valves

Grids”

Further the risk assessment expressly refers to “manager to review weekly once CP is undertaking his phased return into manual tasks.

27. In the finalised risk assessment, the issue of drowsiness has been expressly dealt with. The hazard identified is, “The medication that Carl is on could have side effects of drowsiness, this has been addressed by the medication being taken at night. This is a precautionary recommendation.” The issue was dealt with by requiring the claimant to report instances of drowsiness immediately and to cease work.
28. There was a restrictions review progress meeting on 9 May attended by the claimant, Mr Kelly and Mr Riley. It was recognised that the claimant did not have the relevant licences to do much of the work and would have to renew them. Mr Kelly’s preferred return to work was to have the claimant acting as

a quasi-apprentice, shadowing another Maintainer until his licences were renewed. It is recorded that Mr Kelly preferred the claimant to work with a second person at that time. The claimant was maintaining that Ms Long would not sign off the risk assessment until he had completed his training. The minutes of that meeting make clear that the parties were contemplating that regular reviews would take place during the plan.

29. There was a further risk assessment review meeting on 26 June 2019. The claimant was absent as he had unfortunately had a car accident. Mr Kelly, Mr Riley and Mr Cook, who took over from Mr Riley, were present. The risk assessment was clearly considered and the tasks that the claimant was able to undertake summarised. Some recommendations were to be actioned, namely crane training, briefing on operation of manipulator and the provision of rubber matting. Mr Riley is high-lighted as expressing concerns with the claimant starting his phased return without his licences. There is a reference to the claimant being booked on training but it being blocked but it has not been an issue before us that there was anything malicious in denying the claimant training. The risk of redeployment is identified, but in our judgment, there is nothing sinister about that as it is inevitable when an individual has a disability and has been on long-term sickness absence/light duties that that could be a possibility.
30. There was a further risk assessment review on 2 July. It was agreed that the phased return to work would be 20 weeks. There was disagreement between Mr Kelly and the claimant as to whether he should return in his quasi-apprentice role until his licences could be refreshed. Mr Kelly was stating that he was not expecting the claimant to sign for any tasks. At that meeting Mr Kelly explained that the plan was for the claimant to get his strength back and his physical capability to return to full Train Maintainer duties. There was never any question about the claimant's technical competence and knowledge to do the tasks.
31. There was a further risk assessment review on 4 July 2019. Again, there was disagreement as to whether the claimant should begin prior to obtaining his licences.
32. Following those meetings, a further referral to OH was made by Mr Kelly in July 2019. This posed the following questions:-
“
 - With respect to Carl's physical condition and medication, is Carl fit to perform the full duties of a Train Maintainer?
 - If no, can you give a timeframe when Carl is expected to be fully fit for work?
 - If Carl isn't currently fit for work and no timeframe for a return to full duties can be given, would you support redeployment on medical grounds?”
33. The OH questions were answered on 29 July 2019. Again, the claimant was seen by Dr Jina. This document is similar to the previous ones which

suggest there may have been some “cut and paste” involved. It states nevertheless:-

“He also takes medication for pain relief, some of which are restrictive and cause him drowsiness.

Based on my assessment today Mr Pinnegar is fit for work with the following adjustments:-

- No work in which drowsiness could affect his own safety or that of others.
- No overhead work.
- No heavy work, work requiring a firm grip or repetitive or high-speed tasks with the right arm or tasks requiring strength.

You were previously advised to undertake a risk assessment bearing in mind the limitations as outlined above. It is unclear whether this has taken place and what the outcomes thereof are.

As such, Mr Pinnegar is only fit for restricted duties as above (or as per the outcome of your risk assessment if this has been undertaken).

Bearing in mind that this injury was sustained quite some time ago and that Mr Pinnegar has had a number of treatments thus far; it is not likely there will be any significant improvements or resolution of his current limitations.”

34. During August 2019 the claimant undertook new starter training. He was not able to train on cranes. The training document is entitled “Life Extensions Assessment Observation” and states:-

“All components affected during this process have been observed and checked in accordance with the instructions contained within the relevant quality plan using the process instructions listed within that relevant quality plan.”

35. It would appear that there were 16 components all of which the claimant completed save for 2, namely, auto-coupler change and drawbar housing replacement. The list of instructions detail 59 tasks. 11 of these have been scored through on the basis that the claimant was not physically able to undertake them. A further 3 are tasks that the claimant in his witness statement says that he was not physically able to do. The claimant told us that he struggled to do them which is why he said he could not do them.

36. On 6 August 2019 Mr Kelly wrote to the claimant to arrange a medical case conference for 28 August to review his medical condition. That was presumably on the back of the OH report of 29 July 2019. We find it curious that Mr Kelly should be seeking to review the claimant’s medical condition when hitherto he has been, on the face of it, fully backing the claimant’s phased return to work to give him an opportunity to get his strength back and improve his capability to do more and more of his work tasks.

37. Having completed his training, (save for cranes) the claimant began his phased return to work on 21 August 2019.
38. The medical review on 28 August did not take place as, apparently, the HR representative had not turned up. Consequently, on 28 August 2019, the claimant was written to in order to rearrange the medical case conference for 16 October 2019.
39. The phased return to work indicated that to begin with the claimant would work two hours for two days of his four-day shift in the workshop. The rest of the shift would be in the office. Over the course of the 20 weeks his hours and days working in the workshop were gradually increased such that it was planned that by December 2019 he would be working four days on full hours in the workshop, ie, full time.
40. We find that the phased return to work, put in place by the respondent, was a reasonable adjustment. We find that the claimant had been risk assessed for tasks that he was physically able to undertake and returned to undertake them. We find that the claimant had been retrained and held the necessary licences to do the work. We find that it was envisaged that the claimant's performance would be reviewed regularly and that he would be risk assessed as to whether he could safely increase the amount of tasks he could undertake. As expressly contemplated by Mr Kelly, the claimant was being given an opportunity to develop strength, capability and dexterity in his left, non-dominant arm. We find that it is highly likely that the more the claimant used his left arm the better he would become at doing his tasks.
41. Nevertheless, Mr Kelly made another referral to Occupational Health on 3 September 2019. We find it curious that two weeks after the claimant had begun his phased return to work such a referral should have been made by Mr Kelly in the terms he did. Dr Jina of OH replied in a letter dated 8 October 2019. Mr Kelly referred to this OH report as being a "game changer" and is what caused him to decide that there was no point in the phased return to work continuing and that the claimant should be redeployed. Accordingly, we have examined the questions asked and answers given closely. These are as follows:-
42. Question: With respect to Carl's physical condition and medication, is Carl fit to perform the full duties of a trained Maintainer?

Having repeated the familiar restricted duties, the answer given is "as above". We find that this represented no change from the previous reports.
43. Question: If no, can you give a timeframe when Carl is expected to be fully fit for work?

Answer: As advised in previous memos, Mr Pinnegar's limitations are likely to be ongoing and therefore the restrictions above are likely to be required for the foreseeable future."

Again, we find that this represents no change at all on the previous reports.

44. “Question: Carl has begun a phased return to work which involves performing specific tasks as per risk assessment. Has there been improvement or resolution of his limitations as a result of this?”

Answer: A risk assessment was advised bearing in mind that Mr Pinnegar has ongoing limitations which are unlikely to change. As advised a number of times previously, there is not likely to be any significant improvements or resolution of the limitations. It is therefore unrealistic to expect a risk assessment to result in a resolution of the limitations. The purpose of risk assessments is to establish a safe system of work despite the ongoing limitations.”

Again, we find that there is no change in circumstances represented by this answer. It had always been the position that the claimant’s medical limitations were permanent. It is obvious that the purpose of risk assessments was to establish a safe system of work despite the ongoing limitations. Mr Kelly appears to have concluded that because the medical limitations were effectively permanent, so the claimant could not resume his full duties with reasonable adjustments. We find that Mr Kelly’s position was premature and unreasonable. The whole purpose of the phased return to work was to see if the claimant could return to full duties or, with reasonable adjustments, a substantial amount of his duties, notwithstanding his disability and consequent medical limitations.

45. “Question: You previously advised 29 July “it is not likely that there will be any significant improvements or resolution of his current limitations” Does this advice still stand?”

Answer: As above.”

Again, we find that this represents no change at all.

46. “Question: If Carl isn’t currently fit for work and no timeframe for a return to full duties can be given, would you support redeployment on medical grounds?”

Answer: Any decision regarding alternative employment options, including redeployment and so on are your managerial decisions to make. This is therefore for you as a manager to decide. Presumably you may need to consider such alternative options if you are unable to accommodate for or sustain any adjustments required.”

Again, we find that this represents no change from previous reports and merely reflects the obvious reality.

47. Consequently, we do not consider that the 8 October 2019 Occupational report was a “game changer” in any way and did not entitle Mr Kelly to

conclude that the phased return to work was a waste of time, should be aborted and the claimant referred for redeployment.

48. On 16 October 2019 the case conference meeting took place. Mr Kelly is recorded as stating:-

“Occupational Health advised there is no improvement and will be no improvement, regardless of whether or not the phased return/risk assessment is continued.”

49. Further, a Mr McVeigh, an employee relations partner, states:-

“stated the restrictions are for the foreseeable future, therefore the risk assessment is no longer an option.”

50. Mr Kelly was saying that the claimant was only carrying out a small percentage of the role and it was non-heavy manual work whereas the claimant and his representative were disputing that. It would appear that the claimant was saying he was undertaking more roles than within the risk assessment and that was on the basis that he had been signed off as competent to do them following his training. The claimant reiterated that he did not suffer from drowsiness and Mr Kelly instructed the claimant only to work within the confines of the risk assessment.

51. It is clear to us that the claimant was physically able to undertake more work than was contained within the original risk assessment. We find that the reviews that were intended to take place were not happening. We would have expected further risk assessments to be undertaken to see if the claimant was capable of safely undertaking more and more of his full-time duties. This did not happen. We find that Mr Kelly had decided to move to redeployment, if not before, then at this meeting. Nevertheless, Mr Kelly also stated that the assessment needed to be expanded for the claimant to carry out more tasks than had been risk assessed. The claimant was instructed only to do those tasks that he had been risk assessed.

52. On 22 October Mr Kelly invited the claimant to a further medical case conference on 30 October. Meanwhile, Mr Kelly created a schedule of all the tasks across the maintenance depot and assessing whether the claimant could undertake them taking into account potential drowsiness, no overhead work and no heavy work etc. According to Mr Kelly this indicated that only one module could be undertaken wholly by the claimant. We find that this document is not wholly reliable. We find that it is self-serving in that Mr Kelly is relying on it in order to justify his decision to move to redeployment. It represents a paper exercise and ignores the fact that the claimant had been working on many tasks having been risk assessed. Indeed, it is at variance with the risk assessment.

53. On 28 October 2019 the claimant was invited to a further medical case conference on 18 November.

54. On 18 November the case conference took place. It is clear to us that Mr Kelly had decided that redeployment was the only option. Further, it is clear

to us that the claimant was highlighting that he felt he had not been given a chance to get back to full duties after recovery. It was emphasised that there had been no reviews. It was pointed out that Mr Kelly had not spoken to the claimant's team leader about his performance. The meeting concluded with the claimant being offered redeployment and being given 10 days to consider that offer.

55. On 21 November 2019 the claimant was invited to a further medical case conference on 3 December 2019. At that meeting the claimant provided evidence from his doctor that he was not suffering from any symptoms of drowsiness. Nevertheless, the claimant was told that he had until 16:00 on that day to indicate whether or not he accepted redeployment. He was told that if he declined or did not respond then he would be medically terminated from that Saturday.
56. The claimant reluctantly and with protest agreed to redeployment in those circumstances.
57. On 6 December 2019 Mr Kelly referred the matter to OH once again stating:

“Mr Pinnegar has consistently reported drowsiness due to the medication he is taking...”

Whilst it is true to say that the OH report referred to drowsiness, in every meeting Mr Kelly had had with the claimant the claimant had denied any symptoms of drowsiness and as such, that comment is somewhat disingenuous. In any event, the response from OH which we have was not released to Mr Kelly.

58. On 23 December 2019 the claimant was offered the role of Customer Service Assistant 2 which he turned down. The claimant thought he had to have a Safety Critical Licence for this role which he did not have. We find that he was incorrect in that he did not need such a licence. It was only required for Customer Service Assistant 1. The lack of a licence would only have meant he could not 'act up'. Nevertheless, the claimant refused the role because he did not want to do it and did not want to be redeployed. He wanted to be a Train Maintainer and not have cash handling duties/work on a crowded train station platform as a CSA2.
59. On 1 January 2020 the claimant raised a grievance about being placed on redeployment and appealed against the job offer.
60. On 17 February 2020 the claimant presented this claim to the employment tribunal. It is accepted by Ms Hart that this claim does not relate to matters that post-date the submission of the claim on 17 February 2020.
61. During the course of this hearing we heard a lot of evidence from both sides as to whether the claimant had the physical capacity to return to full duties or a substantial amount of his full duties. As well as the schedule already referred to, as part of the grievance procedure in August 2020 Mr Kelly produced a more detailed breakdown of the tasks of the Life Extension

Team and an analysis of whether or not the claimant's limitations would have allowed him to complete those tasks. Excluding drowsiness, Mr Kelly's analysis was that the claimant could undertake 40% of the tasks which represented approximately 10 to 15% of the role. If drowsiness were included then the percentages would drop even further. Conversely, the claimant estimates that he was undertaking 60% of his normal duties during the phased return to work and that had he been risk assessed and allowed to complete other tasks then he would have reached a position where he could undertake 80 to 90% of his normal work duties.

62. We accept that the respondent's management in conjunction with Occupational Health would be in the best position to assess whether the claimant was able to undertake his full duties (or a substantial part of his full duties with reasonable adjustments) safely. We do not consider that we are in a position to assess the claimant's physical capabilities against his normal duties and we are not in a position to assess the potential for drowsiness against the cocktail of drugs that he was taking. Both parties may or may not be correct in their assertions. An observed risk assessment at the end of the phased return to work would have provided a definitive answer.
63. Nevertheless, as set out in Ms Hart's analysis of the law, the duty to make reasonable adjustments is directed at enabling disabled workers to secure and remain in employment. It requires an employer to take positive steps to avoid a substantial disadvantage.
64. We have taken into account the size and financial resources of the respondent. The respondent commendably embarked on a phased return to work which we consider was a reasonable adjustment to assess whether the claimant could return to his former role. We have concluded that by abandoning the phased return to work and moving the claimant on to redeployment was both a failure to make reasonable adjustments and unfavourable treatment.

Conclusions

65. We find that the respondent did have a provision, criterion or practice in that employees on light duties were required to return to full duties (which may have been with reasonable adjustments).
66. We find that the respondent did apply that PCP to the claimant.
67. We find that that PCP did cause the claimant substantial disadvantage compared to non-disabled employees as he had to be risk assessed and needed time to demonstrate his capabilities.
68. We find that the respondent knew that the claimant was likely to be placed at that disadvantage.
69. We find that the steps that it would be reasonable to take to avoid that disadvantage were the steps actually taken initially. These were to place the claimant on a phased return to work based on a risk assessment that

was to be reviewed over the course of the return to work. Consequently, we find that terminating the phased return to work half way through was a failure to make reasonable adjustments and that the claimant should have been allowed to complete his full agreed return to work programme and a final risk assessment undertaken before making any decision on whether he should be redeployed.

70. Once the claimant raised a grievance over the decision to redeploy him, so the redeployment exercise appears to have been suspended. Consequently, at all times up to 17 February 2020, the claimant was working as a Train Maintainer in his team and, by definition, tasks that he was physically incapable of doing or had not been risk assessed for were undertaken by other members of the team. Consequently, we do not find that there was a failure to make reasonable adjustments as regard issues 8a, b, d and e.
71. We find that the respondent did commence the redeployment process on 18 November 2019 even though the claimant was only part way through his 20 week phased return to work and when a full risk assessment had not been completed.
72. We find that the respondent, through Mr David Kelly, Deport Manager, on 3 December 2019, did threaten the claimant with dismissal if he did not accept medical redeployment.
73. We find that the respondent did offer the claimant the role of Customer Service Assistant 2 on 23 December 2019. We find that that role did not in fact require a Safety Critical Licence. A Safety Critical Licence would only have been necessary in the event that the claimant had to act up to CSA 1.
74. We find that each of those items of treatment constituted unfavourable treatment. The claimant clearly did not want to be redeployed.
75. We find that that unfavourable treatment was because of something arising in consequence of the claimant's disability, namely , his inability to carry out 100% of his full work duties as a Train Maintainer and/or because of the restrictions placed on his work by OH due to his disability and the fact that his medical limitations were effectively permanent.
76. We find that the respondent treated the claimant unfavourably because of those things arising.
77. We have considered whether the treatment was a proportionate means of achieving a legitimate aim. The respondent relies on legitimate aims including ensuring the welfare of its employees, the running of an efficient service and the business interest of employing individuals who can carry out the majority of their role. We find that those aims are legitimate.
78. We find that placing the claimant on redeployment halfway through his phased return to work was not a proportionate means of achieving the legitimate aim. Taking into account the size and administrative resources of

the respondent and the intention of all parties at the outset of the phased return to work, we find that halting the phased return to work halfway through was not justified and disproportionate.

- 79. We find that the commencement of the redeployment process on 18 November 2019 was within three months of the presentation of the claim form and, accordingly, in time. The respondent did not take any jurisdiction points in closing.
- 80. Accordingly, the claimant's claim of discrimination on the grounds of disability is well founded and his claims succeeds.

Employment Judge Alliot
4 November 2021

Date:
16 November 2021

Sent to the parties on:

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For the Tribunal Office