EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Andrew Holland	**v**	GlaxoSmithKline Services Unlimited

Heard at: Cambridge

On: 13 December 2021
17 and 18 January 2022
In Chambers: 18 January 2022 (p.m. only) and 19 January 2022

Before: Employment Judge Tynan

Members: Ms N Howard and Mrs S Laurence-Doig

Appearances
For the Claimant: Mr M Blitz, Counsel
For the Respondent: Mr H Zovidavi, Counsel

RESERVED JUDGMENT

1. The Claimant's complaint that by being dismissed he was discriminated against contrary to Section 15 of the Equality Act 2010, succeeds.

2. The Claimant's complaint that the Respondent failed to comply with its duty to make adjustments in contravention of Section 20 of the Equality Act 2010 succeeds insofar as:

    a. the Respondent failed to permit the Claimant to work day shifts in his substantive contracted role; and
    b. the Respondent failed to short-list the Claimant for the roles of Compliance Co-Ordinator, Learning and Development Advisor and Document Co-Ordinator, and failed to offer him redeployment into any of those roles on a trial basis.

3. The Claimant's complaint that he was unfairly dismissed succeeds.

4. The Claimant's remaining complaints under Sections 15 and 20 / 21 of the Equality Act 2010 are not well founded and are dismissed.

RESERVED REASONS

1. By a claim form presented to the Employment Tribunals on 11 August 2020, following Acas Early Conciliation between 29 June 2020 and 17 July 2020, the Claimant brings claims against the Respondent that he was unfairly dismissed and unlawfully discriminated against on grounds of disability.

2. At the outset of these proceedings it was accepted by the Respondent that, at the relevant times, the Claimant was disabled within the meaning of Section 6 of the Equality Act 2010 ("EqA 2010") by reason that he had been diagnosed with Systemic Lupus Erythematosus ('Lupus') in 2015.

3. The matter came before Employment Judge K J Palmer on 13 April 2021 for Case Management. In his Case Management Summary following that Hearing, Employment Judge Palmer included a List of Issues to be determined by the Employment Tribunal (pages 40 – 42). Counsel confirmed that those issues were unchanged. The issues in the case are relatively few.

4. The Claimant gave evidence in support of his claim on 13 December 2021. Unfortunately, as a result of a participant falling ill it was not possible to proceed after the Claimant had given his evidence. The Hearing was therefore adjourned part heard until 17 January 2022.

5. At the resumed Hearing the Tribunal heard evidence on behalf of the Respondent from:

   - Andrea Bradford, Process Lead, who was effectively the Claimant's Line Manager whilst he was in a Document Author role from 28 May 2019 until 22 September 2020 when his employment terminated;

   - Daniel Waites, Manufacturing Unit Manager at the Respondent's Ware site and who was the Claimant's Manager's Manager from 12 March 2018 when the Claimant returned to the Production Team following a secondment;

   - Stuart Richardson, Respiratory and Micronising Value Stream Director, who heard the Claimant's Appeal against his dismissal in June 2020;

   - Saminder Takhi, GBI HR Manager and Employee Relations, who acted as HR support to Mr Richardson in the Appeal process; and

   - Andrew Watt, Recruitment Account Manager, who was involved in recruitment for a Document Co-Ordinator role recruited to in Autumn 2020.

6. There was a single agreed Bundle of documents running to 368 pages. The page references in this Judgment are to the page numbers of that Hearing Bundle.

Findings of Fact

7. GlaxoSmithKline is a well known global healthcare company. It develops medicines, vaccines and consumer healthcare products. The Respondent has a large production facility at Ware in Hertfordshire employing approximately 1,100 staff. It employs approximately 16,000 staff in Great Britain.

8. The Claimant commenced employment with the Respondent as a Production Operator in RSC Packing on 8 December 1997. His contract of employment from 1997 was included in the Hearing Bundle. We must assume therefore that it was not updated at any time during his 24 years of employment notwithstanding changes to the role he performed for the Respondent.

9. At paragraph 2 of his Witness Statement, the Claimant sets out his history of employment in terms of the roles undertaken by him. That summary of his employment experience was not disputed by the Respondent, though in the course of our discussions in Chambers we have noted a lack of consistency across various documentation within the Hearing Bundle in terms of the Claimant's stated job roles. Nothing ultimately turns on this. We note here that the Claimant had Compliance and Compliance Co-ordinator responsibilities over a 2/3 year period from 2014 to 2016, training experience thereafter, and Document Author experience in the year prior to the termination of his employment.

10. As noted already, the Claimant was diagnosed with Lupus in 2015. Lupus is an illness of the immune system. As the Respondent's in-house Occupational Health Nurse Specialist noted following an assessment on 19 July 2018:

> *"It is a life long condition, there is no obvious pattern to the symptoms and are characterised by regular flare ups and quieter periods. The most common symptoms are extreme fatigue and weakness, muscle and joint aches and pains, cognitive impairment (described as brain fog), sensitivity to UV light, flu like symptoms and headaches. In Andy's case, currently it causes pain in his elbows and to a lesser degree upper legs (which may be associated with a chronic back condition) and chronic fatigue which fluctuates in intensity with some periods of "brain fogging"."*
>
> (page 141)

11. Perhaps because it has not been in dispute within these proceedings that the Claimant meets the statutory definition of a disabled person, the Claimant's Witness Statement does not identify the symptoms as he

experiences them, or the affects upon his day to day activities. Though they are noted at various points within the Hearing Bundle in correspondence and the notes of various meetings, the only specific disadvantage noted in the List of Issues in relation to the Section 20 / 21 EqA 2010 complaint, is the detrimental impact of shift work, in particular night shift work, on the Claimant's health.

12. In July 2015, the Claimant took on a Compliance role within the Respondent's Compliance Team with a view to addressing the difficulties that shift work presented for him. The role enabled him to work regular hours during the day. His secondment, which was in the role of Compliance Co-Ordinator, continued until December 2016. Thereafter, the Claimant secured a further secondment in a training role which included utilising MyLearning, the Respondent's e-learning portal. As we have noted already, there is some lack of consistency in terminology around the Claimant's work history; for example, paragraph 2 of his Witness Statement does not entirely marry up with the chronology submitted for the Hearing. The chronology is less clear as to the role(s) performed by the Claimant in the period 2018 to 2019. However, it does not seem to be in dispute that from July 2015 the Claimant stopped working shifts, including in the period 2017 to 2019 when he returned to the Production area. When the Claimant was informed on 20 April 2020 that his employment would terminate (albeit his notice period did not formally commence) it was noted that the Claimant's contractual role was that of Packing Technical Operator (page 187).

13. The Claimant's Contract of Employment at pages 45 – 52 of the Hearing Bundle provides as follows in relation to his hours of work:

> *"During the course of your employment, you may be required to work reasonable overtime, or to change your working pattern, including working an alternative shift pattern. Different shift patterns attract different premiums and a change of shift pattern may result in an increase or reduction in your shift premium."*

14. Included in the Hearing Bundle was the 'Shift and Ways of Working Handbook' for the Ware site, effective from 1 April 2016. It evidences a range of shift patterns being worked at Ware. The fact that the Handbook runs to some 83 pages provides some indication as to the complexity of the shift arrangements and ways of working. Thirteen defined and agreed shift patterns are identified in the Handbook, including a "4 nights" shift. We accept Mr Waites' evidence that, following negotiation and agreement with the Respondent's recognised Union, permanent night only shift working is no longer permitted on site. Furthermore, the Respondent's permanent employees and agency workers are treated consistently in this respect and more generally.

15. During the hearing there was extensive reference to the Respondent's "LEN" and "DANF" shift patterns. A LEN shift pattern involves employees working Late, Early and Night shifts over a three week cycle. Each shift

lasts nearly eight hours. The DANF shift pattern involves Day and Night shifts only. Each shift lasts approximately 12 hours, with staff benefitting from a longer period off in the transition between day and night shifts. During the Claimant's employment, the Lines on which he worked operated to a LEN shift pattern, though by the time of his Appeal against his dismissal a DANF shift pattern was being trialled, and indeed was subsequently adopted with effect from 2021 following its approval in a workplace ballot.

16. The 'Shift and Ways of Working Handbook' includes a section dealing with Managers' specific responsibilities (section 6.5.2 – pages 77 and 78). It includes examples of situations which should be avoided by managers when approving holiday requests, including,

> *"Going significantly below the RTO level on a particular day / shift for what are perceived as "business requirements" (e.g. off site training etc.) then declining a holiday request on another day / shift because that would put the department marginally below the RTO level. It is recognised that situations like this do arise. Where they do, clear communication is essential."*

> *"Declining a holiday request on the basis of "skills availability" even though the overall RTO level has been maintained for the team. This should be resolved by having the right team plan in place and skills within the team. Managers should use the PDP process to develop people"*

A note in section 6.5.2 records:

> *"A business process will be followed by managers to determine the number of people above RTO level required in each area to allow for all types of employee absences (typically 20%, rounded up, to a maximum of 25%)"*

17. The Tribunal was not told how many, if any, of the Respondent's staff who work shifts at the Ware site do so pursuant to a flexible working arrangement. However, the 'Shift and Ways of Working Handbook' does not state that flexible working is not permitted. On the contrary, it is apparent from Section 5.1 of the Handbook that the Respondent envisages flexible working arrangements being agreed on a case by case basis within the overall framework of the various shift working patterns, albeit any such arrangements must be formally agreed and then reviewed annually (page 70).

18. We further note the Flexi Hours Policy at Appendix 3 to the Handbook. Flexi hours may be used to enable employees to attend meetings before or after their scheduled start or finish time (page 128). Appendix 6 to the Handbook (page 132) gives details of when and how to cover for absent members of staff.

19. The Respondent operates a Disability and / or Long Term Ill Health in The Workplace Policy (it was referred to by the witnesses in the course of their evidence as the Disability in the Workplace Policy and we shall adopt that term). The Policy is at pages 136 – 140 of the Hearing Bundle. The Policy sets out respective responsibilities, including in the case of Mangers,

    "Making reasonable adjustments to the working environment, working practices, and **working patterns**." [our emphasis]

20. One of the stated responsibilities of Human Resources is to,

    "Assist Line Managers with requests for reasonable adjustments and to facilitate significant employment adjustments, which could include redeployment."

21. The Policy includes a section on Reasonable Adjustments. The examples of reasonable adjustments include *"working arrangements"*.

22. Later in the Policy there is reference that,

    "Where appropriate reasonable adjustments will be made to enable you to continue working or, where necessary, and if possible, provide you with suitable alternative employment."

    We find that the Policy reflects what, in our collective experience, is a common approach amongst employers to managing disability within the workplace, namely one that focuses first on retaining employees within their current role and, only where that is not possible, redeploying them within the organisation. We return to this.

23. Mr Blitz placed some emphasis in the course of cross examination on the flow chart at page 140 of the Hearing Bundle, suggesting that it evidences that employees covered by the Policy would be automatically slotted into other roles. Whilst that is one possible impression given by the flow chart, we do not consider that it reflects the Respondent's policy on redeployment; the policy is set out more fully at pages 136 – 139 and was confirmed by the Respondent's witnesses in their evidence at Tribunal, namely that disabled employees at the Respondent do not receive preferential treatment in terms of other roles that become available within the organisation. We return later in this Judgment to the question of whether that Policy should have been adjusted to accommodate the Claimant's disability.

24. The chronology identifies that there was an initial Disability in the Workplace meeting with the Claimant in March 2018. There seems to have been no record kept of that meeting, or at least there are no meeting minutes or other records of it in the Hearing Bundle. We infer that the meeting was triggered when the Claimant returned to the Packing Line in 2018 following the secondments referred to in paragraph 12 above. The

minutes of a subsequent Disability in the Workplace meeting on 6 February 2019 suggest that the Claimant had undertaken a range of activities whilst consideration was being given to his situation (see in particular Section 2.2 of the meeting minutes at page 148 of the Hearing Bundle). The minutes record that the Claimant informed Abs Shire, the HR Manager at the time,

> *"The shift is always going to have an impact given that AH is living with Lupus. AH has tried different shifts in the past which has been detrimental to his health. Being on days makes him function better and the Lupus manageable. DW confirms that they have tried several shift patterns in the past. The last attended Management meeting was held in 12 March 2018 and nothing has changed."*

25. Following the 12 March 2018 meeting the Claimant had been referred for an Occupational Health Assessment. We have already referred to that assessment, undertaken in July 2018. As regards the Claimant's capacity to work, Ms Freeman, the Occupational Health Nurse Specialist noted,

> *"Andy has identified that his health is markedly affected when working on shifts and he was advised by his rheumatologist in writing that shift working would have a negative effect on his health condition. He has found that working on days has really improved his health and he is having less flare ups of extreme tiredness with possible associated sickness absence. He has also noticed a vast improvement on his physical abilities since day shifts.*
>
> *He stated that he feels fully able to work as an Offline Supporter with the office based work and manual handling task, but it is the regularly changing shifts which really made him exhausted."*

26. Ms Freeman offered the concluding opinion,

> *"Andy is fit to work in his current role on days or a similar role on days, but he feels it is very likely his health would be negatively affected if he returned to shift work."*

27. Ms Freeman did not make any specific recommendations in terms of adjustments to the Claimant's working arrangements, though went on to state that she would support him remaining on days if possible.

28. Given that Ms Freeman identified common symptoms of extreme fatigue, weakness, muscle and joint aches, pain, cognitive impairment, sensitivity to UV light, flu like symptoms and headaches, it is difficult for us to understand why greater thought was not given by her to specific adjustments that might be considered in relation to the Claimant, including for example the provision of ergonomic equipment and aids, regular and longer breaks, appropriate adjustment to lighting and so on. We consider that the parties were not greatly assisted by the assessment, specifically by Ms Freeman's apparent failure to pro-actively consider the critical issue

of potential adjustments to the Claimant's work and working arrangements. Regrettably, as we return to, this state of affairs continued.

29. On 3 October 2018, the Claimant and Mr Waites met informally to discuss the potential for redeployment. They had a more formal meeting on 6 February 2019, the minutes of which are at pages 143 – 146 of the Hearing Bundle (and which were signed by the Claimant as confirmation of their accuracy). As over six months had elapsed since Ms Freeman's assessment, it was agreed that there should be a further Occupational Health referral. The documented reason why the Claimant was said to be unable to meet the requirements of his role was that he could not sustain a shift pattern on a long term basis. There is no indication in section 2.1 of the meeting minutes (page 144) of any discussion of or consideration being given to a fixed shift during the day, whether a late or an early shift, or a tailored shift specific to the Claimant that straddled the early and late shifts. We find this reflects that the Respondent's focus was on secondment and redeployment opportunities, rather than on retaining the Claimant within his substantive role as envisaged under its own Policy.

30. The minutes evidence the Claimant's flexibility,

> *"AH would accept Stevenage as an alternative location. AH would accept a lower paid job if an appropriate role has been identified.*
>
> *AH would be willing to undergo initial training depending on the training when there is basic skill set training … with his condition there is a conflict between health and shift."*

31. The meeting outcome section at page 145 of the Hearing Bundle confirms that Mr Waites triggered the formal redeployment process. In other words and as noted already, his focus was on redeploying the Claimant rather than identifying adjustments to keep him in his substantive role. In accordance with the Disability in the Workplace Policy, the redeployment period was to last 12 weeks.

32. On 5 April 2019, the Claimant met again with Ms Freeman. She produced an updated written assessment the same day (pages 153 and 154). It reinforces the Claimant's evidence at Tribunal, namely that the issue was not his ability to perform the functions of his role, rather the impact that shift working had on the symptoms of his condition. Ms Freeman wrote,

> *"He states he cannot perform these tasks to the best of his physical and mental ability on shifts, due to the negative effects shift work has on his symptoms, namely physical and mental fatigue which are known symptoms of the condition.*
>
> *His symptoms remain improved whilst he has been working regular day shifts which are more beneficial to the company with less absenteeism. He feels that there isn't an issue with him carrying*

> *out his duties in the area, however there is a conflict of interest between his body and working shifts.*
>
> *… the Lupus is an ongoing manageable condition and future flare ups of symptoms are still likely to occur with no recent long periods of absence due to the Lupus which in Andy's opinion has been reduced by being on a regular eating, sleeping, resting and work pattern."*

33. Whilst the assessment could not be clearer as to the perceived benefit of working a regular shift, once again Ms Freeman failed to offer advice as to adjustments which might be implemented with a view to retaining the Claimant in his substantive role.

34. At the end of the 12 week redeployment period, a Document Author secondment opportunity was identified for the Claimant. He was seconded into that role with effect from 28 May 2019. The secondment was expected to last until 31 December 2019, though in the event he remained in Ms Bradford's Team through to the termination of his employment on 22 September 2020. The secondment letter at page 158 of the Hearing Bundle, states that he would return to his substantive role as Production Team Leader, when his secondment ended. We note that in a third Occupational Health assessment dated 24 February 2020 (to which we return below), the Claimant's substantive role was described as Packing Technical Operator.

35. Having secured a secondment, the Claimant was informed by letter dated 3 July 2019 (page 161) that the Disability in the Workplace procedure would be paused and would only recommence if the role into which he was seconded did not become permanent. He was warned that in the event the role did not become permanent, he would likely be issued with notice of termination immediately and, accordingly, that he may want to continue looking for further opportunities whilst seconded. The Claimant maintained that he had been assured that the role would become permanent. The weight of evidence is otherwise.

36. By 16 October 2019, Ms Bradford was giving feedback that the Claimant had settled *"extremely well"* into the Document Author role and had started progressing his own updates with thorough checks. She referred to him as having made *"a solid start"* to the secondment.

37. We refer to the third Occupational Health assessment of 24 February 2020, this time undertaken by Dr Neil Coutinho. For the first time there is some reference to the demands of the role itself, as opposed to the shift pattern, potentially aggravating the Claimant's health condition. Dr Coutinho noted,

> *"Andrew feels that he will be able to resume most of the physical aspects of his role including handling lifting equipment, but I understand from Andrew that work on the Line (including the*

loading of trays of devices) can be high paced, and as such there is potential that this could aggravate his health conditions. Whether working on the Line is suitable for Andrew would depend on an individualised risk assessment for the work activities."

38. It will be seen therefore that Dr Coutinho merely noted the potential for the Claimant's condition to be aggravated by the work itself, but any definitive view on the matter would require an individualised risk assessment. No such assessment was undertaken; we conclude that this was because the Respondent's focus continued to be on redeployment rather than retaining the Claimant in his substantive contractual role.

39. Dr Coutinho recommended that,

"Reasonable adjustments should be considered."

However, Dr Coutinho failed to identify what form those adjustments might take other than to note that the Claimant's attendance was less likely to be adversely impacted if he worked regular hours and did not work shifts. We find that his recommendation was not acted upon or, at least, certainly not considered in the context of the role he was contracted to do.

40. The Respondent reactivated its Disability in the Workplace Policy in relation to the Claimant on 1 April 2020 and invited him to a meeting with HR on 9 April 2020. In the meeting invitation letter (pages 173 - 174) the Respondent wrote,

"You should be aware that as a result of your continued inability to meet the requirements of your role, and in the absence of another suitable role being found, the outcome of this meeting could result in your dismissal with notice from the company on the grounds of capability, as detailed in the GSK Disability and / or Long Term Ill Health in the Workplace Policy."

41. The reasons why the Policy was reactivated was not addressed in Ms Bradford's Witness Statement. She endeavoured to provide an explanation in her evidence at Tribunal, namely that there was a reorganisation affecting her Team. There are no documents within the Hearing Bundle regarding any such reorganisation to enable the Tribunal to gain a better understanding as to the nature of the reorganisation, or the potential implications for the Claimant in terms of his secondment and longer term redeployment prospects.

42. In the period leading up to the meeting invitation on 1 April 2020, the Claimant had been absent from work with a chest infection and Lupus flare up. The chronology indicates that he was absent between 28 January and 13 March 2020. This means that his return to work coincided with the Government's instruction on 16 March 2020 prior to the first national lockdown that employees must work from home wherever possible. At or around this time the Claimant separated from his wife, albeit they were still

living together in the same property, and the Claimant found himself working from home in his bedroom, sitting on the edge of his bed. Although this was not specifically raised in evidence, given his diagnosis with Lupus, the Claimant would have been potentially at increased risk in terms of Covid-19. It is not in dispute that the Claimant asked Ms Bradford during this period of home working if he could work one 'lane' as opposed to two. We find this was readily agreed to by Ms Bradford as a supportive measure during a very difficult time for him.

43. The minutes of the meeting of 9 April 2020 are at pages 177 – 182 of the Hearing Bundle. During the meeting the Claimant talked Mr Waites through his current health situation. The Claimant continued to be consistent in stating that shift work was a contributory factor in his flare ups. The meeting minutes include the following note,

> *"He assured DW that it was the shift timings that impacted his condition rather than the actual work he was doing".*

That is consistent with what he had been saying over an extended period.

44. The minutes go on to record,

> *"He said that being desk bound has been better because it stops him from putting pressure on his joints and he is able to self manage his work and physical ability, (e.g. he is able to stretch when he needs). He added that being on the lines may worsen his condition but he is willing to give this another go. He explained that he wants to work for GSK, however the shift work is detrimental to his mental and physical condition. …he expressed that it was hard to recover from each shift and admires everyone who works on this shift pattern."*

45. Mr Waites acknowledged during the meeting that he had observed a deterioration in the Claimant's physical state throughout the weeks on shift and praised him for his commitment.

46. At paragraph 24 of his Witness Statement, Mr Waites states that during an earlier catch up meeting in February 2020, they discussed the use of moving pallets and standing up for prolonged periods of time, from which Mr Waites concluded that such activities would adversely impact the Claimant's health. That conclusion is not supported by the contemporaneous documents and is at odds with Dr Coutinho's recommendation of an individual risk assessment in order to identify whether the Claimant's health would be adversely impacted on the Line. We find that Mr Waites has placed a gloss on their discussion at this time. The Claimant clearly stated, as he had done throughout, that he was capable of performing his job and that it was the shift pattern alone that aggravated his condition.

47. There was some discussion on 9 April 2020 of the reorganisation impacting Ms Bradford's Team, that the role to which the Claimant had been seconded was said to no longer exist, and that other Teams did not have the headcount to add such a role. In the course of this discussion, the Claimant disclosed that he had applied for six or seven roles in the past but had failed to secure an interview for them. He said that he was

    "fighting a losing battle as I do not have the qualifications required."

    Mr Waites informed the Claimant that had he known he had been applying for roles, he would have endeavoured to support the Claimant in that process.

48. Towards the bottom of page 179 of the Hearing Bundle there is record of a discussion as to why the shift patterns were in place. Mr Waites explained that these were designed to support manufacture of a product which had been growing in volume. Given the increased volume in production, the Claimant's Union Representative, Mr Dunk asked if it would be possible to accommodate more day shifts for the Claimant. Mr Waites' documented response was,

    "DW advised that higher management and Grade 7 employees usually occupy the day shifts."

    We find, once again, that there was no meaningful engagement with the possibility of an adjustment to the Claimant's working arrangements within the context of the LEN shift pattern. Instead, Mr Waites view on the matter was informed by the fact that the Claimant was employed at a Grade that ordinarily involved working variable shifts, rather than a fixed shift. We conclude that his mind was closed on the matter.

49. The outcome of the meeting on 9 April 2020 was that it was decided the Claimant should be given notice terminating his employment with the Respondent, albeit notice would not commence until 1 July. We find that this delay was not by way of an adjustment in respect of the Claimant's disability, rather it was a measure that had, at the request of the Union, been extended to other employees who were displaced by reason of redundancy at the same time. No doubt, the concern was that staff should not find themselves searching for new employment when the country was still in lockdown and the economic outlook was uncertain.

50. The outcome of the meeting on 9 April 2020 was confirmed in a letter to the Claimant dated 20 April 2020 (pages 187 and 188). The letter refers to *"the high paced nature of the role"* as well as the fact that it was shift work, meaning that it was not ideal for the Claimant. We cannot find any reference in the documents in the Hearing Bundle to the pace of the role being a factor in the Claimant's ability to perform it. A risk assessment had not been undertaken to support that conclusion. We are satisfied that it reflects what we have already referred to as the gloss that Mr Waites had put on his discussions with the Claimant. In his letter, Mr Waites wrote,

> *"As discussed in the meeting, there are no adjustments to the shifts that are possible due to demand and the business need for fully staffed shifts throughout all hours."*

51. The meeting minutes do not support any such explanation having been offered during the meeting itself. Mr Waites did not elaborate further in his letter as to what he meant. He has endeavoured to provide that clarification at paragraph 25 of his Witness Statement, where he refers, amongst other things, to a change of Line Manager every week over a three week shift pattern if the Claimant only worked days. Putting aside that this was not referred to in his letter, it overlooks the provisions of the Flexi Hours Policy at Appendix 3 to the Handbook that the start and / or finish time of a shift can be flexed to facilitate meetings and discussions.

52. By letter dated 1 May 2020, the Claimant appealed against the decision to dismiss him on grounds of capability.

53. On or around 1 May 2020, the Claimant applied for a role with the Respondent as a Compliance Co-Ordinator. The job advertisement / description / specification is at page 305 of the Hearing Bundle. Applicants were informed,

> *"When applying for this role, please use your CV to describe how you meet the competencies for this role (as outlined in the job requirements above). Information that you have provided will be used to assess your application."*

54. We find that the Claimant failed to submit his application in CV form. Instead his application comprised a single page letter (page 306), which contained no reference to a CV being attached. The fourth paragraph of the letter starts mid-sentence lending the impression of an inattention to detail. The Claimant failed to inform Mr Waites that he was intending to apply for the position. Instead, he only made Mr Waites aware of this after he received a standard form notification that his application had been unsuccessful.

55. Mr Waites spoke to the hiring manager. In an email to the Claimant dated 6 May 2020, Mr Waites confirmed that his application for the role had in fact been considered by the hiring manager, albeit on the strength of his letter. He asked the Claimant to forward his CV and said he would endeavour to have the application reassessed, but that he could not make any promises. There is no further evidence within the Bundle whether or not the Claimant's application was reassessed and indeed, whether he did send Mr Waites a copy of his CV as requested. The Claimant does not address this in his Witness Statement. Accordingly, we are not in a position to make any further specific findings as to what happened following Mr Waites' email of 6 May 2020. The Claimant's lack of success in his application for this role is not referred to in the factual background

section of his particulars of complaint, though the List of Issues identifies that his application should have received preferential treatment.

56. On 15 May 2020, the Claimant raised a formal grievance with the Respondent, which it seems by agreement was subsumed within his appeal against his dismissal.

57. On 16 June 2020, the Claimant was awarded a bonus in the form of a £20 E-Voucher to reflect his input to the VeevaQualityDocs (VQD) document management system project.

58. It is not in dispute that the Claimant was awarded less than other colleagues in the Team. The amounts in question were not particularly significant, ranging up to £100 in value. We prefer Ms Bradford's evidence on this issue, namely that the Claimant's award reflected the fact that he had only been working on one lane in the second quarter of 2020, compared to his colleagues who had been working two lanes and accordingly making a greater input to the project. We do not accept the Claimant's evidence that the reason given by Ms Bradford to him at the time of the award was that he had been sick. In reaching our findings on the matter, we have regard to the fact that the Claimant was also adamant he had been offered a permanent role in Ms Bradford's Team, when in fact the documentation evidences conclusively that it was a time limited secondment, even if all concerned hoped that it might become a permanent arrangement in due course. The Claimant's continued insistence at Tribunal that he had been assured of a permanent role in Ms Bradford's Team, in the face case of clear evidence to the contrary, ultimately leads us to prefer Ms Bradford's evidence on this issue.

59. As noted already, the Claimant's notice period started running on 1 July 2020. In the meantime the Mr Richardson heard his Appeal against his dismissal. The Appeal Hearing took place on 12 June 2020 and reconvened on 16 June 2020 when the Claimant was informed that his Appeal had been unsuccessful. That outcome was confirmed in a letter to the Claimant dated 19 June 2020 (page 243 onwards of the Hearing Bundle).

60. The Claimant's Appeal comprised of four substantive grounds of appeal. Mr Richardson was supported by Ms Takhi from an HR perspective. The Claimant's second ground of appeal concerned his fitness or otherwise to perform a production role with adjustments. Mr Richardson's decision in this regard was,

> *"While you state that you can complete most of the duties expected in the role of a PTO within Packing, the contracted role involves working shifts and the business is not able to set precedent by having someone permanently on days when there is no business need."*

61. As with Mr Waites' decision to dismiss the Claimant, Mr Richardson's stated rationale lacks clarity. In particular, we have struggled to understand what Mr Richardson meant when he referred to there being no business need and what, if anything, this comment added to his statement about not setting a precedent. In his evidence at Tribunal, Mr Richardson accepted that his comments likely reflected the views of Mr Waites. Mr Waites' evidence in this regard at Tribunal, which Mr Blitz highlighted at the start of his closing submissions, was that if the Claimant solely worked a day shift,

    "we would have an influx of people wanting the same".

62. In spite of the Respondent's efforts to put forward a more nuanced explanation as to why the Claimant could not be accommodated by only working day shifts (paragraph 25 of Mr Waites' Witness Statement and paragraph 10.2 of Mr Richardson's Witness Statement), we find that no, or no meaningful, consideration was given to adjustments to the Claimant's shift pattern in the period March 2018 to 9 April 2020, and that on 9 April 2020 Mr Waites ruled the matter out on the basis of the Claimant's grade, and that he and, subsequently, Mr Richardson also ruled the matter out on the basis that it would set a precedent.

63. The Claimant's third ground of appeal concerned the potential introduction of a DANF shift pattern to replace the LEN shift. Whilst we heard various evidence on the matter, it was ultimately an unnecessary distraction. Whether the Lines operated to a LEN or DANF shift pattern, the issue was essentially the same, namely that working shifts aggravated the Claimant's condition and would require consideration of an adjustment to his working arrangements so that he worked a fixed day shift.

64. The Claimant's employment with the Respondent terminated on 22 September 2020. After his employment terminated, the Claimant submitted an application for a Document Co-Ordinator role with the Respondent. The closing date for applications was 28 September 2020. The job advertisement / description / specification is at page 309 and 310 of the Hearing Bundle. As with the Compliance Co-Ordinator role, the respective candidates were required to use their CV to describe how they met the competencies for the role. The Claimant submitted his CV but was unsuccessful. Ms Bradford and Mr Watt's evidence and the documentation in the Hearing Bundle confirms that the various candidates including the Claimant, were assessed solely by reference to their CVs rather than by reference to the assessors' knowledge of them.

65. Notwithstanding the Claimant had been working in Ms Bradford's Team under her supervision for approximately 15 months and notwithstanding the positive feedback evidenced at page 366 of the Hearing Bundle, she felt that his CV had failed to make mention of problem solving, capabilities in English, understanding of the VQD system or of MyLearning. His application was therefore not taken forward. We find that Ms Bradford was in a position to have reached an informed view as to the Claimant's

capability against each of the specified criteria had she had looked beyond his CV and scored him objectively using her direct knowledge as to how he had performed in role as Document Author. Not surprisingly, the Claimant sought feedback as to why his application had been unsuccessful and this was provided by Mr Watt, albeit he essentially relayed information that had been given to him by the Respondent. The given reasons are at paragraph 5 of his Witness Statement. At paragraph 7 of his Witness Statement, Mr Watt endeavours to address the reasons why he believes the Claimant may not have been suited to the Document Co-Ordinator role, stating that there was a key emphasis in the advert on doing more than gathering and handing over data (which is what he felt the Claimant's CV indicated had been the extent of what he had done when performing the Compliance Co-Ordinator role on secondment in 2015/2016). Of course, the Respondent never discussed this with the Claimant to understand his experience and what, if any, training he might require if he was to succeed in the Document Co-Ordinator role.

The Law and Conclusions

EQUALITY ACT 2010

66. Section 15 of EqA 2010 provides,

> 15 Discrimination arising from disability
>
> (1) A person (A) discriminates against a disabled person (B) if-
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

67. Section 20 of EqA 2010 defines the duty to make adjustments as follows,

> 20 Duty to make adjustments
>
> (1) …
> (2) …
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

68. It is not necessary for the Tribunal to have regard to the second and third statutory requirements in this case.

69. It is not in dispute in this case that there was a PCP in the form of a requirement that the Respondent's employees fulfil their contractual role

and, where relevant, work shift patterns including night shifts. Nor is it in dispute that this placed the Claimant at a disadvantage in comparison to others who were not disabled because shift work, but night shift work in particular, affected his health detrimentally and rendered him less able to fulfil his contractual shifts.

EMPLOYMENT RIGHTS ACT 1996

70. Subject to any relevant qualifying period of employment, an employee has the right not to be unfairly dismissed by his employer (section 94 of the Employment Rights Act 1996 ('ERA')).

71. Section 98 of ERA provides,

> 98 General
>
> (1) 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 dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) 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
>
> …
>
> (3) …
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-
>
> (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.

72. We deal first with the Claimant's s.15 EqA 2010 complaints. It was common ground that his complaint in relation to his dismissal turns on whether his dismissal can be justified by the Respondent, it being accepted by the Respondent that the requirements of s.15(1)(a) are met. The Respondent has the burden of showing that the treatment in question was a proportionate means of achieving a legitimate aim. It is accepted by the Claimant in this regard that maintaining production and fulfilling its contractual obligations constitute legitimate aims on the part of the Respondent. In the course of his closing submissions, Mr Zovidavi also cited the wider public interest in the uninterrupted manufacture and supply of medicines and healthcare products. Although this was not alluded to by the Respondent in its various meetings with the Claimant during his employment, and nor is it referred to in the Respondent's witness statements, the Respondent is entitled to advance it as a further legitimate aim. We did not understand from Mr Blitz's closing submissions that he disputed this. Nevertheless, we are left with the impression that the Respondent has sought to bolster its justification defence in circumstances where relatively limited justification was offered by it at the point at which it decided that notice of termination should be given and where the justification put forward in the Respondent's witness statements is expressed in relatively summary terms.

73. We have given careful consideration to whether, as Mr Zovidavi contends, dismissal was the only option available to the Respondent, namely that it was a proportionate response in terms of the Respondent's legitimate aims. That necessarily involves an objective balance to be struck between the discriminatory impact of the PCP and the Respondent's reasonable needs.

74. It is a trite observation that the implications of dismissal for the Claimant were very significant. After 24 years' loyal service to the Respondent he lost the security of a well-paid job with a world-leading business. It is well established that those with disabilities face greater obstacles in the jobs market. The further difficulty was that the Claimant was faced with securing another position during an unprecedented public health crisis.

75. In our judgement, the Respondent's evidence in this case falls some way short of establishing that its ability to maintain production levels would have been compromised had the Claimant worked a regular day shift, or indeed that there was a material risk in this regard. The Respondent asserted that the shift (or more accurately the line worked on by the Claimant) might not run properly and that significant production could be lost. We are required to evaluate this critically and to consider whether, objectively, the Respondent has demonstrated a real need to dismiss the Claimant. We are not satisfied that the claimed production risks were as the Respondent has sought to portray them. In our judgement, the Respondent's case, at its highest, is that adjusting the Claimant's working pattern would have involved a degree of inconvenience in terms of managing him and would potentially have set an unhelpful precedent in terms of the wider workforce at Ware. In evaluating the production risk

and management challenge, we consider it relevant that the Claimant was supported by the Union in his request for an adjustment to his working pattern. The Union has a good working understanding of the shift arrangements at Ware and is closely involved when these are reviewed and changes made from time to time. It seemingly believed that the relevant adjustment could be made without compromising production on the line. As noted in our findings above, the Shift and Ways of Working Handbook envisages flexible working requests being made and agreed in relation to those who work shifts. Likewise, the Respondent's documented Disability in the Workplace Policy identifies that adjustments will be aimed at keeping an employee in their substantive role. We are not satisfied that dismissal was the only option available to the Respondent in this case. In our judgement, a more proportionate response would have been to identify a regular shift for the Claimant to work during the day. This may have been the Early or Late shift, or a bespoke shift for the Claimant. It may have involved the Respondent in seeking volunteers from amongst his colleagues to cover the shifts that he then no longer worked, or deploying agency staff, who are widely used across the business, to cover any resulting gaps. To this end, the Respondent might have increased headcount above the required RTO level, the Handbook having acknowledged a discretion in this regard. The Respondent is a highly profitable global business with the necessary financial, management and HR resources at hand to support the retention of a long-serving disabled employee in the Claimant's situation and to manage any flexible working requests that might be made by others on becoming aware of such arrangements.

76. As regards the practical implications, we are in no doubt that any day to day operational management issues that might have arisen would have been capable of being dealt with by the relevant manager on duty at the time. We give short shrift to the suggestion in Mr Waites' witness statement that the arrangement might have been detrimental to the Claimant's health; we suggest that any inconvenience to either party is infinitely less impactful than dismissal. To the extent that any issues might need to be managed by a single manager to ensure continuity and consistency, for example performance appraisal or absence management, such issues could be scheduled for discussion according to when the Claimant and the manager in question were both working the same shift or, where a discussion could not wait, the flexi hours policy could be deployed to facilitate meetings and discussions at the beginning and end of shifts. Given the Claimant's disability, we can understand why consistency would be desirable in terms of managing any issues arising as a result of his condition, but otherwise the Claimant was not someone in respect of whom it was suggested there were conduct or performance issues that necessitated close supervision by a single manager. In our judgment he was eminently capable of being managed from day to day by up to three different managers over the course of a three weekly repeating LEN shift pattern, with little or no inconvenience to the Respondent and no adverse impact in terms of the Claimant's health. In our judgement, the Respondent has belatedly sought to advance an ill-thought through and

ultimately insubstantial justification for dismissing the Claimant in circumstances where the real reason it remained opposed to any adjustment was the precedent it believed this might set. In all the circumstances, the Respondent has failed to discharge the burden upon it in s.15(1)(b) EqA 2010 and accordingly the Claimant's first s.15 complaint succeeds.

77. The Claimant's second s.15 complaint is not well founded. The level of his bonus award was not in consequence of something arising from his disability, namely disability related absence or performance. It reflected his personal difficulties in Q2 2020 when he was separated from his wife, working from home at the end of his bed, and he asked to work one lane, none of which was in consequence of anything arising from his disability.

78. Mr Blitz was right to describe the section 15 and 20/21 complaints as closely connected, or opposite sides of the same coin. It will be evident from our conclusions above that for the same reasons we conclude that the dismissal was not a proportionate response by the Respondent, we also consider that the Respondent breached its duty to make reasonable adjustments by failing to adjust the Claimant's shift pattern to enable him to work a regular day shift. And as we return to below, in our judgement it also means that the Respondent acted unreasonably in terms of section 98(4) of ERA.

79. As regards the remaining section 20/21 EqA 2010 complaints, identified as Issues D2 and D3 in the Case Management Summary, the first of those two complaints is well founded. The Claimant's history of employment and the evidence more generally in the case evidences that the Respondent has the ability and capacity to redeploy staff within its business both permanently and by way of secondment, not only as a means of mitigating redundancies but in order to fill vacancies, develop its staff and aid retention. There is no evidence before the Tribunal to suggest that the roles of Compliance Co-ordinator, Learning & Development Advisor and Document Co-Ordinator needed to be filled on a time critical basis. The evidence was that the positions were potentially open to external candidates, in which case the Respondent must have envisaged that the roles might not be filled for a period of time whilst any successful external candidate(s) worked their notice periods elsewhere. As an absolute minimum it would in our judgement have been a reasonable adjustment to short-list the Claimant for interview for all three positions. The Claimant had skills and experience relevant to each role. Having regard to the financial and other resources available to the Respondent we consider that it would have been reasonable for the Respondent to have gone further than simply short-listing the Claimant for interview and instead that it would have been a reasonable adjustment to have automatically offered him a trial period in any role for which he was potentially suited by reason of his skills and experience. We consider this included the Compliance Co-Ordinator role, albeit only from the point at which Mr Waites and Ms Found were made aware of his application and therefore in position to request of

the hiring and recruiting managers that this adjustment to the process should be made for him.

80. The complaint identified as Issue D3 does not succeed. Putting aside that the "support, training and adjustments" during the redeployment process were not further identified by the Claimant or on his behalf by Mr Blitz, any adjustments contended for must address disadvantages resulting from the relevant PCP, in this case the requirement to work shifts, in particular night shifts. There is no evidence, and it is not part of the pleaded case nor identified within the List of Issues, that the redeployment process itself placed the Claimant at a disadvantage, for example because he suffered fatigue or brain fog. It is unclear to the Tribunal how support, training or other unspecified adjustments might address the particular fatigue experienced by the Claimant as a result of working the LEN shift and which he was not in fact working during the redeployment process.

81. The Respondent has the burden of establishing the reason for dismissal and that this was a potentially fair reason within the ambit of section 98(2) of ERA. It has discharged the burden on it in this regard. We are satisfied that the Claimant was dismissed because the Respondent believed he was incapable by reason of ill-health of performing the duties of his job at the times required by the Respondent, namely in accordance with the LEN shift pattern. However, having regard to the size and administrative resources of the Respondent, we conclude that it acted unreasonably in relying upon his incapability as sufficient reason for dismissing him. We have identified the adjustments that it might reasonably have made to retain him in his role, or failing that so that he might be redeployed within its business. It follows that its failure to do so was unreasonable and accordingly that it dismissed him unfairly.

82. Notice of a Remedy Hearing together with any case management orders in connection with that Hearing will be sent to the parties separately in due course.

8 February 2022

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Employment Judge Tynan

Sent to the parties on:

11 February 2022

For the Tribunal Office