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EMPLOYMENT TRIBUNALS

Claimant: Sadie Stuart

Respondent: Princess Alexandra Hospital NHS Trust

Heard at: East London Hearing Centre

On: 10 – 13 May 2022

Before: Employment Judge P S L Housego
Members: Mr L O’Callaghan
Mr P Quinn

Representation

Claimant: Margherita Cornaglia, of Counsel
Respondent: Nathaniel Caiden, of Counsel

JUDGMENT

The claim is dismissed.

REASONS

Summary

1. Ms Stuart has autism spectrum disorder. On 09 November 2019 she started work with the Respondent as a Ward Assistant. Her 6 month probation was twice extended, and on 29 July 2019 she was moved to a less demanding ward, but in November 2019 her employment was terminated, as not having passed probation. Ms Stuart accepts that she had difficulty with aspects of the role, but says that dismissal was disability discrimination, following a failure to make reasonable adjustments. The Respondent says that the performance issues were such that this was a case of failing the probation period, after, they say, they did all they could to try to help Ms Stuart.
2. The Tribunal found that there were issues with Ms Stuart’s work as a Ward Assistant, which were a consequence of her autism spectrum disorder (as was Ms Stuart’s case), and while the Respondent made efforts to

accommodate her, the difficulties imposed by her autism spectrum disorder made it impossible for her to carry out the role of Ward Assistant. While Ms Stuart was hardworking likeable and willing, she simply was not able to do the job of Ward Assistant. This requires an ability to work autonomously and to prioritise matters which arise without warning during the shifts, and by reason of her autism spectrum disorder this is an ability that she does not have. The job could not be reduced to a set series of tasks, and it is an essential part of the role that the post holder be able to react to circumstances as they arise, using their own initiative to address matters.

3. The Tribunal did not think the Respondent handled numerous aspects of this matter well. There was no contact about the disability disclosed by Ms Stuart in her pre-employment questionnaire, as the policy clearly required. The first letter about performance of 18 April 2019 (283) did not refer to autism, when this was the reason why Ms Stuart was not performing well, and lacked empathy. The suggestion of a domestic role was made at a meeting with her Ward Manager (Ms Samkutty) on 26 June 2019 at which Ms Stuart was taken by surprise to see Tina Griffin of human resources, and at which her trade union representative was not present. Ms Stuart feared this was a precursor to dismissal and became upset. While the suggestion was repeated to that trade union representative in an email no formal offer was made stating that it would be a Band 2 job, as was the Ward Assistant role, with no reduction in pay. Although Ms Stuart accepted in her oral evidence that she was not interested in such an offer, the option should have been presented to her clearly. (While the Tribunal noted that Ms Stuart's trade union representative was a "*disability champion*" and could be expected to explain to Ms Stuart, that does not relieve the employer of the obligation to explain the option. Ms Stuart's objection to the change, reiterated in oral evidence, means this does not affect the outcome of this claim.) The occupational health reports were unspecific as to reasonable adjustments that might be made. There was no training for colleagues about how Ms Stuart's autism spectrum disorder would affect the way she approached her role, and it seems that some, at least, did not know of it, including her first mentor. Ms Stuart was initially placed in the most demanding of the wards, and not moved for some months. Ms Lopez said that she did not see any of the occupational health reports until this hearing, as (unhelpfully) Ms Samkutty remained the line manager even after the move to Tye Green Ward. Reference to Ms Stuart's previous employments by Tina Griffin was unhelpful, and reads negatively. On 26 June Tina Griffin wrote to Ms Stuart's trade union representative to discourage Ms Stuart from claiming disability discrimination, rather than ask if it was wished to raise such a matter. This indicates that there are a lot of learning points for the Respondent.
4. However, the fundamental issue was that the job of Ward Assistant requires someone to be adaptable, to react to circumstances, and to use their initiative to work out what task takes priority and then to do the tasks in order of priority. Unfortunately, Ms Stuart cannot offer these skills, whatever help she is given (and some help was given), and it is an essential requirement of the role. It follows that there was no failure to make reasonable adjustments and that dismissal was proportionate.

Law

5. Ms Stuart was employed for less than 2 years and so cannot claim unfair dismissal.
6. The claim of disability discrimination relies on S15 of the Equality Act 2010, for which no comparator is needed:

“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.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”

7. Ms Stuart also says that the Respondent did not make reasonable adjustments:

“20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

- (a) removing the physical feature in question,*
- (b) altering it, or*
- (c) providing a reasonable means of avoiding it.*

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

- (a) a feature arising from the design or construction of a building,*
- (b) a feature of an approach to, exit from or access to a building,*
- (c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or*
- (d) any other physical element or quality.*

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

21. Failure to comply with duty

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

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

...”

8. The parties helpfully agreed a list of issues, reproduced here:

Claim No 3201152/2020

IN THE EMPLOYMENT TRIBUNAL

EAST LONDON

B E T W E E N:

MISS SADIE STUART

and

THE PRINCESS ALEXANDRA HOSPITAL NHS TRUST

Claimant

Respondent

AGREED LIST OF ISSUES

Disability

1. The disability is Autistic Spectrum Disorder.
2. It has been conceded that this is a disability at the material time (see p.63).

Reasonable adjustments sections 20 EqA

3. It is accepted that the Respondent applied a provision, criterion or practice ("PCP") of requiring the Claimant to undertake full duties and in particular to meet the requirement to work independently and proactively to support the team in the safe delivery of care; be able to make decisions in her job role to support the team in the admission and discharge of patients; and be able to multi-task to a satisfactory standard during her probation period.
4. It is further accepted that this PCP placed the Claimant at a substantial disadvantage in comparison with persons who are not disabled, namely it put the Claimant at risk of dismissal as she was not able to perform her duties to the required standards.
5. The Respondent concedes knowledge of disability at the material time and of the substantial disadvantage from the PCP.

6. Accordingly, the only issue that is live is whether the Respondent failed to take such steps as were reasonable to avoid the above disadvantage? In particular, did it fail to make the following adjustments:
 - 6.1. To provide a [suitable] mentor / buddy; either via itself or via the Access to Work Scheme;
 - 6.2. Carry out a formal stress risk assessment to evaluate areas of work that caused the Claimant most difficulties, pursuant to HSE Guidance. [Consequently, set probation objectives in light of the formal stress risk assessment];
 - 6.3. Provide the Claimant with further time to meet her probation objectives following her transfer to Tye Green Ward.
7. Has the Claimant presented the claim before the end of the period of three months starting with the date of the alleged act or omission or, for conduct extending over a period for the purposes of s.123(3)(a), the date on which that period ended (allowing for the ACAS Early Conciliation process) (which is anything before 25 November 2019)?
 - 7.1. Applying the test in *Hull City Council v Matuszowicz* 2009 ICR 1170, CA when did time start running for the purpose of determining whether the Claimant is out of time? Specifically,
 - 7.1.1. If the Respondent did an act inconsistent with making reasonable adjustments, when did the Respondent do such an act?
 - 7.1.2. Otherwise, when might the Respondent reasonably have been expected to make reasonable adjustments?
8. If not, is it just and equitable to extend the time limit under s.123(1)(b) EqA?

Discrimination arising from disability section 15 EqA

9. The Claimant relies on dismissal as being unfavourable treatment, with the Respondent accepted that any dismissal can be classed as unfavourable treatment.
10. There is no issue that the dismissal was because of something arising in consequence of disability, namely Claimant inability to multitask or follow verbal instruction without seeking clarification and the difficulties she faced in carrying out certain tasks independently or proactively without reference to clear and concise written instructions, arose in consequence of her disability.
11. In terms of the legitimate aims:
 - 11.1. The Respondent contends that it is a legitimate aim of the Respondent as a provider of medical services to protect patient safety, provide good patient care, ensure

efficient flow of patients through the hospital, enable efficient and effective ward management and efficient, effective, safe and appropriate service and support to patients and staff.

11.2. The Respondent accepts that it required the Claimant to meet the minimum requirements of the role of a Ward Assistant in that she was required to:

11.2.1. work reasonably independently i.e. to work without frequently asking management what she should be doing;

11.2.2. work reasonably proactively / assess each situation herself;

11.2.3. be able to make independent decisions within her role to a required degree;

11.2.4. undertake an element of multi-tasking; with a requirement to respond to the needs of the ward as they present themselves and work to assess situations as they arise and as required rather than concluding one task necessarily before moving to the next.

11.3. The Respondent contends that it was proportionate, being appropriate and reasonably necessary, to apply the above requirements and to manage the Claimant's performance in the way that it did and ultimately to terminate the Claimant's employment when she was not able to meet the minimum requirements of the Ward Assistant role to be able to satisfy the Respondent's legitimate aim, even with significant support and adjustments.

11.4. The Respondent contends that the Claimant, even with the significant support and adjustments put in place, was not capable of fulfilling the adjusted role of Ward Assistant in a way that protected patient safety and achieved the legitimate aims referred to at paragraph 11.1 above and there were no less discriminatory means that were appropriate in all of the circumstances.

12. The Claimant accepts the above aims are legitimate aims. Accordingly, the sole live issue is one of proportionality.

Remedy

13. If the Claimant's claim is successful what compensation is appropriate in the circumstances?

13.1. What financial loss, if any, is directly attributable to the element(s) of discrimination found proven?

13.2. What is an appropriate award, if any, for injury to feelings caused as a result of the element(s) of discrimination found proven taking into account the guidelines in *Vento v Chief Constable of West Yorkshire Police (No 2)* [2003] IRLR 102?

14. Should any award be decreased on grounds including:
 - 14.1. Has the Claimant complied with her duty to mitigate her loss?
 - 14.2. Has the Claimant contributed to loss suffered such that any award for compensation should be reduced?
 15. Pursuant to the relevant provisions of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 (SI 1996/2803) is interest due on any compensation award? If so at what rate and from what date?
 16. Does any element of the compensation require grossing up to reflect taxation?
9. The Claimant must provide evidence from which this Tribunal might find disability discrimination. If she does so, it is for the Respondent to show that the reason was not, even in part, to do with disability¹. The question of whether an adjustment is or is not reasonable is a value judgment for which there is no burden or standard of proof. The same applies when deciding whether a particular matter is a substantial disadvantage to a disabled person by reason of a provision criterion or practice, and whether it is a proportionate means of achieving a legitimate aim. There is no requirement for a comparator for the S15 claim.

Evidence

10. The Tribunal heard oral evidence from the Claimant, and from four witnesses for the Respondent: two ward managers, Johncy John Samkuty and Terri-Gel Lopez, June Barnard (Associate Director of Nursing, who decided Ms Stuart's appeal against dismissal) and from Tina Griffin, the relevant human resources adviser. There was a bundle of documents of 416 pages.

The hearing

11. The hearing was in person, but June Barnard and Tina Griffin gave evidence remotely (one lives in Cornwall, the other in Aberdeen). No adjustments were necessary by reason of Ms Stuart's autism spectrum disorder. The Tribunal carefully explained the process to Ms Stuart, and answered her questions about it. There were very taxing technological issues with the parties who were remote, eventually resolved sufficiently for the hearing to be conducted fairly.

Submissions

12. Both Counsel prepared written closing submissions, and spoke to them. In essence the submissions of Ms Cornaglia (who also provided authorities

¹ The law about burden of proof is comprehensively set out in *Royal Mail Group Ltd v Efofi* [2021] UKSC 33 and the Tribunal applied the approach there prescribed.

and a helpful academic text on autism spectrum disorder) were that:

- 12.1. While Ms Stuart had disclosed her autism spectrum disorder on the correct form, and the form stated that occupational health would investigate when such an answer was given, nothing had been done.
- 12.2. There had been no action until March or April 2019, more than 3 months after she started, which had undermined Ms Stuart's confidence.
- 12.3. There had been no stress risk assessment as was indicated.
- 12.4. The first occupational health report had said only that Ms Stuart would need help to remain employed, but had not said in what way.
- 12.5. There had been no attempt to educate (or even notify) her colleagues about the effect of her autism spectrum disorder, so that the person assigned as her first buddy/mentor had become irritated by Ms Stuart's repetitive questioning and successfully asked to be rota'd for shifts that were not alongside her. Her ward managers were not trained in autism spectrum disorder, and so (even with their personal experience of family members) were not in a position to help, as they should have been.
- 12.6. There should have been an approach to Access to Work, which might have funded a part time or full-time mentor, either permanently or temporarily, to work alongside Ms Stuart.
- 12.7. There were two changes to Ms Stuart's workplace (so that she worked in three wards), from Saunders Ward to a 2 week spell at Lister Ward, then a transfer to Tye Green Ward. Ms Stuart did not respond well to changes, and so this was unhelpful.
- 12.8. Saunders Ward was very busy, with patient stays of only about 48 hours. It was fast paced, and unpredictable, which was the opposite of what Ms Saunders needed. She should have been placed at Lister or Tye Green (or another less stressful ward) from the beginning.
- 12.9. Having moved her to Tye Green Ward, she should have been given a full 6 months there as a probationary period, but after 3-4 months she was dismissed.
- 12.10. The investigation into her previous two unsuccessful probationary periods of probationary employment (in 2016 and 2018) was not proper and coloured the approach taken towards her, and was not disclosed to her.
- 12.11. With a staff of over 40 in both wards she worked in (not counting the 2 weeks in Lister Ward) duties could have been reallocated to leave Ms Stuart with a clearly defined pattern of work, particularly as she was well liked and was accepted to be a hard-working

person.

- 12.12. The EHRC Code was relied upon, and the Access to Work scheme, and the HSE Guidance on risk assessments. The lack of joined up thinking – lack of training for colleagues, disconnect between management and occupational health and delay – all made it harder for adjustments to be effective, in part as the stress of the situation made it more difficult for Ms Stuart to succeed. This was a vicious cycle of self-fulfilling failure.
 - 12.13. Had she had further mentoring support, and reduced objectives, and a full 6 months at Tye Green she would have had the opportunity to succeed in passing probation, and that these were not provided meant there were not reasonable adjustments made.
 - 12.14. The S15 claim clearly had the unfavourable treatment of dismissal, and that arose from something arising from Ms Stuart's disability (difficulty in meeting the three areas set out in April 2019). The aim of patient care was legitimate, so the issue was whether dismissal was proportionate. That was the same issue as whether there were reasonable adjustments. It was submitted that reasonable adjustments could and should have been made. Had reasonable adjustments been made Ms Stuart have kept her employment: it followed that dismissal was disproportionate as it would not have occurred had the reasonable adjustments been made.
 - 12.15. If the cost of a support worker was considered too high, that conclusion should only be reached if financial support was not possible. The Respondent had not explored the possible financing of a mentor, and so should not have ruled that out on cost grounds.
 - 12.16. Human resources were not supportive given the "*different light*" email (288) about past probation fails. There was the expectation that she would fail.
 - 12.17. As to time, the whole employment was a continuum up to and including the appeal hearing. Nothing was out of time, for that reason.
13. Mr Caiden responded:
- 13.1. While it was unfortunate that there had been no contact on receipt of the pre-employment disability form, Ms Stuart had expressly stated on it that no adjustments were needed by reason of her autism spectrum disorder. She had said that she needed help with data entry, but that was not part of her role as a Ward Assistant.
 - 13.2. At every step of the way more had been done than was indicated by the Trust's policies:
 - 13.2.1. Probation is supposed to be extended, if at all, only once, but Ms Stuart's probation was extended several times, and she had about a year's probation.

- 13.2.2. The supernumerary (mentoring) period on Saunders Ward was doubled from the usual two weeks, to four weeks, when (soon after she started) it was clear Ms Stuart was having difficulties.
- 13.2.3. The period on Lister Ward was as a supernumerary, and so was additional two weeks' training.
- 13.2.4. There was further extensive mentoring in Tye Green Ward.
- 13.3. Ms Stuart had always accepted – indeed it was her case – that she is unable (by reason of autism spectrum disorder) to work autonomously, and unable to prioritise the various tasks that it was her role to undertake. These were fundamental to the role of Ward Assistant, and while (to some extent) that might be reduced, these responsibilities could not be eliminated. At its most basic level this meant that Ms Stuart's disability meant that she was just not able to undertake the role of Ward Assistant.
- 13.4. The Respondent had tried to keep Ms Stuart employed: she is likeable and hardworking. They had taken note of her need for a structured day, and that part of her role involved domestic duties, which she carried out well. They had offered her a role as a domestic, at the same level of pay and status (Band 2) as her Ward Assistant role, as a redeployment (so no application or competitive interview)² which would have given her the predictability she needed. She had refused to countenance that prospect. The union had been told of that offer at the time. That was a reasonable adjustment to have offered, and Ms Stuart accepted in cross examination that had she taken it she would probably still be employed. It was a job that catered for all the difficulties Ms Stuart encountered in the WA role, and there was considerable overlap with the WA role (such as cleaning commodes). While Ms Stuart was entitled to reject the offer, that did not mean that it was not a reasonable adjustment to have offered. That being so, it was not possible for Ms Stuart to reject it and then claim disability discrimination for not making reasonable adjustments. The purpose of the Equality Act 2010 is not to keep people in jobs they cannot do, but to make changes to jobs so that they can remain employed, and that had been done.
- 13.5. As to the other changes made, as much had been done as could be done. It was not a good claim to point to failings in occupational health advice or lack of assessment. The issue was whether reasonable adjustments had been made, not what assessments had, or had not, been carried out.
- 13.6. In that connection, it was incumbent on the Claimant or her trade

² The evidence on this varied. In the hearing it was said to be a redeployment, so without competitive interview, but the contemporaneous evidence was that an interview had been fixed for the day after the meeting at which it was proposed, and cancelled when Ms Stuart said she was not interested in the change. Whatever the detail, it was not contested that if Ms Stuart had agreed to change to become a Band 2 domestic she could have done so in June 2019.

union representative to say what should have been done. None of the suggestions were apt. It could not be reasonable or proportionate for the Respondent to be required to engage a mentor to help Ms Stuart full or part time, temporarily or even permanently, particularly where they had offered her a role at the same pay and in the same place, which she could undertake with her disability without such a mentor. This would amount to hiring someone else to do the job for her.

- 13.7. This was not a “*slow learner*” case where more time was needed. It was the Claimant’s case that she simply could not meet the targets set in April 2019. That would not change however long she was given. The issue was only whether it was reasonable to require that she did the job she had been hired to do, it having been adjusted by removal of some of the duties, with its inherent need to be autonomous. It was submitted that it was.
- 13.8. The evidence was that at the appeal the union representative had accepted that there was an inevitability to the decision to dismiss Ms Stuart³.
- 13.9. The evidence was that the Trust dealt with those in acute need. That Ms Stuart was now successful in a role in a care home was not a parallel. The Trust dealt with acute cases. Even though Tye Green Ward was for older people this was not a parallel with a care home. Care Home residents were healthy. Those in Tye Green Ward were there for non-elective surgery following trauma, such as a fall and a broken hip. There were always a few patients whose condition was critical pre or post operation.
- 13.10. The move to Tye Green Ward was helpful to Ms Stuart, because there were fewer discharges a day, and part of the role was to make sure patients were discharged effectively, and their beds made ready for new admissions.
- 13.11. After 9 months in the role, including the reset of 2 weeks retraining on Lister Ward, it was not unreasonable of the Respondent to expect Ms Stuart to have got to grips with the role in a further 3+ months. By reason of her autism spectrum disorder, no matter what the Respondent did Ms Stuart could not fulfil the essential responsibilities of the role.

Background – uncontentious facts

14. The Respondent runs a hospital, the patients of which are in acute need.
15. Ms Stuart has autism spectrum disorder. Her somewhat idiosyncratic presentation means this is not hard to discern. She is a likeable individual, and essentially hard-working.
16. Ms Stuart needs order in her life. She says that traits of Obsessive

³ See footnote 5.

Compulsive Disorder sit alongside her autism spectrum disorder (there is no diagnosis of OCD and it is not a disability for this case). Her ideal day at work is to have a written list of instructions each of no more than two lines, to be taken in order and ticked off as each is accomplished (so that she always knows where she is in the list).

17. The role of Ward Administrator (“WA”) is to help the nurses focus on clinical duties by relieving them of administration. When patients need to be discharged the WA has to ensure that the vacated bed is to be readied (by the WA) for the next patient.
18. There are cleaning tasks, such as cleaning commodes. There is an interface with Health Care Assistants (“HCAs”) who also clean them. Used commodes represent a health issue and so cannot be left.
19. Ms Stuart used a notebook to note down the tasks which she was given, so that she could tick them off when accomplished. When she was interrupted in a task she would know to what task she needed to return. Even with this aid, she would, on occasion, get distracted and fail to complete a task (such as finishing the cleaning of commodes) or forget to take a patient for X ray.
20. While Ms Stuart well understands the need to prioritise the various tasks that she needed to do⁴, she is unable to prioritise tasks without a clear set of ground rules. Ms Stuart’s own example in her oral evidence was: is it more important first to take someone to the toilet, or to get them fed? She does not know. In her current role in a care home, this is easier for her, for if the task is to check continence pads, the task is approached by dealing with residents in the order in which they were last changed. In the context of acute wards, matters occur without notice and at random, and the WA has to decide the order of things to be done. This Ms Stuart cannot do.
21. The post of WA is to ease the burden on nurses, so that they can care for patients. It is not their role to micromanage the WA. The WA is expected to be proactive in seeing what needs doing, and then get on with doing it. It was difficult for, and an unwelcome distraction to, the nursing staff to have to answer questions from Ms Stuart about what she should be doing next, and to have to remind her of what she should be doing.
22. The nurse in charge of the shift (there were half a dozen different nurses who performed this role) would brief Ms Stuart every shift about what was likely to happen and what would be required of her in that shift. That would take perhaps 20 minutes, and Ms Stuart would make notes in her notebook accordingly. The Ward Managers could spend as much as 3 hours a week briefing Ms Stuart.
23. Action plans were prepared for each week, and annotated with outcomes. Often Ms Stuart would be recorded as doing a good job. However, there were recurrent problems. All stemmed back to Ms Stuart not being able to work autonomously, and being unable to prioritise work, and getting distracted so leaving a task incomplete after being interrupted by needing

⁴ She said in interview (181) that she would cope with the demands of the role by staying calm and prioritising work and asking for advice.

to do another.

24. The job description for the role (149) set out that

“The post holder is responsible for organising and prioritising own workload, identifying and responding to changing priorities when working within dictated deadlines.”

“Able to solve problems.”

“Must be practical and able to prioritise workload.”

Section (8) set out the most challenging parts of the job, and concluded:

“Day to day challenges according to service needs.”

The skills and aptitude section (9) stated:

“Able to work quickly and under pressure” and

“Able to use own initiative.”

It is clear that there is a key requirement for a WA to be able to respond proactively to the needs of patients, whose needs change frequently, and which can arise without advance notice, and to do so using her own initiative. While at the start of a shift there will be some structure to what is likely to be needed to be done, that will inevitably be subject to change depending on what happens during the shift.

25. In answers to questions put in cross examination Ms Stuart said that she had read the job description before the interview. Plainly she knew what the role entailed before she started work. The job description was available on the website advertising the role.

26. The chronology is:

26.1. 27 September 2018 – Ms Stuart was interviewed.

26.2. 09 November 2018 – Ms Stuart started work. She had a standard two week supernumerary period alongside Paul King, a WA. This was extended by another two weeks as it was felt that she was not ready to work alone.

26.3. 16 January 2019 – 1st occupational health report. This states that Ms Stuart and her mother saw occupational health and Ms Stuart was upset as she feared losing her job. It did not refer to autism spectrum disorder, and said, only, *“Sadie will need support to remain at work.”* It was addressed to Ms Samkutty, and copied to Ms Stuart. It was a self referral.

26.4. 01 March 2019 – 2nd occupational health report after assessment on 28 February 2019 (281-282). This refers to autism spectrum disorder. It reports that Ms Stuart perceived that she was bullied (no formal

complaint was ever made), and that frequent referrals to occupational health were causing her stress. This observation casts doubt on Ms Stuart's case that there was inadequate reference to occupational health support. The report suggested adjustments. A formal stress risk assessment was suggested. It suggested focusing on her strengths, such as cleaning commodes, taking samples to the lab and direct patient care. Multi-tasking should be reduced to a minimum and written instruction given as far as possible, although it was appreciated that the type of work she was doing required a degree of multitasking.

- 26.5. By 08 March 2019 there were regular objectives set and measured (214 - 239) against weekly action plans. These show a mixed picture, with some good days, but also highlighted a lack of consistency, and no sustained improvement.
- 26.6. On 18 April 2019 the probation period was extended (283). Three key areas were identified as requiring attention. They remained the same until her eventual dismissal. They were:
 - 26.6.1. Ability to work independently, without frequently asking the line manager what to do next.
 - 26.6.2. Work proactively to support the team delivering patient care – assess each situation, ask herself what she could do to help, and then do it.
 - 26.6.3. Make decisions – not *“what shall I do?”* but *“This patient is due for discharge, so I will gather up their things and then tidy the room.”*
- 26.7. These were three points which Ms Stuart accepts that she is simply unable to do, by reason of her autism spectrum disorder⁵. The issue, then, is whether it would be a reasonable adjustment to provide a buddy/mentor, or restructure the job to remove the obligation to work in this way, as Ms Stuart claims, and allow more time, or whether this is an inability to do the job at all.
- 26.8. On 11 June 2019 Tina Griffin found out that Ms Stuart had 2 previous roles with the Trust, and did not successfully complete probation in either case. Her email to Ms Samkutty (288) said *“This puts a different light on things”*. A *“statement of sorts”* was to be obtained from the WA who was working alongside Ms Stuart (in fact this was not done), but it was not stated the reason a statement was needed. Ms Samkutty was advised not to discuss previous work history with Ms Stuart. While Tina Griffin's witness statement and oral evidence was that this was relevant, as relevant to try to help Ms Stuart, so as not to repeat past problems, this cannot be right, as no one talked to Ms Stuart about it. It was rather that Ms Stuart had not passed

⁵ Appeal against dismissal, Pauline Priest, trade union representative *“The three areas that were a problem are the only 3 points that she cannot do. She cannot work independently, she cannot do these things due to her autism.”* (387)

probation twice before, and so was considered unlikely to do so on a third occasion. However, if that was the view, nevertheless efforts were made for a further 4 months to help Ms Stuart pass her probation.

- 26.9. On 26 June 2019 Tina Griffin met Ms Stuart with Ms Samkutty. The trade union representative was not available. Tina Griffin said there were strong points, particularly in housekeeping, and suggested that Ms Stuart be redeployed as a housekeeper/domestic. This would be a Band 2 just the same, but the details were not discussed. Ms Stuart did not want this change and became upset, and the meeting was curtailed. Tina Griffin then emailed the trade union representative setting out that the suggestion had been made and rejected (290). In part she advised that it was unhelpful for Ms Stuart to make allegations against Ms Samkutty that she was discriminating against her. This indicates that such an allegation was raised at the meeting and was unfounded. It would have been better to ask if there was a wish to bring such an allegation, and if so what it was. The Tribunal notes, however, that the claims made against the Respondent do not include any such allegation. That email also asked the trade union representative to suggest any adjustment that was thought reasonable. No suggestion was forthcoming, other than to explore how multitasking could be reduced, and to seek a stress risk assessment. The trade union representative did not ask further about the possible solution of Ms Stuart becoming a domestic.⁶
- 26.10. On 05 July 2019 there was a further referral to occupational health. The issues were difficulties in focussing on the daily task, not able to risk assess the ward, getting distracted easily and not being proactive.
- 26.11. Following a two week spell as a supernumerary WA on Lister Ward, on 29 July 2019 Ms Stuart moved to Tye Green Ward. In Lister Ward she worked alongside another WA, Jean Turner. Ms Turner found her satisfactory, and said so in a short email feedback (364). At Tye Green she worked 10 shifts alongside Martin Shaw, another WA, and then a further 22 shifts where their shifts overlapped between 12:00 – 15:30. This move was arranged as Saunders Ward had a swifter throughput of patients than Tye Green Ward, so Tye Green Ward might be less difficult for Ms Stuart.
- 26.12. The next occupational health report (from the referral of 05 July 2019) was dated 31 July 2019, from an external provider, Harlow Occupational Health Service Ltd. It reported (erroneously) that Ms Stuart had been employed for 3 years (her first short employment was in 2016, and appears to have been conflated with this employment.) It refers to adjustments by saying:

“As adjustments to support her in her role she does not multitask i.e. one task at a time, she writes a list of tasks and ticks them off when

⁶ The Tribunal did not find credible Ms Griffin’s oral evidence that the change to a domestic role might be a stepping stone back to becoming a WA: this is a role Ms Stuart cannot undertake successfully.

she has completed them, if she is given instructions these need to be in writing.”

This takes us back to the root of this case – is that so big a change that it means that the job is simply not being done? It cannot be a reasonable adjustment that the job holder does not do the job at all. Could the role of WA be undertaken by someone who is not proactive, who does not work autonomously, and who needs detailed written instructions as to how the working day is to be spent?

- 26.13. On 30 August 2019 Terri-Gel Lopez (Ward Manager at Tye Green Ward) emailed (340) Ms Samkutty (who remained notionally responsible for Ms Stuart as there was not a formal handover to Ms Lopez) to say that she was not comfortable signing Ms Stuart off as a probation pass after so short a period (Ms Stuart had some weeks holiday in August).
- 26.14. On 10 September 2019 Ms Stuart’s probation was again extended by Ms Samkutty (346), to end on 13 December 2019. The objectives to be met were those set out on 18 April 2019.
- 26.15. Ms Lopez again set action plans, and Ms Stuart’s performance against them was evaluated (347 et seq). Ms Lopez went through the job description and removed various tasks (the amended one is at 149 et seq).
- 26.16. On 25 November 2019 at a meeting, Ms Stuart was told that she had not passed her probation. She did not want to work a notice period. A letter of the same date (359-361) set out the reasons. It was stated that they had moved her to another ward, given mentorship support, redesigned her role, extended the probation period, involved occupational health support, and had regular support and 1-2-1 meetings. She had declined a change of role to that of domestic assistant. The use of a notebook had been encouraged, but had not solved the problems. After this length of time it was no longer possible to hope for improvement. There was a need on occasion to multitask, as this was in the nature of providing healthcare in an acute hospital environment.
- 26.17. On 20 December 2019 Ms Stuart appealed her dismissal. She stated:

“I am unable to multitask and consequently I need to work in a structured environment and therefore need to be given instructions in a different way that adequately reflects my disability requirements and unfortunately this has not been done.”

A statement of her case stated:

“... in all the action plans provided ... seem to show that she needed constant prompting and that is why she failed. She was given instructions that were multi-tasking. However when she carried out “one job at a time” then she was very successful and able to complete

her tasks.”

And

“Sadie can only deal with written instructions which are only 2 lines long”.

- 26.18. A management report was prepared, dated 03 February 2020 (374 et seq). Both Ward Managers contributed with the assistance of a human resources person.
- 26.19. The appeal hearing notes (10 February 2020) are in effect a transcript. The outcome letter (20 February 2020, 390-391) confirmed the decision to end Ms Stuart’s employment, for the reasons given in the letter of dismissal.

Facts found

27. The Trust’s occupational health department failed to deal with Ms Stuart’s disclosure of her autism spectrum disorder⁷ appropriately and in accordance with policy. While this is most unfortunate, fundamentally it made no difference, because Ms Stuart stated that she needed no adjustments because of her autism spectrum disorder.
28. The history of Ms Stuart’s employment is set out above. In summary, she started on Saunders Ward, where the patients stay only about 48 hours. It is a high-pressure environment. The WA’s role is to take the load from the nurses by arranging things, and when that is not required to do cleaning duties like sorting out used commodes. This means that there is a background of routine work, overlaid by short or no notice matters (which may include helping to deal with emergencies such as cardiac arrest).
29. Her particular needs, as someone with autistic spectrum disorder, were not assessed when she joined (as they should have been) but as she said that she needed no adjustment this made no difference to her ability to do the work. Her colleagues and managers were not briefed as to her autism, and how it would affect how she worked. That would have been good practice and made Ms Stuart’s work life better.
30. When, soon after she started work, problems became apparent, the Ward Manager, Johnny John Samkutty, was as helpful as could be expected, and the two week mentorship was doubled.
31. Ms Stuart said that she gave Ms Samkutty a copy of a comprehensive expert diagnostic 2016 report (161 et seq), soon after starting work. This Ms

⁷ Page 192 – the “yes” box was ticked in answer to the question “Do you suffer from a recognised disability?”. The pre-employment health screening form (197) said “*I have a disability under the autism spectrum disorder*” and in answer to the question as to whether adjustments were needed ticked “yes” and “*I need assistance with data entry and computer tasks*”. There were no such tasks for Ms Stuart in her WA role. A further form (198) asked if she had a disability that could cause difficulty in carrying out the role, and she ticked “yes”, but then ticked “no” to the next question which asked if she needed any adjustment. The form stated that a yes to either question would lead to a further assessment. There was an occupational health report on 16 January 2019, but this appears to be a subsequent self-referral by Ms Stuart.

Samkutty denied. On balance we find that Ms Stuart is mistaken in her recollection. The report was provided by Ms Stuart's mother for the dismissal hearing. It makes no difference. Ms Stuart is a person of transparent honesty. She has no reason to have any reticence about her autism spectrum disorder, and it was readily apparent from her presentation in the hearing, perhaps best described as a little ideosyncratic. Particularly as both ward managers have close family connection with autism spectrum disorder it is inconceivable that it did not occur to them that Ms Stuart might be on that spectrum. Autism spectrum disorder was referred to in the 1st occupational health report dated 16 January 2019, addressed to Ms Samkutty (and which Ms Samkutty must have read at the time).

32. It has always been accepted by Ms Stuart, her Counsel and her trade union representative, that Ms Stuart cannot multi-task. She cannot work autonomously. She understands the need to prioritise competing demands on her time, but unless she has a clearly defined set of parameters to use to decide how to prioritise these demands she is unable to order the demands on her time. It is not possible to devise a reasonable adjustment to address this difficulty.
33. The chronology and undisputed facts are set out above.
34. The adjustments made were as much as could be done without having someone manage Ms Stuart directly. That would remove much of the benefit of having a WA. It would need to be someone such as the nurse in charge of the shift, and that is a very busy role, running a large ward with acute patients. It is not possible to think it reasonable that this person would have to check up on what Ms Stuart was doing and to remind her to finish cleaning commodes or take someone somewhere. The key point of the role of the WA is to relieve the workload of the nurses so that they can focus on patient care: this would undermine the rationale for the role.
35. The answer to the question posed at 26.11 above is that the Tribunal decided that it is not possible for the role of WA to be undertaken by someone who needs direct supervision.
36. The move to Tye Green Ward was accompanied by more mentorship. While a WA will typically get two weeks mentorship, Ms Stuart had four weeks on Saunders Ward, two weeks on Lister Ward, two weeks on Tye Green Ward and further overlapping shifts there. While the mentors were not told about Ms Stuart's autism spectrum disorder (which will inevitably have undermined the effectiveness of their mentorship), and the first found the constant questions of Ms Stuart onerous, and might not had he been educated about her autism spectrum disorder. The extension of mentorship was more than adequate as a reasonable adjustment to make sure that Ms Stuart knew exactly what the role was, and how it should be carried out.
37. The action plans and reports were carried out regularly. The nurse in charge would always spend time briefing Ms Stuart. Both Ms Samkutty and Ms Lopez spent considerable time once a week briefing her. This was entirely adequate support.
38. Ms Stuart was encouraged to use her notebook, and the Ward Managers

would also write in it. This was sensible.

39. Whether the probation period on Tye Green was four months or six months (including a period of annual leave) the result would have been the same. Ms Stuart's autism spectrum disorder means that however long she worked on Tye Green Ward she would not have passed her probation.

Conclusions

40. For these various reasons, the claims are unsuccessful. At root, the role of Ward Assistant is an autonomous one. It cannot be other. While there can be direction as to what is intended to happen on the ward, which was the subject of a pre-shift briefing, the reality will always be different. Ms Stuart's autism spectrum disorder precludes her from carrying out those changeable aspects of the role. The effect can be reduced in the ways set out, but it remains a central requirement of the role. Not being able to deal with this requirement means that Ms Stuart is not able to undertake the role successfully. The aims are legitimate – patient care – and, there being no alternative, it has to be proportionate to dismiss Ms Stuart in pursuit of those aims.
41. The adjustments made to the role were as many as could be envisaged (and Ms Stuart does not say otherwise, other than seeking to employ a permanent mentor). There was the possibility of a domestic role which Ms Stuart could have undertaken, but did not want. That reflects also on the proportionality or otherwise of recruiting a mentor (full or part time, permanent or temporary) to support her. It is not proportionate. It would double the cost to the Respondent (a mentor would be unlikely to be paid less than Ms Stuart). The mentor would have to be present throughout all shifts, as the multitasking issues occur at random. The mentor would direct Ms Stuart as to what to do next: but what else was the person to do all day? Extending the probation in Tye Green to six months would not achieve anything. The ward administrator roles on the wards are all similar, and Ms Stuart had nearly a year on them. The effect of Ms Stuart's autism spectrum disorder on her work was not going to diminish if she had a few more months' probation.
42. Further, as set out above (and while noting the many ways this could have been handled better), Ms Stuart had the opportunity to redeploy to a role as a domestic, in the same place, doing some of the same work, and at the same Band 2 level and salary, and she has all the skills to make a success of that other role. That is the essence of a reasonable adjustment – to fit the person to the job. It was offered. That Ms Stuart was entitled to refuse does not mean that dismissal from the job she could not do was disability discrimination.
43. It is not necessary to decide the time issues, as the claims fail on their merits. However, everything that occurred before reasonable adjustments were put in place (in March 2019) is well out of time, and there would be no good reason for it to be just and equitable to extend time for such matters.
44. The Tribunal accepted Mr Caiden's submission that the focus of attention

for the claim for reasonable adjustments is on what was done, or not done, to help Ms Stuart. Any failure to undertake an assessment, while it may explain why a Respondent failed to make an adjustment, is not itself a failure to make a reasonable adjustment. An assessment is not an adjustment. An assessment helps decide what adjustments should be made.

45. The Tribunal also accepted Mr Caiden's submission that any resultant stress or anxiety would not assist the claim, for the detriment must arise from the disability, and that is autism spectrum disorder, not anxiety. (If stress or anxiety exacerbated the effect of the disability that would be connected with the disability, but that was not the submission).

Employment Judge Housego

13 May 2022