EMPLOYMENT TRIBUNALS

Claimant: Mr A K Pollard Wilson

Respondent: Liverpool University Hospitals NHS Foundation Trust

HELD AT: Liverpool **ON:** 30, 31 August, 1 and 2 September 2022

BEFORE: Employment Judge Johnson

MEMBERS: Mr J Murdie
Ms H Price

REPRESENTATION:

Claimant: Ms L Millin (counsel)
Respondent: Mr A Gibson (solicitor)

JUDGMENT

The judgment of the Tribunal is that:

1) The complaint of unfair dismissal is well founded and succeeds. However, because the dismissal results from procedural unfairness, the Tribunal finds that the adoption of a fair procedure would have delayed a fair dismissal to a date no later than 14 September 2020.

2) The complaint of direct disability discrimination (s.13 Equality Act 2010) is not well founded and is dismissed. This means the complaint is unsuccessful.

3) The complaint of discrimination arising from a disability (s.15 Equality Act 2010) is not well founded and is dismissed. This means the complaint is unsuccessful.

4) The complaint of a failure to make reasonable adjustments (ss.20 & 21 Equality Act 2010) is not well founded and is dismissed. This means the complaint is unsuccessful.

5) The case will proceed to a remedy hearing with a hearing length of 1 day on Friday **2 December 2022** to determine remedy in the successful unfair dismissal complaint. The hearing will take place remotely by CVP.

REASONS

Introduction

1. The claim arises from the claimant's employment with the respondent as a Band 5 Staff Nurse from 1 July 1999 to 14 August 2020 when his employment was terminated.

2. A claim form was presented on 10 November 2020 following a period of early conciliation from 21/10/20 to 9/11/20 and complaints of unfair dismissal, disability discrimination, discrimination arising from sexual orientation, breach of contract and unpaid holiday pay.

3. The respondent presented response on 21 December 2020 resisting the claim and seeking further particulars.

4. The case was subject to case management at a preliminary hearing before Employment Judge ('EJ') Buzzard on 25 February 2021. The final list of complaints were identified and the complaints of discrimination arising from sexual orientation, breach of contract and unpaid holiday pay were withdrawn and were not considered at the final hearing. Further particulars were ordered to be provided by claimant and in reply, an amended response was provided by the respondent.

Issues

5. A final list of issues was prepared by Ms Millin and amended slightly to account for s13 treatment which allegedly took place on 18/2/20 and time limits issues under s123 Equality Act 2010 ('EQA'), which were omitted from the final list. The list included complaints of unfair dismissal, direct discrimination (s.13 EQA), discrimination arising from (s.15 EQA) and a failure to make reasonable adjustments (ss.20&21 EQA).

6. The list was included within the hearing bundle and there is no need to repeat it here.

Evidence used

7. In terms of the claimant's witness evidence, the Tribunal heard from the claimant himself and his husband Ian Pollard Wilson.

8. In terms of the respondent's witness evidence, the Tribunal heard from (in order):

    a) Louise Walsh (Thoracic Matron)
    b) Janet Richards (Clinical Business Manager for Outpatients and Psychology)

c) Wendy Thompson (Breast Screening Service Manager)
d) Sharon Mills (Deputy Office Manager – Breast Screening)
e) Alice Wood (Assistant HR Business Partner)
f) Alison McCann (HR Business Partner)

9. The agreed hearing bundle ran to in excess of 400 pages and consisted of pleadings, correspondence and relevant policies and procedures produced by the respondent concerning employee relations.

10. The witness statements were provided in a separate bundle and some amendments were required to page numbering referred to within the statements, given that they were prepared before the final version of the bundle was produced.

11. An issue arose on day 3 when Ms Millin identified policies within the hearing bundle and which referred to the *Trust Reasonable Adjustments Policy* (p.296) and *Supporting Staff with Disabilities Policy* (p.346), but which were not included within the bundle. Ms McCann was able to assist the Tribunal in her evidence concerning these policies and this matter will be dealt with in the findings of fact below. However, for the purposes of the hearing, the Tribuinal was satisfied that it was not necessary nor in the interests of justice to obtain copies of these documents.

12. The Tribunal acknowledged that during the majority of these proceedings, the claimant has been unrepresented and Ms Millin was instructed to represent him the weekend before the hearing commenced. Her involvement (and that of Mr Gibson were of great assistance in allowing the case to be resolved during the 4 days listed for the final hearing and we are grateful to them both for the sensible and pragmatic way in which they represented the parties in this case.

Findings of fact

<u>The respondent</u>

13. The respondent is an NHS Hospital Trust in the Liverpool area. The relevant Trust for the purposes of this claim was originally the Aintree University Hospital NHS Foundation Trust (‘Aintree’) and following a merger on 1 October 2019 with Royal Liverpool and Broad Green Hospital Trust, it became Liverpool University Hospitals NHS Foundation Trust (known as ‘LUHFT’).

14. Prior to the merger, both hospitals had their own HR policies and procedures and Ms McCann who is a HR Business Partner, gave convincing and reliable evidence which explained how they were affected by the merger. This involved HR, trade union officers and managers across both former Trusts considering the totality of the policies and procedures and selecting those elements which provided the best protection to employees for adoption as the LUHFT policies and procedures.

15. In theory, the *redundant* policies and procedures not selected would cease to be used following 1 October 2019, but Ms McCann conceded that some continued to be referred to by managers and remained identified in documents included within the hearing bundle. Accordingly, the Tribunal makes its findings of fact as appropriate based upon the evidence available within the hearing bundle and the witness evidence, especially that provided by Ms McCann and Ms Wood of HR.

Claimant

16. The claimant Mr Pollard Wilson, (whom we shall continue to refer to as *the claimant* so as to avoid and confusion with his husband who is also Mr Pollard Wilson), was a Staff Nurse originally employed by Aintree and at the time of his dismissal, he had transferred to LUHFT. He started working for Aintree on or around 1 July 1999 and began working as a healthcare assistant. He subsequently trained to be a nurse, qualified in 2004 and by 2015, he was a Staff Nurse, Band 5.

17. The claimant unfortunately suffered a stroke on 15 May 2015 which gave rise to a number of significant impairments and he was absent from work for many months. He was subject to the Attendance Management policy and was in danger of being dismissed in 2016 by reason of medical incapability. However, in order to give him an opportunity to rehabilitate and reach a point where he could return to work, it was agreed that he would take a 3-year career break, and which was permitted by the Career Break Policy. This would ensure that he was retained as an employee, but he would not be paid during the period of the break.

18. The Tribunal accepts that this was an unusual step for Aintree to take, especially given the claimant's clinical role, but it was an adjustment which aimed to give him an opportunity to be able to return to his substantive position. The break was discussed at a meeting on 14 September 2016 and began shortly afterwards.

19. During the period of the career break, the claimant allowed his nursing registration to lapse and he did not undertake any continuing professional development training. This was understandable, given that his primary focus during this period would have been rehabilitation and no criticism is made of him in relation to this omission.

Claimant's return to work following the career break

20. However, in 2019, Louise Walsh who was the Thoracic Matron ostensible responsible for the claimant 's team was informed by Alice Wood that his career break would be coming to an end and he needed to be contacted to discuss his circumstances and what his intentions were concerning work.

21. A meeting was arranged for 11 October 2019 in order that the claimant's return to work could be discussed. Both Mrs Walsh and Miss Wood attended on behalf of management and the claimant attended with his husband Mr Pollard Wilson. There was no dispute that at this meeting, the claimant mobilised himself using a wheeled *zimmer*-style frame with a seat fitted and

he clearly continued to have difficulties with his mobility. He also had difficulties with his speech and the Tribunal accepts that Mr Pollard Wilson provided support to the claimant with communication during the meeting. The claimant accepted that he could not *and did not* want to return to work to his substantive role of Staff Nurse.

22. It was accepted by the Tribunal that the claimant would in any event been required to have return to work nursing training and complete a return to practice course had he wanted to resume a nursing role and that there may have been less physical nursing roles available. However, the claimant was clear that he did not want to return to work as a nurse but was interested in remaining employed by LUHFT in some capacity.

23. Mr Pollard Wilson explained to Mrs Walsh and Miss Wood that his husband was looking at a clerical role and Miss Wood explained that there was nothing suitable available within the Thoracic Ward where he had worked before his health issues arose. However, it was suggested that instead redeployment elsewhere within LUHFT could be considered. During this meeting it was explained that once placed on the redeployment register, an employee would have 12 weeks in which to find alternative employment and if no suitable alternative role was identified within this period, the employee would be dismissed. Mr Pollard Wilson said that this did not seem to be fair, but the claimant himself confirmed that he wished to be placed on the register to see whether a suitable job could be found. The Tribunal accepted that at this stage, this appeared to be the only way that an alternative job to his substantive role could be identified and the claimant agreed to this course of action.

24. First of all, he was referred to Occupational Health ('OH') in order that his capacity to return to work could be considered and the Tribunal understood this is a standard step for a reasonable employer to take when dealing with an employee who has been absent on long term sickness absence, (which effectively in this case the career break covered).

25. The OH doctor, Dr Ku Sarangi examined the claimant on 19 November 2019 and produced a report which concluded that he had made progress in his recovery following his stroke but continued to require the assistance of a wheelchair or walker for mobility. Dr Sarangi also concluded that while his speech remains impaired, the claimant's communication was felt to have improved and that these improvements were sufficient to permit a return to work. Various adjustments were recommended in relation to mobility and access, assistance with the carrying of heavier items, but that Dr Sarangi considered that the claimant should be able to communicate despite changes in his speech. It was felt that he should be restricted in his hours of work, but no specific maximum was identified. Nonetheless, it was sufficiently clear from this OH report that part time work should be considered together with a phased return in a clerical role.

26. A meeting to initiate medical redeployment took place on 14 January 2020 at Aintree Hospital with Ms Walsh and Ms Wood attending on behalf of management. The claimant was accompanied by his husband. A letter was

sent on 20 January 2020 by Ms Walsh confirming what was discussed. The claimant was advised of his potential termination of contract in 12 weeks with a termination date of 8 April 2020 if no alternative role was found through redeployment. The claimant was informed that he would be given access to available roles and would be given 3 days to express interest in them once notified. There would then be a discussion with the manager looming to recruit for the role in question and if it is agreed that the claimant was suitable for the post, redeployment would then take place.

27. Although the Tribunal accepts that LUHFT's policies and procedures would have included references to the duty to make reasonable adjustments and the OH report had already informed management of the claimant's particular needs in that regard, it seems surprising that no mention was made of how this duty would be addressed as part of redeployment exercise. No prompt was therefore provided to the claimant to request these adjustments.

28. The Tribunal accepts that this letter provided the claimant with a notice of termination and an opportunity to appeal this notice within 14 days. No such appeal was made by the claimant, (or on his behalf by his husband).

29. As the claimant had now ceased his career break, he was regarded as having returned to work (albeit not to have resumed his substantive role) and his pay was restored at the substantive Band 5 grade. This was a generous step for LUHFT to make given that C was no longer able to resume working as a Staff Nurse and his lapsed qualification would have prevented his return even if he had been fit to do so. This pay continued for the duration of his remaining employment, (although it is understood that had he secured alternative employment, he would have eventually been placed in the pay band applicable to that job)

<u>The redeployment process</u>

30. Between 15 January 2020 and 4 March 2020, the claimant was sent 11 potential administration roles with a mixture of hours of work being described. Even though ideally it was something which could have been reinforced in the letter of 20 January 2020, the Tribunal accepts that it would have been reasonable (as Miss Wood asserted), for LUHFT to expect the claimant to ask whether he could work more flexibly in respect of those roles which described greater hours of work than he could work.

31. In any event, the claimant expressed an interest in 4 roles, although he only attended meetings in relation to 2 roles, namely clinic clerk and Breast Screening Clerical Officer.

Meeting 12 February 2020 – Clinic Clerk role

32. Janet Richards who was at that time Clinical Business Manager for Outpatients and Psychology was asked by Miss Wood to arrange a meeting with the claimant describing him as being on the redeployment register in order to assess his suitability. No mention was made concerning the reasons for his redeployment, his OH recommendation or his need for reasonable adjustments. While the Tribunal understands the concerns which an

employer has concerning confidentiality, in the case of the claimant, it would have been helpful for all concerned to have basic information provided to the relevant managers, in order that they would be able to consider potential adjustments that may be required, both in relation to the meeting and the actual role under consideration. This is not to say that the managers were necessarily uncomfortable in dealing with a disabled employee with impairments of the nature experienced by the claimant, but the meetings could have proceeded more smoothly had more appropriate information been made available.

33. As it was, on balance, relevant managers appeared to be taken by surprise as to the claimant's impairment and the adjustments that he requested. Mrs Richards confirmed that she was surprised by the claimant's communication difficulties on the phone and his need to be accompanied by his husband.

34. We accept that Mrs Richards had to be clear in describing the requirements of the role and that the work could be challenging and intensive, with up to 100 patients being seen in a single day and that travelling some distance between buildings could be necessary to obtain records etc. Reasonable adjustments were discussed, including the use of the on-site shuttle bus and that nonetheless considerable walking could be required. Although there was some disagreement concerning exactly what was said, the Tribunal accepts on balance that Mr Pollard Wilson suggested that LUHFT should provide an electric wheelchair to assist the claimant with his mobility and that Mrs Richards were surprised by that request, knowing that her department's budget was limited. Moreover, she acknowledged that it would not address all of the issues which may require adjustment. She did accept that because lifting might be an issue for the claimant, consideration could be given to a lockable trolley being provided which could carry the files being moved between buildings.

35. Perhaps the most significant matter in issue was the question about how the claimant could deal with aggressive or agitated patients. We accept that this was a question which she asked of all candidates for roles within this department because it covered the Liver Clinic which dealt with patients who were alcohol dependent and who were more anxious than normal, but also because incidents could arise with any patient who became agitated due to tense situations such as cancelled or delayed appointments. It was a reasonably question to ask and would have been asked of all employees.

36. Despite what the claimant and Mr Pollard Wilson said, on balance we do not accept that Mrs Richards was casting doubt upon the claimant's ability to '*run away'* in such a situation and instead was more concerned about his ability to de-escalate the situation or seek management support. The claimant was understandably anxious about securing alternative employment and his husband was naturally supportive with this process, but we are unable to conclude that Mrs Richards raised this matter in a way which was directed towards the claimant as a disabled person. There was a copy of a handwritten note dated 13 February 2020 produced by Mr Pollard Wilson which referred to a phone conversation with Ms Wood and describing Mrs Richards at a meeting (confusingly) dated 7 February 2020 (and not 12

February 2020), was negative and insulting. However, while Ms Wood recalled a phone conversation with Mr Pollard Wilson, no emails or letters produced during the redeployment process raised these matters as an issue. On balance, we must conclude that Mr Pollard Wilson in his telephone conversation with Ms Wood did not refer to Mrs Richards' behaviour and had it done so, we accept Ms Wood's evidence that she would have investigated it further

37. Ultimately, we accept that during the redeployment interview on 12 February 2020, Mrs Richards discussed the difficulties that the role might present and felt that the role would not be right for the claimant given the concerns confirmed by OH regarding his mobility, his requirement for quick communication, high volume of work with patients attending, phone calls and dealing with clinical staff. She confirmed that had there been some suitability for the role, she would have been happy to consider reduced working hours. However, she said that while she discussed restricting the claimant to parts of the role, it was not possible to remove elements from the job to reduce the potential impact upon C without having to create additional roles or significantly reducing the function of the role.

38. As a consequence, the Tribunal accepts on balance, that this was a reasonable decision and trial period would not have been of assistance, given the IT training required which could take up to 3 months before being completed. A problem appeared to arise from the claimant transferring from a clinical role to an administration role which meant he did not have the transferrable skills involving systems which admin staff being redeployed would have had. This added to the challenges confronting the claimant and the managers working with him in this particular redeployment issue.

Meeting 18 February 20 – Breast Screening Clerical Officer role

39. This post was a 0.6 full time equivalent role which meant that the expected hours of work were 22.5 hours per week and was paid as a Band 2 role. The clinic was situated in Broad Green hospital in Liverpool.

40. The interview was conducted by Mrs Thompson, who was accompanied by Sharon Mills. On this occasion, the claimant attended the appointment using a wheelchair and again accompanied by his husband. An issue arose because managers had not been informed that the claimant was using a wheelchair, although Mrs Thompson did confirm that she was aware prior to the meeting that the claimant had been a staff nurse and had previously suffered a stroke. The consequence was that Mrs Thompson had to quickly change the meeting room so that a larger venue could be used which would accommodate everyone and the additional space required for the claimant's wheelchair.

41. Mrs Thompson discussed the role and explained that there would be taking large volume phone calls for appointments, data inputting and given the nature of the service, the work could be intensive involving the movement of files around departments, using step ladders and visiting the mobile units on site. She acknowledged that accommodation could be made for the mobility

issues experienced by the claimant and in relation to this matter, an issue then arose which involved some dispute between the parties.

42. The claimant argued that one of the two managers asked him to get up out of his wheelchair and show them how far he could walk. This was disputed by the two managers who said that it was Mr Pollard Wilson who was keen for the claimant to demonstrate how mobile he was and that despite the perceptions being given by his use of the wheelchair, he should stand up and show them how far he could walk.

43. While both managers denied what was alleged against them, Mrs Thompson was not challenged in cross examination and having considered all of the evidence, the Tribunal finds on balance that the managers' version events was the more accurate. The incident did not feature as part of the ultimate grievance and had it been raised earlier, this is something which could and would have been investigated. The Tribunal accepted that there may have been an anxiety on the part of the claimant and Mr Pollard Wilson to demonstrate the claimant's capacity for this clerical role and this may have resulted in him getting out of his wheelchair, but we do not accept that it took place at the prompting of management.

44. There was a discussion between everyone present at the end of the meeting and it was agreed that the claimant would not be suitable for the role because of the range of challenges required to be dealt with and the claimant accepted that his was the case in his oral evidence.

Remainder of redeployment period following the introduction of 'TRAC'

45. On 5 March 2020, LUHFT introduced its 'TRAC' system, which Ms Wood explained moved the traditional manual system of redeployment to an electronic system. Employees on the redeployment list under the TRAC system would receive daily emails providing details of all available vacancies across the LUHFT trust. It would be for the employee to identify those vacancies that they were interested in and the expectation was that they would investigate each role themselves before expressing an interest. There was no dispute that the claimant was subject to the TRAC system from this date.

46. Ms Wood referred to TRAC as being a *'slicker system'* on a number of occasions during her oral evidence. While this might have been the case in broad terms, she acknowledged that when the TRAC was introduced, there were a number of *'IT glitches'.* There was a conversation between Mr Pollard Wilson and Ms Wood on 3 March 2020 expressing concern that the claimant had not been provided with emails from the TRAC system. However, we accept Ms Wood's evidence that as this discussion took place a few days before the TRAC was formally introduced, which would have been why the email had not been sent and that following its introduction, the claimant was provided with the TRAC email updates.

47. This system was applied to all employees and in the same way, regardless of the reasons for them being on the register. What was clear to the Tribunal,

however, was that the affected employee was effectively left to get on with their redeployment exercise and there appeared to be an absence of 'nudging' or prompts from HR or relevant LUHFT departments.

48. Following the lockdown imposed by the government as a result of the Covid pandemic, the LUHFT like every NHS trust faced a huge increase in its workload with the additional demands arising from the need for greater personal protection to reduce the risk of infection.

49. The claimant received a government letter on 3 April 2020, notifying him that he was more vulnerable and that he needed to shield for at least 12 weeks from that date. Ms Wood wrote to him on 8 April 2020 acknowledging his need to shield and confirming that his redeployment period would be *'paused'* for that period. This mean that the end of the redeployment period was moved from 8 April 2020 to 10 July 2020, which included not only the 12-week shielding period, but an additional 2 weeks to allow further redeployment opportunities to be explored before termination of employment took place once redeployment resumed. The letter was clear in restating that if the claimant was unable to find a suitable alternative vacancy as part of the redeployment, his employment would be terminated on 10 July 2020.

50. Ms Wood conceded in her statement that there was a break in the jobs placed on the redeployment register between 7 April 2020 and 1 July 2020, because the claimant was the only person on the register at that time and was unable to access meetings.

51. Ms Wood sent a further letter on 5 June 2020 extending the redeployment period to 14 July 2020 and again confirming termination of employment if no alternative work was found by that date. A further extension was notified in her letter dated 25 June 2020 extending redeployment to 14 August 2020 and confirming termination by date on the same basis as before. Additionally, by this date, it was possible for meetings to take place remotely by way of Microsoft Teams and although this was an adjustment available to all employees on the redeployment register, it would have assisted the claimant by not having to increase his risk of infection from Covid by attending LUHFT premises.

52. In the meantime, the claimant had sought support from Angela English an Outreach worker of Sahir House and she was allowed to contact Ms Wood directly in order that the claimant's employment documents could be obtained. Ms Wood provided these documents. The Tribunal understood that Ms English did not play a direct role in supporting him through the redeployment process, other than to ask for an extension following the claimant's notification that he must shield.

53. Mr Pollard Wilson emailed Ms Wood on 12 August 2020 to remind her that the 14 August 2020 date was fast approaching and seeking confirmation as to what would happen next and whether an extension could be provided to his husband the claimant for the redeployment period. He felt that 4 months had not been enough time for redeployment and that the claimant had been frustrated because 95% of the jobs advertised on TRAC were full time roles.

She replied on 13 August 2020 explaining that 15 jobs had been notified pre TRAC and 86 jobs were notified on the TRAC since its introduction. She reminded the claimant and Mr Pollard Wilson that the employee needed to contact the manager recruiting and discuss the requirements of the role and issues that they might have. She concluded by confirming that the claimant's employment would terminate on 14 August 2020 and that no further extension should be granted. Her letter included a reminder that the claimant had remained on full pay since he returned from his career break at the beginning of the year and he had therefore been receiving full Band 5 pay while on the redeployment register for 8 months.

54. The Tribunal was provided with a copy of the relevant TRAC redeployment vacancies and there were a variety of hours identified including full time, part time and no specified time. As a large organisation with many employees working flexibly, the expectation of the LUHFT was that employees would be aware of the right to request flexible hours and should make requests for flexibility in hours when expressing an interest in available roles.

Dismissal

55. The claimant's employment came to an end on 14 August 2020. On 18 August 2020 Mr Pollard Wilson raised questions in an email to Ms Wood concerning outstanding pay and also querying whether a formal termination meeting would take place. In her reply of the same day, Ms Wood provided the necessary answers to the questions, but explained that the formal termination meeting took place at the beginning of the redeployment exercise on 14 January 2020 and therefore no further meetings were required.

56. This reply appeared to be incorrect as the LUHFT Sickness Management policy introduced on 7 January 2020 dealt with the matter of redeployment and provided the following information:

'If no suitable post is found during the redeployment period, a final meeting will be held with the employee at which time it will be confirmed that the contract of employment will end. A HR representative must be present at this meeting. The staff member should be informed of their right to representation by either a staff side representative or work-based colleague at this meeting. The 4-month redeployment period may be extended with mutual agreement.'

Both Miss Wood and Mrs McCann conceded during the oral evidence that with hindsight, both a dismissal meeting should have been offered and also a formal letter confirming dismissal should have been sent. This must be correct both in terms of in-house policy, but also in terms of the overall good practice that should be expected of any employer, but particularly one as large as an NHS trust with access to considerable HR and employment law resources and advice. It is important that all employees faced with dismissal are given clarity as to the date of their termination, the reasons behind it and notification of the opportunity of an appeal.

57. The Tribunal acknowledges that there had been correspondence between the claimant and LUHFT regarding the redeployment period, its commencement,

its duration, extensions and revisions to termination date, but ultimately, it is reasonable for an employee to expect an employer with LUHFT's resources to clearly define the point at which the actual termination takes place shortly before or at the time when it is actually taking place in a termination letter.

Appeal and grievance

58. Two months later on 8 October 2020, the claimant sent a letter to Miss Wood headed 'appeal and formal grievance', arguing that his dismissal was unfair and discriminatory. He referred to his length of service and while acknowledging his employer's accommodation of his health problems with the 3-year career break, he expressed unhappiness with the redeployment process. He argued that the majority of jobs notified were unsuitable and did not meet the requirements provided in the OH report, namely that he could work in an administrative role on reduced hours with a phased return to work. He asserted that the onus was on LUHFT to provide suitable jobs rather than leaving it to him. He referred to the question at the 12 February 2020 interview concerning how he would deal with an aggressive patient but did not mention being asked to get out of his wheelchair during the Breast Screening clerical interview at Broad Green. He stated that he did not receive a letter of dismissal, was given notice of a right of appeal, or received an invitation to a dismissal hearing. He sought reinstatement and confirmed flexibility in terms of pay.

59. By this time, Miss Woods was seconded elsewhere, and the letter was passed to Mrs McCann who replied on 28 October 2020. She explained that the delay arose from the LUHFT experiencing a Covid surge at the time with an understandable impact upon workloads, especially as many staff were not available due to Covid infection.

60. She attempted to reply to what she felt were the main issues raised in the letter and outlined the redeployment period and that the initial letter confirming claimant's placement on the redeployment register explained he was working his notice and his employment would terminate at the end of the redeployment period. This was affected by the extension. However, she stated that the notice of appeal and grievance had been sent out of time and would not be dealt with.

61. She noted that no explanation had been given for the delay although in evidence, both the claimant and Mr Pollard Wilson explained that they had been waiting for legal advice and their representative had been unavailable for some time. While this might be the case, the Tribunal does find it surprising that a short holding letter was not sent by the claimant shortly after the termination date explaining his difficulties, although acknowledges that this arose from a position where no actual termination letter had been sent by LUHFT's HR team. Nonetheless, the claimant and Mr Pollard Wilson had some awareness of the actual termination date following the email exchanges in August 2020 with Miss Wood and while Mrs McCann's decision may have seemed harsh, it is understandable why she adopted this approach having not been involved with the case previously.

The law

Unfair dismissal

62. Section 98 of the Employment Rights Act 1996 provides that it is for the employer to show the reason for dismissal. It must be a reason falling within subsection (2) or some other substantial reason which justifies the dismissal of an employee holding the position which the employee held.

63. In this case the reason relied upon by the Respondent is conduct which is a reason falling within subsection (2).

64. In order to decide whether the dismissal is fair or unfair, having regard to the reason shown by the employer, the Tribunal must consider 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 that question shall be determined in accordance with equity and the substantial merits of the case (section 98(4)).

65. It is clear from decisions such as that in Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 that the Tribunal must consider the reasonableness of the employer's conduct, not simply whether they, the Tribunal, consider the dismissal to be fair. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. It is recognised that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another. The function of the Tribunal therefore is to decide whether in the particular circumstances of the case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. Quite simply, if the dismissal falls within that band, then the dismissal is fair; if the dismissal falls outside that band, it is unfair. That decision was subsequently approved by the Court of Appeal in Post Office v Foley [2000] IRLR 827. It was emphasised that the process must always be conducted by reference to the objective standards of the hypothetical reasonable employer, and not by reference to the Tribunal's own subjective view of what they in fact would have done as an employer in the same circumstances.

66. The Polkey principle established by the House of Lords is that if a dismissal is found to have been unfair then the fact that the employer would or might have dismissed the employee anyway had the employer acted fairly goes to the question of remedy and compensation reduced to reflect that fact.

Disability discrimination

Direct discrimination

67. Section 13 of the Equality Act 2010 sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of

a protected characteristic (race in this case), A treats B less favourably than A treats or would treat others.

Comparators

68. For the purposes of direct discrimination, section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different. Comparison may be made with an actual individual or a hypothetical individual. The circumstances relating to a case include a person's abilities if on a comparison for the purposes of section 13, the protected characteristic is disability.

Discrimination arising from a disability

69. Section 15 of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. However, this kind of discrimination will not be established if A shows that he did not know, and could not reasonably have been expected to know, that B had the disability.

Failure to make reasonable adjustments

70. Sections 20, 21 and 39(5) read with Schedule 8 of the Equality Act 2010 provide, amongst other things, that when an employer applies a provision, criterion or practice ("PCP") which puts a disabled employee at a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled, the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. Paragraph 20 of Schedule 8 provides that an employer is not expected to make reasonable adjustments if he does not know, and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the disadvantage.

Time limits in discrimination complaints

71. Section 123(1) of the Equality Act 2010 provides that a complaint may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Tribunal thinks just and equitable. Under section 123(3) conduct extending over a period is to be treated as done at the end of the period; and failure to do something is to be treated as occurring when the person in question decided on it. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something (a) when P does an act inconsistent with doing it; or (b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Caselaw in final submissions

72. Ms Millin referred to two cases (but both the Court of Appeal and Supreme Court decisions in the latter), in her final submissions on behalf of the claimant and these are as follows:

    Taylor v OCS Group [2006] ICR 1602 CA

    Efobi v RMG [2019] EWCA Civ 18

    Efobi v RMG [2021] UKSC 33

73. The Tribunal refers to caselaw as appropriate within its discussion below.

Discussion

Unfair dismissal

74. There was no dispute between the parties that there was a dismissal and that it took place on 14August 2020. The claimant had been notified of this date previously when the redeployment period was extended as a result of his ongoing shielding due to Covid. While there remains the issue of what the respondent should have done in terms of letters and meetings at the point of termination, it was clear that both parties accepted that dismissal had taken place on 14 August 2020.

Reason

75. The respondent has shown that the principal reason for the dismissal was capability and this is a potentially fair reason under section 98 Employment Rights Act 1996?

Fairness

76. The claimant had been suffering from ill health as a result of a stroke in 2015 and it was accepted that by 2016, he remained unfit to return to work. At this point many employers would have sought to terminate an employee's employment given that it was unlikely that a return to work could happen within the foreseeable future.

77. It is to LUHFT's credit that they explored imaginative ways of providing the claimant with additional time in which to rehabilitate in order that he could return to his substantive role of staff nurse. It was clear that while the career break option was available to employees, it was rarely exercised and certainly not for a period of 3 years and where hard to replace clinical staff were involved.

78. Unfortunately, the claimant's rehabilitation had not progressed as well as he expected or hoped by late 2019 and he conceded that he would not be able to return to his substantive role. As such, consideration was given to next steps by his employer and as he expressed an interest in returning to some sort of

employment with LUHFT, it was agreed that he would be placed on the redeployment register.

79. The effect of this placement was that he was given notice of termination of his employment from his substantive role but remained in receipt of Grade 5 staff burse pay for the redeployment period.

80. He was not placed in any roles during the redeployment period, but two meetings took place which unfortunately were unsuccessful, and notice was given of other vacancies for him to consider.

81. An OH report was obtained which explained that the claimant was fit for some work, providing it was administrative, part time and subject to a phased return. There was no reason to conclude that had a suitable vacancy been found, these recommendations would not have been considered.

82. In terms of managing the long term sickness absence, the respondent behaved reasonably by obtaining an up to date medical opinion to assess the claimant's capability, allowed redeployment opportunities rather than simply giving notice, extended the notice period/redeployment period to allow for Covid shielding with additional time included and by 14 August 2020, the respondent could not reasonably be expected to wait longer before dismissing and genuinely believed that the claimant was no longer capable of performing his duties.

83. There were, however, procedural failure in that while consultation had initially taken place in January at the beginning of the redeployment period and with further letters during the period, they did not adequately consult with C in August 2020 when date of termination was approaching. We concluded that it was reasonable to expect that policy was followed and that a meeting had been offered either in person or by Teams and even if that was declined, a letter should have been sent confirming the termination, its date, the reasons for the termination and a reminder of the right of appeal. These small additional steps would have provided the necessary enquiry and investigation to take place between employer and employee to ensure that they were both clear as to how and why the dismissal was taking place. The respondent's HR witnesses accepted that this should have been done and they are commended for their willingness to make this concession during the hearing.

84. While the claimant did delay before raising an appeal and grievance, this did take place following this procedural failure by the respondent. It is unfortunate that steps were not taken to rectify the original omissions to send a dismissal letter and offer a meeting, but the Tribunal acknowledges the exceptional circumstances arising from Covid with fewer staff being available and Miss Wood being away.

85. There was, however, a procedural failure by the respondent in relation to the actual termination and the failure to offer a meeting and dismissal letter. But for the reasons given above, the claimant would have been fairly dismissed anyway by capability had a fair procedure had been followed, or for some? The Tribunal finds that had these procedural matters been adopted correctly,

it may have resulted in a short additional period before dismissal took place, but that this would have been completed by no later than 14 September 2020 by which time a meeting could have taken place and a letter issued. Of course, had the claimant elected to appeal this decision, this would have taken place after the date of termination of employment and it would not have affected the date of termination, given our finding that he would have been dismissed in any event.

Disability discrimination

Disability (s6 EQA 2010)

86. It is agreed that the claimant was at all material times a disabled person for the purposes of section 6 of the Equality Act 2010 due to a stroke which took place in May 2015.

Direct discrimination (s13 EQA 2010)

87. The Tribunal concluded that in relation to the Outpatients role meeting on 12 February 2020, Mrs Richards did ask the claimant about how he would deal with patients who might present in an aggressive way. However, we accepted that this was a question which would be asked of all candidates regardless of disability and was a reasonable question given the nature of the role often working alone in a stressful environment and dealing with patients who could be highly anxious, whether because of alcohol abuse or other reasons.

88. The claimant clearly saw this question as a detriment, but we did not accept it was reasonable given that it was a typical question that would be asked of all candidates for roles in the Liver unit. We acknowledged that the stress and challenge which he experienced during this process in the knowledge that he was at risk of dismissal may have affected his anxiety about questions being asked, but it was not reasonable to conclude that it was a discriminatory question given its general application which would have applied to hypothetical comparators.

89. For these reasons we also accept the questions relating the job involving a busy environment and the need to walk long distances were equally reasonable and non-discriminatory as hypothetical comparators would be treated no differently.

90. In terms of the interview on 18 February 2020, we found that on balance neither Mrs Thompson or Mrs Mills requested that the claimant get out of his wheelchair to see how he could walk. We appreciate that both the claimant and Mr Pollard Wilson had a different recollection, but in the absence of any contemporaneous complaint or it being raised as part of the appeal and grievance letter, we find that on balance, it was more likely that the management version of events was correct.

91. Accordingly, the alleged forms of treatment cannot proceed any further and the direct discrimination complaint must fail.

92. Finally, the Tribunal did consider the question of time limits and accepts Mr Gibson's submissions that these alleged forms of treatment took place more than 3 months before proceedings were commenced and were isolated incidents not forming part of a series of continuing acts, relating to meetings with specific managers on single days.

93. The Tribunal considered whether it would be just and equitable to extend time in accordance with s123 EQA, but the claimant and Mr Pollard Wilson provided evidence that they were considering seeking advice from the CAB shortly after the interviews took place and despite having good lines of communication with HR, failed to raise these matters quickly. We appreciated that the claimant during redeployment may have been anxious about introducing any controversy into the process of securing alternative employment. However, it was clear from his husband's reaction during the meetings he attended following the ending of the career break, that he would have supported him in raising any issues which he felt necessary to take up with management. Accordingly, while not significant given the findings above, the Tribunal does not accept it is just and equitable to extend time.

Discrimination arising from disability (Equality Act 2010 section 15)

94. It was clear from the OH report that the claimant was fit to engage in some sort of work with LUHFT, providing it was restricted to an admin or clerical role, involved reduced hours and he was afforded a phased return to work. This was connected with his disability and amounted to the 'something arising' from that disability as required by section 15 EQA.

95. Accordingly, we then considered whether the respondent treated the claimant unfavourably by sending details of jobs which were inappropriate and outside OH advice and/or dismissing him on grounds of capability

96. It was clear that the claimant would be sent every job available within the LUHFT and he would express interest and have opportunity to have a meeting with the recruiter and he could contact them with any questions. The claimant agreed with to move into this process at redeployment meeting.

97. Some of the jobs would not have been of interest to the claimant and some might have required further clarification. There is some concern that the claimant was left to his own devices with the redeployment process and that at times, management who were recruiting, did not receive any information about the claimant's circumstances before a meeting took place.

98. The difficulty facing the respondent was that they did not want to deprive the C of the opportunity to consider for himself which roles out of a significant number might be of interest and if so, whether any adjustments might be possible. Additionally, there were the understandable concerns about sharing personal data with prospective recruiters. However, the Tribunal felt that a little more engagement (with the claimant's permission) from the respondent's HR officers, might have made the meetings which took place run more smoothly.

99. While this might be the case, the ultimate trigger for proceeding to a meeting remained with the claimant and this was a reasonable approach to take. He was supported by his husband and there was no indication that he was not capable of considering the list of available jobs. It was a very stressful period for him, but he was afforded an appropriate opportunity to maximise his chances of finding a suitable alternative vacancy. The OH advice simply provided an indication of what C required when he identified a role that was of interest. This was not discriminatory in application.

100. In terms of the dismissal, the Tribunal finds that it was a reasonable decision to reach given that the redeployment period was extended on several occasions and by the date termination took place, no alternative vacancies had been identified. While it was connected with C's disability, it was not connected with his need to work part time in a clerical post, but because he had not secured alternative employment by the end of the redeployment period.

101. While not necessary to consider, the Tribunal acknowledges the respondent's defence that the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were patient care and the need to retain employees in employment. There is no question that they had tried to retain the claimant as an employee from the date when he became unwell in 2015 and they allowed the claimant to have appropriate support to remain in work until August 2020. The redeployment period was the final opportunity to find a means of retaining C even though he was unfit for his substantive job and was a proportionate means of achieving the legitimate aim.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

102. The claimant relied upon the following "PCPs" (provision, criterion or practice), in relation to the proposed roles which the claimant expressed interest in during the redeployment process:

a) Walking long distances during the working day.
b) Lifting heavy medical records.
c) The working time being 30 hours minimum per week.
d) Climbing to retrieve records
e) Requiring accountancy
f) Requiring a clear voice answering telephone

103. Mr Gibson submitted they were not PCPs because they were not the essential criteria of the claimant's substantive role of staff nurse and it was accepted by him that by 2020, he was no longer fit to carry out this role. He said that any PCPs for that role were irrelevant in this case.

104. The Tribunal noted that the identified PCPs related to roles which the claimant had expressed an interest. It was clear that each of the roles had certain requirements as part of the job description which would have been necessary for an employee to carry out their role effectively. If the job had been taken on by the claimant in an unadjusted way, then depending upon

the role, one or more of the proposed PCPs would have been in place as part of that role. Accordingly, while it was an elegant argument by Mr Gibson, we do not accept that the asserted requirements (insofar as they were relevant to each job), did not amount to PCPs.

105. These PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that he had limited mobility than comparable employees not so disabled, his voice although improving remained impaired and the physical effort in working meant that he could not realistically work full time when beginning a role.

106. While the managers did not know before the meetings the extent of the claimant's disability, by the time the meetings took place they knew or could reasonably have been expected to know that the claimant was likely to be placed at the disadvantage.

107. The claimant raised a number of potential adjustments for the roles which he was interested in and says that the following adjustments to the PCPs would have been reasonable:

i. Provision of alternative transport on site.
ii. Lockable trolley.
iii. Support with movement between sites
iv. Provision of an electric wheelchair
v. Provision of full Sigma training

108. All of the steps which were identified within the proceedings did appear to have been considered by managers and discussed with the claimant and his husband. The options of transport were considered, lockable trolleys suggested by management, shuttle bus and the removal of some elements of the job. The real problem, however, was that the claimant had a number of impairments which when considered collectively meant that any adjustment dealing with one, would still leave the other impairments to be resolved. This also made it difficult to break down the roles into smaller parts without either rendering the job very limited in scope or requiring new jobs to be created to support the omitted duties.

109. The Tribunal accepted that this was particularly challenging given that some of the tasks needed a range of skills which would render a role very difficult to carry out if elements were removed. Ultimately, any effective adjustments would have been disproportionate and thereby unreasonable. It was not the respondent's duty to create a job involving only those tasks which C could do or to break up a number of roles to create a job for the claimant. that was not the purpose of redeployment and nor was it the purpose of their duty to make reasonable adjustments.

110. The Sigma training did not directly arise from the claimant's disability, but from his previous non clerical experience in a clinical role and accordingly it was not relevant, even though it was necessary for the claimant to do the job.

111. We considered the question of a trial period in the selected roles but preferred the evidence of the management that the time required to train the claimant in Sigma and familiarisation with the role would have required a minimum of 3 months and would have disproportionate and not a reasonable step to make. It did not appear that any trial period could in practical terms be completed within a few weeks.

112. It really was an unfortunate situation, and the Tribunal acknowledges the frustration experienced by C and his husband during the redeployment period, but we are satisfied that there was no failure by the respondent in relation to its duty to make reasonable adjustments as alleged in this case.

Conclusion

113. The judgment of the Tribunal is as follows:

a) The complaint of unfair dismissal is well founded and succeeds. However, because the dismissal results from procedural unfairness, the Tribunal finds that the adoption of a fair procedure would have delayed a fair dismissal to a date no later than 14 September 2020.

b) The complaint of direct disability discrimination (s.13 Equality Act 2010) is not well founded and is dismissed. This means the complaint is unsuccessful.

c) The complaint of discrimination arising from a disability (s.15 Equality Act 2010) is not well founded and is dismissed. This means the complaint is unsuccessful.

d) The complaint of a failure to make reasonable adjustments (ss.20 & 21 Equality Act 2010) is not well founded and is dismissed. This means the complaint is unsuccessful.

114. The case will proceed to a remedy hearing with a hearing length of 1 day on Friday **2 December 2022** to determine remedy in the successful unfair dismissal complaint. The hearing will take place remotely by CVP.

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Employment Judge Johnson

Date 22 September 2022

JUDGMENT SENT TO THE PARTIES ON
6 October 2022

FOR THE TRIBUNAL OFFICE