EMPLOYMENT TRIBUNALS

Claimant: **Mr J A Ferreira Lopes Da Silva**

Respondent: **Elis UK Limited**

Held at: **London South Employment Tribunal**

On: **7, 8, 9 November 2022 and 12 December 2022 (in chambers)**

Before: **Employment Judge L Burge**
Mrs S MacDonald
Mr N Shanks

Representation
Claimant: In person
Respondent: Mr Goodwin, Counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is:

1. The Claimant's application to amend his claims to include 3 further suggested reasonable adjustments is granted, and one other is refused; and

2. The Claimant's claims of unfair dismissal and disability discrimination fail and are dismissed.

REASONS

Introduction

1. The Claimant was employed by the Respondent from 5 November 2012 as a linen porter. The Claimant was dismissed with effect from 1 September 2020 for alleged lack of capability.

2. The Claimant claims that his dismissal is unfair within section 98 of the Employment Rights Act 1996 and also claims disability discrimination.

The evidence

3. The Claimant, Jose Ferreira Lopes Da Silva, gave evidence on his own behalf. Tracy Carrington-Last (Service Resource Manager) and Ioan Lewis

(General Manager) gave evidence on behalf of the Respondent. The hearing took place in person, with Mr Lewis attending via video link.

4. The Tribunal was referred during the hearing to documents in a hearing bundle of 275 pages.

5. Mr Goodwin provided the Tribunal with a skeleton argument and written closing submissions. Both the Claimant and Mr Goodwin provided the Tribunal with oral closing submissions.

Issues for the Tribunal to decide

6. At the beginning of the hearing the Tribunal reviewed the issues to be decided. The list had not been agreed by the parties following a Preliminary Hearing held on 22 November 2021. The Tribunal decided that the issues for it to decide were:

A. Jurisdiction

1. The Claimant was dismissed with effect from 1 September 2020. The claim form was presented on 17 December 2020. ACAS Early Conciliation commenced on 13 November 2020 and the Early Conciliation Certificate was provided on 20 November 2020.

2. Which, if any, of the Claimant's complaints are prima facie out of time, having regard to ss. 123(1)(a) and 123(3) Equality Act 2010 ("EqA")?

3. In respect of those complaints that are prima facie out of time, do they amount to a single continuing act of discrimination that is otherwise in time?

4. In respect of those complaints that are prima facie out of time, does the Tribunal nevertheless have jurisdiction to determine them, on the basis that they were presented within such other period that the tribunal considers to be just and equitable (pursuant to s.123(1)(b) EqA)?

B. Unfair dismissal

5. What was the reason for dismissal? The Respondent asserts that the reason was capability.

6. Was the dismissal procedurally fair?

7. Was the decision to dismiss for this reason within the range of reasonable responses of a reasonable employer?

8. If the dismissal was procedurally unfair, what was the chance of the Claimant being fairly dismissed if a fair procedure had been followed?

C. Disability

9. The Respondent admits that the Claimant is "disabled" by virtue of his back condition.

I. Direct discrimination

10. Did the Respondent dismiss the Claimant?

11. Has the Respondent treated the Claimant less favourably than it treated or would have treated the comparator(s)? The Claimant relies on Michael Millet and/or a hypothetical comparator.

12. Was such less favourable treatment because of disability?

II. Indirect discrimination

13. Did the Respondent apply a provision, criterion or practice ("PCP") to the Claimant and to persons who do not share the Claimant's relevant protected characteristic? The PCP relied on is:

(a) the requirement for regular attendance at work

(b) the application of the sickness absence policy

(i) The Claimant was not legally represented, the Respondent was represented by Counsel. At the Preliminary Hearing the PCP had been recorded as "The Respondent's policy of dismissing employees based on the amount of sickness absence taken". The Respondent's position was that they did not have this PCP and so the claim must fail. In the case of *Mrs A Martin v City and County of Swansea*: EA-2020-000460-AT (Previously UKEAT/0253/20/AT) per HHJ Taylor :

> "*Litigants in person often struggle with discussions about PCPs at preliminary hearings for case management, seeing it as a jargon term that is difficult to decipher. Even lawyers can falter when identifying the correct PCP. However, it is clear that PCPs are not designed to be traps for the unwary and a practical and realistic approach should be adopted at the case management stage to identify a workable PCP which should not thereafter be over-fastidiously interpreted with the result that a properly arguable reasonable adjustments claim cannot be advanced, particularly when dealing with litigants in person."*

(ii) The crux of the Claimant's case was that he had been absent from work and had been subjected to a sickness absence procedure that had culminated in his dismissal. The way in which the PCP had been captured did not reflect an arguable claim. In accordance with the overriding objective Rule 2, dealing with the case fairly and justly and particularly ensuring that the parties are on an equal footing, the PCPs were amended to reflect the restrictive PCP that did not adequately capture what the Claimant was arguing.

14. Does the PCP put other disabled people at a particular disadvantage when compared with persons who do not share this protected characteristic? The substantial disadvantage the Claimant suffered from those two PCPs was that he was at increased risk of dismissal due to his disability.

15. Did the application of the PCPs put the Claimant at that disadvantage in that the Claimant was dismissed? The Claimant was in fact dismissed.

16. Can the Respondent show that the PCPs are a proportionate means of achieving a legitimate aim? The Respondent asserts that it has the legitimate aims of:

> (a) It is an essential feature of the employment relationship that work is carried out in exchange for payment, and requiring employees to attend work is a proportionate means of achieving that aim.
>
> (b) achieving a stable and operational workforce and that the consideration of absence history, potential future absence and prognosis are reasonable and proportionate means of achieving that aim.
>
> (c) providing a service to its clients and performing the commercial functions essential to its business model, and requiring employees to attend work to perform the functions of the business is a proportionate means of achieving those aims.

III. Discrimination arising from disability

17. Did the Respondent treat the Claimant unfavourably by dismissing him?

18. Was this treatment because of something arising in consequence of the Claimant's disability?

The 'something arising' that the Claimant relies on is his absence history.

19. Can the Respondent show that this treatment was a proportionate means of achieving a legitimate aim? The Respondent asserts that it has a legitimate aim of achieving a stable and operational workforce and that the consideration of absence history, potential future absence and prognosis are reasonable and proportionate means of achieving that aim. Also, providing a service to its clients and performing the commercial functions essential to its business model, and requiring employees to attend work to perform the functions of the business is a proportionate means of achieving those aims.

IV. Reasonable adjustments

20. Did the Respondent apply a provision, criterion or practice ("PCP") to the Claimant? The PCPs relied on are:

(a) the requirement for regular attendance at work

(b) the application of the sickness absence policy

(c) the requirement to perform the duties of his job role.

21. Did the PCPs put the Claimant at a substantial disadvantage when compared with persons who are not disabled? The substantial disadvantage the Claimant allegedly suffered was that he was at increased risk of dismissal and he was unable to perform the duties of his job role.

22. Did the Respondent take such steps as were reasonable to avoid the disadvantage? The Respondent says it did in:

(i) Taking occupational health advice.

(ii) Discussed adjustments with the Claimant.

(iii) Considering adjustments that could be accommodated.

(iv) Sharing alternative roles and redeployment opportunities with the Claimant and inviting him to apply to the same.

(v) Delaying absence management and ultimately dismissing him for over a year in the hope that he would recover and/or receive treatment.

23. The Claimant asserts the following adjustments would have been reasonable:

(a) Allowing the Claimant additional unpaid leave to allow for an operation to take place.

(b) An adjusted role to carry out the service clerk role

(c) Adjusted lighter duties

(d) Adjusted duties to provide more flexibility.

24. The Claimant successfully applied to amend his claim to include (b) – (d) above. The balance of injustice and hardship in refusing the application would lie with the Claimant if he were not permitted to bring these claims. The Respondent was prepared to deal with them and had known about them for some time. A further reasonable adjustment was not allowed as it was not arguable as a reasonable adjustment claim and the Tribunal is entitled to take into account merits when deciding applications to amend.

D. Remedy

The hearing would deal with liability only, a further remedy hearing would be listed if required.

Findings of Fact

7. The Respondent is a company contracting to provide textile, hygiene and facilities services to various organisations. They have 43,000 employees worldwide. In the UK the Respondent has 6,000 employees. The Claimant worked as a "OPD" (linen porter) at Kings College Hospital from 5 November 2012 until he was dismissed with effect from 1 September 2020. At Kings College Hospital the Respondent had 14 employees. The Claimant's role involved delivering clean linen to stations across the hospital, collecting soiled linen to be returned for cleaning and processing. The role required walking, standing, pushing and pulling large heavy cages of linen. There was a lot of bending and lifting, it was a physically demanding job.

8. The Claimant was absent for various reasons during the first half of 2019, for just under 30% of his working time. From 10 July 2019 the Claimant was absent from work with severe back pain, thought to be caused by lipoma.

9. The Tribunal accepts the Respondent's evidence that there was a cost to the Respondent while the Claimant was absent. The Respondent had to keep him on the payroll, pay agency staff to cover the role, spend management time in communicating with the Claimant/taking him through the sickness procedure, and pay his holiday pay, even when his sick pay had expired.

10. The Respondent had a Sickness Absence policy (the "Policy") that provided guidance on cases of short, persistent absences as well as long-term absences. On 16 August 2019 Ms Carrington-Last wrote a welfare letter to the Claimant, although it was sent to his previous address in error. However, there were telephone discussions between the Claimant and Ms Carrington-Last over that period as can be seen by the first line of the Invitation to Capability Meeting letter dated 5 September 2019 which starts with "following previous discussions". The letter invited the Claimant to a capability hearing to take place on 10 September, although it was subsequently rearranged to 26 September 2019. The letter attached the Policy and the Claimant's sickness absence summary for the year.

11. The Tribunal accepts Ms Carrington-Last's evidence that she considered the Claimant's absence under the long-term absence provisions as it had lasted over 4 weeks and the notes of meeting referred to the Claimant as being "long Term Sick (over 4 weeks)". The long-term guidance in the Policy provided:

> *"If you are persistently absent or likely to be absent continuously for four weeks or more, your manager will contact you to hold a wellbeing meeting. You may be asked to give your permission for Elis to obtain advice from an Occupational Health specialist or your doctor to support the management of the absence.*
>
> *…*
>
> *On receipt of the medical report your manager will arrange a meeting*

to discuss it with you. You should therefore make yourself available for this meeting to make sure all options are considered to facilitate a full and permanent return to work.

Depending on the nature of your illness it may be more appropriate to arrange for this discussion to be by telephone or to meet you at home or somewhere that is not your usual workplace. Your manager will agree this with you if necessary.

Upon your return to work, your manager will discuss your absence and how this will be managed moving forwards.

Where medical evidence suggests that even with the support from Elis that there is no prospect of a return to work with acceptable regular attendance levels, a decision may be taken after a formal meeting to dismiss you with notice."

12. On 26 September 2019 the capability meeting took place. At that meeting they discussed the Claimant's daughter and wife and then Ms Carrington-Last stated that "You are currently absent from work as Long-Term Sick (over 4 weeks) due to a bad back pain. How are you feeling?". The Claimant replied that he was not good, was in "a lot of pain" and that surgery was being considered. The Claimant consented to being referred to Occupational Health. A form to obtain a medical report from the GP was completed, although a report was not subsequently obtained. Ms Carrington-Last stated "It is in everyone's interest to get you back to work" to which the Claimant responded "My Dr hasn't advised me to come back to work with the pain I am having and not having a diagnosis". The Claimant was only provided with these notes a year later after the appeal hearing.

13. The Claimant had various medical tests and investigations with medical professionals in the autumn and winter of 2019. An Occupational Health assessment took place on 17 March 2020. The Occupational Health's opinion was that the Claimant's:

"pain is unlikely to resolve until after he has had surgical removal of the lipoma as that appears to be the source of his pain. Given the intensity of his pain and his current functional limitations, he is unlikely to be able to resume his contractual duties but could resume on to amended duties if any can be found. He would require amended duties until after he has had surgery. If no amended duties can be found, then he is likely to continue to be off sick until after he has had surgery.

14. In answer to the question "What is the employee's current fitness for work?", the answer was "He is unfit for his contractual duties and this is likely to be the case until after he has had surgical removal of his lipoma". Further,

"Likely date of return to work?
A return to work on amended duties would be possible within 7 days if any could be found for him

What effect will this condition have on the employee's ability to carry out his/her duties?
He is likely to continue to experience significant levels of pain which would cause difficulties with prolonged walking and standing, frequent bending over and heavy manual handling – this is likely to continue until after surgical removal of lipoma"

15. Unfortunately, the United Kingdom then entered a prolonged period of isolation because of Covid. The Claimant's family was advised to shield and the Tribunal accepts the Respondent's evidence that they did not expect the Claimant to return at this time due to his need to shield. The Claimant continued to provide sick notes during this period and stated that he was not fit for work. He was still waiting for his surgery to be booked but there were delays due to the pandemic.

16. On 25 August 2020 a review meeting took place. The Claimant confirmed that the lump in his back was pressing on a nerve and causing pain when moving. The Claimant did not know when the back surgery would take place and stated "everything causes pain at the moment. If I didn't have to do lifting or heavy work it would be tolerable but I can't say for certain". Ms Carrington-Last asked about whether he could do a job in the factory – this involved feeding linen into the laundry machines and was considerably lighter work than the porter duties but the Claimant said that from his knowledge he did not think that it would be suitable. They spoke about the Service Clerk role in Kings College Hospital, which was a more administrative position but there was someone in the role already. The Tribunal accepts Ms Carrington-Last's evidence that she had previously spoken to the job holder of the Service Clerk role to see if he would work as a linen porter to enable MM (see below) to fulfil the Service Clerk role but he had declined.

17. After the meeting Ms Carrington-Last sent another up-to-date vacancy list but the Claimant replied stating that none of the vacancies were suitable, either because of the distance he would have to travel or because of his qualifications.

18. On 27 August 2020 the Claimant was invited to a capability hearing in relation to his long-term sickness and that one of the potential outcomes was dismissal.

19. On 1 September 2020 the Capability hearing took place. The Claimant confirmed that none of the vacancies were suitable. The Claimant had exhausted his statutory sick pay entitlement and had been absent for nearly 14 months. There was no date for the Claimant's surgery, he had an appointment in December 2020 for potential pain management, but he was not able to carry out his existing job and his view was there was no other vacancy that was suitable for him. Ms Carrington-Last stated that as there were no dates or times for an operation to resolve his back pain she made the decision to terminate his employment with notice and outstanding holiday to be paid.

20. On 4 September 2020 dismissal was confirmed by letter because:

> *"• You have been absent since July 2019 and have exhausted your entitlement to SSP.*
> *• You are unable to carry out the tasks for your current role as an OPD (linen porter) until you have a back operation.*
> *• There are no reasonable adjustments that can be made to fulfil your current job role as an OPD (linen porter)*
> *• There is no definitive date for the operation.*
> *• You have an appointment for 9th December 2020 for pain management.*
> *• You have confirmed the vacancies shared with you have not been suitable."*

21. The Claimant appealed by letter dated 8 September 2020 and an appeal hearing took place on 18 September 2020 with Mr Lewis as the Appeal Hearing Manager. The Claimant said none of the vacancies were suitable for his situation, he was not available for any managerial roles and that he was still unsure about what adjustments could have been made to his existing role and he would have liked to talk to his manager about that. The Tribunal accepts Ms Carrington-Last's evidence that she spoke with the Claimant's site manager and so she had provided input.

22. When asked what his physical capabilities were the Claimant stated that there was no change from the medical report. When Mr Lewis asked what roles might be possible for him, the Claimant would not engage in the question. He said:

> *"…everything causes me pain. The pain is there all of the time. It is less severe when I do less movements. Certain movements like bending, lifting and pushing cages are not suitable at all and that is what I tried to explain."*

23. On 25 September 2020 the appeal outcome letter upheld the decision to dismiss.

24. Throughout the Claimant's sickness period on account of his back all of the fit notes from his doctor said that he was "not fit for work".

25. The Claimant names MM as a comparator. The Tribunal finds that MM's disability did not prevent him from doing all his duties as a linen porter, the main thing he could not do at all was push a full cage of linen. He could still pack linen and carry out runs with smaller trolleys, so he could still do a significant proportion of his role which the Claimant was unable to do.

Legal principles relevant to the claims

Unfair dismissal

26. Section 94 Employment Rights Act 1996 ("ERA") confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that they were dismissed by the Respondent under section 95, but the

Respondent must show the reason for dismissing the Claimant (within section 95(1)(a) ERA).

27. S.98 ERA deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within s.98(2).

> "*s.98 (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it—*
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do…"*

28. The second part of the test is that, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason:

> *s.98 (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

29. For capability dismissals the test is similar to the "*Burchell*" test in misconduct cases. It is sufficient for the employer to show that it had an honest belief, based on reasonable grounds, that the employee was incapable or incompetent: *Taylor v Alidair* [1978] IRLR 82.

30. Where an employee has been off work on long-term sickness absence, the Tribunal must consider whether the employer can be expected to wait any longer for the employee to return (*Spencer v Paragon Wallpapers Ltd* [1977] ICR 301). .According to the Court of Session *in S v Dundee City Council* [2014] IRLR 131, Ct Sess (Inner House), the Tribunal must expressly address this question, balancing the relevant factors in all the circumstances of the individual case. Such factors include:

- whether other staff are available to carry out the absent employee's

work
- the nature of the employee's illness
- the likely length of his or her absence
- the cost of continuing to employ the employee
- the size of the employing organisation; and
- (balanced against those considerations), the unsatisfactory situation of having an employee on very lengthy sick leave.

31. There is no onus on employers to create a special job where none exists (*Merseyside and North Wales Electricity Board v Taylor* 1975 ICR 185)

32. The compensatory award can be reduced if the Tribunal considers that a fair procedure might have led to the same result, even if that would have taken longer (*Polkey v A E Dayton Services Limited)* [1988] ICR 142.

Disability discrimination

33. The Equality Act 2010 provides:

> *"6 Disability*
> *(1) A person (P) has a disability if—*
> *(a)P has a physical or mental impairment, and*
> *(b)the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*
> *(2) A reference to a disabled person is a reference to a person who has a disability.*
> *(3) In relation to the protected characteristic of disability—*
> *(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;*
> *(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability."*

34. The EqA 2010 provides the following in relation to direct discrimination:

> *"13 Direct discrimination*
> *(1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
> …"

35. It is often appropriate for a tribunal to consider, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of the protected characteristic. However in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the Claimant was treated as he was (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285).

36. In *London Borough of Islington v Ladele (Liberty intervening)* 2009 ICR 387,

EAT, Mr Justice Elias (then President) confirmed the principal in *Shamoon* and said that a strict reliance on the comparator test can be positively misleading where the protected characteristic contributes to, but is not the sole or principal reason for, the employer's act or decision.

37. Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out (*Nagarajan v London Regional Transport* [1999] IRLR 572, HL.

38. In relation to indirect discrimination, the EqA provides:

> *"19 Indirect discrimination*
> *(1)A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
> *(2)For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
> *(a)A applies, or would apply, it to persons with whom B does not share the characteristic,*
> *(b)it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
> *(c)it puts, or would put, B at that disadvantage, and*
> *(d)A cannot show it to be a proportionate means of achieving a legitimate aim.*
> *(3)The relevant protected characteristics are—*
> *…;*
> *Disability…"*

39. In relation to discrimination arising from disability, the EqA provides:

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

40. In *Secretary of State for Justice and anor v Dunn* EAT 0234/16, the EAT identified the following 4 elements that must be made out in order for the claimant to succeed in a section 15 claim:

> *"… there had to be unfavourable treatment; something arising in consequence of the disability; and the unfavourable treatment had to be because of the something arising in consequence of the disability. However, the unfavourable treatment would not amount*

to discrimination if it was a proportionate means of achieving a legitimate aim and therefore justified."

41. Cost alone will not provide a justification for discriminatory treatment (*Woodcock v Cumbria Primary Care Trust* [2012] ICR 1126, CA, and *Heskett v Secretary of State for Justice* [2020] EWCA Civ 1487).

42. The Tribunal must consider a the balancing exercise which may include whether a lesser measure could have achieved the employer's legitimate aim and if there has been a failure to make reasonable adjustments.

43. In relation to reasonable adjustments, the EqA provides:

> *"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.*
> *…*
>
> *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.*
> *(3)A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."*

44. The EHRC Code provides a list of factors to consider:

> *"6.28*
> *The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:*
> *• whether taking any particular steps would be effective in preventing the substantial disadvantage;*
> *• the practicability of the step;*
> *• the financial and other costs of making the adjustment and the extent of any disruption caused;*
> *• the extent of the employer's financial or other resources;*
> *• the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and*

> *• the type and size of the employer."*

45. Substantial disadvantage is a fairly low bar as can be seen in *Rakova v London North West Healthcare NHS Trust* UKEAT/0043/19 where the disabled claimant was unable to work as efficiently as her colleagues due to problems with the software supplied to all.

46. In *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160, a requirement for an employee to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions was a PCP which placed a disabled employee at a substantial disadvantage as the disability made it more likely that the employee would have absence from work. In relation to the reasonableness of the adjustment, the Court of Appeal stated:

> *"So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness."*

Burden of Proof

47. S.136 of the EqA sets out the burden of proof:

> *"…(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision…"*

48. The burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another (*Hewage v Grampian Health Board* [2012] IRLR 870, SC).

49. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong* [2005] IRLR 258. Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

50. The Court of Appeal in *Madarassy*, a case brought under the then Sex Discrimination Act 1975, states:

> *"The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities,*

the respondent had committed an unlawful act of discrimination."

51. This was confirmed by the Supreme Court in *Royal Mail Group Ltd v Efobi* [2021] UKSC 33.

52. A person's health and their disabilities are not indissociable and a person's health can be relevant to their ability to perform their job role, so applying health-related criteria or policies is not inherently discriminatory (*Owen v Amec Foster Wheeler Energy Ltd and anor* 2019 ICR 1593, CA and *Mackereth v Department for Work and Pensions and anor* 2022 EAT 99.

53. The Tribunal has regard to the Equality and Human Rights Commission's Statutory Code of Practice on Employment ("the Code") as required by section 15(4)(b) of the Equality Act 2006.

Conclusions

Unfair dismissal

54. From 10 July 2019 the Claimant was absent from work with severe back pain, he was not able to perform his role of linen porter. A sickness absence procedure followed and he was dismissed in accordance with the sickness absence policy because of his long-term absence due to back pain. This was a potentially fair reason under s.98(1) namely, the capability of the employee for performing work of the kind which he was employed by the employer to do.

55. The Respondent has employees of approximately 6000 in the United Kingdom. By the time he was dismissed the Claimant had been off for 14 months and there was no operation scheduled which could have given an indication of when he might return to work. Agency staff were able to cover the role but this was at increased cost to the Respondent. Throughout the Claimant's sickness period on account of his back all of the fit notes from his doctor said that he was "not fit for work". They did not say that he "may be fit for work taking account of the following advice". Importantly the Claimant was consulted and he too could not point to adjustments that would enable him to return to work nor to any other vacant role that he could do.

56. The Occupational Health Report also said that the Claimant was not fit for work and that the pain was unlikely to resolve until after the Claimant had had surgical removal of the lipoma as that appeared to be the source of his pain. It was unfortunate for the Claimant, and many others, that because of covid non-urgent procedures were put on hold to deal with the pandemic.

57. Given the intensity of the Claimant's pain and his functional limitations, the Occupational Health report assessed the Claimant as only being able to resume on to amended duties "if any can be found". The Claimant's job was very physical. It involved walking, standing, pushing and pulling large heavy cages of linen as well as bending and lifting. The Claimant said he could not do a similar but less physically demanding job which involved feeding linen through a machine. It was reasonable for the Respondent to

conclude that the Claimant was unable to perform any aspects of his role. To the Tribunal the Claimant said that he wanted the role of Service Clerk, a role that someone else filled. However, Ms Carrington-Last had already asked the Service Clerk if he would swap roles for someone else who had a disability and who was struggling with the linen porter role and the answer had been no so it was reasonable to assume that he would similarly have not swapped in this scenario. The Respondent did not have to create a different job for the Claimant.

58. The Claimant could not identify adjustments to his role that would enable him to resume working. There were a large number of vacancies at the Respondent of all sorts of different roles necessitating different levels of qualification and experience in various parts of the UK including London. The Claimant thought he might be capable of performing a different office based role, but he said that none of the vacancies on the vacancy lists were suitable for him.

59. There was a cost to the Respondent while the Claimant was absent - the Respondent had to keep him on the payroll, pay agency staff to cover the role, spend management time in communicating with the Claimant/taking him through the sickness procedure, and pay his holiday pay, even when his sick pay had expired.

60. The Tribunal concludes that the employer could not be expected to wait any longer for the Claimant to return because there was no return date and so they would have had to wait for an indefinite period of time.

61. The Claimant was critical of the capability procedure. He said that Ms Carrington-Last had decided to start the first capability meeting because of his history of taking time off to care for his dependents. In the first half of 2019 the Claimant had been on sickness absence for just under 30% of the time. The Tribunal has found that the Claimant was being taken through the “long-term” sickness absence policy and this was consistent with him having been off from 10 July 2019 with severe back pain and so the Claimant’s criticism is unfounded.

62. The Claimant was also critical that there was no welfare meeting. On 16 August 2019 Ms Carrington-Last had written a welfare letter but it was sent to the Claimant’s old address and so he did not receive it. She did not follow this letter up in writing although she did then have telephone conversations with him. The Respondent had not provided the notes of the capability meeting from 26 September 2019 until a year later. It would have been best practice to offer a welfare meeting in writing, ensuring that it was sent to the correct address. It also would be best practice to provide notes of meetings in a timely manner. However, The Tribunal concludes that employers are not expected to follow a perfect procedure and that welfare conversations did take place, even if the initial letter was sent to the wrong address. Looking at the process in the round, it was a fair process.

63. In these circumstances the Tribunal concludes that the Claimant was dismissed for capability and that the dismissal was in the band of reasonable responses and fair, in accordance with s.98(4) ERA.

Disability discrimination

64. The Claimant's claims surround his sickness absence ending in dismissal on 1 September 2020. ACAS Early Conciliation commenced on 13 November 2020 and the Early Conciliation Certificate was provided on 20 November 2020. The claim form was presented on 17 December 2020. The Claimant's claims were therefore brought in time and the Tribunal has jurisdiction to hear them.

65. The burden of proof is on the Claimant to provide facts which in the absence of any other explanation, the Tribunal could decide that the Respondent had contravened the EqA. The Claimant will struggle to satisfy that burden if he has not provided evidence-in-chief to support his allegation.

I) Direct

66. The Claimant did not provide any evidence to indicate that he was dismissed *because of* his back condition. Both he and the Respondent thought that he had been dismissed because of his sickness absence. The Claimant's comparator is not an appropriate comparator as he shares the protected characteristic (disability) and his circumstances were fundamentally different as he was able to perform some of his job role and some with adjustments whereas the Claimant could not. A hypothetical comparator (someone whose circumstances are the same, but without the disability) would have been treated in the same way. The Claimant's claim of direct disability discrimination therefore fails.

II) Indirect discrimination

67. The Respondent's provision, criterion or practice ("PCP") that it was said to apply to the Claimant, and to persons who do not share the Claimant's relevant protected characteristic were said to be:

(a) the requirement for regular attendance at work

(b) the application of the sickness absence policy

68. These PCPs exist at the Respondent and apply to all, including the Claimant. However, in accordance with s.6(3) EqA, to succeed in a claim of indirect discrimination the Claimant's group is restricted to those who have the same disability, ie those who have a back condition. The Claimant's claim of indirect discrimination therefore fails as he has not shown that those with his particular disability suffer or would be put to a particular disadvantage.

III Discrimination rising from Disability

69. The Tribunal concludes that the reasons for dismissal were clear – the Claimant was dismissed in accordance with the sickness absence policy for being on long term sick leave with no prospect of return. The Claimant was therefore subjected to unfavourable treatment causing a detriment

(dismissal) because of "something" arising in consequence of the Claimant's disability (his sickness absences).

70. The question then is whether or not the unfavourable treatment is a proportionate means of achieving a legitimate aim. The Respondent said its legitimate aims were achieving a stable and operational workforce and providing a service to its clients and performing the commercial functions essential to its business model. There were no reasonable adjustments that could have been made to the Claimant's role to enable him to return and the other vacancies, in the Claimant's own view, were unsuitable. A lesser measure than dismissal could have been to wait for an indeterminate length of time for the Claimant's operation to be scheduled which, in the Tribunal's view, was not a reasonable course of action for the employer to have to take. Cost alone will not provide a justification for discriminatory treatment but the Tribunal concludes that the aim of having stable and operational workforce and performing the commercial functions essential to its business model outweighs unfavourable treatment on the Claimant in this case. Dismissal was a proportionate means of achieving its legitimate aims. The Claimant's claim of discrimination arising from disability therefore fails.

IV) Failure to make reasonable adjustments

71. . The PCPs relied on are:

(a) the requirement for regular attendance at work

(b) the application of the sickness absence policy

(c) the requirement to perform the duties of his job role.

72. The Respondent did have these PCPs. Did the PCPs put the Claimant at a substantial disadvantage when compared with persons who are not disabled? Section 23 EqA does not apply to s.20 which means that it is a different comparative exercise to that in indirect discrimination claims. The substantial disadvantage that the Claimant suffered was that he was at increased risk of dismissal (and was in fact dismissed) and that he was unable to perform the duties of his job role. "Substantial disadvantage" has a fairly low bar (*Rakova v London North West Healthcare NHS Trust* UKEAT/0043/19) and the Tribunal concludes that the three PCPs above put the Claimant at a substantial disadvantage when compared to persons who are not disabled.

73. The Respondent has 6000 employees in the UK and thus has resources and other roles available. The Respondent did take steps to avoid the disadvantage when they took occupational health advice, discussed adjustments with the Claimant and repeatedly asked him what adjustments could enable him to perform his role. They also shared alternative roles with him and delayed the sickness absence procedures before dismissing him after 14 months of absence. Even at the point of dismissal and appeal they explored with the Claimant what adjustments could help him return to work and whether there was an end in sight to the absence but there was not.

74. The Claimant asserted that he should have been allowed additional unpaid leave to allow for an operation to take place. However, the Tribunal

concludes that this was not reasonable, given that there was no proposed date of an operation at all and given the costs to the Respondent of keeping the Claimant on the payroll as outlined above.

75. The second adjustment proposed by the Claimant was that he should have been able to carry out the Service Clerk role. The Tribunal concludes this was not a reasonable adjustment because the Service Clerk role was not vacant and the incumbent had already declined to swap roles when a disabled colleague had been struggling with aspects of the linen porter role. It would not be reasonable to force an employee from their role in order to insert the Claimant into it. The final reasonable adjustment suggested was that the Claimant be provided with adjusted lighter duties to provide more flexibility. There were no lighter duties as part of the role that the Claimant identified he could do with his back condition and so it would effectively be creating a new role for him with duties that did not need doing by the Respondent. That would not be reasonable. The Claimant's claims of failure to make reasonable adjustments therefore fail.

_____
Employment Judge L. Burge
Date: 14 December 2022

Sent to the parties on
Date: 4 January 2023