



EMPLOYMENT TRIBUNALS

Claimant
Mr L S Garcia

v

Respondent
Guy's & St Thomas' NHS
Foundation Trust

Heard at: Central London Employment Tribunal

On: 26 – 27 June 2023, 28 June 2023 (in Chambers)

Before: Employment Judge Brown

Members: Dr V Weerasinghe
Ms H Craik

Appearances:

For the Claimant: Ms C Mangaporo, Lay representative
And In person

For the Respondents: Ms A Greenley, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Respondent did not subject the Claimant to discrimination arising from disability by dismissing him.
2. There will not be a remedy hearing.

REASONS

Preliminary

1. By a claim form presented on 24 April 2022 the Claimant brought a complaint of discrimination arising from disability against the Respondent, his former employer. The alleged unlawful act was his dismissal.
2. The issues in the case had been agreed as follows:

1. Discrimination arising from disability (Equality Act 2010 section 15)

1.1 Did the respondent treat the claimant unfavourably by:

1.1.1 dismissing the claimant.

1.2 It was agreed that the following things arise in consequence of the claimant's (admitted) disability, namely an injury to his arm and neck, which was diagnosed as Mild Bilateral C5 Radiculopathy neck degeneration changes, ulnar nerve compression and Right Carpal Tunnel Syndrome

1.2.1 The claimant's sickness absence between 29 April 2020 and October 2021.

1.3 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

1.3.1 To ensure all staff were capable of performing their duties in order to:

1.3.1.1 Ensure adequate and appropriate staffing levels;

1.3.1.2 To deliver high quality services safely and efficiently;

1.3.1.3 To ensure the appropriate use of public money;

1.3.1.4 To ensure optimal staff productivity; and

1.3.1.5 To protect patients' safety.

1.4 The Tribunal will decide in particular:

1.4.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

1.4.2 Could something less discriminatory have been done instead;

1.4.3 How should the needs of the claimant and the respondent be balanced?

3. This hearing was to consider liability only.
4. The Claimant clarified at the start of the hearing that he does not rely on depression and anxiety as a disability.
5. Knowledge of disability was not in dispute. The Respondent agrees that the "something arising from disability" – the Claimant's absence – arose from his physical disability.

6. The only issue in the case was therefore justification / proportionality in relation to the dismissal.
7. The Tribunal heard evidence from the Claimant. For the Respondent, the Tribunal heard evidence from: Anoma Gunawardena who was Deputy Matron of the Brompton Hospital Adult Intensive Care Unit (AICU) between 2015 and 2022 and Senior Nurse Matron for that Unit from 2022; Lauren Berry, Head of Nursing for Harefield Hospital and the dismissing officer; and Keith Thompson, Chief Pharmacist and Clinical Director, appeal officer.
8. There was an agreed bundle of documents.
9. The parties made written and oral submissions. The Tribunal reserved its judgment.

Relevant Facts

10. The Respondent is an NHS Trust consisting of five main hospitals. It employs about 22,000 people. The Claimant was employed by the Respondent from 1 September 2014. He was employed as a band 3 Health Care Assistant ("HCA") at the relevant times in this case. When he worked as an HCA, he worked at the Brompton Hospital Adult Intensive Care Unit (AICU).
11. He had 25 episodes of short- and long-term sickness during his employment, p176 – 177.
12. Anoma Gunawardena was Deputy Matron of the Brompton Hospital Adult Intensive Care Unit (AICU) between 2015 and 2022. She deputised for the senior nurse in her absence and had managerial responsibilities, including long-term sickness absence management and organising the shift roster. During the covid pandemic she took over management of HCA sickness absences. In 2022, she became the Senior Nurse Matron for AICU at the Brompton Hospital.
13. It is agreed that in 2020 the Claimant sustained injury to his arm and neck, which was later diagnosed as Mild Bilateral C5 Radiculopathy neck degeneration changes, ulnar nerve compression and Right Carpal Tunnel Syndrome. It is also agreed that the Claimant was a disabled person by reason of these conditions at the relevant times.
14. On 29 April 2020 the Claimant commenced sick leave.
15. The Brompton Hospital Adult Intensive Care Unit AICU is an acute ward where 99% of patients admitted have multi-organ failure. Once a patient's condition improves they are transferred back to their local hospital, so AICU only cares for patients who are extremely unwell. The maximum patient capacity for AICU is 18 patients at any one time. Normally there are 22 nurses, 6 doctors and 1-2 healthcare assistants working on each shift.
16. Healthcare assistants support the bedside nurses and the housekeeping of the unit.
17. Ms Gunawardena told the Tribunal, and the Tribunal accepted, that, when a healthcare assistant such as the Claimant is absent from work, AICU could have only one healthcare assistant on duty. The nurses would then have to pick up the work of the

healthcare assistant, in addition to their own heavy workload. This puts additional pressure on them.

18. The Claimant agreed in evidence that, during his sick leave, his absence may have meant that there were no HCAs on duty in AICU at all.
19. The Claimant's extended sickness absence coincided with the Covid-19 pandemic, when AICU was under more pressure. In mid-April 2020 AICU had a peak of 56 Covid positive patients admitted on the ward at one time. Towards the end of 2021 it was again very busy with around 30-35 patients, and between April to August 2022 AICU had around 25 patients. This meant AICU was consistently above its maximum normal capacity of 18 patients.
20. During the pandemic AICU used nurses from other areas of the hospital. It needed to train these nurses on a rapid 2 day course, as AICU requires some unique technical knowledge about the machinery and the care plans for seriously ill patients. Limited staff numbers meant that the Unit had one or two qualified AICU nurses for every 4 patients, with two further nurses supporting them from other areas of the hospital. Qualified nurses from other areas of the hospital did not know where things were stored, or how machinery was operated, but healthcare assistants are able to offer them this assistance.
21. When 2 HCAs were on duty, one healthcare assistant would focus on ordering stock and protective equipment and unpacking boxes and the other would provide clinical support on the ward. When there was only one healthcare assistant available, the duties which could not be covered by the remaining healthcare assistant had to be picked up by the nurses.
22. AICU does not usually cover healthcare assistants' sickness absences with bank workers, as their role is primarily supportive. Furthermore, all staff working within the critical care environment need to have additional training to work in the intensive care environment, so it is not easy to obtain suitably qualified staff from the bank.
23. On 26 June 2020 OH reported that the Claimant could undertake all activities, save heavy moving and handling. It advised that he could return to work on amended duties in 2 weeks and that he would provide an update after seeing his GP, p179.
24. A further Occupational Health Report on 20 July 2020 advised that the Claimant's symptoms had worsened and that he would not return to work for a "few more weeks to months" and that he would need many weeks thereafter before resuming heavy work pp 464 – 465. The Claimant attended a Long Term Sickness Absence Meeting on 20 July 2020.
25. The Claimant exhausted his entitlement to full sick pay and commenced half pay for sickness on 22 October 2020.
26. On 19 November 2020 another OH report advised that the Claimant could undertake administrative work, initially for 50% of his contracted hours, p180. It advised that, if no administrative role was available, the Claimant was likely to remain off work, unless a "light role" was available.

27. The Claimant had steroid injections in 2020 for diagnosed carpal tunnel syndrome. It was hoped that he would be able to recover sufficiently to return to his role in AICU.
28. On 7 January 2021 a further Occupational Health Report, p466-467, advised, of the Claimant "... he is very keen to return to his substantive role in AICU. He feels able to perform the duties of his post efficiently in about a month – when he will see the maximum effect of the treatment that he has received. • From an occupational health point of view, based on the information available, I am happy for Lee Seejie returning to his substantive post in about a months' time – say, starting with about 50% of his contractual hours for the first couple of weeks, then increasing his working hours to about 75% of his contractual hours in week three. Thereafter, Lee Seejie can return to his full contractual hours, depending on how he copes. • If Lee Seejie copes with the duties of his substantive post when he returns to work, I am happy for him to continue with his role in AICU. Otherwise, considering redeploying him to a lighter role would be a reasonable approach from a health point of view. "
29. The Claimant attended a Long Term Sickness Absence Meeting on 18 February 2021, p687. The outcome letter recorded, "We informed you of a possible administrative role, temporarily to initiate return to work, details of the job were sent to you after the meeting. • You asked us whether any HCA jobs were available in outpatients department and I confirmed there were no vacancies to my knowledge. • You agreed to review job description for administrative role and let us know before 26th February."
30. The Claimant accepted, in evidence, that he was offered a ward administrator role on the AICU ward in February 2021. He said that he accepted this job and that his manager asked him to go to his GP and ask his GP to sign him fit to return to work. The Claimant told the Tribunal that he had a numbness in his fingertips so his GP referred him to a neurologist and advised him to wait for the results and did not sign him fit to return to work,
31. An updated Occupational Health report was provided in relation to the Claimant on 8 April 2021, p403-404 and p468-469.
32. In the 8 April 2021 report the OH consultant said, p403,
- "The pain in his right hand has now been reduced after receiving injection ... but numbness in his right hand for which he saw the specialist last week. Lee Seejie reports of reduced power in his right hand in a way that he drops things.
- In the consultation, I discussed with Lee Seejie his current health and functional status in the context of the duties of his substantive role. I explained to Lee Seejie that, it seems likely that the demands of his current substantive post to be more than his current functional capacity. In that context, I discussed with Lee Seejie redeployment to a lighter role through the redeployment process. I explained to Lee Seejie about the redeployment policy and that he will be on the redeployment register for some time - and the risk to his to employment, if a suitable job does not become available. Lee Seejie told me that he is scared of being moved to an administrative role due to training etc. I discussed with Lee Seejie supporting him to be moved to a lighter HCA role e.g.outpatients, if available. Lee Seejie is happy to be moved to outpatients, if a suitable HCA role in outpatients is available for him."

33. The 8 April report said that the Claimant was waiting for the results of further investigations into numbness in his right hand. The report said,

“Based on the information available, it seems less likely that Lee Seejie would be able to efficiently and regularly perform duties of his current post in the future.

Therefore, in my opinion, considering redeployment for Lee Seejie to a lighter role e.g. an HCA post in outpatients, would be a reasonable approach from the health point of view.

If a suitable job becomes available, both Lee Seejie and I think that, he should be able to gradually return to work in about a couple of weeks.”

34. A Long Term Sickness Absence Meeting – Stage 2 Third Review Meeting was held with the Claimant on 26 April 2021, p684.

35. The outcome letter of that meeting said,

“I explained to you that, your occupational health assessment, states that you were less likely to perform duties in your substantive position in AICU with current symptoms. You agreed.

- I explained to you how clinical activities has changed in AICU due to pandemic and how concerned I am about your safety, working in such environment with your current symptoms.

- Further to OH recommendation of moving to lighter role in outpatients, I asked you about your preference to be moved there. You replied that you preferred to work in an environment with patients contact. You also said that if there were no vacancies in outpatients department, you would take a suitable redeployment in any department.”

36. The Claimant told the Tribunal that he was fit to undertake lighter duties in the AICU.

37. Ms Gunawardena told the Tribunal that there were no adjusted duties for HCAs during the pandemic on the AICU. She said, “In Intensive care unit we don’t have lighter duties – we have to be 100% fit to work because there is a physical demand – we have very sick patients. The equipment and manual handling require fit people. The patients are sedated and ventilated with multiple organ failure.” Ms Berry told the Tribunal, “When OH said that the Claimant should have a lighter role, OH were talking, early on, about outpatients. AICU had the sickest patients in South East England. We are a tertiary heart and lung hospital, which means a specialist heart and lung focus, so we were getting the sickest patients who could benefit from best care. We were getting young patients under 50, some as young as 18. They were working at twice or 3 times capacity and it was a very heavy environment. There were no light duties in the department.”

38. The Tribunal accepted the Respondents’ evidence that there were no “light duties” available in the AICU because manual handling of, and use of equipment in relation to, very ill and sedated patients required people who worked there to undertake heavy physical tasks.

39. The Claimant provided numerous Statements of Fitness for Work to the Respondent. Some said that he was unfit for any work, for example on 15 January 2021 for 3 weeks, p108, and on 5 March 2021 – 29 March 2021, p113.

40. On 4 May 2021, his GP said that the Claimant had “arm and hand pain under investigation” and that he “may be fit for work taking account of the following advice: “must be able to do lighter duties for example admin work”, p398. That Fit Note was valid 4 May 2021- 3 August 2021.

41. The Claimant commenced a 12 week Redeployment period on 10 May 2021, p117 – 118. This was later extended by 2 months.

42. The Claimant attended a redeployment meeting on 12 May 2021, p117 – 118. Ore Ediale was appointed to assist the Claimant in the redeployment exercise.

43. The outcome letter from the redeployment meeting said,

“you explained that you were willing to consider any roles and also any HCA role in any department. You still expressed your desire to work as an HCA in any department.

I gave you an update, further to OH report of 8th April to consider redeployment to a lighter role, eg admin roles or an HCA post in Outpatients Department (OPD). I have been in contact with the manager there and she has confirmed there is no current vacancy in OPD for an HCA. I have also been in touch with other wards in the Trust and awaiting their responses.

I went through the redeployment process with you and explained that the Trust will make every reasonable effort to find an alternative role for you. This will include guaranteeing an interview for appropriate vacancies where you meet the essential requirements of the person specification. The Trust would support a period of redeployment for no longer than 12 weeks. Your 12 weeks commences from the date of this meeting, 10th May to 2nd August 2021.

I informed you that if at the end of this period, we are unable to find an alternative role for you, we will proceed to Stage 3 of the Sickness Management process which is termination of the employment contract on the grounds of incapacity.” P117

44. On 28 April 2021 Ms Ediale had sent an email to various recipients saying she had an HCA who needed redeployment to another department, p702. That email was forwarded on 13 May 2021 to managers with a request saying,

“We currently have a member of staff looking for redeployment within the trust as a HCA. Would anyone have any vacancies to help support this request. I would be grateful if you could pass to any managers that I may not have include who may be able to assist with this request.” P702.

45. A vacancy list was sent to the Claimant around 21 May, p119 – 121.

46. On 25 May 2021 Ms Ediale sent the Claimant a link for job vacancy on the Guy’s and St Thomas website and asked the Claimant to provide his CV, p613. She said that she had asked for his CV on a few occasions previously.

47. It was not clear that the Claimant ever provided his CV to Ms Ediale.
48. There was a dispute of fact as to whether the Claimant had access to his email during the redeployment process. It appeared, however, that the Claimant did have access to his email address in May 2021, p126-7, July 2021, p671, August p131, including access to his email address from his personal phone. The Tribunal decided that he did have access to his work email during the redeployment period.
49. On 1 July 2021 Occupational Health provided a further report, p129- 130 & 470-471. This advised:
- “If a suitable job becomes available for Lee Seejie, in my opinion he should be fit to start performing the duties of that role (e.g. a suitable role in outpatients). He does not require a phased return to work anymore, as he reports improvement in his musculoskeletal symptoms. I understand that Lee Seejie is due to see a neurologist in July 2021. • Finally, Lee Seejie tells me that he has found the process of redeployment to be difficult. Please may I respectfully ask that you have a direct discussion with him to see how he can be best supported, taking into account the employee and the service needs. Lee Seejie is very keen to perform the duties of a lighter post, when it becomes available.”
50. There was a dispute of fact as to how many redeployment meetings the Respondent held with the Claimant.
51. The Claimant told the Tribunal that he heard nothing from the Respondent. He said that he communicated with Ms Adiale by text and telephone. He said that sometimes he spoke to Ms Adiale every day but most of the time he heard nothing.
52. It was not in dispute that the Claimant was sent few vacancies during the redeployment period.
53. There was a dispute of fact as to why this was the case. The Claimant told the Tribunal that there were many vacancies suitable for him during the redeployment period. He did not produce any evidence of these vacancies. The Respondents witnesses all told the Tribunal that there were very few vacancies at the relevant time.
54. Ms Gunawardena told the Tribunal that main focus of the Trust at the time was to provide care for covid patients and so employees were allocated to clinical areas, but were supposed to go back to their roles afterwards. She said that there were few elective surgeries taking place at the time.
55. Ms Berry told the Tribunal that the Hospitals had merged and there were reviews of structures in summer 2021 to determine where services overlapped, so that it was difficult to redeploy staff. She said that she had been concerned herself that few jobs had been made available to the Claimant, so she had checked with Ms Ediale what had happened. Ms Ediale had said that she had looked for jobs but there were none available, and that emails had been sent to matrons, but there had been no response.
56. The Tribunal accepted the Respondent’s evidence regarding the reason for the lack of vacancies sent to the Claimant during the redeployment period. There was no evidence that the Claimant had applied for jobs himself, or had located any. The

Respondents' witnesses explained why there were few vacancies by reference to the circumstances at the time.

57. The Claimant told the Tribunal there was an administrative vacancy on the AICU during summer 2021 and that another HCA had undertaken the role. He said that he was shouted at by Ms Ediale when he raised this.
58. Ms Gunawardena told the Tribunal that the AICU did not have any vacancies for administrative staff. She said that the AICU has 2 administrative staff, whose work is not completely administrative, in that they undertake receptionist and admission and discharge duties and organise transfers. These staff members are Mr Aroo and Mr Nazeem. Mr Aroo has been in this role for more than 10 years and Mr Nazeem started in 2019. Ms Gunawardena told the Tribunal that, when these members of staff are on annual leave, they cover each other, so there was never a vacancy in an ICU administrative position.
59. The Tribunal accepted Ms Gunawardena's evidence that there was no vacancy in the AICU in the summer of 2021. Ms Gunawardena gave detailed evidence about the fact that there was an establishment of 2 administrative staff. The Tribunal found her detailed explanation convincing. By contrast, the Claimant provided only sketchy details of the role he said was available. The Tribunal noted that the Claimant had been offered a *temporary* administrative role in February. While this might have contradicted Ms Gunawardena's evidence that there was no possibility of any vacancy, this was not put to her in evidence. Indeed, the Tribunal noted that Ms Gunawardena had offered that temporary position to the Claimant in February 2021 and concluded that, if there had been a vacancy in summer 2021, she would have offered him any vacancy in the summer too. The fact that she did not indicate that there was no administrative vacancy at that time.
60. A potential HCA role was identified for the Claimant in the Out Patients Department in August 2021 and a meeting was arranged for the Claimant with the Service Managers, Ish Rasool and Florence Parafina on 19 August 2021. The Claimant attended the meeting, face-to-face. The managers considered that the Claimant was not suitable for the role. The Claimant was informed and given feedback on 26 August.
61. Ms Berry told the Tribunal that the recruiting managers did not consider the Claimant to be suitable because, in an outpatients clinic, there is an expectation that, if there is an emergency such as a heart attack, the HCA will respond to provide emergency care. In the outpatient clinics, the patient – to - clinician ratio is much lower than on wards. An HCA may therefore be on their own. There may be a delay in treatment if that individual cannot provide support. That means that the HCA needs to be able to do life support and CPR. She said that the Claimant could not undertake CPR because of his symptoms and the Claimant was therefore not suitable to work as an HCA in the Out Patients Department.
62. The Tribunal accepted Ms Berry's evidence. The Claimant did not contradict it.
63. During August the Claimant sent a message to Ms Ediale asking to be trained to undertake a phlebotomist role. Ms Ediale did not reply, p133.

64. Ms Gunawardena told the Tribunal that she did not know about the Claimant's request, but there would still have to have been a vacancy for the Claimant to be redeployed into. She said of the phlebotomist role, "It is quite intricate, holding needles and bottles, so if you had problems with your right arm and dropping things it would be difficult. It also involves direct contact so we don't want patients to be hurt."
65. The Claimant told the Tribunal that he considered he could undertake the phlebotomist role with one hand.
66. The Tribunal accepted the Respondent's evidence that a phlebotomist role would not be suitable for the Claimant, given his problems with grip and dropping things. Taking blood involves intricate handling and placing of needles precisely in veins and collecting blood in bottles/tubes. The Tribunal accepted that there would be a risk of injury to the patient if the Claimant used only one hand, or he used his hand which had problems with grip.
67. On 16 September 2021 the Claimant was informed of a temporary vacancy in Cashiers Office in the Royal Brompton Hospital to cover long-term sickness. A meeting was arranged with the manager on 28 September. It was agreed this was a suitable role for the Claimant to try. The Claimant started the role on Monday 4 October 2021. A letter was sent to him on 30 September confirming details of this role, p157-158.
68. The Claimant experienced difficulties accessing the Respondent's IT system while he was in this role.
69. On 25 October 2021, the Claimant had a personal emergency which meant he was not able to attend work. The Claimant told the Tribunal that he originally asked for 1 day off. The Claimant told the Tribunal that the Respondent offered to authorise 1 week annual leave, which he accepted.
70. On 1 November 2021 at 9.51 the Claimant asked for more days off, or a further week, saying that it could perhaps be treated as annual leave, p140.
71. On 1 November 2021 at 10.23 Ms Adiale replied, telling the Claimant that his manager was concerned about his absence and his commitment to the post, p140. She said that, if the manager decided not to carry on with the redeployment, there would be nothing Ms Adiale could do. She asked if the Claimant wanted to use annual leave for the previous week and the current week.
72. On 1 November 2021, the Claimant sent an email to the manager explaining the reason for his absence and said he was in a dark place, p159. He did not return to work. The Respondent also treated a second week as annual leave.
73. On 2 November 2021 Ms Ediale told the Claimant that he would not be working in the cashiers office in future, p142.
74. On 9 November 2021 the Claimant's GP signed him off work from 1 November – 31 December 2021 for "Arm pain – trapped nerve, awaiting treatment." P160.
75. On 18 November 2021 the Respondent wrote to Claimant inviting him to a Final Long Term Sickness Hearing – Stage 3, to be held on 29 November 2021, p168 – 169.

76. Ms Gunawardena prepared a Management Statement of Case dated 19 November 2021, p170 – 197.
77. On 24 November 2021 Issa Nadeem emailed Lauren Berry, who had been appointed to conduct the Stage 3 meeting saying, amongst other things, “Ore agrees that checking for vacancies was not always done every week but when she had checked there weren’t any HCA roles in the London patch - she had asked our recruitment team (Abi) to also check for roles both at the clinical group sites and also GSST who informed her there weren’t any internal roles of HCA in OPD.” P203.
78. The Final Long Term Sickness Hearing – Stage 3, was ultimately rearranged for 22 December 2021, p250 – 266. Lauren Berry conducted the hearing.
79. On 31 December 2021 the Claimant’s GP signed him off work further until 31 January 2022, p274.
80. On 10 January 2022 Ms Berry wrote to Claimant notifying him of the outcome of the Stage 3 meeting and dismissing him, p277 – 281. She said,
- “ I am satisfied that the Trust have taken all reasonable steps to try and assist you back to work in an alternative capacity. I conclude that you remain unfit for meaningful work for the foreseeable future due to poor health. Regrettably I consider there is no reasonable alternative at this stage but to dismiss you with notice on grounds of capability due to ill health as the Trust cannot continue to sustain your high level of absence from work and the associated impact. ... redeployment has been extended beyond the 12-week timeframe so that you obtained further information about the test results which you recently provided in November 2021. You do remain medically unfit with no reasonable prospect of a recovery with your arm/hand. You agreed with your manager and Occupational health to seek redeployment in a lighter role but unfortunately those roles proved to be futile and there are no other suitable vacancies available at this time. The redeployment trial in cashiers did end when you took absence and the reasons were explained to you by Lesley Johnson and Ore Ediale, as this role was temporary as confirmed in the letter appendix 43 and there is currently no requirement for this position. I am sure you will also appreciate the considerable operational /service difficulties in covering this period of long-term absence over 20 months is unsustainable for AICU without the input of any additional resources. Human resources have also enquired if any vacancies are available within the COVID vaccination deployment programme at the Trust however these positions are filled with bank workers and there is no recruitment for substantive posts.”
81. The Claimant appealed against his dismissal on 13 January 2022, p289 – 290. His grounds of appeal were: Failure to consider Long Covid-19 as the Claimant’s possible cause of sickness absence; Insufficient support from the Respondent to return to work; and Insufficient support for redeployment opportunities.
82. The Claimant attended the appeal hearing with his representative, Farah Kamani of Unite, on 3 March 2022. The hearing was adjourned to allow the Claimant’s representative to submit documents to the appeal panel and to Lauren Berry, and to allow time for these documents to be reviewed. At the hearing on 3 March 2022, the Claimant’s representative asked that the Claimant be referred back to Occupational

Health. The Respondent arranged for the Claimant to be reviewed by Occupational Health. An OH report dated 24 March 2022 was produced, p405-406.

83. The report said,

“From the occupational health point of view, there is nothing that I can add to previous occupational health reports. I suggested redeployment to a lighter role for Lee Seejie, which I understand [that it] happened in about October 2021 (a desk-based role in finance). ... Lee Seejie tells me that he does not require any counselling or any psychological interventions at the moment. I understand that Lee Seejie was seen by his neurologist today; where the neurologist asked for further medical investigation. He still reports dropping things with his right hand, but he feels able to work normally.”

84. The Claimant's union representative provided a statement and relevant supporting documents on 24 March 2022, p367-368, 371 – 384.

85. The appeal hearing was reconvened on 28 March 2022, p407 – 441.

86. The Claimant set out 3 issues in a document detailing each ground of his appeal, p371-384. which he said showed the Respondent had not supported him to return to work following periods of sickness absence: Acas guidance for Long Covid-19; lack of access to his work IT account lack of support in regaining access. The Claimant considered that his managers had removed IT access to exclude him and make life more difficult; the third matter related to the Claimant's gender.

87. Mr Thompson told the tribunal that Acas advised that employees suffering from Long Covid-19 should have an Occupational Health assessment and be offered a phased return to work. He told the Tribunal that he considered that it would be quite normal for someone who had been off work for some time and past the password retention period to be locked out of their account and need to be on site to regain access. The Claimant raised an IT ticket for his line manager to approve. Mr Thompson told the Tribunal that he concluded that any delay in dealing with was an administrative error rather than specifically targeted at the Claimant. He acknowledged that the process could be improved but concluded that it did not form part of the process which led to the Claimant's dismissal or evidence of a failure to support his return to work.

88. On 4 April 2022 the Claimant was informed of the appeal outcome, which dismissed his appeal, p445, 449 – 456.

89. In Mr Thompson's appeal outcome letter he said, “It is my assessment that, in accordance with the ACAS recommendation and the Trust's sickness absence policy, the employer did ensure that they had done everything they could before considering a capability procedure. One other point you raised under this section was whether all your historical periods of sickness had been considered when arriving at the decision at Stage 3 hearing. Lauren confirmed that this was not the case, and that only the period of absence from 29th April 2020 had been considered. ... The second issue was the lack of access to your Trust email account for a period between August 2021 and February 2022. On balance, from the documents I have seen I think it is most likely that this was due to your password expiring, rather than an attempt to prevent you from accessing tools needed to undertake your role as you suggest. ... Whilst I'm sorry

that you experienced this challenge in accessing your Trust email, I do not consider this to be evidence of a failure to support your return to work.” P452.

Relevant Law

Discrimination

90. By s39(2)(c)&(d) *Equality Act 2010*, an employer must not discriminate against an employee by dismissing him or subjecting him to a detriment.

Discrimination Arising from Disability

91. s 15 *EqA 2010* provides:

“(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”.

92. When assessing whether the treatment in question was a proportionate means of achieving a legitimate aim, the principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax* [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60]. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own objective assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: *Hardys & Hansons plc v Lax* [2005] IRLR 726, CA.

93. Treatment will not be proportionate unless it is necessary for the achievement of the objective and this will not usually be the case if there are less disadvantageous means available, *Homer* [2012] ICR 704.

Discussion and Decision

94. The Tribunal took into account all its findings of fact, and the relevant law, when reaching its decision.

Dismissal a Proportionate Means of Achieving a Legitimate Aim

95. It was not in dispute that the Claimant was dismissed because of something arising in consequence of disability. The “something arising” was the Claimant's absence from work.

96. The burden of proof shifted to the Respondent to show that the Claimant's dismissal was a proportionate means of achieving a legitimate aim.

97. The Respondent relied on the following aims:

- a. To ensure all staff were capable of performing their duties in order to
 - i. Ensure adequate and appropriate staffing levels;
 - ii. To deliver high quality services safely and efficiently;
 - iii. To ensure the appropriate use of public money;
 - iv. To ensure optimal staff productivity; and
 - v. To protect patients' safety.

98. The Tribunal has found that Healthcare Assistants, such as the Claimant, support the bedside nurses and the housekeeping of the AICU intensive care unit. They are responsible for ordering stock and protective equipment and providing clinical support on the ward.

99. The Tribunal accepted that the Claimant's absence after April 2020 meant that AICU had only one healthcare assistant on duty, at most. The nurses had to pick up the work of at least one healthcare assistant, in addition to their own heavy workload. This put additional pressure on them.

100. The Tribunal found that the Claimant's sickness absence was all the more serious because it coincided with the Covid-19 pandemic, when AICU was consistently above its maximum normal capacity of 18 patients, with extremely sick patients. The assistance of HCAs was more important during this period because qualified nurses from other areas of the hospital were redeployed to AICU and AICU healthcare assistants were needed to tell them where things were stored and to otherwise support them in this specialist area.

101. AICU does not usually cover healthcare assistants' sickness absences with bank workers, as their role is primarily supportive. Furthermore, all staff working within the critical care environment need to have additional training to work in the intensive care environment, so it is not easy to obtain suitably qualified staff from the bank.

102. The absence of the Claimant on sick leave, therefore, put pressure on other staff in the Unit and meant that redeployed staff did not have the support they needed, all at a time of enormous demand on the Unit's critical, life-saving service. The Tribunal accepted that maintaining adequate staffing levels, including 2 HCAs on the AICU, was important and that the Respondent did have the aims of ensuring all its AICU staff were capable of performing their jobs (to ensure adequate and appropriate staffing levels; to deliver high quality services safely and efficiently; to ensure the appropriate use of public money; to ensure optimal staff productivity; and to protect patients' safety). It also accepted that the Respondent pursued those legitimate aims when it allowed the Claimant sick leave after April 2020, in the hope that he would return to work and then, when he did not, attempted to redeploy him to allow another HCA to be recruited.

103. The Respondent kept the Claimant's role open for him from 19 April 2020 until May 2021. It had been hoped that his condition might improve, to allow him to return to work. The Tribunal accepted that the Respondent could not keep the Claimant's HCA post open indefinitely in these circumstances, so that attempting to redeploy him after 12 months of absence was proportionate means of pursuing its aim of ensuring that all its AICU staff were capable of performing their jobs.
104. The Tribunal was also satisfied that the Respondent undertaking a redeployment process in respect of the Claimant, to identify a job he could actually do in accordance with OH and GP advice, pursued the legitimate aims of ensuring the appropriate use of public money and ensuring optimal staff productivity.
105. The Claimant was warned that, if the redeployment process was unsuccessful, so that the Respondent was unable to find a role for him, the Respondent would proceed to Stage 3 of the Sickness Management process, which would be termination of his contract.
106. Ultimately, when the redeployment process was not successful, the Claimant was dismissed. The Tribunal decided that the Claimant's dismissal on 10 January 2022 was a reasonably necessary and proportionate means of achieving the Respondent's legitimate aim of ensuring that staff were capable of performing their jobs. At the time of the Claimant's dismissal, he remained unfit to carry out his contractual role and there was no suitable alternative employment available, despite an extended redeployment period.
107. At that point, it was necessary and proportionate to dismiss, rather than prolonging his employment. While the Tribunal balanced the discriminatory effect of dismissal on the Claimant, it noted that the Claimant had been unfit for his AICU post for more than 20 months. He was signed off work, unfit to work in any capacity at the point of dismissal, and there was no other less discriminatory option available at that time. It was not proportionate to continue his employment indeterminately, with no reasonable prospect of a return to work. The Tribunal considered that the Respondent had attempted less discriminatory options, like allowing extended sick leave and attempting to redeploy him, but none had been successful in returning him to work.
108. In coming to its conclusion, the Tribunal considered whether there were, or had previously been, less disadvantageous ways of achieving the Respondent's legitimate aims. It decided that there were not. It has set out its conclusions on each potential option below:
109. Giving the Claimant an adjusted role in AICU – The Tribunal found, as a fact, that there were no "light duties" available in the AICU because manual handling of, and use of equipment in relation to, very ill and sedated patients required the people who worked there to undertake heavy physical tasks.
110. Offering the Claimant an Administrative Role in AICU in summer 2021 The Tribunal found, as a fact, that the Respondent had offered the Claimant a temporary administrative role in AICU in early 2021. That indicated that, if there were such posts available, they would have been offered to the Claimant. The Tribunal found that there was not an administrative role available in AICU in summer 2021.

111. Training the Claimant in Phlebotomy and Offering him a Phlebotomy role. As Ms Gunawardena pointed out in evidence, there was no evidence that there was a phlebotomy vacancy for the Claimant to be offered. In any event, the Tribunal accepted the Respondent's evidence that taking blood involves intricate handling and placing of needles precisely in veins and collecting blood in bottles/tubes. It accepted that there would be a risk of injury to the patient if the Claimant used only one hand, or he used his hand which had problems with grip.
112. The Respondent taking more proactive action during the redeployment process. While the Claimant contended the Respondent had many vacancies and was bound to have had a suitable role for him amongst 22,000 staff. He contended that he heard very little from the Respondent. The Tribunal found that, in fact, there were few roles available which were potentially suitable for the Claimant during the redeployment process. It was satisfied that the Respondent looked for suitable roles, by emailing managers and matrons and looking for suitable roles in vacancy lists. It was satisfied that the Claimant had access to his email address throughout the redeployment process, so that the Respondent was able to communicate effectively with him through this. The Tribunal was satisfied that the roles which were potentially suitable and available were brought to the Claimant's attention. Two such roles, in particular, the Out Patient HCA role and the cashier role, were specifically discussed with him. The cashier role was offered to him. The redeployment process, including the cashier post, lasted more than 5 months. The Respondent investigated whether there was work available, even at the point of dismissal, in the vaccination hub. That may, or may not, have been suitable work for the Claimant (he was signed off all work in any event), but the Tribunal was satisfied that the Respondent did make all reasonable attempts to find suitable alternative work for him over an extended period. Other roles may have arisen after the Claimant's dismissal, but the Respondent acted proportionately at the time.
113. Whether the Cashier Role should have been withdrawn The Claimant undertook the cashier role as cover for another employee who was on long term sick leave. He had only been in post for 3 weeks when he took a week off work and then asked for another, p138 - 140. Even though this 2 weeks' leave was retrospectively approved as annual leave, p140, the Claimant was supposed to be covering for someone else's absence, but very quickly took significant absence leave himself. In the circumstances that he was covering for absence, but was significantly absent himself, the Tribunal considered that the Respondent acted reasonably and proportionately in removing him from that role. In any event, his retrospectively approved "annual leave" was almost immediately superseded by his 9 November 2021 GP sicknote, signing him off work for 2 months from 1 November to 31 December. He was signed off for reasons which related to his arm and not for any difficulties he experienced in that post. He would have been unable to fulfil the duties of the Cashier Role after 1 November 2021, in any event. That was an additional reason why the Respondent was justified in not continuing to offer the Claimant the cashier role.
114. Looking for HCA roles during the Redeployment process when the Claimant could not undertake an HCA role . Both OH and the Claimant agreed that the Claimant should be redeployed to an Outpatients HCA role if one was available. The Tribunal considered that it was not for the Respondent's managers to disregard the Claimant's preference and its own OH advice – it was reasonable and proportionate for the

Respondent to search for those roles in the first instance. The Claimant was offered a cashier role shortly after the Respondent established that he could not, in fact, undertake the role recommended by OH. It took all reasonable and proportionate steps in this regard.

115. In summary, the Claimant's dismissal, by letter of 10 January 2022, was a proportionate means of achieving a legitimate aim. The Respondent did not, therefore, subject the Claimant to discrimination arising from disability when it dismissed him.

Employment Judge **Brown**

Date: 29 June 2023

SENT to the PARTIES ON

29/06/2023

FOR THE TRIBUNAL OFFICE