



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr D Townsend**

**and**

**Torbay and South Devon  
NHS Foundation Trust**

**Held at: Exeter**

**On: 24-27 April 2023**

**Before: Employment Judge Smail  
Ms C. Lloyd-Jennings  
Ms E. Smillie**

**Appearances**

**Claimant: Ms C. Goodman (Counsel)  
Respondent: Mr S. Way (Counsel)**

**JUDGMENT** having been sent to the parties on 10 May 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. By a claim form presented on 28 July 2022, the Claimant claims disability discrimination. The admitted disability relates to an undiagnosed chronic pain condition. This involves abdominal pain with spells of severe pain sometimes daily. The Claimant was originally employed as a health care assistant on Turner ward in Torbay hospital. The claim relates to alleged failures to make reasonable adjustments. A Reserved Judgment sent to the parties on 8 February 2023 extended time limits.
2. Employment Judge Bax identified the issues on 1 November 2022. Disability and knowledge of it were conceded on 7 November 2022 in respect of all material times. The remaining issues I take from the list of issues identified on that occasion on reasonable adjustments.

**THE ISSUES**

A. A PCP is a provision, criterion or practice. Did the Respondent have the following PCPs?

1. The requirement to be fit to undertake contractual duties as an HCA, and if he was unable to do so and not redeployed, he would be liable to be dismissed. This PCP is accepted by the Respondent.
2. The policy that access to the redeployment register is limited to twelve weeks. This was applied when he was put on the redeployment register from 6 October – 29 December 2021.
3. The requirement for there to be a second occupational health report before placing him on the redeployment register. The Claimant was first told that he needed a new report on 8 July 2021 and a second report was obtained on 10 September 2021.
4. The practice of not sending those seeking redeployment, job vacancy lists or alerting them to jobs as they arise. The Claimant says this relates to the period between 6 October – 29 December 2021. The original period of twelve weeks.

B. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability?

PCP 1. The Claimant was unable to perform his duties as an HCA and was facing the possibility of dismissal.

PCP 2. The Claimant had limited capacity to undertake work and required a sedentary part-time role and therefore the length of time did not allow for those difficulties.

PCP 3. The redeployment process was delayed and therefore not started earlier.

PCP 4. It meant he was unable to look into whether the vacancies were suitable or could be adjusted so that they were suitable.

C. Did the Respondent know or could it reasonably have been expected to know the Claimant was likely to be placed at the disadvantage?

- D. What steps the adjustments “could have been taken to avoid the disadvantage? The Claimant suggests:
1. The redeployment process should have been started earlier. The Claimant said this should have been done by July 2021.
  2. An extension to the 12-week period when there was access to the redeployment register. The Respondent says that this was done and the Claimant was then redeployed. The Claimant says but for the grievance he would have been dismissed. The Claimant says that the 12-week period should have been extended at 29 December 2021 and not when it was, subsequently extended some months later.
  3. Use the first OH report to start the redeployment process (PCP 3). The Claimant says that this should have been done by 8 July 2021.
  4. Sending the Claimant vacancy lists and job alerts (PCP 4). The Claimant says this should have been on-going between 6 October and 29 December 2021.
- E. Was it reasonable for the Respondent to have to take those steps?
- F. Did the Respondent fail to take those steps?

## **THE LAW**

4. The relevant statutory provision is section 20(3) of the Equality Act 2010. That relates to the first requirement to make reasonable adjustments, which is this case allegedly. The subsection reads “the first requirement is a requirement where a provision, criterion or practice of [the employer’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.”

5. The issues identified above reflect the individual components of the statutory cause of action. Substantial disadvantage, it is common ground, means one that is more than minor or trivial.

## **FINDINGS OF FACT**

### **The nature of the disability and absence from work**

6. The Claimant started as a HCA on Turner and Ricky Grant Wards, Torbay Hospital on 4 November 2013. He was employed to work 37.5 hours a week. He worked predominantly 11.5-hour night shifts. He was on sickness absence owing to chronic abdominal pain between July 2020 and January 2021. Following a fit note dated 18 January 2021, he was certified for a phased return to his role. There was an OH referral on 18 January 2021,

and a report followed on 25 January 2021. That was a telephone assessment undertaken by an Occupational Health Nurse, Lucy Stretton.

“You have referred him for support with regards to a return to work from his current long-term sickness. This commenced on 1 July 2020 due to gastro intestinal concerns. Daniel has been able to provide me a detailed background into his gastric concerns. As you are aware, his absence started due to abdominal pain. There was a change in bowel habit and weight loss over a number of months. His GP made appropriate referrals, following which he has been under the care of several medical teams undergoing investigations. Today he is waiting further results and expecting a referral to Derriford hospital. Daniel tells me that although there is no clear diagnosis, he has been told that this is likely to be a long-term condition, which fluctuates between periods of good health and episodes where he experiences an exacerbation of his symptoms. It is too early to clarify this situation. However, Daniel describes being very aware of his physical limitations. He tells me that he has had an occupational therapist assessment and been provided with aids to support him at home. These include a walking stick for use during periods of extreme abdominal pain and fatigue as a result; a perching stool to use in his kitchen enabling him to sit and be able to continue functioning; and a bath board to enable him to sit while having a shower. In addition, he has been successful in achieving a blue badge. In light of this he is going to apply for Personal Independence Payments (PIP) to help support him in view of both his physical and mental health requirements.

In terms of specific questions, is the reason for ill health permanent, fluctuating, progressive or resolvable? I anticipate that his current health situation is likely to be long-term, although this is not possible to confirm as he does not currently have a diagnosis. As you are aware his mental health condition is long-term with fluctuating symptoms.

Does the condition affect normal day-to-day activities and if so in what way? Throughout his sickness it is evident that all of his daily activities with living have been adversely affected. However, he has made a marked improvement, he is managing to achieve tasks such as walking, shopping and driving.

Is the employee fit to carry out all current role activities? Please outline any recommendations or adjustments for consideration? I confirm that Daniel is fit to return to work, however, the following recommendations will facilitate and support his return to return with a phased return of hours.

1. He is aware that this utilises annual leave hours: an example would be week 1, 1 x nightshift; week 2, 2 x night shifts non consecutive; week 3, 2 x consecutive night shifts, week 4, 3 x night shifts. His return should be considered flexible, therefore, he is to be met with regularly.
2. To phase his duties where possible given his working nights. Please enable the first couple of shifts to be supernumerary enabling Daniel

to familiarise himself with changes in trust and ward processes, then to gradually introduce more clinical tasks.

3. To avoid heavy lifting and moving - specifically any lifting of boxes, or equipment alone to avoid any additional pressure on his abdomen.

8. She anticipated that restrictions to be in place initially for eight to ten weeks when it would be reviewed. As to the question when a return to work was likely? She noted that Daniel has been signed off as fit to return to work by his GP. She understood he was on annual leave that week and next week but would then be able to start a phased return of working hours.

9. That report was comprehensive as to the nature of the illness and disability and also came up with recommendations as to a return to work *in the original role*. The Claimant returned to work on 29 January 2021 on the phased return. We assume that the nature of that phased return reflected what Lucy Stretton proposed.

11. On 17 and 18 February 2021 he was off sick. He had completed two weeks of a phased return before then, three shifts in total. He then had annual leave commencing on 22 February 2021. He then received an isolation recommendation letter (a shielding letter), which expired on 31 March 2021. He then had another week of annual leave whilst awaiting a further occupational health review.

12. Dr Emma McCollum, an OH Physician, undertook an occupational health telephone assessment on 7 April 2021. Again we shall take some care to quote the relevant passages:

“Current situation. Mr Townsend outlines onset of abdominal pain and weight loss in early 2020. His symptoms increased over time with spells of severe abdominal pain resulting in his absence from work. He has had extensive investigations to establish if there is an underlying structural cause, these are on-going. His symptoms are currently managed with pain relief. He had a referral to the Pain Management Team last year but unfortunately did not find this beneficial. He is exploring a second opinion. He outlines constant abdominal pain, which limits his day-to-day activities at home. He has spells of severe pain, which can be daily. He has enhanced level PIP and a blue badge. He is able to walk 100 metres unaided on a good day but uses a stick for longer distances and requires frequent breaks. He is not able to go to a supermarket and has assistance with cleaning tasks at home. He has no difficulty with driving and undertakes short shifts for a food delivery service on an ad hoc basis. He has several underlying mental health conditions, which are controlled with medication opinion. Mr Townsend has developed chronic pain and investigations as to a possible underlying cause are on-going. He has significant functional limitations. He is not currently fit to return to his substantive role as an HCA. As his symptoms have been long-standing and no current treatment changes are planned, I do not anticipate an

improvement to allow him to return to work in the next two to three months and possibly long-term. I would suggest consideration for redeployment. He will require a predominantly sedentary role which matches his skill set and is likely to be able to undertake approximately 20 hours a week.”

12. Following that, there was a stage 2 review meeting on 21 April 2021. His line manager Sara McMurray, the manager of Turner Ward, held that. David Byfield of HR accompanied her. The outcome letter that day said the following:

“We discussed your occupational health report. It states that you still have significant functional limitations due to chronic pain and that investigations into the underlying cause are still on-going. It states that you are not fit to return to your substantive role as an HCA at present and possibly not for the next two to three months or possibly long-term and therefore suggest redeployment be considered which I would agree with. The redeployment process was explained and discussed with you today and it was explained that this process can only start once you are deemed medically fit by your GP to return to work with the recommended adjustments. Meanwhile, whilst you are not fit to return, I will contact you on a regular basis starting next week to see how you are and monitor your progress. We can then arrange to meet again with HR to discuss redeployment.”

13. It is common ground that Ms McMurray and the Claimant were in regular contact in the way she suggests.

14. He signed off over this period. There was a long-term absence review meeting, which is an important meeting for the Claimant as he puts the case, and it was described as a long-term absence review/redeployment meeting on 8 July 2021. It was held by video. The outcome letter following that meeting was sent out on 10 July 2021 and we take care to quote relevant passages. Also in attendance was Mr Byfield of HR and Anne-Marie Stanley, the Claimant’s RCN Union Representative. The purpose of the meeting was to review the Claimant’s current absence and to see whether he was fit to return or commence the redeployment process as previously discussed. Ms McMurray states -

“I enquired how you have been since we last spoke and you stated that you were still experiencing intermittent abdominal pain and that your mobility was still also affected as a result and that you were needing assistance with housework etc. You also stated that you were waiting for a dietician appointment and a response to your request regarding another referral to the patient team as you are not happy with the initial consultation. You also stated that you are expecting a gastro enterology review sometime soon. I enquired as to how you felt your current mental health was and you said that you were feeling ok at present.

We discussed the fact that you did not feel that you were fit to return to start the redeployment process yet but will be keen to start looking at

the paperwork. David reminded you that we cannot hold a post for your redeployment until you are fit to start that process. Anne-Marie suggested that we look at trying to find a suitable available position/post whereby you see if you are fit to return to start the process. I said I would look into that and let you know of any possible options. Anne Marie asked about ill health retirement and the possibility of starting that paperwork to keep all options open and processes started. I stated that I would request the paperwork but that I would like you to be reviewed by occupational health in the meantime. I have sent them a referral today. As your sick note ran out a week ago, I suggested that you speak to your GP and get that extended appropriately. Please could you forward that to me when you can. I informed you that I will now be on annual leave for two weeks but will contact you again as soon as possible on my return.”

15. Several matters arise from that meeting. First of all, the Claimant’s position was that he was not fit to return to start the redeployment process. Secondly, that Ms McMurray wanted a further referral to occupational health. It also remained the position that if the Claimant was to come back, he would need to be signed as being fit to work. A point was made by the Claimant that it was deliberate that he had not had a sick note signing him off at that meeting, in case redeployment process could be started, but his position in the meeting was that he was not fit to work. However, as far as the Respondents were concerned, in terms of redeployment, it was not a case of not having an extant sick note, it was rather more of having an extant fit note saying that the Claimant was fit to return to work. We regard after consideration that the Respondent’s position in those regards was reasonable. How can you have someone return to work, even for redeployment, if they are not fit to return? The evidence for that is reasonably regarded as a fit note.

16. As to the possibility of trying to find some work for the Claimant to do in advance of formal redeployment, some effort was made by Ms McMurray. We see from a communication she sent on 8 July 2021 to Mr Byfield, who was her HR support at that time:

“I have enquired about the possibility for Daniel Townsend doing something within non surgical cancer services to see if he is fit enough to start the redeployment process. All the admin roles are fully established as far as I can see and I really cannot just have him answering the phone on a ward or anywhere else for that matter due to the limited space/social distancing rules. It is not easy as I feel Anne-Marie seems to think it is. Along with the fact that it is not just about answering the phone, as this involves having to go and find the relevant people to give messages to etc., it is a very active role. Do you have any other suggestions? I will refer him back to occupational health before I go on annual leave. I will not have time to request and look at any retirement paperwork or redeployment paperwork until I return.”

17. She tells us and we accept that she did make other enquiries of her line manager as to the possibility of some sort of work but nothing was suggested. Mr Byfield did not suggest anything either. A sick note was obtained that same day retrospectively to cover 15 June 2021 – 15 July 2021, that was signing him off altogether as unfit for work.

18. The Claimant's union representative raised with Mr Byfield on 12 July 2021 a job she had seen as being available - Oncology Clerical Officer. She suggested that was a relevant job for consideration of redeployment. Mr Byfield replied on 20 July 2021, stating that he had checked with the recruitment department as that job had not yet reached the advertising site for NHS jobs and he would come back to her as to their reasons.

“As explained at the last meeting this was not highlighted to them for a number of reasons. The main one being that Sara is awaiting the occupational health advice others being that the redeployment process had not been fully explained to them, Dan is not currently on the at risk register nor were we in receipt of his skills and experience”.

20. The Claimant has a point, which the Tribunal acknowledges, that the redeployment paperwork might have been requested to be filled in earlier by the Respondent but that does not deal with the fundamental difficulty to this part of the Claimant's case as we see it, namely that he was not signed back fit for work.

22. A telephone appointment again with Dr Emma McCollum, was arranged for 11.00 on 2 August. The Respondent's idea was that there would be an occupational health assessment again to assess the issue of redeployment fitness or the parallel matter, which the Claimant was also putting on the table namely early ill health retirement. The proposed call on 2 August did not take place. The Claimant says he did not receive a call, maybe it was because he did not have signal. This is unfortunate because this might have accelerated matters slightly. The OH assessment did not take place. It is not clear to us that this was the fault of Respondent. It would be for the Claimant to make sure he was in signal and there is no evidence that the Claimant promptly rang back.

23. As it was, the occupational health report meeting was rearranged for 10 September 2021. Anne-Marie Stanley of the Union wrote on 2 September 2021. She made reference to the meeting on 8 July 2021, she reminded Ms McMurray that they discussed the possibility of finding some alternative work for Daniel to enable him to consider a phased return to work. She pointed out that Daniel was meant to be contacted by occupational health but unfortunately that had to be rescheduled for 10 September. She also chased up the ill health retirement paperwork. In respect of the redeployment process, she had pointed out a post within the directorate, the oncology job which may have been suitable. She expressed disappointment that Mr Byford had said



that this could not be progressed in part because the redeployment paperwork had not been completed.

24. We find that whilst there are points of perfection that might be put to the Respondent, the Respondent was acting reasonably, given the unpleasant nature of the Claimant's undiagnosed illness and its incapacitating effects that plainly show he was a disabled person, to require before putting in place any sort of return to work, a fit note saying he was fit for amended duties and accompanying that an occupational report backing the position.

25. In the event, coinciding with the expiry of the half sick pay that he was on, the Claimant did submit a fit note for amended duties. He did complete the redeployment process and an occupational health report repeated essentially what the earlier position had been. Given the complexity of the Claimant's condition and the duty of care that the Respondent owes to its own employees, we do not criticise the Respondent for having failed to start the redeployment process any earlier than it in fact began.

#### The redeployment process

26. We now turn our attention to the operation of the redeployment process. The redeployment period is twelve weeks (three months). It is clear that if at the end of the twelve weeks, no redeployed post has been found, that puts the employee at risk of dismissal. It is important therefore that the Claimant is appropriately supported during that twelve-week period because the clock is ticking at the end of which he could be dismissed. The Claimant's experience of that twelve-week period was varied. There were different periods of support and ultimately the Tribunal finds that for at least eight weeks of that period the support provided to the Claimant fell far short of what was desirable.

27. For the first period of those twelve weeks, Mr Byfield, the HR officer, was in charge of the Claimant. We see that for the first three weeks he did communicate weekly with the Claimant as to what jobs may or may not be suitable. Of course, the range of jobs that the Claimant was fit to do was significantly restricted. There is a policy in the 2020 – 2021 draft of the organisational change policy, which described the role of HR and the obligations of HR during the redeployment process. Paragraph 5.5. It was a version of the policy, theoretically extant in June 2021, therefore over this period. It reads as follows:

“All vacant posts received by Employment Plus [a division of the Respondent] will be passed to Human resources prior to their release to general advert. Posts that match the requirements of individuals on the redeployment register will be held for those individuals for five days. Any individual on the redeployment register will automatically be sent the vacancy bulletin.”

27. Whilst theoretically extant, in fact what is described there was defunct and had been defunct for some time in two material respects. Whilst it was right that the vacancy panel would pass jobs for recruitment to HR prior to release to general advert, the period of being held automatically was twenty-four hours only. Furthermore, there was no vacancy bulletin as there once had been a paper bulletin. It was not the practice to send any vacancy bulletin to anybody on the redeployment list. We had at one stage wondered whether for a period during his twelve weeks, the Respondent was in breach of its own policy. This was an artificial way of looking at it because the policy was defunct and had been so for some period. Mrs Reynolds has given evidence to us. She tells us what actually happened, she quotes the provision we have just quoted and she tells us as follows from her witness statement paragraph 3.6:

“This did not reflect actual practice by the time that I was dealing with the Claimant’s redeployment. The vacancy bulletin was no longer in use. Instead, the People Hub receives notification of vacancies on a weekly basis, Wednesday of each week. We have twenty-four hours to review and if appropriate to request that vacancy is held before it is advertised. Upon receiving the vacancy list, I will review and consider if any of them are potentially suitable for individuals on the redeployment register. In some cases, it will be evident that a role is suitable and if so, I will contact the relevant manager immediately and ask for the role to be held. Alternatively, I will request a copy of the job description and job specification, which will allow me to consider further the suitability of the vacancy. Upon considering these additional documents, if I believe the vacancy is potentially suitable, I will email the individual and ask them to confirm their interest in the vacancy. Once an individual has confirmed their interest, I will contact the relevant manager and ask for the role to be held. If this request falls outside of the twenty-four hour window, it may be that the substantive recruitment process for the role in question may have progressed significantly and therefore it may not be possible to hold the role. Such a situation can arise because of the need to fill vacancies within the Respondent’s workforce swiftly given the important nature of the work undertaken.”

28. A grievance was raised by the Claimant, represented by Mrs Stanley, in January 2022, after the expiry of the initial twelve weeks and in an effort - a successful one - to postpone the redeployment review meeting at which the Claimant might otherwise have been dismissed. Mr Atkins was instructed to consider that grievance. He produced a very thoughtful piece of work on 1 July 2022. Mr Atkins is the Cancer Services Manager. He rejected much of the grievance including the suggestion that the Claimant should have been redeployed into the Oncology job that was identified in July and we agree with him about that. He made important observations on the subsequent redeployment process, which we have just been considering.

29. He noted the concern in the grievance, which was that the Claimant had not been sent a vacancy bulletin, a number of jobs were identified by him and his union representative that were not alerted to him by the People Hub

and some of those were held for less than the five days stated at paragraph 5.5 of the organisational change policy.

“I have seen evidence that the HR advisors sent you jobs throughout the redeployment period, however, I accept that you were not sent the vacancy bulletin. During my investigation I have been advised by the People Hub team that this vacancy bulletin is not something that exists in the way it used to, as we now use a centralised NHS jobs website which is updated as soon as vacancies become available, and staff are able to subscribe to their own customisable job alerts by email [we understand that some search criteria and alerts can be put into the system so that jobs at relevant bands or part-time, etc., can be automatically referred when advertised]. The People Hub team also get alerted of new jobs that have recently been approved by the Trust vacancy panel before they go out to advert. Where possible these are sent to candidates before they are advertised but often the adverts go out very soon after being approved by the vacancy panel. However, these roles if considered suitable would still be shared with an individual on the redeployment register.

The roles are reviewed and potentially held by the People Hub team are new roles that come about during the period of redeployment. Those that are already being advertised may have been approved prior to commencement of the redeployment and may not have been seen to be able to advise you of them. Therefore, it is recommended that you also review current vacancies being advertised in case there is something that is available that you feel is suitable. The HR advisor would then be able to explore these further for you. In the case of roles already advertised, it may not be possible to hold them for the requisite five days depending on where in the recruitment process they are. Hopefully an agreement can be reached on a suitable timeframe for you to review as well as supporting the recruiting manager in such cases.

To resolve this matter I am recommending that the People Hub team review the appropriate section in the policy and that it is updated to reflect current practice. In addition, I will recommend that all staff placed on the redeployment register receive appropriate advice on how they will be advised of new vacancies and how to access advertised vacancies. Whilst there is an expectation of the individual on redeployment to actively participate in finding suitable alternative employment, I have seen evidence that a number of jobs were found by yourself and that you were not alerted to them by the People Hub, and that jobs were held for less than the stated five days. My investigation found that some of these oversights had come from a lack of understanding of the posts. I believe the main cause to be the high turnover of vacancies and expectation of recruiting managers to have these posts advertised and recruited to swiftly. This in turn creates pressure on the People Hub to act hastily and on occasion the expectations of the recruiting managers can be difficult to influence.

In addition to the above updates to the policy, there are a number of other considerations that I will recommend in supporting all parties during the redeployment process as there has been variable implementation of this policy during your situation and has led to the

policy not being adhered to fully. I will therefore recommend the following.

1. The organisational change policy should be reviewed to ensure that it provides adequate guidance to support the People Hub team members, managers and individuals being redeployed in overseeing the redeployment process.
2. The expectations of all other involved parties are noted in the OCP sections 12 – 16. However to embed the importance of these commitments this should be supported by a signed agreement as part of the commencement of redeployment.
3. Consideration of reviewing the attendance management policy to include clear guidelines for redeployment on the grounds of ill health.
4. The expectations of recruiting managers who are approached during the redeployment process should be reviewed to ensure that they understand the requirement that they need to cooperate fully with the redeployment process.
5. It should be assessed whether five days is still a suitable time to hold jobs to reduce delays to recruitment and what can be done to identify vacancies before they are advertised.

As to this part of the grievance, I therefore partially uphold your complaint that due to out of date information in the organisational change policy the process set out in the policy was not followed. However, you were provided with details of a number of vacancies during your period of redeployment.”

30. Mr Byfield, for his three weeks, showed the exemplary practice that upon the weekly disclosure of the jobs that were available for recruitment, a HR advisor should filter those and suggest what might be appropriate. That puts entire responsibility for filtration on HR; there is not a system whether by customisable, alert or otherwise, for the individual redeployee to assess for him or herself the appropriateness of any position that is about to be advertised. This is a key period for the reasons that Mrs Reynolds explained. It is when that first job comes to HR’s attention as being in need of recruitment that there is a twenty-four hour period only for HR to step in and protect fully the redeployee’s interest.

31. Regrettably Mr Byfield left three weeks or so into this key twelve-week period. The Claimant graciously accepts that between 6 October and 4 November he has no criticism of what HR did. Between 5 November and 23 November, a period of two and a half weeks, there was no-one looking on his

behalf at the jobs that come out on Wednesdays. That was a period when his interest was not being protected at all. For the remaining five and a half weeks of the redeployment period he in theory had Mrs Reynolds who had this obligation thrust upon her to do her best between 23 November and 29 December. It is significant that over this period, as Mr Atkins acknowledges, that it was the Claimant and the union representative who were really identifying the jobs not from the vacancy panel list - but from the advertised jobs - as to what might be appropriate for redeployment. There was one job that came out after Mr Byfield left which would be a strong contender for a redeployment consideration - a doctor's assistant role - but that was missed.

32. Mrs Reynolds only put forward one potential recommendation, Community Phlebotomist part-time, but on further exploration for reasons we do not know that role was made full-time. No roles with any degree of likelihood of success were suggested to the Claimant following Mr Byfield's departure. Mr Byfield had made some suggestions; he was doing his best.

43. It is the Respondent's responsibility to make sure that someone in HR was effectively monitoring the jobs that the recruitment panel put to them on a Wednesday. It has been explained to us by Mrs Reynolds that often if it is received on a Wednesday, it is late in the day and often it can be Thursday morning when the list comes out. This very materially disadvantaged the Claimant because, through no fault of her own, Mrs Reynolds was part-time Monday, Tuesday and Wednesday. The key period for acting was of course Thursday - that is the twenty-four hours after the jobs come out. The suggestion that all could be picked up on a Monday does not work because for all the information we have seen that first twenty-four hours is a crucial period. For over two thirds of the twelve week period it seems that the Claimant's interests were not being effectively served by Human Resources.

Anne-Marie Stanley

33. It seems to us highly likely that the reason the Claimant was not dismissed was because of the intervention of his union representative. It is not often the Tribunal sees a union representative act with great effect but we acknowledge the service that Anne-Marie Stanley paid to the Claimant in protecting his interests. Her grievance meant that the final redeployment review meeting was put back from January to March. At the revised meeting on 4 March a cursory glance by her at the job adverts discovered three potential jobs that the Claimant might have secured, one of which was the job he is presently doing, to which he was rapidly redeployed after the meeting.

34. It is right that the Respondent at that point extended by six weeks the twelve-week period. We have seen notes for that meeting where the Claimant's dismissal was at the very least a distinct possibility but following the representations made by Ms Stanley the period was extended by six weeks and very happily - the Employment Tribunals do not always see happy endings - more often than not they deal with loss of employment - but in this event, very happily, the Claimant was redeployed and he has held this job

down. We acknowledge that the Respondent did redeploy; we acknowledge also the very significant role Anne-Marie Stanley, RCN representative played.

## **CONCLUSIONS**

35. There were plainly significant problems with this redeployment process. We were disappointed to learn that notwithstanding the very thoughtful contributions to the internal debate made by Mr Atkins, his recommendations have not been followed up. That is a matter of significant disappointment to this Employment Tribunal.

36. At the end of the day, disability discrimination and reasonable adjustments can be a very technical matter and we have to do our best to translate the theory into practice and for a while in our deliberations we wondered in reality whether this was a case of failure to comply with policy and whether that meant that under Nottingham City Transport Limited v Harvey 2012 UKEAT/0032/12 (a decision of the Tribunal chaired by Mr Justice Langstaff, then President, on 5 October 2012) that the Claimant could not argue that there was a PCP. In that case the Employment Tribunal had taken as a PCP an extant conduct policy and had held that there was a breach of the PCP in a one-off application of that policy, which also resulted in there being an unfair dismissal on at least procedural grounds. Mr Way in his submissions says a breach of a policy cannot be a PCP. The PCP is the policy, not the one-off breach.

37. Ours is a different case in principle from Nottingham City Transport Limited v Harvey. Our case does not involve a breach of an extant policy; the policy, for the reasons given to us both by Mrs Reynolds and Mr Atkins in his grievance outcome, was not the policy that was followed. It is defunct and we have to look at what the actual practice was in the relevant period - the twelve-week redeployment period. In the period 5 November – 29 December 2021, the Respondent had mislaid the redeployment form, which the Claimant had filled in. That said, the occupational health reports would have told them what they needed to look for. We also note that between 2 – 9 December Mrs Reynolds was off work whether on annual leave or illness. The Respondent HR division had not put into place a system effectively of monitoring the Wednesday vacancies, action in respect of which needed to take place on a Thursday on the Claimant's behalf.

38. Ms Goodman submitted to us at the outset of her submissions that the real reason the Claimant brings this case is because he wants it acknowledged that during this process he was let down. Although as I say we pay tribute to the Respondent for redeployment, at the end of the day this Claimant came close to being dismissed for failures in the redeployment process. He has proved his point in that regard.

39. There was a practice, which amounts to a PCP, between 5 November and 29 December, whereby the Respondent did not routinely check the vacancy list as sent to them by the vacancy panel and did not routinely alert the Claimant to any jobs that were available; and of course they did not send to him electronically or otherwise, whether customised or otherwise, the list that they got from the vacancy panel and to that extent we find, that the PCP set out at issue 3.2.4 is made out in the way that we phrase it. The PCP pleaded there in the issues is the practice of not sending those seeking redeployment job vacancy lists or alerting them to jobs as they arise. The Claimant says this relates to the period 6 October – 29 December 2021. The practice of not doing this routinely related to what we now know is the internal process as applied: the weekly vacancy list going to HR, HR having twenty-four hours (in practice the Thursday) to hold the job to prevent them being advertised. That was the relevant practice, failure to do which routinely amounts to a PCP. It is not a breach of policy, it is not Nottingham City Transport v Harvey because there was no extant policy, there was a historic policy that had been written down but was defunct as acknowledged by all managers concerned.

39. Did that put the Claimant to a substantial disadvantage? We find on the balance of probability that for anyone on Mrs Reynolds' redeployment list bearing in mind she worked Monday – Wednesday, it did. Either it did apply to anyone else on that list or would have applied to anyone who would have been on that list had there been more redeployees. There was a failure by the Respondent to monitor those jobs on a Thursday when they needed to act. This was a practice which did not relate solely to the Claimant. It did or would have related to others on Mrs Reynolds redeployment list. Was he substantially disadvantaged? Given his disability and the extent of it, yes.

40. This is a very unpleasant condition; it is severely restricting of what the Claimant can or cannot do. There are only very few jobs that he would be able to do - 20 hours, band 2, may be band 3 they would have to be sedentary, non-clinical. For him to lose the advantage of having an effective HR support Wednesday – Thursday was more than a minimal or more than a trivial disadvantage and we see that from the fact that only one job was proposed to him by Mrs Reynolds. We see that he came to the end of that first period of twelve weeks and was very close to having been dismissed, and the reason he was not, was down to the actions of his union representative.

40. In summary on liability, we find that PCP 2 is made out in the sense that it was twelve weeks which is the default position. PCP 3, we reject – it was particular to the Claimant on this occasion. Was he put at a substantial disadvantage? Someone as disabled as the Claimant will be more than minimally disadvantaged by a defined period to obtain redeployment. That said, we do not find that the Respondent was required to extend the 12 weeks necessarily. Twelve weeks ordinarily is reasonable, we do not make criticism of the twelve weeks as such and as a matter of fact in this case it was extended. We reject the contention that the redeployment process should have started any earlier than it did and indeed had it started earlier he had not been signed back fit to work. The premise of the Claimant's argument here

was that the GP upon request could be persuaded to send in, at will, a sick note ticking fit to return to work. We are not persuaded of that. We have read the descriptions of this illness and this disability. We well understand that the Claimant had been off sick for an extended period and we well understand the Respondent's requirements that there be a fit note for amended duties, and occupational health giving the green light to returning. The Respondent had obligations themselves also to the Claimant.

41. Would the Respondent reasonably be expected to know the Claimant was likely to be placed at a disadvantage? Yes of course. They knew the nature of his disability. They knew he had only twelve weeks to find work and they knew he was at risk of dismissal.

42. So PCPs 1, 2 and the rephrased 4 are made out. That latter PCP is that for those on Mrs Reynolds list there was no one in position to freeze the jobs within the requisite 24 hours (normally a Thursday) which were communicated as available late on Wednesday or early Thursday. This is because Mrs Reynolds worked Monday to Wednesday only, as were her agreed days.

43. Indeed, the reasonable adjustment which addresses PCP 4 also flows from PCPs 1 and 2. He was more than minimally disadvantaged by both because with his disability he was more greatly exposed to the risk of dismissal. In some ways the suggested PCP 4 is in truth the reasonable adjustment for PCPs 1 and 2. What is the PCP and what is the reasonable adjustment are often analytically challenging issues.

41. As regards to the adjustments contended for: we will invite further submission on the precise definition. We reject 3.5.1 the submission that the process should have started in July. 3.5.2 is unnecessary in that ultimately the period was extended. 3.5.3 that the first OH report be used. We reject that; it was entirely reasonable for Ms McMurray to require a further one. 3.5.4 sending the Claimant vacancy lists and job alerts between 6 October – 29 December 2021. That needs to be reformulated. Based upon the practice that we now know, what the Respondent failed to do was to have someone from HR on the Claimant's case on the Thursday on the twenty-four hours necessary to act promptly and to alert him of any suitable jobs. That did not happen as it did happen with Mr Byfield. It did not happen after 4 November.

42. In the event our conclusion on liability, then, is that contrary to section 20(3) of the Equality Act 2010, the Respondent failed to make reasonable adjustments during the Claimant's redeployment period, specifically 5 November 2021 to 29 December 2021, by Human Resources failing to support him fully when the weekly list of jobs approved for recruitment was sent by the Vacancy Panel to Human Resources on Wednesdays or Thursdays, by failing routinely to alert him of potentially suitable roles either within the 24 hour period set aside for preventing advertisement of the roles, or at all.



44. One particular job has been identified. We will discuss shortly whether it is sensible to consider identifiable economic loss in respect of that job or not. We certainly in terms of compensation will consider submissions on what any appropriate amount of injury to feelings should be. We have no doubt that during that period of redeployment after Mr Byfield's departure there would be concern on the part of the Claimant that the redeployment was going nowhere and he was going to lose his job.

**Injury to Feelings**

45. Turning, then, to the question of injury to feelings. The Claimant was in any event in a position of some vulnerability whilst having to be redeployed. He was not able to return to his original job. Going through a redeployment process is in any event a stressful position and we accept what has been said on his behalf that bearing in mind his condition, his vulnerability to being dismissed for incapability, it was very important to him in those circumstances that his opportunity to be redeployed in a large public employer such as this in a field with which he was familiar be taken seriously. It was extremely important that that be supported appropriately and he was not for two thirds of that time. That caused unnecessary stress and anxiety. That was eight weeks of not being properly supported. That had on-going effects beyond those eight weeks up until the point when redeployment did start happening productively. On the facts of this case that doubled the length of time to four months.

46. We think that the injury to feelings reflective of the experience of this discrimination is really bang on the border between the lower and the middle brackets. £4,500 submitted by the Respondent is too low. We think it is on the border, £9,900. Interest needs to be added to that.

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Employment Judge Smail  
Date 6 July 2023

REASONS SENT TO THE PARTIES ON  
20 July 2023 By Mr J McCormick

FOR THE TRIBUNAL OFFICE

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