EMPLOYMENT TRIBUNALS

Claimant: Ms J Howie

Respondent: Mountain Healthcare Limited

Heard at: Bury St Edmunds (via CVP)

On: 29 & 30 August 2023

Before: Employment Judge Graham

Representation
Claimant: Mr J Miller, Free Representation Unit
Respondent: Mr A Mellis, Counsel

RESERVED JUDGMENT

1. The complaint of unfair dismissal fails and is dismissed.

REASONS

Claim

1. By ET1 claim form dated 17 February 2022 the Claimant made complaints of disability discrimination and also unfair dismissal following the decision to terminate her employment on grounds of capability. The Respondent filed an ET3 and Response on 11 March 2022 denying the claims.

Procedural history

2. A private preliminary hearing for case management took place on 9 November 2022 before Employment Judge Skehan. At that time some of the legal issues were clarified and directions were made for a final hearing. The Claimant was directed to provide additional information concerning her discrimination complaint. On 23 January 2023 the Claimant withdrew her disability discrimination complaint, and a judgment dismissing that complaint was issued on 15 February 2023.

Legal Issues

3. At the start of the hearing today the Claimant confirmed that the issues regarding the ACAS Code were no longer pursued as this was a capability dismissal. The Claimant has accepted that capability (inability to kneel to perform cardiac resuscitation) was the principal reason for the dismissal. The remaining issues are as follows:

1. Unfair dismissal

1.1 What was the reason or principal reason for dismissal? The Respondent says the reason was capability (inability to kneel to perform cardiac resuscitation on the floor).

1.2 If the reason was capability, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

1.2.1 The Respondent genuinely believed the Claimant was no longer capable of performing their duties;

1.2.2 The Respondent adequately consulted the Claimant;

1.2.3 The Respondent carried out a reasonable investigation,

1.2.4 Dismissal was within the range of reasonable responses.

2. Remedy for unfair dismissal

2.1 Does the Claimant wish to be reinstated to their previous employment?

2.2 Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?

2.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

2.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

2.5 What should the terms of the re-engagement order be?

2.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.6.1 What financial losses has the dismissal caused the Claimant?

2.6.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

2.6.3 If not, for what period of loss should the Claimant be compensated?

2.6.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

2.6.5 If so, should the Claimant's compensation be reduced? By how much?

2.6.9 If the Claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

2.6.10 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

2.6.11 Does the statutory cap of fifty-two weeks' pay apply?

2.7 What basic award is payable to the Claimant, if any?

Hearing

4. The hearing was conducted via CVP. There were a small number of IT and sound issues on day one, and on each occasion I directed parties to have a short break and to log back in and the issues were resolved. I asked for questions to be repeated on a small number of occasions to ensure that they were heard and understood, and this worked well. No issues were experienced on day two.

5. I was presented with a hearing bundle of 226 pages, as well as a mitigation bundle. I was provided with two witness statements from the Claimant and one from Daniel James Keeling in support of the Claimant. Mr Keeling did not attend to give evidence so I placed limited weight on his statement. I was also provided with a witness statement from Gareth Hart (Regional Contracts Director) and Terry Lewis (HR Business Partner) for the Respondent. I heard witness evidence from the Claimant, Mr Hart and Mr Lewis. I asked the Claimant if she required any reasonable adjustments for the hearing and I was advised that she did not.

Applications

6. Prior to the hearing, on 23 August 2023, the Claimant applied for permission to rely upon a second witness statement to deal with the issues of remedy and mitigation which had been left out of her first statement. The Respondent objected on the basis that it was late and secondly it went beyond remedy and mitigation but also addressed liability. The Respondent said that the statement should either be ruled out or the first eight paragraphs should be redacted.

7. I noted the contents of the Presidential Guidance on supplying additional statements, and whilst it appeared to me that the application had been made very late, the contents of the statement did not appear to cause the Respondent any particular prejudice. Mr Mellis confirmed pragmatically that the Respondent's objections were not pursued and that he could deal with the contents of the witness statement where necessary in the hearing. That appeared to me to be a very sensible way forward and I therefore allowed the second witness statement into evidence.

Findings of fact

8. From the information and evidence before the Tribunal I made the following findings of fact. I made my findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. I do not set out in this judgment all of the

evidence which I heard but only my principal findings of fact, those necessary to enable me to reach conclusions on the issues to be decided. I have not referred to every document I read or was directed or taken to in the findings below, but that does not mean they were not considered.

9. The Respondent provides sexual assault referral services and police custodial healthcare to various police forces. Thames Valley Police ("TVP") have commissioned the Respondent to provide forensic health services to persons detained while under the responsibility of TVP.

10. An extract of the agreement between the Respondent and the Police appears in the hearing bundle **[bundle page 105]** and provides the following:

    "30.3 Qualifications and Registration

    The provider and Health Professional, along with police custody staff, is responsible for the health and wellbeing of individuals during their detention in custody, and for the diagnosis, management and discharge of a wide variety of disorders."

11. The Claimant has argued that the Respondent is not contractually required to provide basic life support to TVP. I understand from the evidence in these proceedings that basic life support includes cardiac resuscitation and this involves performing chest compressions on a patient. I find that performing basic life support could fall within that above definition at paragraph 30.3 of the contract. I find that the Respondent was required to provide health care professionals ("HPCs) whose duties would include performing basic life support if the need arose.

12. The Claimant's professional background is as a nurse and she underwent a hip replacement in 2012 and knee replacements in 2016 and 2017. The Claimant has osteoarthritis, and has also undergone surgery on both shoulders during the course of her employment with the Respondent which commenced on 1 September 2019. The Claimant's job title was initially a Forensic Custody Healthcare Professional, but it subsequently changed to Forensic Practitioner. The Claimant was employed to provide clinical cover at Police custody suites across the Thames Valley Police region, and she mainly worked at TVP's Aylesbury custody suite.

13. I have been provided with a job description document for the Claimant's role with the Respondent. This is a detailed and slightly complicated ten-page document which separates out the key responsibilities of the role, it then has a separate section on main activities, there is then a further separate section on duties and responsibilities. The impression created by a document of this size and complexity is that the role was intended to be particularly wide but not all functions would be required all the time.

14. I do not intend to recite the entire contents of the job description however I note under key responsibilities one of the functions is to identify and implement appropriate interventions (paragraph 1.2) **[bundle page 93]**. The Respondent says that this includes preforming basic life support (including cardiac resuscitation).

15. Another key function is to ensure the health, safety and welfare of detained persons held in police custody is maintained (paragraph 1.6). Chapter 2 sets out how the job holder will deliver effective services to the police and says that the job holder (amongst other things) will be required to *"manage a medical emergency as a lead, ensuring a 999 response along with an appropriate clinical response: ABCDE"* (paragraph 2.2) **[bundle page 94]**. The reference to ABCDE appears to relate to a method of performing cardiopulmonary resuscitation ("CPR") as set out in the Resuscitation Council guidelines. Under the heading of duties and responsibilities it is recorded that one of these is to carry out management of minor injuries and basic (intermediate) life support, when required (paragraph 4.10) **[bundle page 97]**.

16. During the hearing the Claimant has argued that the need for basic life support or cardiac resuscitation has been inflated by the Respondent. I find that it was clear from the job description itself at paragraph 4.10 that basic (intermediate) life support was a function of the role. This can also be inferred from the reference in paragraphs 1.2, 1.6 and also 2.2 of the job description referred to above.

17. The Claimant has suggested that this was a minor aspect of her role. I disagree. It may be the case that the need is fortunately rare, nevertheless when the need arises it is a matter of life and death and therefore it cannot be regarded as minor in that context. I did not interpret the Claimant's reference to minor as trivialising basic life support, however I consider that she intended to express is that it was minor in the sense that it was rarely required. I note that the need did not arise during the course of the Claimant's employment with the Respondent. The Respondent has compared this to undertaking fire drills – it is hoped that the need to evacuate in a fire will never arise, but one must be prepared if it does. I accept that analogy and find that performing basic life support was an important function of the Claimant's role, save that it may rarely be required.

18. Prior to starting her role the Claimant completed a new starter questionnaire. This was produced by the Respondent's external Occupational Health provider Maitland Medical. Within that questionnaire the Claimant advised that she had arthritis, and that she had a left hip replacement, and bilateral knee replacements but said that there was no impact on her daily activities. The Claimant was asked if she could go from a standing position to a kneeling position and vice versa. The Claimant responded no. It is clear that the Claimant was open and honest about her medical condition from the start of her employment.

19. A brief Occupational Health advice letter was prepared by Dr Brennan for the Respondent on 13 January 2020. The advice letter confirmed that the Claimant was fit to work with recommendations. The letter referenced that the Claimant had experienced past musculo-skeletal issues that she reported had been resolved, no adjustments were advised, save that an update on manual handling should be undertaken.

20. Whilst the report said that the musculo-skeletal issues were resolved, the situation was more nuanced than that. Whereas the Claimant's knees and hip issues had been resolved by way of replacement, the Claimant was unable to kneel. This information was absent form the report. The

Respondent did not have sight of the Claimant's questionnaire so had no knowledge of the Claimant's joint replacements at that time. It is clear that the information provided to the Respondent by Occupational Health was lacking in detail.

21. I note that the Claimant has said that her immediate managers including Debra Corkett (Head of Healthcare) were aware of her condition since the start of her employment. I have no evidence before me that this was the case, however given that the Claimant was honest and open with Occupational Health in her questionnaire I have no reason to doubt this to be the case. Moreover I noted that the Respondent did not directly challenge this in evidence. I therefore find that on the balance of probabilities that the Claimant had made Ms Corkett and others aware of her hip and knee replacements from early in her employment. However I also find that they were not aware of the consequences of the Claimant's condition until approximately two years later as is set out below.

22. It appears that soon after starting her role the Claimant required surgery on her left shoulder. A telephone Occupational Health consultation was undertaken on or around 24 March 2020 and the subsequent advice letter recorded that the Claimant was making a good recovery from her left shoulder surgery and that the Claimant felt that she would be able to manage chest compressions during CPR if required but only for a short period, and that she had assured Occupational Health that she would not be required to continue with chest compressions for more than a few minutes as she would be relieved from this in order to maintain the airway of the patient. The Claimant was declared fit for her role but was advised to remain cautious and to be aware of any limitations she may have. The medical consultation sheet **[bundle page 90]** also records the Claimant suffered with osteoarthritis and had two knee replacements and a hip replacement. Again it appears that Occupational Health did not share this information with the Respondent.

23. The Claimant experienced another period of sickness absence commencing on 25 November 2020 following surgery on her right shoulder. A further Occupational Health referral was made on 31 December 2020. A telephone assessment took place on or around 8 January 2021 where reference was made to the Claimant's right shoulder surgery, and it was recorded that *"On assessment, Judith said that she might struggle with CPR duties; however she told me that there is a risk assessment to help manage this."* There was no specific reference to the knee or hip replacements. It is assumed that the reference to struggles with CPR was in relation to the Claimant's shoulders. A return to work meeting on 20 January 2021 did not reveal any issues with the Claimant's knees or hips.

24. The Respondent did not become directly aware of the consequences of the Claimant's joint replacements until some point in June 2021 following a further referral to Occupational Health on 16 June 2021 for advice concerning the Claimant's ability to drive to other locations. I understand that this was on the basis that the Claimant was already working long hours and advice was needed about her ability to undertake a lengthy commute on top given her chronic medical conditions.

25. The Occupational Health report of 23 June 2021 recorded that the Claimant

had osteoarthritis, and that she had knee replacements and a left hip replacement. It was this report which acted as a trigger for the subsequent events in this case.

26. On 23 August 2021 the Claimant successfully completed an Immediate Life Support course. This course involved demonstrating CPR and defibrillation, and basic airway management as well as other areas. It is agreed by the parties that the Claimant performed CPR on a dummy which was at waist height for all those who attended. The Claimant was not required to kneel during that assessment.

Risk Assessment Investigatory meeting – 4 October 2021

27. Following the Occupational Health report of 23 June 2021 concerns were raised about whether the Claimant's medical conditions would impact her ability to perform her role including undertaking basic life support. A risk assessment investigatory meeting took place with the Claimant and Linsley Patrick (Health and Safety Manager) on 4 October 2021. I have been provided with a copy of the risk assessment produced following that meeting and it records the discussions with the Claimant about her physical health. It was recorded that the Claimant said that she could not get on her knees but that *"she feels in event of an emergency she would do due to adrenaline but would use a pillow of cushion to kneel on (these are always available in the cell)."*

28. The Claimant confirmed that at the recent immediate life support assessment of August 2021 she did not need to complete it on floor level and that she felt that she would be able to maintain an airway from sitting position which she felt was manageable without increasing pain. The Claimant confirmed that she would not be able to perform chest compressions or breaths whilst on her knees, but said that as all sergeants and detention officers are trained in immediate life support there would be adequate provisions on site if she was not able to manage certain parts of immediate life support.

29. The risk assessment records that telephone advice was provided from Dr Brennan of Occupational Health on 7 October 2021 where he advised that he did not feel that the Claimant would be able to perform safe and effective life support on her knees due to her knee replacements. Dr Brennan said he considered that there would be an increase in risk for the Claimant to attempt to perform CPR with or without a cushion for support. As a result, the Respondent recorded a high level of risk as regards the Claimant performing basic life support and it was recorded that she should stop this activity.

Occupational Health advice – 11 October 2021

30. Further Occupational Health advice was obtained on 11 October 2021 from Dr Brennan who appeared critical of the previous Immediate Life Support assessment from August 2021 as he said that it was undertaken at desktop height which he said was not rational and he added "*of course, nobody simply has a cardiac arrest on a table."* Dr Brennan said that he had *"never been able to observe anyone with one knee replacement – let alone two knee replacements – who has been able to undertake effective and safe*

cardiac resuscitation."

31. The Claimant has challenged this section of the report and says that it was Dr Brennan's personal not professional opinion, and she queried whether given his background he would have experienced CPR being performed. I do not need to resolve Dr Brennan's professional background and I find that this was clearly his professional opinion, and that the Respondent was entitled to rely upon it.

32. Dr Brennan noted that the Claimant also had other joint issues in her wrists and hands and he queried whether the Claimant would be able to deliver cardiac resuscitation sustainably anyway. Dr Brennan said he would defer to the Respondent's own observations but then added that *"if the employee feels that they can deliver cardiac resuscitation then you simply need to let them prove it,"* however he recommended that the Respondent ask the Claimant to sign a disclaimer in case she injured herself in the process which would avoid the Respondent accepting responsibility.

33. The Respondent has said that this was a radical suggestion which it did not follow through due to the risk of injury to the Claimant, and the records suggest that the Claimant did not seek to do so either. The Claimant now says that she should have been allowed to demonstrate that she could perform CPR, however the Respondent's position is that even if the Claimant had wished to pursue the demonstration it would not have done so due to the risk of injury to the Claimant. The Claimant now says that she would not have injured herself in performing a demonstration but that it would just have been uncomfortable for her.

34. Mr Mellis refers me to s. 2 Unfair Contract Terms Act 1977 which he says would invalidate any waiver which sought to exclude personal injury from a claim in negligence, and that to have proceeded with the demonstration would have exposed the Claimant to a potential injury and exposed the Respondent to a potential legal claim.

35. Mr Miller seeks to persuade me that it would have been reasonable for the Respondent to have followed through with this option and he relies upon the maxim of *volenti non fit injuria*. I do not intend to enter into a discussion on the matter of consent in dangerous sports by comparison to the risk of injury of at work, save to note that where a medical practitioner has suggested that a course of action carries with it a risk of physical injury to such an extent that a disclaimer is mentioned, then clearly it is entirely reasonable for an employer to decide not to expose the worker to that risk.

Ill health capability interview – 18 October 2021

36. An ill health capability interview took place on 18 October 2021. This was chaired by Debra Corkett (Head of Healthcare). The purpose of this meeting was to establish whether the Claimant could safely perform life support and what adjustments may be needed for her. The notes of the meeting demonstrate that this was a comprehensive discussion with the Claimant about her ability to perform this aspect of her role.

37. The Respondent said that a pillow or a cushion would not be appropriate for the Claimant to use following the advice of Dr Brennan that this may injure

the Claimant. I also note that the Claimant confirmed that she would not be able to undertake chest compressions on her knees and she suggested that she would check airways instead, and that if she needed to perform CPR then she would be sitting or on a bench, and further that she would not be on her own in a cell. The Claimant said that her condition was not going to go away but she had been working for two years and two months without issue. The Claimant said she would sit on the floor and lean over to do a chest compression and that she had done this once in the street by leaning over someone and not being on her knees.

38. When asked if she was aware of any reasonable adjustments that could be made to help her deliver chest compressions besides kneeling on a cushion, the Claimant confirmed that she was unaware of any appliances, however she suggested that she should be allowed to demonstrate in a cell how she would sit on a bench and deliver CPR. The Claimant said that there was no reason for the detainee patient not to be next to her. The Claimant also said that there was nothing in the CPR policy which said that the person performing it must be on their knees.

Capability hearing – 2 January 2022

39. A capability hearing was convened to consider the Occupational Health advice. I have been referred to the Respondent's Capability Procedure. I note that the Respondent did not undertake an informal attendance meeting however I find that this was not required as this was not an attendance issue, and moreover the policy provides for that step to be skipped where necessary. I note that in any event an investigatory interview had already taken place.

40. A capability hearing took place on 2 January 2022 and was chaired by Gareth Hart, Regional Contracts Director. Terry Lewis (HRBP) attended as note taker. Both Mr Hart and Mr Lewis gave witness evidence at the Tribunal hearing. I understand that the delay in arranging the capability hearing was due to the Claimant having raised a grievance so this process was paused pending the grievance and appeal hearings.

41. I understand that Mr Hart previously worked as a prison officer and had first hand experience of administering CPR to prisoners in that context which is a similar environment. Mr Hart informed the Tribunal that the level of force needed to be applied when performing CPR is equivalent to that which might break a person's rib. It was Mr Hart's clear evidence that kneeling would be required when performing chest resuscitations. I find that Mr Hart had a genuine belief that this was the case. I noted that Mr Hart was unable to recall the full ABCDE acronym when asked, however this did not impact Mr Hart's credibility as a witness in this case.

42. I have been referred to the notes of the capability hearing where there was a discussion with the Claimant about her ability to perform her role. I note that at the start of the meeting the Claimant provided a document containing 12 areas she wished to raise. It is not necessary for me to record all of those here however I note that the Claimant asserted that she had passed the immediate life support training in August 2021 and satisfied the Resus Council Guidelines, however Mr Hart's evidence is that whilst the certificate shows that training had been passed, it does not take into account every

situation or scenario and does not allow for someone to be trained in every position where a patient may fall so it is done at chest height.

43. During the capability hearing Mr Hart referred the Clamant to her job description and asked if she was able to manage a medical emergency as a lead, ensuing a 999 response along with an appropriate clinical response: ABCDE, without potentially causing self-injury. The Claimant replied that she could.

44. Mr Hart also referred the Claimant to the Respondent's contract with TVP to ensure the availability of appropriate HCPs to recognise, diagnose, treat and always manage service users with urgent or life-threatening conditions. The Claimant was asked if she believed that she met this requirement including treating a patient on the floor whilst ensuring that she remained safe and without self injury. The Claimant replied that she did and had done so by reference to a previous incident involving an epileptic seizure. The Claimant was asked if she had provided CPR since employed by the Respondent and she confirmed that she had not.

45. The Claimant was asked if she believed that she could successfully deliver high quality chest compressions for up to 2 minutes without self-injury, given the Resus Council recommendation that staff change every two minutes. The Claimant replied that she believed that she could do that.

46. When asked if she believed that she could do that whilst the patient was on the floor, the Claimant's answer appeared to partially sidestep the question. The Claimant said that the patient would be on the floor or the bench and she disputed whether she would ever be required to do this on her own with a detainee and she said that this would never happen as her experience was that she would be supported within 23 seconds. The Claimant then said she could demonstrate this but *"I feel my role would be to manage the situation and I would be better used on airway than chest compressions. As a practitioner of 40 years is that I would do the airway while you did the chest compressions. If I was in the street I would sit or squat to manage the airway."*

47. On 7 January 2022 Mr Lewis wrote to the Claimant to inform her that Mr Hart had found that the Claimant was unable to safely, without causing injury or harm to herself, complete life support on a patient. The Claimant was informed that as a result her employment would be terminated in accordance with section 10.1 of the Respondent's Ill Health Capability Policy. Having reviewed that section of the policy it provides:

    "10. Employees Found Permanently Unfit

    10.1 If the employee has been found permanently unfit or unable to perform their duties without self-injury by the Occupational Health Physician for their job and no alternative is available, then the employee should be dismissed on grounds of incapability."

48. Whilst this was a three page letter, most of it dealt with separate issues the Claimant had raised in her twelve point note at the start of the hearing which did not relate to the decision to terminate her employment. I note that the Claimant was notified of her right to appeal the decision but she did not do

so.

49. The dismissal letter does not address alternative employment. The Claimant says that she was previously contacted about a managerial role however there was no consideration of alternative roles prior to dismissal. Mr Hart said that this was considered, however the Claimant would not have been suitable for another nursing role due to her inability to kneel to perform chest compressions. Mr Hart also said that there were no managerial roles available at that time, and that as the Respondent had a requirement for all staff to undertake CPR the Claimant would not have been suitable in any event. I was not provided with evidence that there was a contractual requirement between the Respondent and its clients that its administrative or managerial staff should be able to perform basic life support. There is no evidence that there were any suitable alternative roles in any event and therefore I accept the Respondent's evidence in this regard.

50. The Claimant has argued that reasonable adjustments were not considered, however these were previously discussed in the investigatory meeting and no potential adjustments were identified by either the Respondent or the Claimant.

51. Much of the evidence I have heard centres around where a medical emergency may arise and what support would be available. Whilst the Claimant's assumption is that it would likely take place in a cell, that cannot be guaranteed. The evidence of Mr Hart was that a medical incident could occur anywhere within the custody suite, including the cell, a corridor or even at the detention desk. The Claimant has also assumed that she would have somewhere to sit to perform CPR, however Mr Hart's evidence was that this is not guaranteed and he advises me that furniture in the custody suite is fixed and cannot be moved in case it is used as a weapon. As such it cannot be assumed that the Claimant would have somewhere to sit, and Mr Hart was clear that based upon his experience he did not believe that CPR could be performed safely in that way.

52. The Claimant has also relied heavily on the availability of custody officers trained in immediate life support who would be able to assist her. The Claimant relies upon the results of a Freedom of Information Act request on 8 December 2022 which confirmed that custody sergeants and detention officers would be trained in first aid and in the use of a defibrillator as well as other advanced first aid including chest compressions. The response also confirms that a healthcare professional would not be left in a cell without either a detention officer or custody sergeant present with them. The Claimant says that she would delegate chest compressions to the accompanying custody officer and that she would manage the situation and check airways etc. The Claimant has referred to the availability of these officers as having "safeguards in place" which would mitigate against her inability to kneel.

53. Mr Hart's evidence was clear and compelling in this regard, he said that there were too many variables to be able to say where an emergency would occur and who would be around. There is no guarantee that it would be in a cell, it could have been in a corridor or anywhere on site, and it could even have been an officer who had the medical emergency in which case the Claimant may find herself alone for a period of time. I accept that this is

likely to be quite rare however the Respondent has referred me to a very sad incident in 2020 where a detainee shot and killed a police officer in a police station, therefore the Respondent says that it cannot be guaranteed that the Claimant would never be alone, although I accept that the likelihood is small.

54. The Claimant also suggests that the contract with TVP suggest a collective responsibility between the Respondent and TVP. On that basis the Claimant says that the Respondent could not have a genuine belief as it misdirected itself on the Claimant's duties. I do not agree. I have already made findings above that basic or immediate life support was required under the Respondent's contractual arrangements with TVP. I agree that paragraph 30.3 of the contract with TVP does record that the Respondent and HCP and the police custody staff are responsible for the health and well-being of individuals during their detention, however I do not find that it automatically follows from that paragraph that the HCP will supervise or manage the custody officers who will then be required to perform chest compressions. I consider that it was reasonable to expect that the HCP supplied from the Respondent would be able to perform chest compressions from a kneeling position. Moreover, there could be situations where it may fall to the HCP to perform that function rather than to act as a lead who delegates it.

55. The Claimant now says that there was evidence before Mr Hart that she could perform cardiac resuscitation from a bent-over or squatting position, and therefore he did not have reasonable grounds to believe that difficulties in kneeling precluded performing cardiac resuscitation altogether. I do not find that to be the case. There was no evidence before Mr Hart of that nature. The reference to squatting was made only in passing in the capability hearing where the Claimant was referring to managing an airway in a medical emergency and she said that if she was in the street she would sit or squat to manage the airway. The Claimant now says that she was referring to chest compressions in that context, however that is not what was said at the time and Mr Hart was clear from his experience that this could not be done seated, and he was not prepared to risk injuring the Claimant by testing her doing it.

56. I would note that throughout the hearing the Respondent has repeatedly asserted that it had no criticisms of the Claimant's performances on a day to day basis. I also note that the hearing bundle (and the witness statement of Mr Keeling) provides a significant amount of positive feedback about how well the Claimant performed. There is no criticism of the Claimant's performance of the aspects of the role she could physically perform. The issue is the one aspect that the Claimant accepts she could not perform which is performing cardiac resuscitation on her knees.

Law

57. The Employment Rights Act 1996 provides:

94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer.

98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

…

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality,

…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

58. It is for the Respondent to show the reason for the dismissal and that that reason is a potentially fair reason. The reason for dismissal is the facts and beliefs known to and held by the Respondent at the time of its dismissal of the Claimant - ***Abernethy v Mott Hay and Anderson*** **[1974] IRLR 213**. Capability is the reason relied upon in this case and this is a potentially fair reason.

59. It is clear from the case of ***DB Schenker Rail (UK) Ltd v Doolan*** **UKEATS/0053/09/BI** that the test in ***British Home Stores Ltd v Burchell*** **[1980] ICR 303,** applies as much to capability dismissals as it does to conduct dismissals. Therefore the Employment Tribunal is required to address three questions:

i. Whether the employer genuinely believed its stated reason;

ii. Whether it was a reason reached after a reasonable investigation; and

iii. Whether they had reasonable grounds on which to conclude as they did.

60. The Respondent is not required to prove that the Claimant was incapable of performing their job, rather the Respondent needs only establish an honest belief on reasonable grounds that the Claimant was incapable - ***Taylor v Alidair Ltd*** **[1978] IRLR 82**.

61. The question of whether the employee is capable of doing the work that he is employed to do must be determined in accordance with the employee's contractual obligations and role at the time of dismissal - ***Plessey Military Communications Ltd v Brough*** **EAT 518/84**.

62. It is necessary for the employer to have consulted with the employee prior to dismissal and also some attempt to establish the genuine medical position - ***East Lindsey District Council v Daubney*** **[1977] ICR 566**.

63. The range of reasonable responses test as set out in ***Iceland Frozen Foods Limited v Jones*** **[1982] IRLR 439,** ***Post Office v Foley*** **[2000] IRLR 827** and ***J Sainsbury plc v Hitt*** **[2003] ICR 111** requires me to consider whether the decision of the Respondent to dismiss the Claimant fell within the band of reasonable responses of a reasonable employer acting reasonably. This applies equally to the procedure that was followed as well as the decision to dismiss.

64. Guidance on these considerations can be found in ***OCS v Taylor*** **[2006] ICR 1602**, where the Court of Appeal confirmed that Employment Tribunals should:

"…consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage."

And

"consider the procedural issues together with the reason for the dismissal, as they have found it to be. The two impact upon each other and the ET's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss."

65. Tribunals must avoid the substitution mindset and not decide the matter on what the Tribunal would have done in these circumstances. Rather it must apply the standard of what a reasonable employer would have done. There may be a range of responses that a reasonable employer could have reached. Ultimately, the Tribunal must consider whether dismissal fell within

the range of reasonable responses open to a reasonable employer.

66. Whereas there is no requirement for an employer to create a new role where none exists - ***Merseyside and North Wales Electricity Board v Taylor*** **[1975] ICR 185***,* it is appropriate to consider whether the employee could be offered an alternative position more suitable to the employee's state of health - ***Spencer v Paragon Wallpapers Ltd*** **[1977] ICR 301**.

Submissions

67. Both parties delivered oral submissions, and Mr Miller provided written submissions. The contents of those submissions are not repeated here but have been taken into account in reaching my decisions.

Conclusions and analysis

68. I will deal with each of the issues in turn. As regards whether the Respondent genuinely believed the Claimant was no longer capable of performing her duties, Mr Miller has admirably sought to argue before me that the Respondent has misdirected itself as to the Claimant's duties. I do not agree.

69. I have found that the provision of basic or immediate life support was required under the contractual arrangements between the Respondent and TVP and further that it was also a requirement of the Claimant's job description. The fact that it is rarely required does not detract from the fact that in a medical emergency it would be expected that the HCP supplied by the Respondent would be able to perform it. The Claimant's insistence that she would be better utilised managing a situation or performing checks on airways, fails to recognise that there was a requirement that the person performing her role would be able to deliver it.

70. It was clear that the Claimant was unable to perform this aspect of her role in a kneeling position as she had admitted as such in the risk assessment and the investigatory meeting. When asked about her ability to perform this function, the Claimant had effectively said that she would delegate it whilst she managed the situation and checked airways.

71. The Respondent sought up to date medical advice from Occupational Health and was then entitled to base its conclusion in this regard on the advice of Dr Brennan who said that he had never seen anyone perform this safely with one knee replacement, let alone two. Moreover, Mr Hart had first-hand experience of what was required, having served as a prison officer. Mr Hart gave helpful evidence on the level of force that would be required to perform this function. I therefore find that the Respondent did have a genuine belief that the Claimant was not capable of performing this aspect of her role.

72. As regards the second issue, whether the Respondent adequately consulted the Claimant I find that following the risk assessment discussion the Claimant was consulted on two further occasions. Firstly in the investigatory meeting, where it was confirmed that the Claimant's condition was permanent and not going to go away, and again during the capability hearing.

73. The records of those meetings show genuine and reasonable attempts on the part of the Respondent to understand whether the Claimant could perform cardiac resuscitations on her knees, and if not, what adjustments may help. The Claimant confirmed that she was not aware of any adjustments. It is correct that it is not for a disabled person to suggest adjustments, but it is entirely reasonable for the Respondent to have asked the Claimant if she knew of any. Whilst this is not a disability discrimination claim (that complaint having been withdrawn) there did not appear to be any proposed adjustment in this matter which would have been reasonable. I therefore find that the Claimant was adequately consulted in the specific circumstances of this case.

74. As to whether the Respondent carried out a reasonable investigation, I note that Occupational Health advice was sought and obtained, a risk assessment meeting took place which identified that the Claimant could not kneel, and a separate investigatory meeting took place which also considered these matters. The Claimant's argument now is that she should have been allowed to demonstrate that she could perform CPR.

75. The Occupational Health report of 11 October 2021 indicated that Dr Brennan had never observed anyone with one knee replacement, let alone two knee replacements, undertake "effective and safe" cardiac resuscitation. It was clear from the medical advice that allowing the Claimant to demonstrate that she could perform CPR involved such a degree of risk to her of injuring herself that the doctor made an unusual suggestion that she should be asked to sign a waiver first. The Claimant now says that she would not have injured herself but would have only been in discomfort. I must form my view of what was known by the Respondent at the material time, and in my view it was reasonable for the Respondent to have relied upon the medical advice of a risk to the Claimant.

76. When faced with medical evidence that there was a risk of injury I cannot find that it would have been reasonable to have followed through and exposed the Claimant to a risk of injury. I do not find that the failure to allow the Claimant to perform a demonstration in these specific circumstances means that the investigation was inadequate. Rather I find that the Respondent carried out as thorough an investigation as it could, and that to have gone further with a demonstration presented a risk of injury to the Claimant.

77. I do not find that the Respondent failed to give adequate weight to what the Claimant had performed in the past, it noted that the Claimant had not been required to perform this function since she joined the Respondent, and I find it was entitled to look to what she may be able to perform in the future based upon the evidence before it, including the advice of Dr Brennan. I therefore find that in the circumstances the Respondent carried out a reasonable investigation.

78. As regards whether dismissal was within the range of reasonable responses, I remind myself to be wary of a substitution mindset and the issue is not whether I would have dismissed this Claimant, but whether it was within the range of responses open to a reasonable employer.

79. I have found that the Respondent reasonably believed that the Claimant could not perform this rarely required but vital function. I have also found that this belief was reasonably held following a consultation with the Claimant and a reasonable investigation which included up to date medical evidence. I have also found that there was earlier consideration of reasonable adjustments for the Claimant, but none were identified (save that this is not a disability discrimination claim). I have found that it was reasonable for the Respondent to have formed the view that the Claimant could no longer perform that part of her role – this was a rarely required but vital part of her role. I have gone on to consider whether the Respondent adequately considered suitable alternative employment for the Claimant prior to dismissal. I have found that consideration was given to this however no roles were available at that time.

80. Having found that the Respondent reasonably and genuinely believed that the Claimant could not perform this function and having conducted a reasonable investigation and consulted with the Claimant, and there being no suitable alterative role available, I find that the decision to dismiss the Claimant in these specific circumstances was within the range of reasonable responses open to a reasonable employer.

81. I do not find that the Respondent unfairly dismissed the Claimant. The claim is therefore dismissed.

82. I am grateful to both advocates for the quality and clarity of their advocacy and legal submissions which I have found very helpful in reaching my decision.

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Employment Judge Graham
6 September 2023

_____
Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

.....12 September 2023.....

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FOR THE TRIBUNAL OFFICE