



EMPLOYMENT TRIBUNALS

Claimant: Mr M Legname

Respondent: Environment Agency

Heard at: Manchester

On: 13, 14 and 15 June 2023
29 August 2023
(in Chambers)

Before: Employment Judge K M Ross
Ms S A Humphreys
Ms C A Titherington

REPRESENTATION:

Claimant: Ms D van den Berg, Counsel
Respondent: Mr P Smith, Counsel

JUDGMENT

It is the unanimous judgment of the Employment Tribunal that:

1. The claimant was a disabled person within the meaning of the Equality Act 2010 at the relevant time and the respondent had knowledge of the claimant's disability.
2. The respondent failed to make a reasonable adjustment pursuant to section 20 Equality Act 2010.
3. The claim was presented within the time limit within section 123(1) Equality Act 2010.
4. The case will proceed to an "in person" remedy hearing on a date already agreed with the parties on **20 October 2023 at 10.00am at Manchester Employment Tribunal, Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA.**

REASONS

Introduction

1. The claimant has been employed by the respondent since November 2012 and remains employed with them. His current role is Growth and Strategic Adviser in Sustainable Places.

2. The claimant suffers from Generalised Anxiety Disorder. At the relevant time he worked for the respondent in the role as Senior Environmental Crime Officer. The claimant sought a reasonable adjustment to a role in the Sustainable Places team. The respondent refused to redeploy the claimant into the role and he brought a claim to this Tribunal.

Evidence

3. We heard from the claimant and his trade union representative, Ms Quibell.

4. For the respondent, we heard from the claimant's immediate manager, Mr Pharaoh; the claimant's previous manager, Ms J Holt; managers Ms S Mills, Ms B Butler and Mr S Padley (who heard the claimant's grievance).

5. The hearing was in person at Manchester Employment Tribunal. We had the benefit of both electronic bundles and a paper copy of the bundle. The parties had agreed a List of Issues which was confirmed with the panel at the outset of the hearing.

The Issues

6. The issues were as follows:

(1) The question of disability:

(a) The respondent did not agree that the claimant's Generalised Anxiety Disorder met the meaning of "disability" within the meaning of section 6 Equality Act 2010. Accordingly, the Tribunal had to determine:

(i) Whether at the relevant time when the alleged discrimination took place, the claimant had a mental impairment that was long-term and which had a substantial adverse effect on the claimant's normal day-to-day activities.

(ii) When was the alleged act of discrimination?

(iii) For the purposes of determining the "section 20" claim, was the claimant disabled on this date?

(2) Section 20 Equality Act 2010 – failure to make reasonable adjustments:

- (a) It is agreed between the parties that the provision, criterion or practice (“PCP”) in place was as follows:

“The respondent applied a PCP that the respondent required its employees to be fit and capable to attend work and/or perform the role of Senior Environmental Crime Officer in the NES team.”

The remaining requirements to succeed under section 20 were in dispute. These were:

- (i) Did the PCP put the claimant (and others with the same disability) at a substantial disadvantage in comparison with other persons who were not disabled?
 - (ii) What was the substantial disadvantage suffered by the claimant? The claimant said having to work in the NES team adversely affected his mental health and made him unfit for work.
 - (iii) Was the respondent aware, or ought it reasonably to have been aware, that the claimant was disabled and that he was likely to be placed at a substantial disadvantage compared with persons who are not disabled?
 - (iv) Did the respondent take steps that were reasonable to avoid the disadvantage? The claimant said he should have been moved to a role in the Sustainable Places team.
- (3) Time Limits – section 123(1) Equality Act 2010

- (a) The respondent contended in its response form that the claim had been brought beyond the statutory time limit of three months. The Tribunal had to determine:

- (i) When was the alleged act of discrimination? The respondent contended the date should be 2 June 2021. The claimant agreed a decision was made on 2 June 2021 but contended a second decision was made on 2 September 2021 and that was the relevant date.
- (ii) Was the claim form submitted within the requisite three month period (taking account of ACAS conciliation)?
- (iii) If not, is it just and equitable for the Tribunal to extend the time for the claimant to present his claim?

The Law

7. The Tribunal had regard to the relevant law which is to be found at section 6 Equality Act 2010, section 20 Equality Act 2010 and section 123 Equality Act 2010.

8. The Tribunal had regard to the Guidance on matters to be taken into account in determining questions relating to the definition of Disability (2011) (“the

Guidance”). We reminded ourselves that the Guidance does not impose any legal obligation in itself but we should take it into account where we consider it to be relevant.

9. The Tribunal had regard to the Code of Practice on Employment (2015) (“the EHRC Employment Code”) which has some relevance on the issue of disability. Once again, it does not impose legal obligations but we are entitled to take it into account.

10. The Tribunal also had regard to paragraph 2(1) Schedule 1 Equality Act 2010 in relation to the impairment; to **Cruickshank v VAW Motorcast Limited [2002] ICR 729** and **All Answers Limited v W [2021] EWCA Civ 606**.

11. Other case law which is well-known, and which we had regard to, included: **Boyle v SCA Packaging Limited [2009] ICR 1056 HL**; **Goodwin v Patent Office [1999] ICR 302 EAT**; **Woodrup v London Borough of Southwark [2003] IRLR 111**; **Archibald v Fife Council [2004] ICR 954 HL**; **Makuchova v Guoman Hotel Management (UK) Limited EAT 0279/14**; and **Robertson v Bexley Heath Community Centre [2003] IRLR 434**.

The Facts

12. We found the following facts.

13. The claimant started work with the respondent on 4 November 2012 becoming a permanent Senior Environmental Crime Officer on 23 August 2017. By November 2018 the claimant raised concerns about stress. The claimant and his then manager had a conversation about stress and in December 2018 Ms Holt noticed an occasion on a work related Xmas occasion where the claimant had broken away from the group and isolated himself.

14. In April 2019 the claimant was prescribed Sertraline by his GP (page 587) and there was a further meeting between the claimant and Ms Holt in June 2019 with a reference to Generalised Anxiety Disorder (“GAD”).

15. In July 2019 there was a discussion about work-related anxiety and GAD and it noted that triggers for the claimant's stress included organisation change and written comments (page 246).

16. On 28 November 2019 an Occupational Health report was obtained where the claimant explained he had been diagnosed with GAD earlier in that year (page 258).

17. During 2020 the claimant worked on a 12 month temporary assignment in Sustainable Places.

18. Meanwhile, on 10 September 2020 there was a restructure of the claimant's original team.

19. On 5 January 2021 the claimant returned to his substantive Senior Environmental Crime Officer (“SECO”) role in the National Enforcement Service (“NES”).

20. In February 2021 Andy Crawson was the claimant's line manager and an employee passport (see page 675) was created. This relates to the management of an employee with a disability or health impairment.

21. In March 2021 there was a meeting about problems with the merger of the two teams. During that month the claimant, as he had been requested to do, provided a report on problems in the new team structure (see pages 700-701).

22. On 20 April 2021 there was a further meeting about the claimant's disability passport. It refers again to Generalised Anxiety Disorder. The claimant's new team leader, Mr Pharaoh, agreed to refer the claimant to Occupational Health (see page 300). An Occupational Health report at page 307 identified that the claimant's current role as a SECO was likely to provoke stress and anxiety and that the claimant was likely to be disabled under the Equality Act 2010.

23. On 13 May 2021 there was a meeting between the claimant, his trade union representative and Mr Pharaoh regarding the Occupational Health report. The following day on 14 May 2021 Mr Pharaoh told HR that the claimant had said, "before he went on assignment he suffered with GAD and it was exacerbated by the toxic work environment and being micromanaged. Whilst on assignment he was looking to reduce his medication as he felt better but on his return to the team his GAD increased. Although he recognised the change in management has reduced the toxicity it is still causing issues with his condition" (page 314).

24. There was a further meeting on 18 May 2021 between the claimant and Sarah Mills (page 318).

25. We find that on 19 May 2021 the claimant was off work sick, self-certifying for two weeks. There was some confusion between the claimant's evidence and the respondent's witness evidence about the length of the claimant's self-certification period. The claimant's recollection is that because this was during the Covid pandemic he was entitled to self-certify for two weeks rather than the usual week, and we rely on his evidence on this point.

26. We find on 20 May 2021 Ms Bonnie Butler was communicating with Mr Pharaoh about a move out of the team for the claimant. She advised Mr Pharaoh, "we cannot move someone over if they are not a medical redeployee" (page 281). We find there was a meeting between Ms Mills, Ms Butler and Mr Pharaoh. Mr Pharaoh was the junior, immediate line manager. Ms Mills and Ms Butler were senior to him.

27. On 20 May 2021 the claimant's trade union representative emailed Sarah Mills about a role for the claimant at Sustainable Places (page 320).

28. On 21 May 2021 an Occupational Health report was received (page 331).

29. In a telephone call on 24 May 2021 the claimant explained to Mr Pharaoh that Jackie Harris (his former manager when he had previously been on secondment at Sustainable Places) had said she would have him back and that no-one else had applied for the role. We find this is a reference to a return to the Sustainable Places team, the adjustment the claimant wanted.

30. On the same day Mr Pharaoh telephoned HR and he recorded the advice from Ms Brown as, "We can support him to manage his stress and find out what is causing this at present. If the role is advertised, he can apply for it as with any other role. What he is asking of us is unfair, leave open for four months and we cannot fill for that short time". He also recorded the claimant had told him that getting "chest pains and anxiety sent his tinnitus and anxiety through the roof".

31. We find on 25 May 2021 Mr Pharaoh spoke to Ms Mills and he "explained the HR view that he [the claimant] could be let go to the Sustainability role as no-one else applied but that it would be a management decision. Sarah will contact Bonnie to discuss the next steps".

32. On 26 May 2021 the claimant's trade union representative emailed Mr Pharaoh and Ms Mills asking for an immediate transfer (page 347).

33. On 1 June 2021 the claimant supplied a fit note (page 591). We find he was absent from work until September 2021. The fit note records anxiety and depression.

34. On 2 June 2021 the respondent wrote to the claimant, referring to the Occupational Health report dated 29 April 2021, and refused him a four month assignment (page 354).

35. On 3 June 2021 the claimant's trade union representative submitted a grievance on the claimant's behalf relating to the refusal (pages 358-359). The grievance referenced the Occupational Health report which advised, "It is recommended that he [the claimant] be moved from this current department if this is operationally viable". The grievance identified there was a role for the claimant to go to and it had been available since week commencing 3 May 2021 (grievance form pages 360-364).

36. On 8 June 2021 the claimant's union representative requested the grievance should be paused, stating the claimant:

"...has asked me to pause the grievance and to enable you in an informal capacity to find him a role in the immediate and longer term. The claimant would like to be in work next week. The role would need to be outside of NES."

37. On 18 June 2021 the claimant was asked again to complete a stress questionnaire.

38. On 22 June 2021 the claimant asked again for alternative roles (page 94).

39. On 9 July 2021 Mr Pharaoh recorded to HR, "Doctor states he will be fit for work if he is moved to another role" (page 69). He also recorded that the claimant, "stated his condition has deteriorated and he is not sleeping". We find Mr Pharaoh arranged another Occupational Health referral.

40. On 15 July 2021 Mr Pharaoh recorded:

“The assignment he was pulled back from by NES (where we sit) have come back to him [the claimant] and offered him a nine month assignment he can go back to.” (Pages 70-71)

41. Mr Pharaoh records that Bonnie Butler, his “grandparent manager”, (which we find to mean the manager above Mr Pharaoh’s immediate line manager) previously agreed that the claimant would be permitted to move if he could gain an assignment for 6+ months. Mr Pharaoh asked, “From an HR perspective, can the claimant take up this assignment and be slotted in without the need for a formal recruitment process, as it is basically the one [the role] he left back in January?” It was noted that Mr Pharaoh would call the Recruiting Manager.

42. On 19 July 2021 the claimant informed the respondent that the three month assignment opportunity in Sustainable Places, Cumbria had now been extended until the end of March 2022. He also recorded, “Unfortunately the leadership team in NES informed me by text that this has been declined on the advice of HR”.

43. On 21 July 2021 there is a record of HR advice:

“The claimant is not classed as a medical redeployee and therefore current HR advice provided is that if the employee wishes to apply for a vacancy they would need to apply alongside others who may be interested.” (Pages 72-73)

44. On 13 August 2021 new Occupational Health advice was received (see page 444) advising the claimant had been absent from work since 19 May and had a fit note from his GP which would expire on 5 September. The report states:

“On this basis you may wish to consider whether this could be judged to represent a situation in which Mr Legname would benefit from being redeployed to an alternative role on medical grounds.”

It also recorded:

“It does appear that his perception of the work circumstances are now such that it represents a barrier to him returning to that role and there are no adjustments or support you can consider that seem likely to materially change the situation.”

The report states:

“It is my opinion that on the balance of probabilities the immediate benefit to Mr Legname of a change in role and subsequent period of stability is likely to outweigh the future potential for the requirement of a long-term solution to the situation to adversely affect his physical wellbeing.”

The report goes on to say that the doctor considers the claimant is disabled within the meaning of the Equality Act 2010.

45. On 16 August 2021 Mr Pharaoh contacted Rebecca Brown of HR, “Given OH of August and new job, can claimant be moved across on medical grounds?” (page 449). He also asked, “Would this report and closing statement change our position?”.

46. On 19 August 2021 there was a meeting between the claimant and Mr Pharaoh (page 274). On the same day Ms Brown (HR) sent Mr Pharaoh a holding reply (page 448). Mr Pharaoh recorded at page 448:

“Maurizio also reiterated that the post he is applying for is the one he was successfully in post for previously and the last time it was advertised no-one applied. He stated the new advert’s deadline is tomorrow and he feels as he was successful at interview last time on top of the doctor’s new Occupational Health report and the deterioration in his health, he cannot see why he is not being allowed to be slotted in.”

47. Mr Pharaoh said he reiterated that it was unfair for him to be “slotted in” as others may have applied, including those on the redeployee list.

48. On 26 August 2021 Mr Pharaoh recorded that he gave the claimant an update that there was no updated position with the Legal Department who were being contacted for advice (page 274).

49. Mr Pharaoh recorded on 27 August 2021 that he had a case call with Ms Brown of HR. He recorded, “Legal, he can do his role but should be moved”.

50. On 2 September 2021 Mr Pharaoh called the claimant but there was no reply (page 274). On 2 September 2021 he then emailed the claimant (page 451), “Latest advice I have been given is that the latest report does not change your status”. He informed the claimant he could have reasonable adjustments at a job interview, such as a copy of the questions and extra time (see page 451).

51. On 13 September 2021 the claimant was successful in obtaining a two year assignment at the role in the Sustainable Places team (which he wanted as a reasonable adjustment) on competitive interview without any adjustments (page 83).

52. The claimant had a grievance hearing on 24 November 2021 and the outcome was given on 9 December 2021 (he was unsuccessful). The claimant appealed on 21 December 2021. There was an appeal hearing on 4 February 2022 and the appeal outcome was given on 18 February 2022. The claimant was unsuccessful.

53. The claimant presented his claim to the Employment Tribunal on 10 February 2022.

Applying the law to the facts

(1) Disability

54. We turn to the first issue: whether at the relevant time when the alleged discrimination took place, the claimant had a mental impairment that was long-term and which had a substantial adverse effect on the claimant's normal day-to-day activities.

55. We find that the claimant was diagnosed with a Generalised Anxiety Disorder (“GAD”) in 2019. He received 12 sessions of Cognitive Behavioural Therapy (“CBT”) in 2019 and has been prescribed Sertraline continually since April 2019. We

rely on the claimant's evidence that he has also used coping mechanisms such as breathing exercises and yoga to help him with his anxiety disorder.

56. The relevant date at which disability must be assessed is either 2 June 2021, 2 September 2021 or both. We find it is both (see below).

57. We reminded ourselves that the burden is on the claimant to show that he was a disabled person at the relevant time. A disabled person has a disability if he has a "mental impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities" (section 6(1) Equality Act 2010).

58. We reminded ourselves of the Guidance on matters to be taken into account when determining questions relating to the issue of Disability. We reminded ourselves of the guidance in recurring or fluctuating effects. At paragraph C5 it states that:

"If an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur."

59. We reminded ourselves that conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act in respect of the meaning of "long-term" (see Schedule 1 paragraph 2(2) and paragraphs C3-C4).

60. We considered firstly whether the claimant had a mental impairment which had a substantial adverse effect on the claimant's normal day-to-day activities.

61. We find that in late 2018 and early 2019 the claimant began to develop symptoms of what was later diagnosed as Generalised Anxiety Disorder ("GAD"). We find his symptoms were sufficiently serious for him to be prescribed medication and Cognitive Behavioural Therapy ("CBT").

62. We find the claimant to be an honest and genuine witness when giving his evidence, although he was sometimes inconsistent. We find the claimant was doing his best to answer questions honestly. We rely on the claimant's evidence that there was a work related social occasion in December 2018 where he felt he had to remove himself from the group because of his anxiety. We find the claimant informed his doctor that he was suffering from anxiety and pins and needles. We find the claimant confided how his anxiety was affecting him when he spoke to Ms Holt in June 2019. He referred to feeling "physically sick" at reading a note from her and that he not taken any sick leave "despite his anxiety" (which he clarified was Generalised Anxiety Disorder) (page 243). There was a further discussion about the claimant's GAD and work-related anxiety on 12 July 2019.

63. We rely on the claimant's evidence that he felt increasingly stressed and unwell in 2019 and that the prescription of Sertraline helped him (page 587) and the CBT also helped him.

64. We rely on the claimant's evidence that being on secondment and away from the NES team during 2020 helped him, although we note that he continued to be prescribed and to take Sertraline.

65. We find that when the claimant was informed that he would have to return to his substantive role in NES he physically vomited. We accept that he suffered from extreme headaches, nausea, heart palpitations and lack of sleep with hot sweats. We rely on his evidence that he suffered from headaches and chest pains when he returned to work, which progressed into anxiety attacks and lack of breath. We find this shows his disability had a substantial adverse effect on his day to day activities, including working life, sleeping and social life.

66. We rely on the claimant's evidence that his mental health was poor, he felt dizzy and unable to focus properly on simple tasks, often forgetting simple things. We rely on his evidence that his lower back pain became agitated when he was suffering from anxiety and he became hypersensitive to sound when mentally unwell to the point of being "unhinged" by some sounds. We rely on his evidence that that affected where he went out of the house to a point where friends would no longer invite him to social events where there were likely to be loud noises as the claimant would spoil events for them.

67. The Tribunal reminded itself of Appendix 1 to the EHRC Employment Code that states account should be taken not only of evidence that a person is performing a particular activity less well but also of evidence that "a person avoids doing things which for example cause pain, fatigue or substantial social embarrassment or because of a loss of energy or motivation". We rely on the claimant's evidence that sometimes he is unable to follow simple instructions, he can become confused which leads to further anxiety and mood swings. He also suffers from a loss of concentration when persistently anxious and this requires him to read documents or letters numerous times before he can understand or comprehend them, affecting his memory and ability to concentrate, learn or understand.

68. We find the claimant became increasingly unwell during 2021 culminating in his absence from work from 19 May 2021 until September 2021. We rely on the claimant's recollection of a typical day during that period in his statement. To describe the serious adverse effect as "substantial" it must be more than minor or trivial. We must also have regard to the position of the effect of medical treatment. (See Schedule 1 paragraph 5 of the Equality Act 2010).

69. We had no clear evidence as to how the claimant would have been affected if he had not been prescribed Sertraline. We find that the claimant had suffered from GAD from April 2019. We are satisfied that an impairment of anxiety is to be treated as having a substantial adverse effect on the ability of the claimant to carry out normal day-to-day activities because measures were being taken to treat or correct it and but for that those, it would be likely to have that effect. We rely on the fact that the claimant had been prescribed Sertraline by his GP since April 2019 and that he was also prescribed CBT.

70. It is absolutely apparent that by 19 May 2021 the claimant was unable to work because of GAD. We entirely accept his account of how unwell he was at that time. An inability to work is a very serious adverse effect affecting an individual's normal day-to-day activity. The disruption to the claimant's sleep, his inability to concentrate and the other consequences set out in his impact statement show that he was very substantially adversely affected whilst he was absent from 19 May 21-September 2021.

71. In conclusion, the Tribunal is satisfied that the claimant had the mental impairment of Generalised Anxiety Disorder from 2018 onwards. The Tribunal is satisfied that the impairment substantially adversely affected the claimant's ability to carry out normal day-to-day activities, in particular his ability to concentrate, his ability to deal with social situations, and at certain times his ability to work and his ability to sleep. We find that the claimant's ability to carry out normal day-to-day activities, "the adverse condition", was substantial for particular periods. The Tribunal's finds is that that was from when the claimant was prescribed Sertraline in April 2019. However, in case we are wrong about that there was certainly a substantial adverse effect when the claimant was no longer able to work from May 2021.

72. For these reasons we find mental impairment which had a substantial adverse effect on the claimant's normal day-to-day activities, at the relevant time which was in June and September 2021.

73. We must then ask ourselves: was the effect of the impairment long-term? It is long-term if it has lasted or is likely to last at least 12 months or is likely to last for the rest of the life of the person affected.

74. We remind ourselves that it is well known that many mental health conditions are fluctuating conditions.

75. The Tribunal is satisfied that when the claimant took up his secondment in Sustainable Places in 2020 and indeed from September 2021, in a different role away from the stresses in the NES team, he managed to continue at work supported by his line manager.

76. However, like many mental health conditions, the Generalised Anxiety Disorder had and has not gone away. The claimant has remained continuously since 2019 under a prescription of Sertraline and using his coping strategies.

77. We remind ourselves of the guidance on fluctuating effects. The effect of an impairment does not have to remain the same during a 12 month period. We are satisfied that the substantial adverse effect of the impairment was likely to last more than 12 months because the claimant's evidence was that the very serious effect of the Generalised Anxiety Disorder was being ameliorated when he no longer worked under the stressful conditions of the NES team. He has continued to be prescribed Sertraline since April 2019, and he continues to have adverse effects but his coping strategy and medication together with the support from his current manager enable him to continue working.

78. The Tribunal reminds itself that the claimant was first diagnosed in 2019, that he became very unwell in 2020, improved when on secondment and became increasingly unwell in 2021 when he returned to NES until in May 2021 he was unable to work. The Tribunal is satisfied, having regard to the guidance on fluctuating conditions, that the substantial adverse effect on the claimant's normal day-to-day activities was long-term.

79. In reaching this decision the Tribunal also had regard to the fact that all the Occupational Health reports suggest the claimant was disabled within the meaning of the Act and that the respondent (via Ms Holt) confirmed that the respondent had

treated the claimant as a disabled person in 2019 and continued to treat him in this way, providing him with an employee passport and referring him to Occupational Health for Generalised Anxiety Disorder on numerous occasions between 2018 and 2021.

80. We turn to the next issue: when was the alleged act of discrimination?

81. We find the first time the claimant was refused a reasonable adjustment was on 2 June 2021. The respondent at that stage had an Occupational Health report stating that the claimant was likely to be disabled under the Equality Act 2010. There had been a meeting with the claimant, his trade union representative and Mr Pharaoh about the Occupational Health report. A further report was obtained dated 21 May 2021 (page 331). The claimant had asked (given the aggravation of his GAD since he had returned to the NES team) to be moved to a four month role in the Sustainable Places team. This was refused by the respondent on 2 June 2021 (page 354).

82. We find that the claimant lodged a grievance but specifically asked it to be paused so that an informal resolution could be obtained (see email 8 June 2021). The claimant reiterated his request for an alternative role on 26 June 2021 when new information came to light.

83. On 15 June 2021 Mr Pharaoh recorded:

“The assignment he was pulled back from by NES (where we sit) have come back to him and offered him a nine month assignment he can go back to.”

He also stated:

“My grandparent manager previously agreed he would be let go if he could gain an assignment of six months plus.”

He asked:

“From an HR perspective, can M take up this assignment and be slotted in without the need for a formal recruitment process as it is basically the one he left back in January.”

84. On 13 August 2021 new Occupational Health advice was obtained (page 444) essentially advising the claimant should be moved.

85. On 18 August 2021 Mr Pharaoh (the claimant's line manager) expressly asked HR, “Given OH of August and new job, can claimant be moved across on medical grounds?”.

86. On 2 September 2021 Mr Pharaoh emailed the claimant stating, “Latest advice I have been given is that the latest report does not change your status”. It went to suggest that the claimant could have reasonable adjustments in the arrangements for a job that he applied for.

87. The Tribunal is satisfied that this was clearly a new decision communicated by Mr Pharaoh to the claimant on 2 September 2021. There was new information by the way of a new Occupational Health report and new information in the sense that the

role in Sustainable Places was now for a longer period of time – no longer four months but 6 months plus, potentially until March 2022. It was refused again.

88. Accordingly, the Tribunal finds the acts of discrimination were 2 June 2021 and 2 September 2021.

89. Returning to issue (c), we find that the claimant was disabled on both dates.

(2) Section 20 Equality Act 2010 – failure to make reasonable adjustments

- (a) It is agreed between the parties that the PCP was as follows: the respondent applied a PCP that the respondent required its employees to be fit and capable to attend work and/or perform the role of Senior Environmental Crime Officer “SECO” in the NES team.

90. We turn to the next issue: did the PCP put the claimant and the others with the same disability at a substantial disadvantage in comparison with other persons who were not disabled?

91. We find that it did. We find that working in the NES team which the claimant found to be a toxic environment exacerbated his mental health meaning he was unable to perform his role and attend work. He was absent from work sick from 19 May 2021 until he took up the role in the Sustainable Places team in September 2021. We rely on the fact that the very difficult work environment was aggravating the claimant’s Generalised Anxiety Disorder.

92. We turn to the next question: what was the substantial disadvantage suffered by the claimant?

93. We find that the claimant became very unwell as set out in his disability impact statement and eventually was therefore unable to work.

94. We turn to the next issue: was the respondent aware, or ought reasonably to have been aware, that the claimant was disabled?

95. We find that the respondent was well aware, or ought to have been, that the claimant was disabled. We find the Occupational Health report of 29 April 2021 at page 307 said that the claimant was likely to be disabled under the Equality Act 2010. The Occupational Health report of 21 May 2021 said likewise. The Occupational Health advice of 13 August 2021 also said the claimant was likely to be disabled under the Equality Act 2010. Furthermore, Ms Holt accepted that from 2019 she had treated the claimant as a disabled person and both Ms Holt and Mr Pharaoh had regular discussions under the Employee Disability Passport Scheme about the claimant’s Generalised Anxiety Disorder and regularly referred him to Occupational Health.

96. We turn to the second issue of whether the respondent was aware, or ought reasonably to have been aware, that the claimant was likely to be placed at a substantial disadvantage compared with persons who were not disabled.

97. We find that the claimant regularly told his managers of the effect of the work environment upon his disability of Generalised Anxiety Disorder. The Occupational

Health report at page 307 says that the claimant's current role (which was back in NES) was likely to provoke stress and anxiety.

98. On 14 May 2021 Mr Pharaoh recorded that the claimant had told him:

“Before he went on assignment he suffered with GAD and it was exacerbated by the toxic work environment and being micromanaged. Whilst on assignment he was looking to reduce his medication as he felt better but on his return to the team his GAD increased. Although he recognised the change in manager has reduced the toxicity it is still causing issues with his condition.”

99. On 20 May 2021 the claimant told Mr Pharaoh, “GAD exacerbated by his uncertainty around the role”.

100. On 9 July 2021 Mr Pharaoh recorded, “Doctor states he will be fit for work if he is moved to another role”.

101. On 18 August 2021 Mr Pharaoh was asking HR, “Given OH of August and new job, can claimant be moved across on medical grounds?”.

102. We find the new Occupational Health advice on 13 August 2021 made it clear that the claimant’s present role was affecting his Generalised Anxiety Disorder such that he was unable to work and needed to be moved to a new role.

103. We are therefore satisfied that the respondent was well aware that the claimant was being placed at a substantial disadvantage compared with persons who were not disabled, by the requirement to attend work and perform the role of a Senior Environmental Crime Officer in the NES team. They were aware that that was the reason why he was absent from work and the nature of his illness.

104. We turn to the final issue and the heart of the case: did the respondent take steps that were reasonable to avoid the disadvantage?

105. We find that they did not. We find Ms Mills and Ms Butler to be unimpressive as witnesses. It was very difficult for the Tribunal to establish who made the decision communicated to the claimant on 2 September 2021 that he was not permitted to move into the role in the Sustainable Places team, as a reasonable adjustment. We are satisfied that Mr Pharaoh, the junior immediate line manager, was making every effort to assist the claimant.

106. We find Ms Butler appeared to labour under a misapprehension that she could not move the claimant. She said on a number of occasions when being cross examined, “We weren’t allowed to slot in” and “it was not my decision to slot in or not slot in”. When she was asked whose decision it was, she said she acted on HR advice. She was asked specifically “who has the power to move people?”, and she said, “I’m not exactly sure anyone has”.

107. We find at one stage the respondent became distracted by the medical redeployment issue and the suggestion that there was a special criteria in the respondent’s organisation which permitted them to redeploy an employee on medical grounds. For the Tribunal, this is not directly relevant. What is relevant for the

Tribunal are the issues we must consider as required by section 20 of the Equality Act 2010.

108. The main reason relied upon by the respondent as to why it was not reasonable to move the claimant appeared to be that it was not reasonably practicable from an operational perspective. That was the reason given to the claimant on 2 June 2021. At the Tribunal it was said that the claimant, as the only remaining Senior Crime Investigation Officer (“SECO”) had technical expertise which was invaluable to the team, and they simply could not afford for him to be moved.

109. So far as the first refusal was concerned, the respondent also relied on the fact that a four month placement was too short and would cause them operational difficulties and problems in getting someone to cover his role for a such a short period.

110. The Tribunal reminded itself that when considering what is reasonable the test is objective (see **Smith v Churchills Stairlifts PLC [2006] ICR 524 CA**). We reminded ourselves of the factors listed in the EHCR Employment Code as examples of matters that we might take into account (see paragraph 6.28). These are:

- (a) The extent to which taking the step would prevent the effect in relation to which the duty is imposed.
- (b) The extent to which it was practicable for the employer to take the step.
- (c) The financial and other costs that would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of its activities.
- (d) The extent of employer’s financial and other resources.
- (e) The availability of the employer of financial or other assistance in respect of taking the step.
- (f) The nature of the employer’s activities and the size of its undertaking.

111. We find that the respondent knew that placing the claimant in the Sustainable Places team had no cost impact in the sense of an increase in salary cost because it was a grade 5 position and that was the same grade at which the claimant worked his substantive role in the National Enforcement Service. So far as the effectiveness of the adjustment is concerned, the respondent had evidence that it was likely to be highly effective because the claimant had worked already worked there successfully on a 12 month secondment in the same team. The respondent knew that there was a vacancy in that team and that no-one else had been recruited to fill it.

112. It is true that there was a loss of expertise to the claimant's substantive team if he was seconded, but the reality for the respondent (certainly by September 2021, and even by 2 June 2021) was that the claimant was absent from work on sick leave and so they did not have the benefit of his expertise in any event.

113. In terms of training or handover which were other reasons the respondent relied on as making it difficult to second the claimant, again the reality was that the

claimant was absent from work on sick leave from 19 May 2021 so the team was having to manage without him and he was unable to train up anybody else because of his absence on sick leave

114. The Tribunal had regard to the size of the respondent's undertaking and the amount of resources available to the respondent. The respondent is a very large organisation. We were told at the relevant time it had 10,000 employees. When weighing up the benefit to the claimant of being permitted to move to a vacancy, out of his existing role, as recommended by Occupational Health as opposed to requiring him to remain in his substantive role which was making him ill and causing him to be absent from work on sick leave, we are satisfied that moving the claimant to the role in the Sustainable Places team whether in June 2021 or in September 2021 was a reasonable adjustment which could and should have been made.

(3) Time Limits – section 123(1) Equality Act 2010

115. The Tribunal has found that there was a course of conduct with a refusal to permit the claimant to move on 2 June 2021 and a second refusal on 2 September 2021. Both related to a seconded role in the Sustainable Places Team. The only difference was the length of the secondment- initially it was 4 months placement but by September it was a 6 months plus placement. The same individuals were involved in the decision making and communication of the decision to the claimant.

116. We find the Tribunal has jurisdiction to hear the claim. We find there is no issue with regard to time limits for these reasons. The claimant contacted ACAS on 30 September 2021 and a certificate was issued on 10 January 2022. The primary limitation period would have expired on 1 December 2021, as the final decision was made on 2 September 2021. The claimant did not lodge his claim until 10 February 2022. However, the claimant has the benefit of the "stop the clock" provisions (see section 14B Equality Act 2010). Day A is the day the claimant went to ACAS (30 November 2021). Day B is the day he received the certificate (10 January 2022). We remind ourselves in working out when the time limit expired the period beginning with the day after Day A and ending with Day B is not to be counted. Accordingly, the clock is "stopped" for 41 days.

117. We must have regard to the primary limitation period which expired on 1 December 2021 and then add 41 days which takes us to 15 February 2022. The claim was present on 10 February 2022, so we find it is within the time limit.

Remedy

118. The case will now proceed to a remedy hearing. The award sought is for injury to feelings only. If the parties, who are both professionally represented, are unable to resolve the matter, they should cooperate to prepare a small bundle of documents both in electronic and paper form which will include a statement from the claimant relevant to remedy, this Judgment and any medical evidence relied upon by the claimant for the purposes of a remedy hearing. The bundle should be sent to the Tribunal both electronically and in paper form at least seven days before the remedy hearing.

Employment Judge K M Ross
Date: 14 September 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
21 SEPTEMBER 2023

FOR THE TRIBUNAL OFFICE

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