EMPLOYMENT TRIBUNALS

Claimant: Mr G Chowdhury

Respondent: Network Rail Infrastructure Ltd

Heard at: **London South Employment Tribunal** **On: 2-5 Jan 2024**

Before: **Employment Judge Curtis**
Ms. Jerram
Mr Turley

Representation
Claimant: Mr Toms (Counsel)
Respondent: Mr Holloway (Counsel)

JUDGMENT having been sent to the parties on 11 January 2024 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

Claims and issues

1. The Claimant brings claims of failure to make reasonable adjustments and discrimination arising from disability.

2. The issues for the tribunal to consider are contained in an agreed list of issues **[62-64],** which were discussed and agreed at the start of the hearing. They are appended to the end of this Judgment as Appendix A. In addition, it became clear that the tribunal would need to consider the issue of jurisdiction (time) for complaints which were presented outside of the usual time limits; that has been added to the list at Appendix A.

Documents and evidence heard

3. We had witness statements from the Claimant, Annette Ward (HR Business Partner), Edward ('Max') Coventry (Route Operations Manager; dismissed the Claimant), Thomas Wood (Head of Route Stations; heard the Claimant's appeal).

4. We were provided with a bundle containing 460 pages

The facts

5. The Claimant commenced employment on 31 March 2020 as a Customer Service Assistant ('CSA') at London Bridge Station. The role was contracted to work 35 hours per week on a roster system, although the Claimant was actually required to work 35.8 hours per week on average under the roster system and was paid four hours of overtime every five weeks. The main duties of a CSA are patrolling the station and carrying out security checks, reporting any suspicious behaviour, and providing assistance to customers.

6. CSAs also occasionally worked on the Help Desk, answering customer queries and providing information to customers via an information desk. Mr Coventry told us that this was part of the role of a CSA and was part of the Claimant's contracted role, but was not a permanent role as CSAs were required to perform all of their tasks. Whilst that was correct for almost all CSAs, 8 staff were solely or principally assigned to the helpdesk. Two of those were on older contracts and their contracted role was solely helpdesk. The remaining six were principally assigned to the helpdesk having applied for and been granted such roles, although they were also expected to help out with other parts of the CSA role.

7. The helpdesk role was seen as a desirable role by many as the work was undertaken indoors avoiding the need to be outside in the elements and the shift pattern was more favourable.

8. The Respondent has minimum staffing levels for the security checks that CSAs carry out. If the number of staff assigned to security checks falls below a certain level, then the Respondent would be required to close parts of the station. There is no minimum staffing level for the helpdesk. As such, the Respondent properly saw the ability to cover security elements as particularly important for CSA staff.

9. From 15-16 July 2020 the Claimant was absent due to pain in his heel, caused by plantar fasciitis. In a return to work meeting on 17 July 2020 the Claimant told Mohammed Hoque that he had had plantar fasciitis for over a year; that his GP had said it should subside within 6 months; that the symptoms had not been present when he joined the Respondent but had recurred since his employment started

10. The Claimant was told that he could be placed on the helpdesk as an interim measure, but that this could not be an indefinite solution as there was no vacancy on the helpdesk. The Claimant was told that there were individuals who were shielding who were expected to return to work after 10 August 2020 to roles on the helpdesk. A reasonable adjustment form completed by the Claimant and Darrell Lavender (Shift Station Manager) dated 21 July 2020 confirms this position.

11. The Claimant was absent again from 30 July to 6 August 2020 inclusive. By this time the Respondent was aware that the Claimant could not spend extensive periods of time on his feet.

Redeployment register

12. On 7 August 2020 there was an agreement that the Clamant be added to the redeployment register. The Respondent has a Redeployment Policy and Procedure which applies to staff at risk of redundancy and to staff who are unable to continue in their current role due to disability or ill health; the redeployment register was part of that policy. In essence, staff flagged as being on a redeployment register are given priority for future vacancies which arise.

13. The Respondent's Redeployment policy envisages at 2.2 ("Finding suitable alternative work") that "*Where a vacancy arises the resourcing team will search the redeployment pool prior to any form of recruitment advertising being launched. The resourcing team will contact the employee to ascertain their suitability and interest in the role and provide this information to the hiring manager."*

14. Within the Respondent was a redeployment team whose brochure states that they can assist with (amongst other things): CV writing, interview skills linked in, presentation skills, career coaching. They also offered individual consultation sessions.

15. On 15 August 2020 Ms. Annette Ward (HR) sent a request for the Claimant to be added to the register. The Claimant remained on the register until his dismissal took effect on 25 August 2021.

16. There was a dispute about the extent to which the Claimant engaged with the redeployment process and the redeployment team. The Claimant's oral evidence was that he was engaging over the phone and was engaging sufficiently; the Respondent's evidence was that the Respondent did not engage with the process and had to be chased repeatedly by the redeployment team.

17. The Respondent referred us to chronologies at pages **[137]** and **[163-165]** as evidence of the Claimant's lack of engagement. These chronologies show that the redeployment team made various attempts to contact the Claimant to get him engaged, but without any real success. The Respondent also refers to number of occasions on which the Claimant was chased for his CV. Whilst it is correct that the Claimant's CV was chased, this is not of much significance as the Claimant's employment was relatively short and the Respondent had his CV from the start of his employment; the Claimant's CV would not have changed in any significant way since then.

18. Weighing the evidence, we find that there were difficulties in obtaining full and proper engagement from the Claimant, at least until around April 2021. We do not believe that this lack of engagement changed the course of events in any significant way as there was no evidence of any vacancies prior to April 2021 which would have been suitable for the Claimant.

19. Over the period when he was on the redeployment register, the Claimant was regularly sent lists of vacancies. The policy provided for hiring managers to proactively match vacancies to those in the redeployment pool, and that is envisaged by the Redeployment Team (see, e.g., the email at **[165]**). All of the Respondent's witnesses candidly accepted that

this applied to ill health redeployees as well as those at risk of redundancy. It does not appear to have happened in the Claimant's case; instead the Claimant was left to scour the vacancy list and apply for roles himself.

The receptionist role

20. The fact that there was no proactive involvement with the Claimant is, in our judgment, made out by analysing the receptionist role. That was a role which was advertised internally between 17 February and 3 March 2021. It appeared to suit the Claimant's skills and experience: he met all of the essential criteria for the role and it was in the same location as the Claimant's existing role. It appears that the role was line managed by a manager who knew the Claimant and his condition, as the contact for the role is listed as Mr Hoque. The role was not proactively identified to the Claimant, nor was he 'matched' to the role, as envisaged in the Redeployment Policy at paragraph 2.2.

21. When the job vacancy sheet was circulated this role was labelled as "Customer Service Assistant". There was nothing to indicate that it was a receptionist role with limited standing and walking. The Claimant was not aware that this role was a receptionist role at the time that it was advertised. The Claimant therefore believed that this role was not suitable for him.

22. There was a factual dispute as to whether the Claimant had a conversation with Mr Hoque about the reception role at the time, in which Mr Hoque allegedly discouraged the Claimant from applying for the role. We find that the conversation did not take place. In making this finding:
    - We note that the Claimant did not refer to the conversation in contemporaneous documents
    - We note that in the appeal meeting in September 2021 the Claimant referred to not applying for role because it was not advertised; there is no mention of a conversation with Mr Hoque around the role. Had a conversation taken place we would have expected it to be mentioned in this meeting.
    - We note that the alleged conversation is not referred to in the Claimant's ET1 or the particulars of claim; had the conversation occurred then we would expect to see it referenced in these documents
    - The Claimant's oral evidence on the conversation was vague, at best

23. By the time of the Claimant's dismissal appeal meeting on 20 September 2021 the Claimant was aware that there had been a reception role available, as in the appeal meeting the Claimant complained that the role was never advertised.

Roles applied for by the Claimant

24. Prior to his dismissal the Claimant applied for some roles but was not taken forward. There is a dispute as to how many roles the Claimant applied for: the Respondent says 3; the Claimant says 10. We find that the Respondent is correct. We note that the Claimant has not identified what any of the other 7 roles were, nor how he applied for them or when; we

would expect him to know this information if he had in fact applied for 10 roles.

25. The three roles that the Claimant applied for were:

    31.1 Stores Co-Ordinator
    31.2 Document Controller
    31.3 HR Admin

26. The Claimant's evidence, which we accept, was that he did not meet the essential criteria for the first two roles.

27. For the HR role, the Claimant said that he met all essential criteria save for the requirement for previous experience. We find that he also did not meet the criteria for "IT literate, strong Excel, Word and PowerPoint knowledge". We make this finding as we heard evidence that the Claimant said that he would require additional excel training when shadowing a role in Hither Green. We also had doubts as to whether the Claimant met the criteria of "Strong Time Management organisation and prioritisation skills and the ability to work under pressure and to deadlines", given our findings about his lack of engagement with the redeployment process between September 2020 and April 2021.

Information available to the Respondent re: Claimant's disability

28. The Claimant was absent on sick leave due to his foot from 2 to 8 October 2020, and then again from 9 October to 9 April 2021.

29. During the Claimant's employment, occupational health reports were obtained on:

- 17 July 2020
- 9 February 2021
- 27 May 2021
- 15 July 2021

30. The Respondent also had a letter from the Claimant's treating physician at the time that it held the dismissal meeting.

31. Each report recited the Claimant's condition and its impact on his ability to carry out his work role.

32. Pulling the opinions in the reports together, the effect is that the Occupational Health advisers and the Claimant's treating physician believed that the Claimant was unfit to carry out his role from July 2020 until his dismissal took effect.

33. At the time that the receptionist role was available (February to March 2021) the medical opinion was that the Claimant was able to carry out part-time work and was unable to carry out full shifts.

34. The position improved a little; at the time of dismissal meeting the Claimant was able to carry out a sedentary (mainly seated) role on a part-time basis (per the 15 July 2021 OH report).

35. The outlook was uncertain. The Occupational Health physicians did not rule out a recovery and a return to the Claimant's role, but equally there was no prognosis as to the likely recovery time or an estimate of when a return to work might be possible.

Dismissal process, including flexible working request

36. The Respondent had capability meetings with the Claimant on 31 March 2021, 30 April 2021 and 14 July 2021. At the last of these he was given notice of dismissal on the grounds of capability. The dismissal took effect on 25 August 2021.

37. During this period the Claimant also made a flexible working request. He requested a maximum 24-hour working week, preferably weekends. There were three reasons behind the request: to manage his foot; to allow him to return to full time study; and to have more family time.

38. The request was considered on 29 June 2021 and the outcome confirmed in writing on 5 July 2021. The Respondent refused the request but proposed an alternative of 17.5 hours a week in the Claimant's existing role, plus half of the contracted Sundays.

39. The possibility of the part-time working was placed on hold, with the Claimant's agreement, pending the outcome of the capability process and potential ill-health severance.

40. Prior to decision to dismiss taking effect the Claimant shadowed a role in Hither Green. There was no vacancy open at Hither Green prior to the Claimant's termination taking effect or his appeal being heard.

41. The Claimant appealed the decision to dismiss. The appeal meeting took place on 20 September 2021 and the outcome was confirmed on 10 October 2021; the original dismissal decision was upheld.

42. ACAS Early Conciliation commenced on 27 October 2021 and the certificate was issued on 7 December 2021. The ET1 was presented on 22 December 2021.

The Law

Discrimination arising from disability

43. Section 15 of the Equality Act 2010 ("EqA") provides:

> *"(1) A person (A) discriminates against a disabled person (B) if-*
> *(a) A treats B unfavourably because of something arising in consequence of B's disability; and*
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability"*

44. The elements of discrimination arising from disability can be broken down as follows:
    a) Unfavourable treatment causing a detriment
    b) Because of "something"
    c) Which arises in consequence of the claimant's disability

45. The respondent will have a defence if it can show:
    a) The unfavourable treatment is a proportionate means of achieving a legitimate aim – "objective justification"; or
    b) It did not know, and could not reasonably have been expected to have known, that the claimant had the disability – the "knowledge defence".

Reasonable adjustments

46. The relevant parts of Section 20 EqA provide:

> *"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *(2) The duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage"*

47. The relevant part of section 21 provides:
"*(1) A failure to comply with the first…requirement is a failure to comply with a duty to make reasonable adjustments*

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person

48. Section 39(5) provides that a duty to make reasonable adjustments applies to an employer.

49. Assuming that the claimant is a disabled person, the following are the key components which must be considered in every case:

    a) What is the provision, criterion or practice ("PCP") relied upon?
    b) How does that PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled?
    c) Can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was a disabled person and likely to be at that disadvantage?
    d) Has the respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage or to have provided the auxiliary aid or service?
    e) Is the claim brought within time?

Knowledge of disability

50. The employer may have actual or constructive knowledge of an employee's disability. An employer is fixed with constructive knowledge if they could reasonably have been expected to know that the employee had the disability. This is an objective assessment, and what is reasonable will depend on the circumstances.

51. As to the extent of an employer's enquiries into whether an employee is disabled under the EQA, an unquestioning reliance on Occupational Health advice may not be sufficient to enable the employer to rely on a knowledge defence (per *Gallop v Newport City Council [2014] IRLR 211)*.

Relevant case law

52. In closing submissions we were referred to the following cases, and considered them as part of our deliberations:
    - *Aleem v E-Act Academy Trust Ltd* EAT/0099/20, as authority for the tribunal to consider the source of the Respondent's funding (it relies on public funds) when considering whether an adjustment contended for is reasonable
    - *Archibald v Fife Council* [2004] ICR 954, HL: Redeployment without a competitive interview process can be a reasonable adjustment.
    - *Cosgrove v Caesar and Howie* [2001] IRLR 653 and *Southampton City College v Randall* [2006] IRLR 18: If a Claimant does not suggest an adjustment during employment, then that is not a bar to the tribunal finding the Respondent liable for failing to make reasonable adjustments
    - *Tarbuck v Sainsbury's Supermarkets* [2006] IRLR 664: A failure to assess and consult is not sufficient for a reasonable adjustment claim to succeed. *HM Prison Service v Beart* [2003] IRLR 238: the issue is whether a reasonable adjustment at least might have enabled the employee to continue in work
    - *Igen v Wong* [2005] IRLR 258 and *Efobi v Royal Mail Group* [2021] ICR 1263 regarding the reverse burden of proof in s.136 EqA
    - *Buchanan v Commissioner of Police for Metropolis* [2016] IRLR 918. In reasonable adjustment cases what has to be justified is not the Respondents policy, but how it is applied in the Claimant's individual case.
    - *O'Brien v Bolton St Catherine's Academy* [2017] IRLR 547. This case addresses whether specific evidence is needed to demonstrate the impact on the Respondent of keeping someone employed.
    - *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194 and *Kingston Upon Hull City Council v Matuszowicz* [2009] ICR 1170 regarding time limits and when time begins to run.
    - *Chacon Navas v Eurest Colectividades SA* [2007] ICR 1 regarding working life and the extent to which work duties can be considered to be day to day activities
    - We also referred the parties to the case of *Wade v Sheffield Hallam University* EAT/0194/12 regarding the relevance of essential criteria to the question of whether it would be a reasonable adjustment to appoint someone to a role.

Analysis and Conclusion

Knowledge of disability – issues 2.2.2, 3.1.

53. We are required to determine whether the Respondent knew, or ought reasonably to have known, that the Claimant was disabled.

54. On 17 July 2020, when the Claimant returned from a period of sick leave caused by pain in his foot, the Respondent was told by the Claimant that he suffered with plantar fasciitis and that he had suffered with it for over a year. After another period of foot-related sickness absence in early August 2020 the Respondent became aware that the Claimant was unable to spend extensive periods of time on his feet.

55. In our judgment, being on one's feet in a job for lengthy periods of time is a day to day activity. It forms part of the working life for plenty of jobs. The Respondent was, or ought to have been, aware that this was a normal day to day activity.

56. Therefore, we conclude that as at August 2020 the Respondent knew or ought to have known that the Claimant had a condition which had lasted for more than a year, albeit that the symptoms had fluctuated over that period, and that it had a substantial adverse effect on the Claimant's ability to carry out the day to day activity of being on his feet for a lengthy period of time.

57. The Respondent's knowledge as to the Claimant's condition is bolstered by a series of Occupational Health reports between July 2020 and July 2021. These made clear to the Respondent that the Claimant's plantar fasciitis caused an inability to stand or walk for prolonged periods, and an inability for the Claimant to carry out his normal role.

58. We note that the Occupational Health reports were inconsistent on the question of whether the Claimant's condition was likely to be a disability. The February 2021 report stated that the condition was unlikely to be a disability and the July 2021 report stated that it was likely to be considered a disability.

59. The February 2021 Occupational Health report stated that the Claimant's condition was unlikely to be considered a disability as it did not have a significant impact on his ability to carry out normal day to day activities. In our view this was clearly flawed. It made little sense to us, given that the report also stated that the Claimant was only fit for a sedentary role and was unable to spend prolonged periods standing or walking. We find that the Respondent was not entitled to simply rely on its unquestioning adoption of the Occupational Health conclusion that the Claimant was not disabled. The Respondent ought to have realised that it made little sense when set against a background of lengthy and repeated sickness absences for the condition and the Claimant's inability to carry out his job role.

60. In our judgment, the Respondent ought to have known that the Claimant was disabled from early August 2020, that being the time at which the Claimant made it clear to the Respondent that he was unable to be on his feet for extended periods of time.

Reasonable adjustment claims

61. When considering the reasonable adjustment claims we have taken into account the Equality and Human Rights Commission Code of Practice on Employment. In particular, we've considered paragraph 6.28 of the Code which lists factors which may be taken into account when deciding if a step is a reasonable one to take. The list in the Code of Practice is:
    - Whether taking any particulars steps would be effective in preventing the substantial disadvantage;
    - The practicability of the step
    - The financial and other costs of making the adjustment and the extent of any disruption caused
    - The extent of the employer's finances or other resources
    - The availability to the employer of financial or other assistance to help make an adjustment
    - The type and size of the employer

62. The Respondent accepted that it applied the PCPs which required the Claimant to:
    a. Have a certain level of attendance to maintain his employment; and
    b. Be able to carry out his full duties as a Customer Service Assistant including standing for up to 12 hours whilst working shifts even if on a part-time basis

63. These are PCPs which put the Claimant at a substantial disadvantage, as his disability caused significant levels of sickness absence, and his disability made it impossible for him to stand for up to 12 hours whilst working shifts.

64. We therefore turn to consider the contentious issue on the reasonable adjustment claim, which is whether the Respondent failed to make reasonable adjustments which might have enabled the Claimant to remain in work.

3.2.5 (a) Redeploying the Claimant to a sedentary role without interview if necessary, e.g. a receptionist post

65. In the course of the hearing it became clear that there were a number of alternative positions which the Claimant contended he could have fulfilled. We shall address each of them in turn.

i) Stores co-ordinator

66. The job description for this role was at **[447]**. In his evidence the Claimant accepted that he did not meet the essential criteria for this role in a number of respects. In submissions, the Claimant's counsel suggested that this role would have been more of a challenge for the Claimant compared to the others put forward, but it should at least have been discussed with him. We were satisfied that it was not just "more of a challenge"; it was a role which the Claimant was not suitable for and could not have fulfilled with his experience and qualifications. it would not have been a reasonable adjustment to redeploy the Claimant to this role.

ii) Document controller

67. The job description for this role was at **[445].** The Claimant agreed that he did not meet the essential criteria for this role, in that he did not have advanced use of Microsoft Office. He also did not meet the essential criteria of "relevant successful experience of document control processes and techniques".

68. We are satisfied that it would not have been a reasonable adjustment to redeploy the Claimant to this role as he met neither of the essential criteria.

iii) Receptionist

69. Having considered the job description for this role **[454-455],** we are satisfied that the Claimant met the essential criteria.

70. The role was available from 17 February to 3 March 2021. It was a full-time role.

71. From the evidence presented to us, we found that the Claimant was not able to fulfil a full-time role when the Receptionist post was available. At that stage, the Claimant was unable to carry out full shifts and was only able to work part-time.

72. In light of the Claimant's inability to carry out a full-time role, we find that it would not have been reasonable for the Respondent to appoint the Claimant to the receptionist role when it was available in February/March 2021. It would not have been practical to appoint the Claimant to a role which he could not fulfil.

73. At no point did the Claimant suggest to us that it would have been a reasonable adjustment for him to be redeployed to the receptionist role on a part-time basis. We heard no evidence as to whether it would have been practical to appoint the Claimant to the receptionist role part-time. That was not the way that we understood the Claimant was putting the case.

74. As the Claimant was unable to fulfil the receptionist role on a full-time basis, we find that it would not have been a reasonable adjustment to redeploy the Claimant to that role.

iv) HR Admin

75. The job specification for this role was at **[449].** The Claimant accepted that he did not meet the essential criteria of *"Experience of providing professional HR Administration support within a complex and fast moving environment"*

76. As set out in our findings at paragraph 27 above, we find that he also did not meet the criteria of having strong Excel, Word and Powerpoint knowledge.

77. The HR Admin role was available in May 2021.

78. We carefully considered whether it would have been a reasonable adjustment to give the Claimant the role, despite him not meting all of the essential criteria. The main criteria which the Claimant did not meet was

the requirement for experience, in the context of what appeared to be an entry-level role.

79. We concluded that it would not be a reasonable adjustment to move the Claimant to a role where he did not meet criteria which the Respondent appeared to have turned its mind to, and which the Respondent considered to be not just desirable but essential for the role, absent some evidence that the Respondent's position was unreasonable in the circumstances. The Claimant had a complete lack of any previous HR experience; this was an area in which he had had no previous dealings.

v) Helpdesk

80. As set out above, there were no helpdesk vacancies that the Claimant could have been redeployed to.

81. That left three possibilities by way of adjustment:
    81.1 The Respondent could have instructed one of the six staff who were principally assigned to the helpdesk to move from the role they had applied for, with the Claimant then taking that person's role; or
    81.2 The Respondent could have 'bumped' one of the two staff who were contracted to the helpdesk to an alternative role, with the Claimant then taking that person's role on the helpdesk; or
    81.3 The Respondent could have created a new role to accommodate the Claimant working solely on the helpdesk.

82. As to the first two suggestions, we were disappointed to hear that the Respondent had not spoken to the helpdesk staff to enquire whether they would voluntarily move from the role. That would normally be a reasonable step for an employer to take in these circumstances.

83. However, we are satisfied that the suggestion of moving the Claimant to a helpdesk role was not a reasonable adjustment in the circumstances of this case for the following reasons.

84. We find that none of the staff would have voluntarily moved from the helpdesk role to accommodate the Claimant; it was a desirable role for staff and those who worked on the helpdesk had either been selected after expressing an interest in a predominantly helpdesk role or had worked solely on the helpdesk as part of their express contractual terms.

85. The possibility of moving one of the six staff primarily assigned to helpdesk would not have alleviated the substantial disadvantage suffered by the Claimant. We heard from the Respondent that although those staff were principally assigned to the helpdesk, they needed to be able to cover all elements of the CSA role. That was something which the Claimant could not do. There were sound business reasons for requiring those staff to cover the other elements of the business role, in particular the minimum staffing levels for security. Moving the Claimant to one of the 'principally helpdesk' roles would only have alleviated the disadvantage if the Claimant could be excluded from other parts of the CSA role, which was not practical for the business given the business needs.

86. The possibility of moving the Claimant into a solely helpdesk role would not have been a reasonable adjustment in our judgment. There were two

ways this could have been done: by creating a new role for the Claimant; or by 'bumping' one of the helpdesk staff into a different role.

87. In our judgment it would not have been reasonable for the Respondent to create a new role for which there was no business need. The Claimant's case amounted to a suggestion that he should have been paid to do a job that the Respondent did not require, in circumstances where this could continue indefinitely. That, in our view, would not have been reasonable; even in a large employer such as this it is not reasonable to pay someone to do something which is not needed.

88. Whilst we did not have the precise figures for what this would have costed the Respondent it seemed obvious to us that it is not reasonable to employ someone, and pay them, for a job which is not required. As explained in *O'Brien,* the kind of evidence required to show the impact on the Respondent will vary from case to case. In this case the impact on the Respondent was clear: there is a financial cost to employing someone indefinitely to do a job that is not required.

89. The possibility of bumping one of staff who were contractually appointed to the helpdesk would not have been reasonable, in our judgment. We consider that this would cause disruption, it had the potential to create conflict amongst staff given the desirability of the helpdesk role and it had the potential to create legal claims from the bumped employee against the Respondent.

3.2.5 (b) – Allowing the Claimant a further period in his temporary role whilst further treatment options were explored

90. As to whether the Respondent could have allowed the Claimant to continue in a purely helpdesk role, that is dealt with immediately above.

91. This is essentially a claim that the Respondent ought to have waited longer before dismissing, and that in failing to wait longer the Respondent failed to make a reasonable adjustment.

92. In this case, the medical evidence provided no date for a potential return to work. The Claimant was not able to provide a date for potential return. Whilst the medical evidence did not exclude the possibility of recovery, we note that the Claimant had been absent for a significant period of time, during which the Respondent had made attempts to get the Claimant back to work.

93. In our judgment, the Respondent did not act unreasonably in refusing to continue waiting where it was uncertain as to whether that would achieve anything and it was unclear how long the wait would be. The Respondent had already waited a year before the dismissal took effect. This amounted to almost all of the Claimant's employment.

94. The failure to allow more time was not a failure to make a reasonable adjustment.

3.2.5(c): Providing the Claimant with training so he could undertake an alternative sedentary role

95. It was not clear to us what training the Claimant sought, or what role(s) he would have been able to fulfil with additional training. There was some discussion about the possibility of Microsoft Excel training when shadowing a role at Hither Green, but we found that there was never any vacancy available at Hither Green.

96. This aspect of the Claimant's claim fails as there is nothing on which we can conclude that additional training would, or could, have alleviated the substantial disadvantage.

3.2.5(d): Ensuring the Claimant was interviewed through assisting him with job applications

97. The Claimant appeared to suggest that he should have been offered interviews for the roles he applied for. We do not consider that this would have been a reasonable adjustment in circumstances where he did not meet the essential criteria for the roles, and where we have concluded that the roles themselves would not have been reasonable adjustments.

98. We understood this to amount to an assertion that the Claimant should have been assisted in identifying potentially suitable alternative roles.

99. As set out above, there was a gap between what the Respondent's policy envisaged and the reality. The policy envisaged proactively identifying potentially suitable roles for the Claimant and seeking to match him to the roles; the reality was that the Claimant was sent a list of vacancies and left to do the matching himself.

100. The only role on which this had an impact was the receptionist role, as the Claimant was not aware that it was a sedentary role. The Claimant would have been aware that it was a sedentary role had the Respondent's policy worked as envisaged. As set out above, we found that the Claimant would have been unable to carry out this role in any event as he was not able to work full time when the role was available.

101. Aside from the roles listed above by reference to 3.2.5(a) of the list of issues, we were not directed to any other roles which the Claimant could have been assisted with, or which could have been offered by way of adjustment. We do not find that additional assistance would, or might, have alleviated the substantial disadvantage. In short: there were no suitable roles which were missed.

3.2.5(e): Renewing the offer of part-time flexible working as had been agreed with Mr Coventry

102. As at the time of his termination and appeal, the Claimant was unable to work a full shift as a CSA. The Claimant accepted this in his evidence.

103. Allowing part-time working would not have alleviated the substantial disadvantage, as part-time working would still have involved full length shifts.

104. It was suggested to Mr Wood in cross-examination that the Claimant could have been allowed to do split shifts with another worker (e.g. the Claimant working five hours of a shift, then another worker working the remainder of the shift).

105. Mr Wood was clear in his oral evidence that this would not have been practical, due to the logistical difficulties of having part-shift workers (holiday absences, sickness absences, covering half of a shift rather than a whole shift).

106. It was not put to Mr Coventry that an adjustment to part-shifts should have been made, and it was not suggested by the Claimant during his employment; whilst this latter point does not prevent the Claimant from raising it in the tribunal, it does give rise to a possibility that it was not raised as the Claimant knew it was not practical.

107. We find that it would not have been practical to allow the Claimant to work part-shifts

Discrimination arising from disability

108. It is clear that the Claimant was dismissed and his appeal was rejected, and that that constitutes unfavourable treatment. Equally, the dismissal was because of something arising in consequence of the Claimant's disability, namely the sickness absence along with the inability to carry out the full shift length and full duties of the CSA role.

109. The real issue is whether the dismissal was a proportionate means of achieving a legitimate aim. The legitimate aims relied upon are ensuring employees are capable of carrying out the role that they are employed to do and that they attend work.

110. The Claimant rightly accepted that these are potentially legitimate aims; we find that they were legitimate aims in this case.

111. As to whether the Respondent adopted a proportionate means of achieving these legitimate aims, we have considered whether less discriminatory methods were available. In our judgment, the potentially less discriminatory methods have all been ventilated above in relation to the reasonable adjustment claims. None of the proposals put forward as adjustments would have been reasonable, in our opinion.

112. We conclude that there was no less discriminatory way for the Respondent to achieve its legitimate aims. The claim therefore fails, as the Respondent has made out the justification defence.

Jurisdiction (time)

113. As the claims failed, we did not go on to consider the question of whether they were presented within the statutory time limit.

Employment Judge **Curtis**

Date: **28 March 2024**

JUDGMENT & REASONS SENT TO THE PARTIES ON
Date: **12 April 2024**
.....

.....
FOR THE TRIBUNAL OFFICE

APPENDIX TO REASONS: LIST OF ISSUES

1. Disability

1.1 It is agreed that the Claimant was a disabled person as defined in section 6 of the Equality Act 2010 ('Equality Act 2010') at the relevant time or times.

1.2 Did the Respondent know, or ought the Respondent reasonably to have known, at the relevant time(s), that the Claimant was a disabled person?

2. Discrimination arising from disability

2.1 The Claimant alleges the Respondent treated them unfavourably by: Dismissing him and rejecting his appeal.

2.2 With reference to the alleged unfavourable treatment listed at 2.1:

2.2.1 Did the Respondent treat the Claimant unfavourably because of something arising in consequence of the Claimant's disability, contrary to section 15 of the Equality Act 2010?

The Claimant alleges his inability to maintain a certain level of attendance and/or to carry out his full role and shifts as a CSA as being something arising in consequence of their disability.

2.2.2 If so, did the Respondent know, or ought the Respondent reasonably to have known, at the relevant time(s), that the Claimant was a disabled person?

2.2.3 If so, was the Respondent's treatment of the Claimant a proportionate means of achieving that legitimate aim?

3 Reasonable adjustments (PCP)

3.1 Did the Respondent know, or ought the Respondent reasonably to have known, at the relevant time(s), that the Claimant was a disabled person?

3.2 If so, did the Respondent discriminate against the Claimant by failing to comply with a duty to make reasonable adjustments contrary to section 21 of the Equality Act 2010? In particular:

The provision, criterion or practice (PCP) the Claimant relies on is the requirements for the Claimant:

(a) To have a certain level of attendance to maintain his employment; and

(b) To be able to carry out his full duties as a Customer Service Assistant (CSA) including standing for up to 12 hours whilst working shifts even if on a part time basis.

3.2.2 Does that amount to a PCP for the purposes of section 20(3) of the Equality Act 2010?

3.2.3 If the answer to 3.2.2 is yes:

3.2.4 The Claimant alleges that they were put at the following substantial disadvantage by that PCP:

The Claimant had a significant amount of disability related sickness absence and could not stand for the full duration of his shifts and/or complete his full duties.

3.2.5 The Claimant alleges that the Respondent failed to take the following steps to avoid that disadvantage:

(a) Redeploying him to a sedentary role without interview if necessary e.g. A receptionist post;

(b) Allowing him a further period in his temporary role whilst further treatment options were explored;

(c) Providing the Claimant with training so he could undertake an alternative sedentary role;

(d) Ensuring he was interviewed through assisting him with job applications; and

(e) Renewing the offer of part-time flexible working as had been agreed with Mr Coventry.

3.2.6 Did the Respondent apply that PCP to the Claimant and, if so, did such application put the Claimant at the substantial disadvantage described above in relation to a relevant matter in comparison with persons who are not disabled? The identity of non-disabled comparators in relation to the PCP are non-disabled CSAs who are able to stand for their entire shifts and who do not have significant amounts of disability related sick leave.

3.2.7 Did the Respondent fail to take the steps described above that the Claimant alleges would have avoided that substantial disadvantage and, if so, would those steps have avoided that substantial disadvantage? If so, were those steps reasonable for the Respondent to have taken to avoid that substantial disadvantage?

3.3 Did the Respondent otherwise take such steps as it was reasonable to have taken to avoid the disadvantage, in accordance with section 20 of the Equality Act 2010?

3A – Jurisdiction (*NB – added to the agreed list of issues by the Tribunal)*

3A.1 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010?

4. Remedy

4.1 What financial loss, if any, has the Claimant suffered as a result of his/her or unlawful discrimination?

4.2 What award, if any, should be made for injury to feelings?

4.3 Should any other remedy be awarded?

4.4 What recommendation, if any, should the Tribunal make?

4.5 Did the Claimant and the Respondent comply with the ACAS Code of Practice on discipline and grievance (Code)?

4.6 If not, was such failure to follow the Code reasonable in all the circumstances?

4.7 If not, would it be just and equitable for the Tribunal to increase or decrease any award?