EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**
MEMBERS: **MS Z DARMAS**
MS J MARSHALL

CLAIMANT **Z**

RESPONDENT **NATIONAL RAIL INFRASTRUCTURE LIMITED**

ON: **21- 24 and 29 May 2024**

Appearances:

For the Claimant: **In person**
For the Respondent: **Mr Holloway, counsel**

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

(i) The Claimant's claim that the Respondent failed to make reasonable adjustments is not well founded.
(ii) The Claimant was not unfairly dismissed.
(iii) All claims are dismissed.

REASONS

1. Background and issues The Claimant was employed by the Respondent as a Train Delay Attributor (TDA) from 2 December 2019 until 1 September 2022, when he was dismissed for capability. At the time of his dismissal had been off work, on sick leave since 30 May 2021.

2. He brings claims of unfair dismissal and failure to make reasonable adjustments for disability. The agreed issues are set out in the schedule to this judgment.

3. At an earlier open preliminary hearing, the time issues were determined in the Claimant's favour.

4. The Claimant's pleaded disabilities are:

   a. HIV-positive status
   b. Pneumocystis Carinii Pneumonia (PCP)
   c. mixed anxiety, depressive disorder and psychosis.

5. The Respondent does not dispute the Claimant's disability status insofar as it relates to HIV, or that it was aware at all times during the Claimant's employment that he was HIV positive.

6. The Respondent disputes disability status in relation to PCP. They say the Claimant's medical records show that he was diagnosed with PCP in November 2006 but that it is treatable, and his medical records also show that he was treated for the condition which ended on 8 June 2018. They also dispute any knowledge of PCP during his employment.

7. The Respondent also accepts disability status in relation to anxiety, depressive disorders and psychosis but disputes that it had knowledge of those conditions at the relevant time. It is the Respondent's position that it became aware of those conditions in May 2021.

Evidence.

8. The Tribunal had agreed bundle of documents amounting to some 686 pages. We heard evidence from the Claimant and, on his behalf, his mother. We also accepted into evidence a statement of Mr Arnold, another TDA who worked with the Claimant. For the Respondent we heard from his line manager, Ms Adeniyi, from Ms Taylor-Gaskin, an HR Business Partner, and from Mr Jones, who was appointed as the Claimant's welfare manager.

Relevant facts

9. The Claimant began work as a TDA on 1 December 2019. Train Delay Attribution is the process by which the reasons for delays to train services are determined. It involves identifying both what caused the delay and the party responsible. TDAs are responsible for monitoring in real-time the train movements within a particular region to determine the reasons for delays. It is a business critical (though not a safety critical) role. During the covid pandemic TDAs were key workers. The Respondent was aware that he was HIV positive.

10. The Claimant's place of work was London Puddle Dock, which is situated in Blackfriars Station. He did four weeks training at Head office and then began shadowing another TDA as part of his training. While being trained the Claimant worked 9-4 Monday to Friday. Once fully trained TDA's work three days per week over 12-hour shifts..

11. The Claimant was still in his training phase when Covid – 19 restrictions were introduced. As a result of his underlying health condition (his HIV positive status) and in line with government advice the Claimant shielded at home from 19th March to 31 July 2020. He was classified as clinically vulnerable – but not clinically extremely vulnerable.

12. During this period he was not yet qualified to carry out any substantive work. He was therefore asked to access briefings and open access documents on his personal laptop to assist in his substantive role. In mid June he was provided with a laptop which, after some initial technical problems, allowed him to use online training applications from home. At some point he started doing "infills", which was a manual system to correct errors in the automatic recording of train times. He was not however dealing with live train delays, as the Claimant alleges, or working substantively as a TDA at that time.

13. As a TDA the Claimant was a key worker and those of his colleagues with no underlying health conditions continued to work in person. It is a central part of the Respondent's case that TDAs could not work from home. Although the Respondent accepts that it was possible for individuals to access the TDA system remotely ,TDAs were not permitted to work from home as it was not efficient. Ms Adeniyi explained that TDAs were required to have access to multiple screens and to communicate quickly with other individuals such as the train controllers, train service managers and resource managers. They needed to be able to hear the alerts. Having to communicate with them by phone or video was not efficient. She also explained that the TDAs needed to have access to real-time information which was only possible in person and that the servers did not have capacity to cope with individuals working from home. The policy of requiring TDAs to attend work in person had been agreed with the unions- and the RMT Staff representative had advised the Claimant as such, and had offered to put tape 2 metres around his desk. (368).

14. During this initial lockdown three other TDAs were shielding, and none were working on live delays, although one TDA was able to work from home doing infills, as the Claimant did for some of the time.

15. Having heard from Ms Adeniyi we accept that it was not practicable for the Claimant to work from home as a TDA.

16. In July 2020 the Claimant's GP wrote to him to say that from 1 August shielding would no longer be supported for those clinically vulnerable, and providing advice as to how to reduce his risk at work. Before

returning to work at the Respondent referred the Claimant to occupational health (236). Occupational health, having discussed the content of the report with the Claimant, reported that he had an underlying health condition which was well controlled with medication. This was classified as a disability, but he was fit to work, and no adjustments were required.

17. The Claimant now accepts that he did not at any stage ask if he could work from home. He says that he did not ask because it had been made clear to him that TDAs could not work from home - and to ask would have been pointless. He also needed to attend work to pass the exam required him to become a substantive TDA.

18. The Claimant returned to the workplace on 3 August 2020 to continue to shadow and be trained by colleagues. A return-to-work conversation took place by telephone on 7 July 2020 with Ms Adeniyi. The Claimant was asked if he had personal concerns about returning to the workplace and said it was concerned about getting back his knowledge and the old routine, having been away for so long. He also expressed concerns about using public transport. Ms Adeniyi explained to him the various measures that had been taken to adjust the working environment to make sure that it was safe in accordance with government guidelines and gave general advice about covid safety measures. (299).

19. Although the Claimant now accepts (contrary to the evidence in his witness statement) that he did not ask to work from home, it is his case that the Respondent had constructive knowledge that the Claimant would be placed at a disadvantage by being required to attend the office and that as such they should have been proactive and found work for him to do at home. He says that the Respondent should have realised that, because of his underlying HIV-positive status he was immuno-compromised, and he should not be at work and that they should have provided work for him to do at home. We do not accept, as he alleges, that he had been able to work as a TDA at home during his period of shielding, or that he could do so even once qualified, so any adjustment would have required the Respondent to find him another role.

20. When he returned to work he was issued with a yellow and black lanyard. He was given a mask and a plastic face shield visor to wear in the office. This Claimant says that while glass screens were provided between the banks of desks, screens were not provided between adjacent desks which meant that, later on, when a second shift was reintroduced he had to work less than 2m away from a colleague. He said that he and others raised concerns.

21. The Claimant took his knowledge test on 12 August and commenced substantive duties as a TDA on 20 August 2020.

22. The Claimant received a test and trace alert on 6 October and self isolated at home until 19 October .

23. The Claimant was again absent from work from 12 November –2 December. During this period issues arose as to the Claimant's failure to report his absence in line with policy. However on 27th November the Claimant sent fit notes from his GP covering the period 12 November – 1 December 2020 citing work-related stress.

24. The Claimant had a telephone assessment with OH on 3 December 2020. The Claimant disclosed a combination of stresses related to workload, grief because of two colleagues dying, feeling isolated due to moving away from family and friends, and feeling generally unwell. His GP had prescribed antidepressants and counselling. He told OH that he had improved, and he wanted to attempt to return to work. He said that he liked to be at work as the routine helped with his mental health.

25. OH reported (240) that he was indicating moderate symptoms of anxiety and depression, although this was unlikely to be a disability because it had not lasted longer than 12 months and was not having a significant impact on his ability to undertake as normal daily activities. He was assessed as fit to work as the routine helped with his mental health.

26. In his return-to-work meeting (357) on 3 December 2020 with Ms Adeniyi the Claimant said that he felt stressed that the thermal camera work had broken down –and that he felt cold at work. She reported that the thermal camera was now working, and that the Claimant was supplied with a fleece jacket to help when cold. The Claimant said that while he still had fear of the unknown and felt *upset "I feel that going into work will help me get back into routine and help me feel better. I see it as a stepping stone to getting back to normal.".*

27. The Claimant attended work thereafter without incident until 31st May. He had covid vaccinations on 20th February and 2nd May 2021.

28. The Claimant had a hospital appointment booked for 17.40 on 12th May. His shift that day was 7 a.m. to 7 p.m. and Ms Adeniyi released him from duty from 11 a.m. as she understood he needed to fast for six hours prior to the appointment.

29. On 10th May the Claimant asked if he could take 11th May as a leave. This request was granted (372).

30. In his witness statement the Claimant suggests that the Respondent refused his request to take time off and required him to work from 7 am to 11 am on 12th May, when he needed to be fasting for 24 hours. He also says that the Respondent expected the Claimant to return to work after his appointment. The documentary evidence does not support that contention. The Claimant's appointment letter indicates that he was required to fast for two hours before his appointment, and not for 24 hours as he alleges. The Respondent released him six hours before his

appointment. He was not required to return to work after his appointment. His request to take the day off on 11th May was granted.

31. The Claimant had a 1:2:1 with Ms Adeniyi on 19th May. He reported that he was feeling better and generally well. Ms Adeniyi reported that he had a great KPI report (scoring a 100 %p on two elements and she was 97.1% on the third) and to keep up the good work.

32. The Claimant complains that in May 2021 he was forced to cancel a much-needed holiday to Gibraltar, and threatened with disciplinary action if he travelled abroad, and that this triggered his mental health crisis. However, it is evident from the bundle (621) that the Claimant was not refused but chose to postpone given that his mother was still waiting for a leg operation.

33. Unfortunately on 30 May 2021 the Claimant had a significant mental health breakdown. He was taken to A&E and, sometime thereafter, was sectioned under the Mental Health Act. He never returned to work before his dismissal on 1 September this 2022.

34. The evidence in the bundle discloses that that Respondent had considerable difficulties in maintaining contact with the Claimant during his absence. It is unnecessary to document all of the attempts made by the Respondent to get in touch with the Claimant or to seek to identify whether the Claimant was at fault, or whether the failures to keep in touch were down to his health problems. Those attempts are set out in detail in the log kept by Ms Adeniyi (382 – 408). During this period the Claimant sent various fit notes and he attended occupational health appointments by telephone on 29th October 2021, 18th January 2022 and 15 February 2022. On each occasion OH reported that he was not fit to work.

35. After his October OH assessment Occupational Health reported (255) that, with his consent, they would write to his GP as they required further information regarding his mental health status in order to advise management as to his progress and prognosis to return to his job. The Claimant did not respond to the request for consent to contact his GP despite various reminders (390). By the time of his dismissal he had still not agreed that the Respondent could contact his GP or see his medical records.

36. Various appointments were made for the Claimant to attend a welfare meeting with Ms Adeniyi, none of which were kept. The Claimant also did not attend a number of OH appointments which had been made for him.

37. In June 2022 Mr Jones was appointed as the Claimant's welfare manager, as the Claimant had requested that someone else other than Ms Adeniyi be appointed as his welfare manager. Mr Jones told the Tribunal that, despite repeated attempts to get in touch with the Claimant,

between his appointment and the Claimant's dismissal on 1 September 2022 they had only two meaningful conversations.

38. The log kept by the Respondent indicating their attempts to contact the Claimant or his mother, as next of kin and with whom he lived, evidences very many unsuccessful attempts to get in touch with the Claimant and/or his mother. Such contact as did occur yielded very little information. Numerous appointments and welfare meetings were missed either because the Claimant cancelled or because he failed to answer the phone when OH tried to contact the Claimant .

39. On 16 May 2022 the Respondent received a fit note from Claimant identifying that he was not fit to work for a "psychotic disorder" and that this would be the case "indefinitely".

40. In June the Claimant emailed Ms Adeniyi to say that he did not wish to discuss his sickness with OH (442).

41. On 6 July 2022 the Claimant was invited to a meeting to discuss his return to work and/or ill-health severance, but the Claimant did not respond.

42. The Respondent's policies provide for an ill-health severance payment to be made on a termination for ill health, in accordance with a formula. Such a payment can be considered when OH has deemed that the employee is no longer fit to carry out the duties of their role and that there is no suitable type of alternative work in the company. It requires (i) a completed ill-health severance scheme form (ii) a health assessment which supports severance and (iii) and a business case for ill-health severance (571).

43. On 26 July Ms Adeniyi emailed the Claimant to say that she would be initiating the ill-health severance process. "This means that your employment with Network Rail will be terminated based on ill-health as we do not have a realistic expectation of your ability to return to work or any reasonable adjustments may be considered." (447). He then spoke to Mr Jones and agreed to a referral to OH and a Teams meeting the following week– though he subsequently withdrew that consent.

44. In early August there were a number of attempts by the Respondent to persuade the Claimant to consent to a referral to Occupational Health. Although the Claimant acknowledges that both Mr Jones and his trade union representative strongly recommended that he consent, he did not do so. He was warned that if he did not engage the Respondent would be terminating his employment due to ill health. (451).

45. Given his failure to consent the Respondent concluded that he was not a candidate for ill-health severance.

46. An employment review meeting was proposed for 11 August, but the Claimant said he could not attend. The meeting was then rearranged for 19th August by Teams, though the Claimant was given the option to attend in person. The invite email (559) advised the Claimant that one of the potential outcomes of the meeting would be the termination of his employment. The Claimant attended briefly but said that he was very unwell. The meeting was adjourned to 25th August and further adjourned to 1 September as the Claimant's union representative could not attend. In the meantime Mr Jones rang the Claimant on numerous occasions but he did not answer his phone.

47. On 1 September 2022 the adjourned employment review meeting took place. Ms Adeniyi was on leave so her line manager, Mr Southon, attended in her place with Ms Taylor Gaskin and Ms Sylvan of HR, and Mr Jones. Mr Parker attended as trade union representative for the Claimant, but the Claimant did not initially attend either via teams or in person. Mr Parker said that the Claimant told him he could not attend due to anxiety and a black eye.

48. Those present discussed the Claimant's absence and lack of engagement. Mr Parker suggested that the Respondent should consider other roles, but this was rejected by the Respondent because they would need to have medical information in order to consider such roles. The consensus was that the Claimant had failed to engage. Mr Parker asked that the Claimant be given another chance to access and release his medical records and the meeting was adjourned briefly so that Mr Parker could talk to the Claimant. When the meeting reconvened the Claimant joined via Teams. Mr Parker said that the Claimant wanted to return as soon as possible to work from home or on a phased return. When asked what he wanted, the Claimant said he fount it difficult to articulate because of what was going on in his head. There was a further adjournment. After the adjournment Mr Parker said that the Claimant wanted to look at his medical records before releasing them to the Respondent, as there might be "inaccuracies in them which he would get corrected before releasing them". There was then a further adjournment and further representations were made by Mr Parker to the effect that the Claimant would release his medical records. The Claimant said that he hoped to have stronger antidepressants and to be back on his feet next month which would help in returning to work..

49. Following a further brief adjournment the decision was taken to dismiss the Claimant. The decision was announced to the Claimant and the reasons given were that he been on sick leave for over a year and failed to engage with occupational health. As a result there was insufficient medical evidence to allow the Respondent to consider reasonable adjustments that could be made to facilitate a return to work, there had been a detrimental impact of service delivery and there was no likely date for a return to work.

50. This was followed up by a letter of 5th September confirming his dismissal and pay in lieu of notice.

51. The Claimant did not appeal. We accept the shock of his dismissal caused to further deterioration in mental health. He told the Tribunal that he continues to suffer with psychosis, although he presented well at the tribunal.

52. In evidence during the tribunal hearing the Claimant said that at the time of his dismissal he was not fit for work. He could not see what adjustments could be made and he was still suffering from psychosis and hearing voices in his head. He said that he had not been fit to attend the meeting, or to return to work and has remained unable to work since. He said that he should not have been asked to attend a meeting – that he was obliged to say what the Respondent wanted to hear. "I was trying to be helpful that I was not fit to work, and the Respondent should have known this – alarm bells should have rung". The hospital in Brighton had a said that he should not go back to work.

The law

53. Section 39(5) of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer. Section 20 provides that where a provision, criterion or practice (a PCP) applied by or on behalf of an employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable to have to take in order to avoid the disadvantage.

54. Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated than in recognition of their special needs.

55. The Code of Practice on Employment 2011 (chapter 6) gives guidance in determining whether it is reasonable for employers to have to take a particular step to comply with a duty to make adjustments. What is a reasonable step for an employer to take will depend on the circumstances of the particular case.

56. *In* Environment Agency v *Rowan 2008 ICR 218* and *General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4 the EAT* gave general guidance on the approach to be taken in the reasonable adjustment claims. A tribunal must identify (i) the PCP applied by or on behalf of the employer, or the physical feature of premises occupied by the employer (ii) the identity of non-disabled comparators (where appropriate), and (iii) the nature and extent of the substantial disadvantage suffered by the Claimant. Once these maters were

identified then the Tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified. The issue is whether the employer had made reasonable adjustments as matter of fact, not whether it failed to consider them.

57. The test of reasonableness imports an objective standard. The Tribunal must examine the issue not just from the perspective of the Claimant but also take into account wider implications including the operational objectives of the employer.

58. Para 20 (1) of Schedule 8 to the Equality Act also provides that a person is not subject to a duty to make reasonable adjustments if he does not know, and could not reasonably be expected to know, that the disabled person has a disability and is likely to be placed at a disadvantage by the PCP. An employer is required to make reasonable enquiries as to whether an employee is disabled and as to the effect of that disability.

59. In *Doran v Dept for Work and Pensions EAT 0017/14* the Employment Appeal Tribunal found that an employer's duty to make reasonable adjustments is not triggered if the employee has not become fit to work under reasonable adjustments.

60. Unfair dismissal. Section 94 of the Employment Rights Act 1996 sets out the right not to be unfairly dismissed. It is for the Respondent to show that the reason for the Claimant's dismissal is a potentially fair reason for dismissal within the terms of section 98(1). Capability is a reason which may be found to be a potentially fair reason for dismissal.

61. If the Respondent can establish that the principal reason for the Claimant's dismissal was capability , then the Tribunal will go on to consider whether the dismissal was fair or unfair within the terms of section 98(4). The answer to this question "depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and shall be determined in accordance with equity and the substantial merits of the case."

62. An employee's ill health may affect their capability to do the job. General principles of fairness require , where an employee has been absent for ill health for a considerable period, that the employer consults with the employee in question and inform themselves, so far as they are able of the true medical position so that it can make an informed decision about whether to dismiss. Employers should also consider how long the employee is likely to be away, whether there are reasonable adjustments which can be made which would assist a return to work and whether it is possible to employ the employee in a different position in the organisation. The employer has to weigh up compassion and sympathy to the employee with the requirements of the business and weigh that up against the impact that the employee's absence has on the business and his or her colleagues. However if the employee does not engage then there will come a time when the employer can reasonably do no more.

63. In assessing the reasonableness of the employer's decision to dismiss the Tribunal is not entitled to substitute its own judgement for that of the employer. The question is whether the decision to dismiss fell within the band of reasonable responses.

Conclusions

64. The Respondent accepts that it knew at all relevant times that the Claimant was a disabled person by reference to his HIV status. It does not accept that it was aware or should have been aware of any of his other health conditions.

65. As to the Claimant's mental health, the Claimant says that he told the Respondent about his anxiety and depression when he interviewed for his role in September/October 2019. We do not accept this. There is no reference to anxiety and depression in the occupational health report provided to the Respondent in July 2020 . The occupational health report of 3 December 2020 refers to the Claimant's "current condition of stress" but there is no reference to any history of anxiety and depression, and it records that stress was unlikely to be considered a disability because it had not lasted for 12 months. Both these reports were discussed with the Claimant, and he had given consent to release the information to the Respondent.

66. We conclude that the Claimant had had not told the Respondent that he suffered from mixed anxiety and depressive disorder, and that there was no reason for the Respondent to consider that he did so until May 2021. He did express concerns, as did very many people, about the risks of covid-19 but that is not the same as indicating or suggesting any underlying health condition. (For that reason we have not determined whether the Claimant was disabled by reason of mixed anxiety and depression before May 2021 as the duty does not arise if the Respondent had no actual or constructive knowledge.)

67. The Claimant has also referred to Pneumocystis Carini Pneumonia, but there is no evidence that the Claimant told the Respondent about this condition. It is not referred to in his Occupational Health reports. (There is only one entry in his medical notes to this condition which refers to it being a whole event (2006 to 8th June 2018)). In his witness statement the Claimant said he needed access to a shower 2 to 3 times per day to deal with it, but he did not tell the Respondent that this is what he needed; and he attended work without having to do this for 10 months. When the employment judge asked him about this he simply said that PCP was relevant to the case because it made him more vulnerable to infections.

68. Accordingly we conclude that the duty to make reasonable adjustments did not arise in relation to the Claimant's mixed anxiety and depressive disorder before May 2021 or in relation PCP at all, as the Respondent did

not know, and could not reasonably have been expected to know, either that the Claimant had these conditions or that he was likely to be placed at a disadvantage by them.

69. The Respondent was, however, aware at all times of his HIV-positive status. As a result of that status the Claimant was classified as clinically vulnerable to covid-19. As a result of that status he was, in line with government guidelines, permitted to shield from home on full pay during the first lockdown. We do not, however, accept as the Claimant suggested that he was working as a TDA doing live train delays during that time.

70. It is accepted that, from August 2020, the Respondent required the Claimant to attend work in person rather than working from home. (The first pleaded pcp). We do not accept that working from home was established in January 2020 and then withdrawn. He was not carrying out his role from home, as he suggests, between January and July 2020. He was shielding and learning, to assist to with his induction and training and at some point doing infills, but he was not working as a TDA.

71. We considered whether the Respondent should have allowed the Claimant to work from home as a reasonable adjustment because of his HIV-positive status. This would have required transferring him to a different role.

72. The Respondent says that the duty to make adjustments did not arise as the Claimant was not at a substantial disadvantage by the requirement to attend work in the office. The mere fact that he had been assessed as clinically vulnerable did not of itself mean that he was at a substantial disadvantage in comparison to those who were not disabled. Millions of people at that time had been classified as clinically vulnerable. The Respondent was not aware and had no reason to believe that he would be at such a disadvantage. They were entitled to rely on the OH reports who did not suggest a substantial disadvantage or the need to make adjustments.

73. Section 212(2) of the Equality Act states that substantial means “more than minor or trivial”.

74. What was the nature and extent of the disadvantage of which the Claimant complains? The Claimant says that he was concerned about travel to work on public transport and that he considered that the Covid protocols were not always followed in the office.. The Claimant told us that, at the time, his “bloods were good”, but he was anxious. We accept that, as the Claimant was HIV positive, he had reason to be more concerned than most.

75. On balance given the relatively low threshold for the test of substantial disadvantage in section 212 of the Equality Act, we accept that the Claimant was put at a substantial disadvantage, in the sense of

heightened worry, by the requirement to travel to and attend work. Although many other key workers would have been anxious about travelling by public transport at that time, the Claimant's HIV-positive status is likely to have made him more anxious than those who were not disabled.

76. However we considered that allowing the Claimant to work from home would not have been a reasonable adjustment. TDAs were key workers and could not work efficiently from home. The Claimant at no point asked to work from home. He attended work, and when he was there did a good job, as evidenced by his 1:2:1. Although he was clinically vulnerable, he was not clinically extremely vulnerable, and was in the same position as millions of other people who had been classified as clinically vulnerable. Advice from the Government, from his GP and from OH was that he could return to work. OH, with his consent, had not recommended any adjustments. The only practical way to avoid the Claimant having to come into the office was to move him to a new role. The Claimant's concerns about working in the office were the same as everyone else's. As the Claimant had not expressed any desire to work from home or to move into a new role, and as Occupational Health had been consulted and said that no adjustments were required, it was not reasonable to expect the Respondent to proactively discuss whether he should be transferred into a new role or be allowed to continue to shield at home, doing limited work.

77. The list of issues identifies that the Claimant also relies on a second provision, criterion or practice expressed as "a requirement to attend work in person, rather than allowed to be absent during working hours for rehabilitation and treatment." In evidence he clarified that this was a reference to having been required to attend work on May 11 and May 12, 2021, and that the Respondent should have made a reasonable adjustment by providing him time off to be absent during working hours for rehabilitation and treatment.

78. This allegation is misconceived as it was clear from the facts, and the documentation in the bundle that the Claimant was not required to attend work on 11th May or to attend work while fasting. He was given time off for his medical appointment on 12th May as requested and a day off on 11th May. The pleaded PCP was not applied.

79. The Claimant says he was not given an individual risk assessment, but his risk factors were considered by OH and Ms Adeniyi on his return to work in August 2020, which informed the Respondent of the position and advice was given.

80. Unfair dismissal. We are satisfied that the principal reason for the Claimant's dismissal was capability. By the time of his dismissal he had been off work for over a year, and was not cooperating with the Respondent's requests so that the Respondent could assess whether

any reasonable adjustments could be made to assist a return to work, nor could the Respondent's assess any prognosis for a return to work.

81. Dismissing an employee for ill health is always difficult because they are off work through no fault of their own. However in this case all the usual safeguards which an employer is required to take to establish the medical position before taking the decision to dismiss had been thwarted by the Claimant. He had failed to engage, either with welfare meetings, or with requests to attend occupational health, or with requests for the provision of his medical records. It was clear from the Claimant's evidence to the Tribunal during this hearing that part or all of the reason for this was that the Claimant was still ill, but nonetheless there comes a time where an employer is entitled to say we can do no more.

82. In this case we conclude that the Respondent had made reasonable attempts to engage with the Claimant so that they can be informed either as to the prognosis for his return and whether reasonable adjustments would facilitate that return. Although the Claimant said at the meeting on 1 September that he would engage and that he hoped to be able to return in September or October, the Respondent was entitled, given the history, not to believe that he would do so. Having an employee on permanent sick leave affects service delivery and is costly in management time. Given his failure to engage the only real alternative was dismissal. It was not possible for the Respondent to consider reasonable adjustments in the absence of the Claimant's failure to engage.

83. All the claims are dismissed

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Employment Judge Spencer
10 June 2024
JUDGMENT SENT TO THE PARTIES ON

17 June 2024
.....

.....
FOR THE TRIBUNAL OFFICE

Schedule
Agreed Issues

Disability status

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?

Discrimination – failure to make reasonable adjustments

The Claimant asserts that his claim is a failure to make reasonable adjustments claim.

2 If the answer to 1 is yes, did the Respondent discriminate against the Claimant by failing to comply with a duty to make reasonable adjustments contrary to section 20 of the Equality Act?

2.1 The provision, criteria or practice ('PCP') the Claimant relies upon is:

(a) Requirement to attend work in-person, rather than working from home, as established from January 2020, where a laptop was provided, and flexible daytime hours given, but then withdrawn; and

(b) Requirement to attend work in person, rather than allowed to be absent during working hours for rehabilitation or treatment.

2.2 Does 2.1 amount to a PCP for the purposes of section 20(3) of the Equality Act?

If the answer to 2.2 is yes:

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

(a) Having to attend work despite being clinically vulnerable and not yet fully vaccinated, nor a safe work environment being provided, as evidenced by written documentation of events. This contravened the Network Rail Lifesaving Rules, putting my health at risk; and

(b) Having to attend work during rehabilitation and treatment, especially whilst fasting, clinically vulnerable, and not fully vaccinated, as evidenced by written documentation of events, again putting my health at risk.

2.4 The Claimant asserts that the PCP should have been adjusted by the Respondent in the following ways to remove the disadvantage he alleges he suffered:

(a) Continued the flexible working arrangement as requested by the Claimant in writing, or an alternative post be found; and

(b) Provided time off to be absent during working hours for rehabilitation or treatment.

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?

2.6 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?

2.7 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?

U**nfair dismissal**

3.1 Did the Respondent dismiss the Claimant?

3.2 If so, what was the reason or the principal reason for the Claimant's dismissal? In particular, was the reason or principal reason for the Claimant's dismissal:

(a) conduct within the meaning of section 98(2)(b) of the Employment Rights Act 1996 (ERA); and/or

(b) capability within the meaning of section 98(2)(a) of the ERA.

3.3 If the Employment Tribunal finds that the Respondent dismissed the Claimant, was the Claimant's dismissal fair within the meaning of section 98(4) of the ERA? In particular, did the Respondent act reasonably in treating that reason as sufficient for dismissing the Claimant?

Remedy