EMPLOYMENT TRIBUNALS

Claimant: Mr C Oakes

Respondent: Royal Free London NHS Foundation Trust

Heard at: London Central via CVP **On:** 6,7,10,11,12, and 13 February 2025

Before: Employment Judge Forde
Mr S Godcharle
Ms D Keyms

REPRESENTATION:

Claimant: Mr G Burke, Barrister
Respondent: Mr R Ross, Barrister

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.
2. The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed.
3. The complaint of victimisation is withdrawn by the claimant and is dismissed.
4. The claim of unfair dismissal is not well-founded and is dismissed.

Reasons

Background

1. The Claimant commenced employment with the Respondent on 10 October 2005. At the time of his dismissal, he was working as a Junior Charge Nurse

(Band 6) on the Paediatrics Ward 6 North. His working pattern consisted of 32.15 hours over a seven-day period and involved providing unsocial hours cover to the Paediatric inpatient ward.

2. The Claimant's role primarily involved responsibility for the health, safety, care and well-being of patients and their carers as well members of staff he oversaw on the ward.

Details of disability

3. The Claimant says that he is disabled for the purposes of section 6 of the Equality Act 2010 because of the effect of Crohn's disease, depression and anxiety on his daily activities. Disability is not disputed by the respondent.

4. The Claimant was diagnosed with Crohn's disease in 2013 although he had continued to experience related symptoms for several years previously. He has been prescribed Tramadol and paracetamol for the pain and discomfort he experiences during flare-ups of his symptoms, which are largely caused by stress. He has also been prescribed Omeprazole (40mg daily). He has regular infusions of Infliximab (5mg) every eight weeks. He has MRI and an endoscopy every one to two years at his consultant's recommendation.

5. When the Claimant has a period of 'good days', his symptoms are largely controlled by the medication and pain relief and he does not experience pain when passing stools. During the 'bad days', he feels lethargic, experiences pain in his abdomen and rectum, his digestive tract hurts, he is unable to eat and drink properly, experiences uncontrollable vomiting and diarrhea, resulting in severe agony. The Claimant finds it difficult to move around, socialize or communicate. He feels embarrassment at not being able to control the diarrhea and soiling himself. The flare ups can also keep him awake all night with pain. Stress, lack of support and symptoms of depression can significantly exacerbate the symptoms.

6. The Claimant was diagnosed with anxiety and depression in 2018. He has been prescribed Propranolol (80mg daily) and Citalopram (40mg daily). He has received counselling, attended CBT sessions and has recently undergone further counselling with MIND. He has experience of suicidal thoughts and ideation, feels out of control and low, unsure of himself, experiences constant sad thoughts particularly in relation to loss of loved ones, feels constant guilt in relation to his work, recalls the false allegations he had to challenge and was unsupported.

7. The Claimant is left with constant neck and shoulder pain following a car accident in November 2019. This was a very stressful experience as the dispute remains unresolved and he requires regular pain relief for his ongoing symptoms, contributing to his symptoms of anxiety. Whilst driving he feels very anxious when another driver is in close proximity to him or is driving fast.

Background to claim

8. The Claimant's sickness record since 6 May 2022 until 21 August 2023 showed that he had 15 episodes of sickness absence, 4 of which were long-term sickness episodes, 10 of which are short-term sickness episodes, for different reasons, including Crohn's disease and anxiety and depression. He was absent for a total of 220 working days. At least 110 days of the total absence (i.e. 50%) related to anxiety and depression. Another 56 days related to Crohn's disease.

9. The Claimant's sickness absence was managed under the Respondent's Managing Attendance and Sickness Absence Policy & Procedure ("the Policy"). On 10 March 2023 the Claimant attended a Stage 2 sickness absence review meeting which was conducted by the Paediatric Matron, Emma Glass. The Claimant was informed that a significant improvement in his attendance was required and the aim was to achieve at least 80% during the 8-week monitoring period (10 March to 5 May 2023), or he would be progressed to Stage 3 of the Policy. Redeployment on a temporary or permanent basis was discussed.

10. There is an issue between the parties as to the extent to which the claimant was open to considering redeployment and this is observed by Miss Areteey and Mr Hackman when they reach a determination of the dismissal and appeal respectively. It is the claimant's case that he expressed that he was open to considering redeployment.

11. An occupational health report dated 10 May 2023 failed to explore the issue of redeployment and Ms. Glass raised the matter with Occupational Health in an email dated 31 May 2023. She stated, "I was disappointed to see that the purpose of the OH referral which was to discuss medical redeployment was not discussed and has been marked only with the outcome 'not required'." It is the claimant's case that it does not appear that Ms. Glass received a response to her enquiry and that the Respondent did not follow this up or discuss it further with the claimant.

12. Following the Stage 2 meeting until the date of the Stage 3 hearing on 6 September 2023, the Claimant had 44 recorded days of sickness absence. 21 days related to symptoms of Crohn's disease and 23 days related to depression and Covid-19 symptoms.

13. The Claimant attended a Stage 3 sickness absence hearing on 6 September 2023 and he was accompanied by the RCN Regional Officer, Christine Moysey. The hearing was conducted by Head of Nursing for Women and Children's Services, Elizabeth Aryeetey. Ms. Moysey requested that a further referral to Occupational Health should be made to explore the option of redeployment. Mrs Aryeetey agreed and the hearing was adjourned pending the delivery of the report.

14. The Claimant attended a consultation with Occupational Health and a report dated 21 September 2023 stated that the Claimant was fit for work and recommended shorter shifts for the next 1 to 2 weeks.

15. As matters have turned out, the report made a further comment which has become a matter of contention between the parties. The report says the following:

> "In answer to your question about redeployment, from the occupational health perspective there is no reason to believe that redeployment would affect work performance or lead to an improvement in attendance, as his health conditions do not appear to be work-related."

16. The Claimant asserts that Occupational Health and the Respondent failed to adequately explore the redeployment option with him. The respondent says that the report is a reliable in the sense that the claimant did not raise concerns about the integrity of the report duding the meeting when he was informed of his dismissal and because Miss Aryeetey was entitled to rely on this finding as a ground for believing that the redeployment of the claimant to another part of the hospital would have served little point because the claimant's absence history was such that he would have been absent wherever he might have been redeployed to because, as the report points out, the claimant's absences were not work related (although the claimant alleged in evidence before us that some had been, in the absence of any documentary evidence of the same).

17. The outcome of the Stage 3 hearing was communicated to the Claimant in a letter dated 25 September 2023 following receipt of the OH report of 21 September. The letter stated: *"At the request of your representative, Christine, I made a further referral to the Occupational Health department to explore whether medical redeployment was an option to be considered going forward and to establish whether your circumstances had changed I received confirmation that a further assessment took place 21 September 2023 the outcome of which has been shared with your consent.*

18. The Occupational Health advisor stated that *"from the occupational health perspective there is no rea son to believe that redeployment would affect*

work performance or lead to an improvement in attendance, as his health conditions do not appear to be work-related."

19. Following this, Mrs Aryeetey wrote the claimant on 25 September 2023 to to confirm the outcome of her review and her decision to dismiss the claimant. She said, "…having carefully considered the medical evidence, I have decided that regrettably the Trust cannot continue to employ you. Your employment with the Trust is therefore terminated on grounds of ill-health. Your last day of service will be 26th September 2023 and you will receive 12 weeks pay in lieu of notice."

20. The claimant points out and takes issue with the fact that no further enquiries with Occupational Health or discussion with the Claimant prior to the Stage 3 outcome being provided to him. The Claimant asserts that the OH report is inadequately narrow in relation to the issue of redeployment, and that as a consequence , the respondent was obliged to explore this further with the claimant but did not do so. The claimant further criticises the respondent for failing to not considering the connection between the claimant's disabilities and absences.

21. The respondent says that the report is reliable, unequivocal and that Mrs Aryeetey was entitled to reach the findings that she did. In support of her findings, Miss Aryeetey had access to the management statement of case that set out the details of the allegations made against the claimant. Miss Aryeetey notes in her statement at paragraph 9 the following:

"The stage 3 hearing took place as the targets which had been set for Mr Oakes at the stage 2 short term sickness meeting had not been met (pages 259-264, 295-299). The notes of the hearing can be found at pages 566-571. I could see from the Management Statement of Case that Mr Oakes had had significantly high levels of sickness absence which related to a variety of medical issues (pages 319 349). Whilst Mr Oakes' did have longer periods of sickness absence primarily related to Crohn's disease and mental health

issues, he also had significant shorter periods of absences related to a variety of conditions such as colds, flu, hand foot and mouth, Covid-19 etc (pages 120-122,171-172, 178, 186, 203, 216, 226, 289, 293,294, 302, 305-306). Ms Glass' report details that since 15 June 2022, Mr Oakes had been absent for '146 out of 262 working days' and that 'In the past 12 months [Mr Oakes] has attended work for 22 out of an expected 132 shifts.' The report also states that of 14 periods of absence since 15 June 2022, 10 of these were short term sickness absences." (tribunal's emphasis).

22. In evidence, when the periods of absence relied upon by Mrs Aryeetey were put to the claimant, he did not challenge them for accuracy (as was the case during the review and dismissal processes) and therefore the tribunal accepted that they were accurate.

23. Miss Aryeetey found that a number of steps had been taken to support the claimant including but not limited to:

(a) a number of phased returns which included reduced duties;
(b) an agreement that the claimant would not work night shifts;
(c) a flexible working agreement to allow the claimant to attend regular medical appointments and to facilitate childcare arrangements;
(d) at the formal stage 2 sickness review meeting on 16 June 2023, the claimant was offered the possibility of redeployment to the outpatient clinic but expressed the view that he did not want to consider redeployment as he was happy in his job;
(e) flexible annual leave and carers leave;
(f) at the informal stage as opposed to the four middle stages of the respondent's sickness absence procedure, the claimant had undertaken a temporary period of redeployment between May and August 2021 in the respondent's outpatient clinic which was considered to be a less intensive environment with fewer patients to manage at any one time.

24. Having received the further occupational health report on 21 September 2023, Mrs Aryeetey met the claimant and Ms Moysey on 26 September 2023 to deliver her outcome. Her decision was to dismiss the claimant and in her outcome letter, Mrs Aryeetey noted about the claimant had failed to meet improvement targets set for him, that he had not taken up the offer of a number of reasonable adjustments made to him in return to work meetings in April and August 2023, with the claimant expressly stating that he did not require further adjustments, and that it was her view that the claimants attendance record would not improve on the evidence before her. Specifically, mystery TE relied on the occupational health report which says that there was no reason to believe that redeployment would affect work performance or attendance as the claimant's health conditions did not appear to be work related.

25. The Claimant submitted his appeal on 26 September 2023 which he combined with his grievance. His grounds of appeal included a failure to make reasonable adjustments, a lack of support in facilitating his return to work, failure to take into account his disability and the impact of this upon his attendance and a failure to fully explore redeployment. It is agreed that the appeal was heard 17 weeks after it was submitted and by the claimant, in contravention of the respondent's appeals Policy which requires appeals to be heard "in a timely manner and soon as possible after the original hearing" and for a hearing to take place within a "reasonable and appropriate time frame from date of appeal letter, normally 4 weeks".

26. The outcome of the appeal was to uphold the decision to dismiss. The appeal was not a rehearing but was limited to the claimant's grounds of appeal.

27. Following his dismissal, the Claimant attempted to book 'Bank' shifts on several occasions, however, on each occasion he was subsequently informed that his requested shifts had been cancelled. The claimant asserts that this was deliberate and amounts to victimization of the claimant.

Issues

Equality Act 2010

Failure to make reasonable adjustments – s.20-21

The claimant says that the respondent applied the following PCPs to him which placed him at a substantial disadvantage in his role in view of his disability:

a) his job description and the contractual requirements to perform his full duties as a Junior Charge Nurse (Band 6) on the Paediatric Ward 6 North.

b) requirement to comply with the attendance targets under the provisions of the Managing Attendance and Sickness Absence Policy & Procedure or otherwise.

c) requirement to maintain certain level of attendance at work in order not to suffer risk of sanctions and/or dismissal.

28. The Claimant asserts that as a result of the above PCPs he was subjected to a substantial disadvantage in comparison with persons who are not disabled, subjecting him to the risk of dismissal which exacerbated his symptoms of anxiety and depression, leading to suicidal ideation, as well as his dismissal under the Managing Attendance and Sickness Absence Policy & Procedure.

29. The Claimant claims that the Respondent failed to comply with the duty to make adjustments, for the purposes of sections 20 & 21 Equality Act 2010, when it failed to take the following action:

a. extending his employment and/or not dismissing him
b. discounting his disability related absences
c. adjusting the attendance targets
d. offering him shorter shifts as recommended by OH
e. fully exploring the option of temporary/permanent redeployment

30. The Claimant asserts that it was reasonably practicable for the Respondent to make the adjustments listed above and that this would have alleviated the disadvantage he experienced as a result of the PCPs.

Discrimination arising from disability – s.15

31. The Claimant asserts that he was subjected to unfavorable treatment because of something arising in consequence of his disability, in accordance with s15 Equality Act 2010.

32. The 'something arising in consequence of disability' the Claimant relies on include:
    a. his absence from work due to his disability.
    b. termination of his employment due to his disability.

33. The unfavorable treatment relied on is: The Respondent's decision to proceed to stage 3 hearing on 6 September 2023, taking into account his disability related absences and his dismissal because of his sickness absence record and not meeting his attendance targets.

34. The Claimant asserts that the Respondent's conduct did not amount to a proportionate means of achieving a legitimate aim bearing in mind the size of the Respondent, its financial resources and its ability to make reasonable adjustments by way of extending his employment and/or discounting his disability related absences and/or exploring redeployment. For example, it is said that the Respondent failed to extend the Claimant's employment and assess his circumstances to enable him to return to his role. Furthermore, it is asserted by the claimant that the Respondent failed to assess precisely the level of absence that was attributable to disability and to consider what level of absence someone with a particular disability would reasonably be expected to have had over the course of an average year due to that disability. Alternatively, it is argued that the Respondent failed to show that the treatment was a proportionate means of achieving a legitimate aim.

Discriminatory dismissal – s.39

35. The Claimant asserts that he was dismissed in accordance with s39(2)(c) Equality Act 2010 and that this amounted to less favorable treatment because of disability, in accordance with s15 Equality Act 2010, discrimination arising from disability.
36. The Claimant claims that the Respondent's failure to make reasonable adjustments and discrimination arising from disability occurring up until 25 September 2023, constituted discriminatory grounds for dismissal.

Unfair dismissal

37. The Claimant claims that for the reasons stated above his dismissal was unfair.
38. Furthermore, irrespective of the disability claim, the Respondent failed to adequately consider the nature of the Claimant's illness, the prospects of the Claimant returning to work, and his length of service.

39. Moreover, the Claimant avers that his dismissal was unfair as the Respondent failed to adequately consider:
    a) Redeployment whether on a temporary or a permanent basis.
    b) Alternatives to dismissal, by extending his employment to enable him to work shorter shifts, as recommended by Occupational Health.
    c) The relevant provisions of its sickness management policy.

40. Further or alternatively, under Annex 26 of the relevant binding collective agreement (known as Agenda for Change, "Afc") the Respondent had an obligation, as termination of the contract of employment on the grounds of incapability was considered, to take all reasonable steps to obtain appropriate medical evidence via the occupational health service, and to "meaningfully" consider "all other options" before a decision to terminate was made including a return to work with or without adjustments, rehabilitation, redeployment, etc. The Claimant avers that the Respondent failed to comply with these obligations.

41. The Respondent has significantly delayed in addressing the Claimant's appeal against his dismissal.

42. The Claimant asserts that in all the circumstances his dismissal was unfair.

Discrimination arising from disability

43. By **s 15 Equality Act 2010 ("EqA"):**

> (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. In T-Systems Ltd v Lewis EAT 0042/15 the EAT said that the phrase "something arising in consequence of" the disability should be given its ordinary and natural meaning.

45. "Unfavourably" is not defined in the EqA, but the concept is broadly analogous to the concepts of 'disadvantage' and 'detriment' found elsewhere EqA.

46. As Langstaff J explained in Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305, two separate causative steps need to be established for a claim to succeed under s 15:

    a. the disability had the consequence of "something", and
    b. the claimant was treated unfavourably because of that something.

47. In Pnaiser v NHS England and anor [2016] IRLR 170 and then again in Sheikholeslami v University of Edinburgh [2018] IRLR 1090 Simler J (as she was then) approached the issue in the other order (which is, as was made clear in Weerasinghe, open to the Tribunal). In Sheikholeslami, her Ladyship said:

> On causation, the approach to S.15... is now well established... In short, this provision requires an investigation of two distinct causative issues:
> (i) did A treat B unfavourably because of an (identified) something? and
> (ii) did that something arise in consequence of B's disability?

48. The first issue requires the tribunal to determine, what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment (it need not be the main or sole reason) then stage (i) is satisfied.

49. The second issue is a question of objective fact based upon an assessment of the evidence.

50. While a broad approach applies when considering stage (ii) there must still be a connection of some kind; the critical question is whether the 'something' arose "in 'consequence of' (rather than being caused by) the disability.

51. The respondent in this case will have a defence if it can show either of the things set out in s(1)(b). Similarly, this claim will fail if the claimant does not establish that (1) the treatment was not unfavourable; or (2) the treatment was sufficiently disconnected from the something; or (3) in the event that the 'something' did not arise 'in consequence' (see above).

52. A critical evaluation of the evidence is required, entailing a weighing of the needs of the employer against the discriminatory impact on the employee. The Tribunal must carry out its own assessment on this matter, as opposed to simply asking what might fall within the band of reasonable responses of the reasonable employer (Gray v University of Portsmouth EAT 0242/20).

53. When determining whether the measure complained of was reasonably necessary, however, the ET is required to keep in mind that this does not mean there can only be one course open to the employer; reasonable necessity allows that there may be more than one option which would constitute a proportionate means of achieving the legitimate aim in question, Health and Safety Executive v Cadman [2005] ICR 1546 CA at paragraph 31.

Burden of proof

54. **Section 136 of the EqA** makes provisions about the burden of proof. If there are facts from which the tribunal could decide, in the absence of any other explanation, that there was a contravention of the Act, the tribunal must hold that there was a contravention, unless the respondent proves that that there was not a contravention.

Reasonable adjustments

55. The requirements of the duty to make reasonable adjustments are set out in **s 20 EqA** and, by **s 21**, a failure to comply with the duty amounts to discrimination. For the purposes of this case, the duty applies where a "provision, criterion or practice" ("PCP") puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. The disadvantage must be linked to the disability. The duty is to take such steps as it is reasonable to have to take to avoid the disadvantage. "Substantial" means "more than minor or trivial" (**s 212 EqA**). The knowledge defence is not relevant in this case.

56. It is not a reasonable adjustment to ignore the disability related absences when calculating sickness leave, Bray v Camden London Borough [2002] EAT 1162/01.

57. There is no rule that an employer must discount disability-related absences, Royal Liverpool Children's NHS Trust v Dunsby [2005] UKEAT 0426_05_0112.

Burden of Proof

58. So far as the burden of proof is concerned, it is for the claimant to establish that the duty has arisen and that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating

that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. It will then be for the respondent to show that it did not fail to comply with the duty. (Project Management Institute v Latif UKEAT/0028/07.)

Unfair Dismissal

59. The Employment Rights Act 1996 (ERA) Section 94 provides:

The Right not to be unfairly Dismissed

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

Section 98: General Fairness

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(3) In subsection (2) (a) -
(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

98(4):

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

(a) Depends on whether in all the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee
(b) Shall be determined in accordance with equity and the substantial merits of the case.

60. In determining the question posed by section 98(4), the ET is required to ask itself whether the decision to dismiss fell within the band of reasonable responses open to a reasonable employer, Foley v Post Office [2000] ICR 1292-3 CA. The questions thus posed under section 15 EqA (objective justification) and under section 98(4) ERA (fairness) are subject to separate tests, albeit in some factual situations they may have similar effect (see per Underhill LJ at paragraphs 53-54 O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145; [2017] ICR 737 CA and per Sales LJ (as he then was) at paragraph 55 York City Council v Grosset [2018] EWCA Civ 1105; [2018] ICR 1492 CA).

61. The Tribunal must not substitute its own view for that of the employer unless it falls outside the band of reasonable responses, Iceland Frozen Foods v Jones.

Procedure

62. The tribunal had the benefit of a bundle of 578 pages install witness statements were prepared on behalf of the claimant, Mrs Aryteey who was the dismissing officer and Mr Hackman who heard the appeal of the claimants dismissal. Day one of the hearing was used for the tribunal to read into the documents and evidence was heard on day 2. At the start of day 2, Mr Ross on behalf of the claimant confirmed that the claimant was no longer pursuing his claims of victimisation which largely arose out of the claimant not being offered work post dismissal as a bank worker.

Evidence

63. All witnesses provided sworn evidence to the tribunal.

64. The claimant gave evidence first. The claimant appeared comfortable giving evidence to the tribunal and was clearly keen to ensure that the tribunal understood what his he viewed his case to be. However, the tribunal found that too often, the claimant was content to answer his own question as opposed to the question that was put to him. Mr Burke on behalf of the respondent made plain at the start of the claimant’s cross examination that

he would be providing questions which would require yes or no answers and several times during the course of the claimant's cross examination the judge had to remind the claimant that it was desirable from the tribunal's point of view for him to answer the question or alternatively say that he didn't know the answer to the question as opposed to providing his own narrative.

65. This conduct together with some of his answers to question lead to the tribunal's finding that the claimant failed to see the bigger picture in so far as the issues to be determined in the claim and the questions directed at him for that very purpose. A number of times, the claimant described himself as a small cog in a big wheel. It is the tribunal's finding that insofar as his absence impacted the respondent's work was concerned, the claimant's answers were at times evasive and that he lacked insight as the totality of the impact his absences would have had. Consequently, the tribunal found that his responses to the key issues were not capable of being believed or accepted.

66. In providing his answers, the claimant did not come across well. In support of the tribunal's finding in this regard, the tribunal noted that the claimant asserted that despite being head of the ward that his role was interchangeable with other senior nurses on the ward and that as such, his absences would not be felt. He did not say that he was for example a ward leader in his witness statement or in evidence and repeatedly said that his role was interchangeable and that his absence would not be noted not be missed. This is a key observation to make because the tribunal consequently found that the claimant was an integral, essential and senior cog in the wheel contrary to what he said or asserted, one whose absence would be keenly missed on his absence days. We found that it was unrealistic and incorrect of the claimant to have asserted otherwise.

67. Mr Hackman gave evidence on day three of the hearing. His evidence lasted for approximately 30 minutes. He had provided a witness statement of 5 pages and his evidence covered the appeal meeting. His witness statement is brief on detail insofar as his interactions with the claimant are concerned. In his statement, he spends some time explaining his background within the

context of the respondent, the steps that he undertook to prepare himself to consider the claimant's appeal, the factors that he considered as part of the appeal, and then finally, how he reached his decision. Ultimately, Mr Hackman reached the decision to uphold the claimant's dismissal. He says at paragraph 13 of his witness statement the following:

'***The adjustments implemented and/or offered were clearly multiple and varied. This, in our view, gave Mr Oakes the best opportunity to come back to work. However, despite all of the adjustments made or offered, Mr Oakes' absences had not improved. We did not consider that there were any further adjustments that could have been made that would have made a difference and Mr Oakes was not able to suggest any adjustments which were materially different from what had already been considered.'***

68. Mr Ross for the claimant asked him a series of questions in relation to the lack of documentary evidence in terms of notes arising from his the meeting that he had with the claimant on 23 January 2024 or evidence addressing specific issues contained within the appeal outcome letter that he prepared dated 26 January 2024.

69. For example, at paragraph fourteen of his witness statement, Mr Hackman observes that the claimant wanted to return to his current post where he observes that it was unlikely that the respondent would have experienced reduced absence. Mr Ross asked Mr Hackman that given there was no mention in the letter of any suggestion by the claimant of any other role that he could do and that it was not documented anywhere nor was there any evidence to say that it had been documented that it had not been considered or documented. The same point arose in relation to a discussion around redeployment and specifically the claimant's potential redeployment to the outpatients unit upon the advice of the occupational health practitioner.

70. Mr Hackman was asked by Mr Ross whether he had considered discounting the claim is disability absences and specifically whether he had engaged with this aspect as part of his consideration of the claimants appeal. Mr hackman confirmed that he had. Again, the point was made that no paperwork existed

to show that this had occurred nor was it addressed in the appeal outcome letter. However, Mr Hackman was clear in his evidence that he had considered this point and the others put to him by Mr Ross in his appeal outcome letter.

71. It is an unavoidable observation that the appeal outcome letter appears to be a document which could do with further embellishment. That said, the tribunal finds no reason to undermine the integrity of the appeal outcome and finds that the decision reached by Mr Hackman to be reasonable, and proportionate albeit scantily reasoned.

Findings of fact

72. All findings of fact have been reached by evaluating the evidence presented to the tribunal on the balance of probabilities. While this is a case where there is little in dispute between the parties in terms of the factual evidence, where there are factual disputes within the matrix relevant to the issues to be determined, the tribunal considered all of the evidence available to it and the credibililty of the witnesses.

Unfair dismissal

73. We find that through no fault of his own, the claimant was chronically persistently absent.

74. An informal sickness meeting review of the previous 12 months, as far back as October 2019, documented 11 separate absence episodes. By the 14 August 2023, in just the previous 12 months absences totalled 146 out of 262 working days; 14 episodes of sickness of which 10 were short-term sickness episodes for several different sickness reasons. This is evidence is unchallenged both before the tribunal or in the numerous stages prior to the meeting in which the claimant was dismissed by Mrs Aryeetey on 26 September 2023.

75. Although there was no documentary evidence before it of the impact of the claimant's absence on his ward, we find that it is was inevitable that the claimant was an important member of the ward, with key supervisory and managerial duties and that as a consequence, his absences placed a significant strain on the ward, resulting in the cancellation of procedures and the non-admission of patients from A&E. we accept what Mrs Areyteey told us in live evidence and reject the claimant's evidence.

76. We find that the claimant was treated kindly and with compassion by his line mangers and that throughout the process that he was subjected, there was clear communication around the area of underperformance that led to his dismissal by way of his line manager, Emma Glass. An example of her support and the claimant's gratitude for it can be seen on 1 August 2023:

"*Good to chat just now, glad to hear you are feeling better…Let me know if there is anything else you need*" .

77. In his response at the time, the claimant expressed himself like this, *"Lovely to talk to you and so so glad to be coming back.".*

78. We reach these finding on the despite the claimant's live evidence that he considers himself deeply wronged and unsupported. We expressly reject that assertion because of the evidence within the bundle which contradicts what he has to say. We find that the claimant was very well supported by way of support from Miss Glass or others.

79. For example, when the Trust received notice from him that he needed every Thursday off for 12 weeks for counselling, the response was supportive and immediate, *"Yes we can support you with this. Please can you send a list of your appointment dates and any shift clashes so that they can [be] entered on the rota and I can plan cover"*. The claimant was unprepared to accept that this response was supportive and asserted that it was mandatory response given the nature of the request. The tribunal does not agree and finds that the claimant's answer served the illustrate his lack of insight and sometimes evasiveness when asked a direct question.

80. We find that the Trust's approach to the claimant's, disabilities and absences was always sympathetic, understanding and compassionate..

81. It was difficult to replace the claimant when he was absent. His job description detailed the importance of his role; he was a clinical lead who "ran the ward". In evidence, he agreed that two Band 6s on the ward was important for safe administration and that the absence of a Band 6 could cause problems. That was an obvious concession, compounded by the relative lack of Bank cover available for his role. A further concession of note was in live evidence when he said that 2019 to 2023 was a long time for the ward to cope with his absences.

82. At an informal short-term sickness meeting on 23 June 2022, it was documented that in the previous 12 months C had been absent for 91 days; with the majority of absences not caused by his disability, and indeed not caused by work. Following this meeting, the claimant was of for a further periods of sickness absence.

83. By the 10 March 2023, at the formal stage 2 short-term sickness absence meeting, the claimant had been signed off work for 179 days. The majority of the absences ascribable to non-disability conditions. The sickness meeting record noted his challenge to sustaining attendance at work was "stomach virus and COVID-19" which he agreed was *"obviously not"* anxiety/depression or Crohn's disease. By this point, in the five months previous to being absent from work for 179 days, he had been off for 163 days.

84. The claimant sought to establish that his anxiety and depression was caused by work but there is no evidence for that; while there is evidence that adverse life events caused him these difficulties.

85. In her witness statement Elizabeth Aryeety details the impact upon the ward.

"Discussed the wider impact Chris's sickness has on the wider team - he is one of our most experienced and senior nurses with in-charge skills which makes it difficult to cover his duties. Discussed the current staffing situation of high levels of sickness within the team and the challenge the service is facing with high volumes of acute admissions and the acuity of patients. Finding cover for shifts is increasingly difficult and this is having an impact on the wider team."

86. At the short-term-sickness absence meeting on 10 March 2023, the impact of his absence was again made plain:

"When you are not here, we really feel your absence and I have a duty to cover the ward and ensure patients safe [sic]. Have high levels of sickness and no one to look after the children…you as junior charge nurse huge responsibility and team rely on you".

87. The tribunal finds that at all times the respondent alerted the claimant to the importance of his attendance at work and the impact of his non-attendance at work. The tribunal notes that at no point in the factual matrix does the claimant challenge what is being said to him. It is only in his evidence before the tribunal the claimant rejects the impact of his absences. Finds that it is highly unlikely that the claimant would have been unaware of the impact of his absences.

88. By the time of the stage 3 hearing, the claimant was equivocal about returning the work

> *Q:Do you feel like you are going to come back to work?*
> *C: I am depressed but not suicidal. I have been previously suicidal. I was going to ask if I can take annual leave just to relax*.

Then:

> *Q: Are you able to have patients in your care?*
> *A: Yes, for sure…I just needed some assistance*.

And later:

> *Q; When will you be able to return to work?*
> *C: I would say maybe this week or next week and then return the week after*

89. The claimant had been warned repeatedly of the need for a significant improvement in attendance. He agreed in evidence it was made clear to him at the Formal Stage 2 sickness meeting on 10 March 2023, that the point of no return was approaching if his absences continued. The tribunal finds that he

was very well aware that the Trust would very soon have to do something if there was no substantial improvement.

90. Occupational Health made it absolutely clear that the claimant's absences were not work related.

91. We find that the respondent was entitled to rely on the findings within the occupational health report that the claimant's absences were not work related and that Redeployment would not make any tangible difference to his absences which as we have found were significant and substantial and chronic. Furthermore, we find this to have been the case despite the criticisms raised against it by Mr Ross, namely:

a. The Respondent failed to consult with the claimant – or given him an opportunity to state his case – about the OH assessment prior to the decision to dismiss was reached.
b. The relationship between the claimant's disabilities and his absences was not explored at all by the respondent or else the exploration was inadequate.
c. The respondent's consideration of redeployment was overly narrow and thereby inadequately considered. Further, other options were not fully considered.

92. We find that the trust and in particular, Mrs Aryeetey, were entitled to reach the decision that, 'enough is enough', (see Post Office v Jones). We make this finding on the basis of the evidence from Mrs Aryeetey before which was extensive and detailed and in light of our finding that she was an eminently credible witness. She found that the claimant was absent frequently. We find that in the return to work interviews, the claimant was subjected to an extensive discussion around his absences and the impact of them in terms of the services that the respondent sought to provide. We find that the investigation of his absences by Mrs Aryeetey to have been impeccable in terms of its integrity and depth and therefore unimpeachable. We found her to be firm and resolute but clear and reasoned when responding to the three elements of the claimants case as set out above.

93. The appeal was handled by Mr Hackman. While we have found that the appeal by Mr hackman could be described as light touch, we do nonetheless find that he addressed his mind to the issues under appeal and the evidence presented to him. Given the substantial number of the claimant's absences, the number of adjustments afforded to the claimant, and in consideration of all of the other surrounding circumstances, we find that Mr Hackman was entitled to reach the decision he did in respect of the claimant's appeal.

Reasonable adjustments

94. We find that there is no medical evidence before the tribunal to support the contention that extending employment stood a chance of improving the claimant's attendance. It would not enable him to perform his duties. It was not a reasonable adjustment to accept patients would have an inferior service and staff continue to suffer the strains of being without a much-needed clinical leader and mentor.

95. Similarly, there is no medical evidence to suggest that discounting disability related absences would improve claimant's attendance.

96. Further, following the line of cases that include *Bray* and *Dunsby* see above, we find that it is not a reasonable adjustment to ignore disability-related absence when accounting for absences from work and that there is no rule in law that imposes such a duty.

97. Accordingly, we are not minded to make such a finding that in this case the respondent discriminated against the claimant for not discounting all his disability-related sickness absence for absence management purposes. We find that this would not have been a reasonable adjustment and would not be reasonable or practical in any event.

98. The claimant's attendance target was reduced to 80% in the monitoring period of 8 weeks following the Formal Stage 2 sickness absence meeting on 10 March. The respondent says that this was to no effect as the claimant did not complete the monitoring period due to absence by reason of gastrointestinal

problem on 13 March 2023 and on 12 April 2023. The tribunal agrees with this submission.

99. The respondent then reduced to 80% from 13 April 2023. Further absences occurred:
    a. 27 April 2023 : Absent by reason of gastrointestinal problem (7 days);
    b. 4 May 2023: Absent by reason of Covid (9 days);
    c. 19 May 2023 : absent by reason of 'barking cough, vomiting, fever and shivers';
    d. 13 June 2023 : absent by reason of Covid (5 + 2 days);
    e. 19 June 2023: absent by reason of Covid (7 days);
    f. 26 June 2023: absent by reason of Covid (7 days);
    g. 3 July 2023: absent by reason of Covid (7 days);
    h. 13 July 2023: absent by reason of Covid (6 days);
    i. 18 July 2023: absent by reason of Covid (13 days).

100. It is clear and the tribunal finds that lower attendance targets had no impact upon the claimant's attendance and there was no medical evidence in support that it would. The tribunal makes the same finding in respect of redeployment and its asserted impact. Moreover and despite the evidence of the claimant, the claimant had rejected redeployment until the point at which was perhaps clear to him that he was at risk of losing his job by which time it was, in the tribunal's finding, too late to be considered by virtue of the claimant's absences.

101. The tribunal makes the above finding based on the evidence before it. It can be seen that at the short-term sickness meeting with line-manager Emma Glass, he maintained he had not thought about redeployment. He states that redeployment is incompatible with "money, wife, children" concerns and that he had, "[n]ever thought abou.". He does not take up an invitation to consider temporary redeployment or a nursing role without acute pressure or a role working from home or clinic based. He declined to respond to considering the OPD clinic.

102. As regards shorter shifts, the tribunal finds that this would not have been a workable solution for the claimant and that there is no medical evidence to support the contention that this would have been a reasonable adjustment to have assisted him. Shorter shifts would have meant more travelling if the claimant wanted to retain his salary income. Travel was a major problem for him; it was exhausting. In any event, there was no evidence before the tribunal that working normal length shifts put the claimant at a substantial disadvantage.

Discrimination arising from disability

103. In his live evidence the claimant conceded that the constituent parts of the Stage 3 Sickness Absence Management meeting were not unfavourable. Consequently, this claim fails on the basis of the claimant's own evidence to the contrary.

104. The respondent accepts that, by dismissing the claimant, it subjected him to unfavourable treatment because of something which arose in consequence of his disability, namely his absence record.

105. However the tribunal finds that it is a legitimate aim to ensure staff ensure a minimum level of attendance and that the service can be run in a safe and proper manner. The claimant's dismissal happened after a substantial number of absences that had monitored and addressed reasonably and proportionately by the respondent but without improvement. The level of absence was unsustainable and showed no sign of improvement. The impact on the respondent was significant and included last minute cancellations of elective surgical patients, reducing in the number of bookings for operations resulting in longer waits; diminished capacity in the ward, raised staff stress levels, absence of staff support at work; a cumulative burden over the years. It follows that such absences would be filled by bank and agency at short notice, that the available pool of deputy sisters might be difficult to secure at short

notice, and that the available pool of appropriate bank staff is further limited to those with some prior knowledge and experience of working with children. The tribunal notes that this is what the claimant appreciated when he said that he was “sorry to be a pin” when he was cancelling another shift.

106. The tribunal finds that the claimant’s sickness absence frequently happened at short notice or no notice and that this is not something that could be planned for. The wider consequences of this absence were such that action had to be taken and while it is regrettable that the claimant was dismissed as a direct consequence, it is the tribunal’s findings that the dismissal and other aspects of the claim must fail because the reasons given above.

Employment Judge Forde
19 August 2025

Judgment and Reasons sent to the parties on:

20 August 2025
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For the Tribunal:
……

Note
Reasons for the judgment were given orally at the hearing. Written reasons will not be provided unless a party asked for them at the hearing or a party makes a written request within 14 days of the sending of this written record of the decision.

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