EMPLOYMENT TRIBUNALS

Claimant: **Mrs T Cappello**

Respondent: **Nottingham Trams Limited**

Heard at: **Nottingham**

On: **Monday 10 April, Tuesday 11 April and Wednesday 12 April 2017**

Before: **Employment Judge Legard**
Members: **Mr R N Loynes**
Mr A Saddique

Representation
Claimant: **Mr R Rixon, Consultant**
Respondent: **Ms L Gould of Counsel**

JUDGMENT

1. The Claimant is not a disabled person within the meaning of s.6 of the Equality Act and accordingly the claims of disability discrimination are dismissed.

2. The complaint of unfair dismissal is not well founded and is dismissed.

3. The Respondent's application for costs is refused.

REASONS

1. Disability – preliminary issue

1.1 By a claim form dated 5 September 2016 the Claimant brings complaints alleging disability discrimination (specifically 'discrimination arising' (s.15 EA) and failure to make reasonable adjustments, (ss.20/21 EA)) together with a complaint of unfair dismissal. Disability was not conceded and accordingly it fell to be determined as a preliminary issue at the outset of

the substantive hearing.

2. Evidence and Submissions

2.1 We heard evidence from the Claimant who was cross examined. We were referred to a number of documents within an agreed bundle comprising approximately 240 pages. We heard oral submissions from both representatives. We were not directed to any case law but were referred to both the relevant provisions of the Equality Act and the 2011 guidance.

3. Relevant Law

Statute

3.1 Section 6 Equality Act 2010:-

"(1) A person (P) has a disability if:-

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

3.2 Paragraphs 5 and 8 of Part 1 to Schedule 1 of the Equality Act 2010:-

"Paragraph 5:-

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:-

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

(3) Sub-paragraph (1) does not apply:-

(a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed;

(b) in relation to such other impairments as may be prescribed, in such circumstances as are prescribed.

3.3 We took time to consider both the Code of Practice on employment (insofar as it concerns the question of disability) and the 2011 Statutory Guidance. Within the guidance there are a number of examples given to assist a Tribunal in determining whether or not as the case may be, the impairment in question has a "substantial adverse effect" and also provides useful guidance on the meaning of "normal day to day activities", see paragraphs D2 to D23 and specifically paragraphs D4 to D7. We have also considered the appendix to the guidance where there is a non-exhaustive list of factors where it would either be reasonable or not reasonable as the case may be to regard as having a substantial adverse effect on normal day to day activities.

3.4 The guidance suggests that the Tribunal may look at, amongst other things, the time taken for an individual to perform the day to day activities; the cumulative effect of conditions where there are more than one; the extent to which a person might reasonably be expected to modify his behaviour by coping strategies for example. There is also useful guidance on what constitutes a "progressive condition" and on the "effect of treatment". See in particular paragraph B14.

<u>Case Law</u>

3.5 Detailed guidance on the approach to be adopted by Tribunals in determining the disability question was provided by the EAT in *Goodwin v Patent Office*

[1999] IRLR4. Amongst other things the Tribunal is encouraged to take a purposive approach to legislation and be careful not to lose sight of the overall picture. An effect is substantial if it is more than minor or trivial (see s.212(1) EA: B1 of the guidance and also *Aderemi v LSE Railway Limited [2013] ICR 591*.

3.6 Tribunals are encouraged to concentrate on what a Claimant cannot do or can only do with difficulty, see *Leonard v South Derbyshire Chamber of Commerce [2001] IRLR 19*. It is not appropriate to confine an evaluation of day to day activities by reference to a normal day to day environment and disability is to be determined by reference to the circusmtances that existed at the time of the relevant acts or omissions that are alleged to be discriminatory, not the hearing itself - *Cruickshank v VAW Motorcast [2002] IRLR 24*.

4. Facts

4.1 We deal only with the facts that are relevant or potentially relevant to this preliminary issue and specifically to the question of substantiality. The Claimant suffers from a condition known as delayed sleep phase disorder or syndrome (‘DSPS’). According to documentation within the bundle (the provenance of which is not entirely apparent and we have treated it with a degree of caution), it would appear that DSPS affects individuals by delaying their “body clock” so that they tend to fall asleep much later than would otherwise be considered “normal”. Consequently if they are required to wake in accordance with accepted norms of a working society, they are likely to experience abnormal levels of tiredness and lethargy, particularly, of course, in the morning. It’s not quite clear whether the condition is neurological or psychological (there is some conflicting evidence on the point) but that is not in issue before us and we proceeded on the basis that it is either one or the other. Either way DSPS fulfils the requirements of Section 6(1).

4.2 It is not narcolepsy nor sleep apnoea and the Claimant does not take nor has she taken any medication for it. There is a useful letter from a Professor Barker (who we understand is a specialist) addressed to the Claimant’s General Practitioner Dr Dalton dated 29 April in which Professor Barker concludes that he believes the Claimant to be suffering from “sleep phase disorder” and describes the Claimant as going to bed at

about 11-11.30 at night and taking hours for her to get off to sleep. According to Professor Barker:

"When she finally gets off to sleep in the early hours then she gets up about midday still feeling tired and can have a nap in the afternoon from 2 o'clock for 3 hours if she wants. When she wakes up from this it takes a while to come out and she is completely awake all evening and most of the night."

He goes on to say this:

"The problem is that Tara is a night owl, an extreme night owl."

4.3 In her witness statement the Claimant describes those with DSPD as having natural sleep times of between 5 am and 1 pm. However in evidence she described her current routine as going to bed at around 10 o'clock at night, getting to sleep, that is fully asleep after midnight and, at least from Monday to Friday, being woken by an alarm clock at approximately 7.15 am. She does not eat or drink before leaving the house. She then drives approximately 5-6 miles to work where she performs a warehouse picking role, starting work at approximately 8.30am. That role requires reading invoices and picking the relevant product. She begins her driving duties from approximately 10-10.30 am. She said that she sometimes makes mistakes and more often in the morning. Her sleep pattern alters at weekends but only to the extent that she sleeps longer until 10am or so. She has 3 dogs that require letting out, feeding and exercising. Cooking during the working week is undertaken by her wife, but she assumes responsibility at weekends. She cites shopping as a day to day activity that has been compromised but only to the extent of having to delay the activity until late or later in the afternoon. She makes a number of generic and we find broadly unevidenced assertions about concentration levels but without providing any real examples as to how it impacts upon her day to day living.

4.4 However, the relevant date for the purposes of determining the disability question is not today but the time at which the alleged discriminatory acts took place; i.e when the capability proceedings, dismissal and appeal process took place. The Claimant did not contend (and the burden is

upon her) that either her sleep pattern or day to day activities were materially different then than they are today. Indeed in cross examination she was taken to, amongst other things, a stage 2 meeting in June 2016 when it was noted she had been up at 8am and at which she had experienced no difficulty in concentrating or responding to questions. The same was broadly true when the capability dismissal hearing was held on 8 July 2016.

5. Conclusions

5.1 In our judgment the Claimant has failed to show that the impairment from which she suffers has a substantial adverse effect on her ability to carry out normal day to day activities and accordingly we are of the unanimous view that the Claimant does not meet the disability threshold as set out in s.6 of the Equality Act.

5.2 At its highest the Claimant's case is that because her sleep is delayed or postponed as a consequence of her condition, she feels tired in the early mornings and she necessarily has to postpone some of her activities such as shopping. But she has produced little, if any, evidence of substantial adverse effect on her ability to concentrate, drive, cook, undertake household or work related tasks. In arriving at this view we have taken careful account of the 2011 guidance and specifically that which relates to normal day to day activities and substantial adverse effect.

5.3 It follows from our Judgment that the disability discrimination complaints fail and are dismissed.

6. Remaining issue – Unfair dismissal

6.1 Following the determination of the disability question the sole complaint left before us was one of unfair dismissal. Therefore the issues were as follows:-

(a) What was the reason for the Claimant's dismissal and was it a potentially fair one?

The Respondent relied on capability and in the alternative some

other substantial reason ('SOSR'). In submissions Ms Gould argued essentially for a hybrid of the two.

(b) If it is a potentially fair reason did the Respondent act reasonably in treating it as a sufficient reason for the Claimant's dismissal within the meaning of Section 98(4)?

(c) If we found that the Respondent had acted unreasonably and accordingly the dismissal was unfair we were invited, at the liability stage, to consider both 'Polkey' and contributory conduct issues.

7. Evidence and Submissions

7.1 We were referred to an agreed bundle of documents comprising some 240 documents. We heard oral evidence, on the Respondent's behalf, from Mr Michael Bradley (Service Delivery Manager and the dismissing officer) and also from Darren Smith (Deputy Operations Manager and the appeals officer). It had been the Respondent's intention to call Alison Bradley (also a Service Delivery Manager and married to Michael Bradley) who was the Claimant's Line Manager and indeed who had had conduct of the stage 1 and stage 2 capability meetings. We were informed that she was unwell and consequently unable to attend. The Respondent had taken the view, in the interests of proportionality, avoiding expense and delay, to proceed in her absence, emphasising the fact she was not a decision maker.

7.2 We also heard oral evidence from the Claimant herself. However, when giving oral evidence in chief, the Claimant contended for the first time that Allison Bradley had instructed her to:-

(a) delete a video (about which more below); and

(b) tell untruths about the circumstances in which the video came to be made.

7.3 In light of the above evidence (about which there was no forewarning) the Respondent applied for an adjournment. Having heard from both representatives we decided not to adjourn the hearing at that stage (oral reasons been given at the time) although we left the door open for the

Respondent to renew its application following the cross examination of the Claimant. The Respondent declined to do so.

7.4 At the conclusion of the evidence we heard oral submissions from both representatives. We would like to record our gratitude to both Mr Rixon and Ms Gould for the very careful and professional way in which they have conducted their respective cases.

8. Findings of Fact

8.1 The following findings of fact are made on a balance of probability. The Respondent is a private company that operates a tram service within Nottingham City centre on behalf of Nottingham City Council (who retain ownership of the infrastructure on which the trams are run). There are approximately 300 employees of which approximately 140 are tram drivers. At the time in question tram driving duties began at approximately 5 o'clock in the morning and concluded at approximately 11 o'clock at night. Since October 2016 a permanent night shift has been introduced. Drivers are rostered to work at different times throughout the course of a working day. Duty 'start' and 'finish' times vary as do the overall length of some of those duties. Reference has been made to 'early', 'middle' and 'late' shifts but, in reality, there is no shift system as such, nor is any individual tram driver rostered to work by reference to a particular time in the day (absent exceptional circumstances). There is no clear temporal definition of the term 'early', 'middle' or 'late.' There are approximately 32 tram drivers on duty at any one time (and therefore approximately 32 trams on the network) although that number fluctuates according to peak periods.

8.2 The maximum operating speed of a tram is approximately 50mph and, depending on the load, it weighs anything up to approximately 50 tonnes. It has a maximum passenger capacity of 260. A typical tram route runs along routes that are described as either 'on' or 'off' street. When 'on street' the tram shares space with pedestrians, car users and other public transport.

8.3 The Claimant was employed as a tram driver from 25 March 2013 until her dismissal which took effect on 8 July 2016. She appears to have fulfilled

her duties without any cause for concern for a number of years and there is no evidence before us to suggest that her competence was previously called into question. She did have a somewhat chequered sickness absence history. However, for our purposes and indeed from the Respondent's perspective as well, it is not relevant in the context of this case.

8.4 We have been referred to a number of policies, including the sickness absence policy ('SAP'). The formal SAP procedure consists of two stages. At stage 2 it says this:

"Whilst the company will consider the availability and appropriateness of alternative roles… new roles cannot be invented and that such alternatives not be available/appropriate the employee's employment with the company may be terminated."

It says much the same thing at a bullet point below that.

8.5 There is also a conduct policy. At 79B the policy reads as follows:

"Whilst at work employees must "make the safety and comfort of NTL passengers and the public their main concern. Employees must not:-

1. Sleep or give the appearance of sleeping when on duty.

2. Use… telephones on net system, except with specific authority and in appointed places. Personal mobile telephones at the discretion of the Line Manager but in all cases should be switched off when carrying out a safety critical task."

8.6 The Claimant's contract of employment contains, amongst other things, the following :

"Everyone has a duty to ensure that their tasks are discharged in accordance with the procedures and rules which are specifically devised to protect health, safety and welfare of all staff, our passengers and the public."

8.7 In April 2016 the Claimant attended the NHS treatment centre in Nottingham and completed a questionnaire. Within that questionnaire she was asked, amongst other things, the following:

Do you ever feel sleepy while driving? She answered yes.

Do you fall asleep during the day? Answer yes.

If yes, how long ago did this first start to happen? The Claimant responded 'one year ago.'

8.8 Under the final section she said as follows:

"My main problem is that I am so tired during the day, in my job driving trams I find myself falling asleep quite often and really struggling to keep my eyes open."

At this stage, we note that that is not a document that was before Mr Bradley when he took his decision to dismiss (an important factor in the context of an unfair dismissal complaint).

8.9 It is clear therefore that in early 2016 or quite possibly much earlier than that, perhaps April 2015, the Claimant had become concerned that she was experiencing abnormal levels of tiredness particularly when undertaking tram driving duties in the morning. It is common ground (and indeed a matter of common sense) that driving a tram is a safety critical role. Lack of concentration, misjudgement from a driver or, in extremis, a case of a driver falling asleep at the controls could have catastrophic consequences for passengers, pedestrians and other road users. Furthermore, albeit far less important, a report of a driver falling asleep at the controls (whether or not an accident ensues) could also lead to serious reputational and contractual consequences for the Respondent.

8.10 Rather than report her concerns to line management at any time prior to March 2016, the Claimant elected to use her mobile phone to record herself whilst driving the tram. According to the Claimant this video was taken at some point in February 2016. We have not seen the video and we were informed that it has since been deleted. We were told that it

shows the Claimant "nodding off" whilst at the controls of a tram, with her eyes closed for up to 5 seconds at a time. According to the Claimant the video was taken on an early shift at approximately 8.30 in the morning but we have seen no evidence to support that assertion. We were informed that the Claimant has diary records in her possession (that may have shed some light on the above) but those were not disclosed during the course of these proceedings.

8.11 The Claimant, understandably anxious about what she considered to be abnormal sleepiness, went off sick on or about 7 March 2016. She self-referred to her GP who in turn referred her to a sleep disorder specialist, Professor Barker, whom she first saw on 25 April.

8.12 Prior to that, on 5th April, she had a stage 1 absence meeting with her line manager, Alison Bradley. The Claimant informed Mrs Bradley that she was being tested to see if she had sleep apnoea because she had been so tired. Mrs Bradley asked if there was anything the company could help her with (including counselling.) There was some discussion about her levels of stress and Mrs Bradley indicated that a medical report would be commissioned.

8.13 On 19th April the Respondent wrote to the Claimant's GP, requesting a medical report and posing a number of questions. The Respondent pointed out that tram driving was a safety critical role that "requires one hundred per cent concentration at all times".

8.14 On 25th April the Claimant saw Professor Barker and was diagnosed with 'delayed sleep phased disorder', a recognised sleep condition which, in essence, means that an individual's body clock is out of sync with the hours normally associated with waking and sleep by the population at large. In our Disability Judgment, we have gone into considerably more detail with regard to this condition and the effects thereof. It is described as a permanent condition for which the Claimant did not require medication.

8.15 On 29th April 2016 Professor Barker produced a 'To whom it may concern' letter, containing the following:

"Tara Cappello has a delayed sleep phase disorder that means that her natural body clock is set to be tired/sleepy at 5/6 am and ideally she would sleep until about midday/2 pm. This means she is very sleepy in the mornings… And it is much more difficult for her to do tasks. She is however much more awake and alert afternoons and evenings. I would strongly recommend that she does late shifts for her tram driving or late middles and night shifts. It is extremely important that she avoids all early shifts when I do not consider her to be safe driving."

8.16 This was accompanied by a second letter of the same date but addressed to her GP. Both letters were handed to Mrs Bradley on or about 2 June.

8.17 In the second letter Professor Bradley said, amongst other things:

"She goes to bed about 11/11.30 at night. It takes her hours and hours to get off to sleep. She finally gets off to sleep in the early hours and gets up about midday. Still feeling tired and can have a nap in the afternoon for 3 hours if she wants. When she wakes up from this it takes a while to come out and she is completely awake all evening and most of the night… The problem is that Tara is an extreme night owl. She is very awake throughout the early hours. Only gets sleepy in the early morning. ***She brought with her a video that shows her as a tram driver early in the morning and it quite clearly shows her falling asleep for most of the time on the video. There are many periods of 5 second intervals of time when she has got her eyes completely shut and her head is nodding. It is clearly not at all safe****."*

8.18 Professor Bradley goes on to describe the DSPD in more detail and then this:

"I think left to herself her natural bed time would be between 4 or 6 in the morning and her natural up time would be between 11 and 2. I think after these times actually she would be perfectly safe driving, it's just that she is not first thing in the morning."

8.19 The Claimant's disclosure of the second letter was accidental. She knew that falling asleep whilst driving a tram, as well as using her mobile phone to record herself doing so, was potential gross misconduct and therefore the consequences of either admitting that or disclosing the video would very likely lead to her summary dismissal. In oral evidence for the first time the Claimant stated, that after handing over the letters Mrs Bradley, (someone whom she described broadly as a well meaning, very supportive Line Manager) explicitly told her to:-

(a) delete the video and/or not disclose it in order to safeguard her job.

(b) tell an untruth about how and in what circumstances the video came to be made."

8.20 In her witness statement, the Claimant refers to one of her managers advising her not to disclose the video to the company. There is no mention of Mrs Bradley. There is no mention of Mrs Bradley having seen the video and there is certainly no evidence of Mrs Bradley or any other manager requesting or encouraging the Claimant to tell an untruth. There is no mention of the above in the particulars of claim. There was no mention of this assertion (of potentially critical importance within the context of this complaint) within any of the hearings, despite the fact that, on the Claimant's account, she had informed both her trade union representatives.

8.21 We have not heard from Mrs Bradley and so we must, of course, treat what is set out within her signed witness statement with a considerable degree of caution. Nevertheless, having done so, we unhesitatingly conclude that the Claimant has not told the truth in relation to what we find is an important matter. There is no contemporaneous evidence to support her assertions. On the contrary the evidence, including comments attributed to individuals including Mrs Bradley, at all times pointed in the opposite direction. In any event, it is, in our view, inherently implausible that Mrs Bradley, a Service Delivery Manager charged with the conduct and safety of the tram network, would indulge in a dishonest cover up and encourage a subordinate to tell lies, motivated only by misplaced goodwill. We reject the Claimant's evidence on that point unreservedly.

8.22 The other medical evidence before us consisted of a General Practitioner letter and a later letter from Professor Barker. The General Practitioner letter says amongst other things that the Claimant is:

"best after 1 o'clock in the afternoon and that according to the General Practitioner Professor Barker believes the Claimant would be perfectly driving after 1 o'clock in the afternoon."

The General Practitioner records that stress, depression and acute uvitis does not have any relationship to the DSPD.

8.23 The latter letter from Professor Barker is a somewhat generic and non-specific commentary on the syndrome as opposed to its effect on the Claimant as an individual and, to that extent, it is of limited assistance.

8.24 A stage 2 meeting was held on 10 June. On the Claimant's case (which we have already rejected) Mrs Bradley not only already knew of the existence of the video by then but had also given clear instructions not to disclose it and to tell untruths about it. But the minutes of that meeting (which we accept are not a verbatim transcript) nevertheless show that Mrs Bradley, when referring to the video, asked the Claimant to explain it. The Claimant informed Mrs Bradley it was taken months ago, probably about February and that her partner Maria had videoed her in the car. Mrs Bradley asked a further series of questions about the video and its provenance.

8.25 During the meeting the Claimant described herself as a night owl. Her tiredness had been there a while. It was pointed out to her that they could not create a permanent late shift just for her and it was also pointed out that the Respondent had very serious concerns about the Barker second letter. Given what we find are entirely understandable concerns, the Respondent then wrote to Professor Barker on 23 June but the Claimant ultimately refused to give her consent to such a letter being sent. There was a reconvened meeting on 28 June 2016 by which point the Claimant had been stood down from all driving duties (including within the depot).

8.26 The Claimant was asked during that meeting why she refused consent for the letter to be sent to Professor Barker. The Claimant answered "because I gave you the letter by accident (referring to the 'second letter'). It was meant to be private and confidential". There was some discussion about whether the condition was curable. The Claimant 's position at that meeting was that her natural 'up' time was between 11am and 2pm. Further discussion took place about the Claimant falling asleep whilst driving and she was reminded that that was the reason behind her being stood down. The Claimant did go on to say during the course of that meeting that she had been up since 8am that day and feeling fine.

8.27 A decision was taken to escalate the matter to formal stage 3 meeting, which took place on 30 June 2016. Michael Bradley was in the Chair and the Claimant was represented by Dean Geoffrey. [We point out at this stage that we have not looked in any detail at the DVLA material which we have not found particularly helpful in this case for either party.]

8.28 During this meeting the Claimant repeated that it was her wife that had taken the video whilst she had been driving the car. She said she did not know that she was asleep. The hearing was reconvened on 8 July, at the conclusion of which she was dismissed. During the course of that relatively short meeting the Claimant was to say this: "I'm getting up at 8 am, going to bed between 11pm and 1am". When asked if (between 8am and 11pm) she had gone back to sleep she said: "no as long as she had had 8 hours of sleep." She was no taking any medication. In essence the Claimant confirmed that she had reverted to a normal sleep pattern. Her trade union representative said that her condition could be cured, clicking his fingers, with the words "just like that". Mr Bradley referred to a number of contradictions between what the medical expert appeared to be saying and what the Claimant and her trade union representative were saying during the course of the meeting.

8.29 It is fair to say that contents of the letter inviting the Claimant to stage 3 meeting left much to be desired. That said, the Claimant did not take any significant procedural points before us.

8.30 The Claimant appealed citing in support 9 separate grounds of appeals,

one of which was that the Respondent had failed in its duty of care by allowing her to drive for 20 days after the company had deemed her to be safety critical. The appeal was chaired by Darren Smith. Beforehand he had received a note from Michael Bradley in which he said amongst other things:

"I was also not comfortable with Tara's explanation of the video where she "falling asleep as a tram driver" as her explanation of this changed when questioned."

8.31 The hearing took place on 28 July 2016 and the Claimant was represented by Chris Needham. Mr Needham was permitted to go through each and every separate ground of appeal. Mr Smith asked amongst other things whether her sleep pattern was reverting and to which the Claimant answered "yes". Mr Smith upheld the dismissal and in doing so said as follows:

"We feel there has been a breakdown in trust between the company and employee because there seems to have been a lot of contradictions that have been stated throughout all these meetings as well as the refusal in allowing us to obtain clarification on reports from professors."

8.32 Mr Smith's outcome letter, somewhat light on detail, followed.

9. Relevant Law

9.1 s.98(1) of the 1996 Act provides:

"(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."

9.2 The burden of proof rests upon the Respondent to show the reason. Under s.98(4) ERA (where the burden is neutral) we must be satisfied that the Respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee. A reason for dismissing an employee is a set of facts known to the employer or beliefs held by it such as would cause it to dismiss the employee, see *Abernethey v Mott, Hay and Anderson [1974] IRLR 213*.

9.3 One very clear and consistent principle that is always applied in construing s.98(4) is that it is not for the Tribunal to substitute its own opinion for that of the employer as to whether certain conduct is reasonable or not. Rather its job is to determine whether the employer has acted in a manner which a reasonable employer might have acted, even though the Tribunal may have acted differently, see *Collins v United Distillers*; *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439* and the following quote from Mummery LJ in *London Ambulance Service v Small [2009] IRLR 563*:

"It is all too easy, even for an experienced Tribunal to slip into the substitution mindset."

9.4 At all stages including the determination as to whether or not the sanction of dismissal is appropriate, the Tribunal should apply the range of reasonable responses test, see *Sainsburys Supermarkets v Hitt [2003] IRLR 23.*

9.5 The starting point for analysing the duty of the tribunal in deciding whether or not an ill health capability dismissal is fair is the EAT decision in *Spencer v Paragon Wallpapers Ltd [1976] IRLR 373*. In general an employer will not have acted reasonably unless it's taken steps to discover the current medical position – see *Schenker Rail (UK) Ltd v Doolan UKEATS/0053/09* (Lady Smith). In that case, the EAT criticised the Tribunal for having substituted their view for that of the employer. It was for the employer (not the Tribunal) to reach its own conclusions on the medical evidence and it was entirely reasonable for that employer to have concluded, in the circumstances, that there was a significant risk of the claimant succumbing to further periods of stress-related illness if he returned to his pressured role.

9.6 Insofar as 'SOSR' dismissals are concerned, a Tribunal should be on the lookout for an employer who uses the rubric of SOSR for a pretext to conceal the real reason for dismissal. An alleged "breakdown of trust and confidence" is not a mantra that can be mouthed by employers faced with difficulties in establishing a more conventional reason, see *Leach v Office of Communications [2012] IRLR 839*.

9.7 A so-called 'Polkey' reduction reflects the chance that the employee might not have lost her job had fair procedures been adopted. Where the tribunal concludes that the dismissal would have occurred in any event a 'nil' award will normally result (or a small additional compensatory award only to take account of any additional period for which the employee would have been employed had the proper procedures been carried into effect - see eg *Mining Supplies (Longwall) Ltd v Baker [1988] IRLR 417*).

9.8 In *Scope v Thornett [2007] IRLR 155* the Court of Appeal emphasised that the task is for the tribunal to identify and consider any evidence which it can with some confidence deploy to predict what would have happened had there been no unfair dismissal. To fail to do this could lead to over compensating the employee, which would not be a just outcome. Pill LJ stated:

'The EAT appear to regard the presence of a need to speculate as disqualifying an employment tribunal from carrying out its statutory duty to assess what is just and equitable by way of compensatory award. Any assessment of a future loss, including one that the employment will continue indefinitely, is by way of prediction and inevitably involves a speculative element. Judges and tribunals are very familiar with making predictions based on the evidence they have heard. The tribunal's statutory duty may involve making such predictions and tribunals cannot be expected, or even allowed, to opt out of that duty because their task is a difficult one and may involve speculation.'

9.9 In *Software 2000 Ltd v Andrews [2007] IRLR 568* (Elias P presiding) the EAT reviewed the authorities on 'the 'Polkey' principle, including *King v*

Eaton and concluded, amongst other things, that in assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice; that the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence and that the Tribunal must take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

10. Conclusions

10.1 We accept Ms Gould's submission the reason for dismissal is essentially a hybrid of capability and some other substantial reason. In terms the reason why Michael Bradley decided to terminate the Claimant's contract was because he lacked the necessary confidence in the Claimant's ability to safely fulfil her role in what is a safety critical job. This reason falls perhaps more comfortably within the SOSR definition but we, as an industrial jury, are not necessarily tied to labels. It is our task to determine the set of facts or beliefs that caused the employer to dismiss and determine whether those facts fall within either one or more of the potentially fair reasons within s.98 of the Act.

10.2 In this case, the key question is whether or not, on the evidence before him (both medical and factual), Mr Bradley acted reasonably when he decided to terminate the Claimant's employment. In cases such as this where there is a real risk of applying the benefit of hindsight. We have therefore taken extra care, when determining the 'reasonableness' question, to assess the evidential position as it presented itself to Mr Bradley at the time he took the decision to dismiss. We found Michael Bradley to be a truthful, if somewhat inarticulate, witness. We find that he was not presented with a 'standard' (if such a thing exists) capability situation, indeed far from it. It is clear that his overriding concerns were the Claimant's apparent deliberate refusal and/or failure to come clean and provide him with a truthful, transparent account of how the condition affected her; the extent to which her body clock had or was changing; the circumstances in which the video came to be made and whether it was in fact taken of her driving a tram. He was further concerned by her general

lack of cooperation.

10.3 He also had (we find reasonable) concerns regarding a number of contradictions within the evidence, importantly the contradictions between the Claimant's position (namely that she had reverted to for an 8am start and was in essence sleeping and waking to a normal pattern) and the medical evidence which suggested that her normal (but supposedly permanent) waking pattern was somewhere between 3 and 6 o'clock in the morning. He had further reasonable concerns about whether or not the condition was permanent (or, as the Claimant's trade union representative appeared to indicate with a click of the fingers, curable).

10.4 Overall Mr Bradley could not be confident that the Claimant was being honest, truthful and transparent about her condition and in connection with matters that were clearly relevant to it. This was a two way street. The driver has personal responsibility to ensure that he or she protects the health and safety of the passengers and other road users. It is entirely reasonable for Mr Bradley to have concluded that the Claimant, by failing to give full and frank, open and transparent disclosure and cooperation could no longer be trusted to operate as a tram driver, particularly when there was no clear pathway to recovery and there was contradictory evidence as to how the condition might impact upon her were she to be placed on (for example) permanent nights (i.e should her body clock return to 'normal'.)

10.5 we find that the appeal took the matter little further either way, save as to add a degree of support to Mr Bradley's position. Overall there was nothing in the appeal grounds or the way in which they were dealt with which fundamentally altered the position. In all the circumstances, therefore, we find that the Respondent acted reasonably in treating some other substantial reason and capability as the reason for the Claimant's dismissal and accordingly we find the dismissal is fair within the meaning of s.98(4). For that reason we have not gone on to consider either 'Polkey' or 'contributory conduct' issues.

10.6 By way of footnote only we were not impressed with the Respondent's evidence that there was no possibility of accommodating the Claimant on a permanent night shift and, had this been a straightforward capability

dismissal case, the outcome may (we say 'may' with a degree of hesitation) have been different. There was no evidence beyond self serving assertions; for example no documentary evidence or audit trail to support the Respondent's position in this respect and we find that it cannot have been beyond the wit of this employer to have realigned the roster in order to accommodate the Claimant. However, given our substantive findings above this observation is of no assistance to the Claimant.

10.7 Following oral promulgation of the above Judgment, the Respondent made an application for costs under Rule 76(1)(a) on the basis that the Claimant (or more accurately the Claimant's representative) had acted unreasonably in the way in which the proceedings or at least part of the proceedings had been conducted. We were referred to, amongst other things, various case management orders; an 'Unless Order' (that was retrospectively extended); inter-parties correspondence including a letter dated 23 February.

10.8 In very broad terms it was argued on behalf of the Respondent that the failure by the Claimant's representative to properly articulate her case and set out the basis upon which the Claimant's s.15 'discrimination arising' and/or 'reasonable adjustment' complaints were being pursued amounted to unreasonable conduct such as to justify an award of costs.

10.9 We reminded ourselves briefly of the relevant law. Costs in the Tribunal generally do not follow the event, see *Gee v Shell*. We have in mind the relatively high threshold for unreasonable conduct and the award of costs (see *Yerrakalva; Downham Market* line of authorities).

10.10 We find that this complaint of the Respondent's is really something of nothing. Matters such as this are part of the general cut and thrust of litigation. If costs were to follow each and every time a party or a party's representative failed to provide adequate particulars in support of their claim then there would be very few claims that come before the Tribunal without meriting a costs award. Whilst we have some sympathy for the Respondent as it has led them to incur a little bit more extra time by having to amend their grounds of resistance, we find that the conduct about which they complain is not unreasonable within the meaning of Regulation 76(1). For those reasons we refuse the application. For the avoidance of doubt,

in the alternative the application, if made under Rule 80, also fails for the same reasons. Indeed the application does not come anywhere close to meeting a wasted costs order.

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Employment Judge Legard

Date 24th July 2017

JUDGMENT SENT TO THE PARTIES ON

..12August 2017...

.S.Cresswell...
FOR THE TRIBUNAL OFFICE

<u>Note</u>
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.