EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr Julian Opoku **v 1. London Underground Limited**
2. Mr Carl Painter

Heard at: Watford **On**: 18 to 21 December 2018

Before: Employment Judge Bedeau
Members: Mrs A Brosnan
Mrs J McGregor

Appearances
For the Claimant: Mrs R Hodgkin, Counsel
For the Respondents: Ms J Shepherd, Counsel

RESERVED JUDGMENT

1. The claim of direct disability discrimination is not well-founded and is dismissed.

2. The claim of discrimination arising in consequence of disability is not well-founded and is dismissed.

3. The claim of indirect disability discrimination is not well-founded and is dismissed.

4. The claim of failure to make reasonable adjustments is not well-founded and is dismissed.

5. The claim of victimisation is dismissed upon withdrawal by the claimant.

REASONS

1. By a claim form presented to the tribunal on 25 October 2017, the claimant made claims of disability discrimination and cited in addition to the first respondent, three individual respondents: Mr Peter Sanders; second respondent, Mr Euan Taylor, third Respondent and Mr Carl Painter, fourth respondent.

2. In the response, presented to the tribunal on 29 November 2017, it was averred by the respondents that the claimant's disability, namely type 2 diabetes, was not in issue. As a result of failing to properly manage his blood sugar levels there were restrictions imposed on his work as a Customer Services Supervisor. Eventually a decision was decision was taken to place him in the first respondent's Redeployment Unit.

3. The claims of disability discrimination were denied.

The issues

4. At the preliminary hearing held on 23 March 2018, before Employment Judge Clarke QC, the claims and issues were identified and clarified. They are now set out below.

    4.1 Direct disability discrimination, s.13 Equality Act 2010;
    4.3 discrimination arising from disability, s.15;
    4.4 indirect disability discrimination, s.19;
    4.5 failure to make reasonable adjustments, s.20; and
    4.6 Victimisation, s.27.

5 In respect of the issues the learned Judge stated the following;

> "7. Direct disability discrimination (section 13 Equality Act 2010)
>
> 7.1 Did the respondents treat the claimant less favourably because of his admitted disability?
>
> 7.2 The alleged detriments relied upon by the claimant are:
>
> 7.1.1 On 14 April the fourth respondent instructed the claimant no longer to perform his duties (prior to that he had been performing them subject to certain restrictions suggested by the first respondent's Occupational Health Advisors).
>
> 7.1.2 On 24 April 2017 the fourth respondent informed the claimant that he was considering him for medical termination or medical redeployment because of his disability.
>
> 7.1.3 On or shortly after 7 August 2017 the first respondent rejected an internal complaint raised by the claimant without investigation and, instead, designated it as a non-discrimination grievance.
>
> 7.1.4 On 5 September 2017 the first and second respondents informed the claimant that he was to be medically redeployed because of his disability.
>
> 8. Discrimination arising from disability (section 15 Equality Act 2010)
>
> 8.1 Did the respondents each treat the claimant unfavourably because of something arising from his disability?

8.2 The "something arising" relied upon by the claimant is the advice from Occupational Health that the claimant could do his job, but only subject to certain named restrictions.

8.3 The detriment relied upon is the failure to allow the claimant to do his job as so restricted.

8.4 If the respondent did treat the claimant unfavourably, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

9. Indirect disability discrimination (section 19 Equality Act 2010)

9.1 Did the respondent apply to the claimant a provision, criterion or practice (PCP) that put disabled persons at a particular disadvantage?

9.1.1 The PCP relied upon by the claimant is a requirement that unless persons suffering from diabetes (or persons suffering from a manageable medical condition) optimally managed that condition they could not perform their duties without restriction.

9.1.2 The substantial disadvantage relied upon by the claimant is his not being allowed to do his job and being placed in the redeployment unit.

9.1.3 If so, can the respondent show it to be a proportionate means of achieving a legitimate aim.

10. Failure to make reasonable adjustments (section 20 Equality Act 2010)

10.1 Did a PCP imposed by the first respondent put disabled persons at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

10.1.1 The PCP relied upon by the claimant is that set forth above in relation to the section 19 claims.

10.1.2 The substantial disadvantage relied upon by the claimant is not being allowed to perform his job.

10.2 If so, did the respondent take such steps as it was reasonable to have taken to avoid disadvantage. The claimant asserts that the taking of the following steps was reasonable, adjusting the mode of performance of his duties such that he did not (1) work on or near a live track, (2) work on the platform edge (unless there is a train in the station) and (3) work alone for long periods of time.

11. Victimisation (section 27 Equality Act 2010)

11.1 Did the claimant do a protected act? The act relied upon by the claimant is the raising of a complaint of disability discrimination to the first respondent on 7 August 2017.

11.2 Did the respondents subject the claimant to a detriment because he had done the protected act?

11.3 The detriment relied upon by the claimant is that on 5 September 2017 the first and second respondents informed the claimant that he was to be medically redeployed because of his disability.

12. Jurisdiction

12.1 Were the claimant's various claims presented within the relevant time limit?

12.2 If not, is it just and equitable to extend time?"

The evidence

6 The claimant gave evidence and did not call any witnesses.

7 Only the first and fourth respondents were proceeded against. On behalf of the respondents, evidence was given by:

- Dr Sheetal Chavda;
- Mr Carl Painter, Area Manager Stations;
- Mr Euan Taylor, People Management Advice Specialist; and
- Mr Peter Sanders, Area Manager – Stations.

8 In addition to the oral evidence the parties produced two bundles of documents comprising in total of over 461 pages. References will be made to the documents as numbered in the joint bundle.

Findings of fact

9 This case concerns the actions taken by the respondents in respect of the claimant who was at all material times employed in a safety critical role but whose diabetes is not well controlled giving rise to potential health and safety issues.

10 The first respondent is a major transport provider within the London area operating trains underground and overground. It has an Attendance at Work Policy. In respect of case conference, paragraph 5.2.1 states the following:

> "A case conference consists of the employee concerned, the employee's representative (if the employee choses to be accompanied at the case conference by a trade union representative/fellow worker), the manager, and a representative from Human Action Plan that must be abided to by all parties. The employee's case will continue to be monitored by the case conference until it is mutually agreed that this is no longer necessary."

11 The following follows from the previous paragraph

> "5.2.2 Step 1 – Reasonable adjustments

If, in returning to work temporary or permanent adjustments are required to help the employee improve and maintain acceptable standards of attendance at work, the case conference must consider this, taking into account the needs of the individual. Where no adjustments can be made, or adjustments that are made do not satisfactorily improve the employee's attendance, the case conference should consider the options outlined in 5.2.3 and 5.2.4.

For those employees who have a disability that is within the scope of the Disability Discrimination Act (DDA), the company's processes developed to ensure compliance with the provisions of the DDA must be followed.

5.2.3 Step 2 – Suitable alternative employment

If the employee wishes to remain in employment, the case conference should seek advice and guidance from LUOH regarding the employee's ability to do an alternative job. In these circumstances an employee's service will not be terminated until a minimum of 39 weeks have elapsed from the time he/she first became unable to carry out his/her job for medical reasons.

Managers should proceed in accordance with item 6.2.8 of the Main Agreement for Operational Staff and Operational Managers (October 22nd 1992) and the company's procedures covering medical redeployment and protection of earnings.

An employee's service may be terminated before 39 weeks have elapsed where:

- An employee does not wish to be considered for redeployment, or
- It is clear no suitable jobs are likely to be identified, or
- An employee refuses a reasonable offer of suitable alternative employment.

5.2.4 Step 3- Termination of employment on medical grounds

As a last resort, where all other options have been fully exhausted, the case conference will discuss arrangements for termination of employment on medical grounds and advises the employee of his/her right of appeal."

(283 to 296 of the joint bundle)

12 There is a guidance document in relation to those employees who suffer from diabetes. In relation to insulin treated diabetes, the guidance states:

"When considering an employee's medical suitability for safety related work tasks, an individual risk assessment should be undertaken using the framework below. This should be undertaken under the supervision of an experience OH Physician.

5.1 Blood Glucose Monitoring

Employees should demonstrate adequate blood glucose self-monitoring. They should provide evidence at review of at least twice daily glucose checks over the preceding three-month period (using a memory meter). There should also be evidence of checking of times relevant to performance of safety critical tasks. As

> a guide, this should be within 2 hours of starting and every 2 hours in a prolonged period of undertaking safety related work tasks."

13 In relation to blood glucose control, paragraph 5.2 states:

> "The diabetes should be under stable control.
>
> It is deemed that those who are recently diagnosed with Type 1 diabetes or those with **recent initiation of insulin** therapy in type 2 diabetes are not "under stable control". It is necessary for such patients to have a medical assessment by Occupational Health to confirm that stable control has been achieved for 4 weeks before returning to safety critical work. It would be anticipated that this assessment would occur 4 to 8 weeks after the initiation of insulin."

14 The guidance which is for Occupational Health, explains what is Hyperglycaemia and Hypoglycaemia and the long-term complications. These conditions will be considered later in this judgment. (42 to 51)

15 There is an information leaflet on diabetes, normally given by Occupational Health to diabetics who are engaged in safety related tasks and who are treated with insulin. (52-53)

16 The first respondent also has policies on Bullying and Harassment as well as Grievance. (289-303)

17 The Willesden Green area covers four stations; Willesden Green; Dollis Hill; West Hampstead; and Kilburn. Dollis Hill has one Customer Services Supervisor 2, "CSS2", on duty 24 hours, 7 days a week; Willesden Green has 1 CSS2, working alone overnight from 11pm to 7am and on Monday to Friday 1 or 2 Customer Services Assistant, "CSA" plus a CSS2 Monday to Friday from 7am to 11pm and on Saturday a CSS2 and 1 CSA. At West Hampstead and Kilburn stations there is 1 CSS2 at each station 24 hours a day. There are no CSAs rostered. Possibly a CSS2 at limited times.

18 The claimant stated in his witness statement that he commenced employment with the First Respondent on 3 September 2001, however, the first respondent asserted that his employment commenced on 17 June 2002. This dispute may not be significant having regard to the claims. He has had a good disciplinary and sickness record. He was diagnosed as suffering with Type 2 Diabetes in January 2015. In April 2016 he took up a new position as a CSS2 in the Willesden Green Station Area, Jubilee Line and attended a promotion/transfer medical with occupational health on 1 July 2016 when Dr Jon Wyer, Occupational Health Medical Adviser, reported to Mr Fernando Soler, Area Manager, Willesden Green, on 4 July 2016, that the claimant's diabetes was not satisfactorily controlled. He had a glucose reading of 20.5 which was very high. Dr Wyer advised that there should be restrictions imposed on his work as a CSS2, namely "unfit for track" and "unfit for platform edge (except when a train is in the platform)" and that there should be a review in six months. (54-54D)

19 A Customer Service Supervisor is a safety critical role. The post-holder is required to supervise access to the station environment; provide help and assistance to customers; supervise station staff activities; support the Customer Service Manager with people issues; follow the instructions given by a Customer Service Manager to ensure the smooth operation of the station and to deal with issues as they arise; and to work collaboratively with other operational employees. In cases of emergency, he or she has to provide the necessary support such as working with the Fire Brigade. They would also be required to go on the rail track to retrieve items and provide whatever assistance is required. The claimant accepted in cross-examination that he has a safety critical role.

20 He is a 42-year-old man who previously worked as a professional fitness instructor. He is also an amateur competitive body builder and has been participating in body building competitions since 2016. He told the tribunal that he takes body building supplements and uses sugar-free artificial sweeteners in his foods and drinks.

21 On 23 September 2016, he emailed the new Area Manager at Willesden Green, Mr Carl Painter, stating that as from 22 September 2016, he has been on insulin injections. In it he described the insulin he was injecting at the time. He then wrote the following:

> "I still test my blood glucose levels and liaise on a daily basis with my Diabetic Nurse." (62B)

22 He was due to attend a case conference with Mr Painter on 23 September 2016, but it had to be adjourned as his trade union representative was unavailable. It had previously been scheduled to take place on 30 August 2016 but had to be adjourned for similar reason. Mr Painter decided to make a referral to Occupational Health and to have a case conference thereafter as the claimant had informed him that he was taking insulin which was a significant change in his treatment. (62)

23 Dr Sheetal Chavda, Consultant Occupational Physician, on 4 October 2016, submitted report on the same day to Mr Painter. She did not meet with the claimant but advised Mr Painter. Her assessment took place three months after the earlier assessment on 4 July. The fact that the claimant was taking insulin meant that occupational health had to consider whether or not his diabetes was well controlled. In her report, Dr Chavda adopted the earlier restrictions and added a further restriction, namely the claimant should not work alone for prolonged periods of time. She then wrote:

> "In order to review these restrictions in the future, Mr Opoku will need to carry out regular blood sugar monitoring (at least twice a day and at times relevant to his shifts at work) for at least three months and demonstrate satisfactory control of his condition. Once he has undergone an assessment at OH, we will then write to his GP for further information regarding this and confirmation that his condition is well controlled. In order to review some of the restrictions, a risk assessment may need to be carried out depending on the outcome of the Occupational Health Assessment and GP Report.

> Therefore, at this stage, Mr Opoku should be restricted from his role as outlined above and should start monitoring his blood sugars regularly for at least three months. At that stage, he should be referred again to OH with an update and at the assessment, Mr Opoku will need to provide evidence of his sugar monitoring using a memory meter.
>
> I hope this addresses your questions for now and if you need additional advice or clarification, please do not hesitate to contact me." (63)

24 Notwithstanding the report, Mr Painter allowed the claimant to carry on his duties as a CSS2 within the Willesden Green Area.

25 Being a diabetic, the claimant's body is unable to regulate the levels of sugar in his blood. He started to take insulin in September 2016 on a regular basis in order to maintain his blood sugar at an acceptable level. Healthy people have glucose levels of between 4 to 7 mmol/l which is regulated naturally by insulin secretion from the pancreas. High levels of glucose will lead to complications such as peripheral neuropathy, loss of visual acuity due to retinopathy and kidney problems, nephropathy due to lack of natural regulating mechanism in diabetics. Levels lower than 4mmol/l are considered to be at increased risk of hypoglycaemia "hypo" and high levels are at risk of hyperglycaemia "hyper".

26 Hypoglycaemia is an impairment of function caused by a lack of glucose to the brain. This is likely to occur when blood sugar levels fall below 4 mmol/l. Around this level impaired cognitive function will occur, although people may not recognise it when it is happening. Once the level drops below 4, there is a risk of collapse. The diabetic may require third party intervention, extra glucose to raise their glucose levels, otherwise there is a risk of seizures and blackouts and eventually fatality. Even if they have regained consciousness following an intervention, it is likely that they will be disorientated and confused and will not be able to make decisions. With insulin treated diabetics, the risk of hypoglycaemia and collapse rises with the number of years they use insulin.

27 If the claimant experiences a hypoglycaemic attack while on duty, there is a very real risk that he would collapse and, if he is working near the platform edge there is the risk that he may fall under a train or on an electrified track. This would very likely be fatal. The first respondent could not expose the claimant to such a risk. If a collapse was to occur while being on non-electrified track, without third party assistance, the claimant may go into seizure and the outcome might still be fatal. While some diabetics may experience warning signs of an impending hypoglycaemic episode, such as anxiety, sweating, hunger, increased pulse rate, that might alert them to take action, this does not apply to all diabetics. It is possible that a diabetic can develop a sudden onset and sudden alternation in brain function, which makes it even more important to properly assess that person and the severity of the condition and not to rely simply on the person's judgment about how well controlled their condition is.

28 In relation to hyperglycaemia, this is where the diabetic has high glucose levels in the blood, which can have a very similar impact to those described for hypoglycaemia except that they are not at risk of a collapse. A diabetic suffering from hyperglycaemia may, however, have impaired cognitive function with the associated confusion and disorientation.

29 The respondent's Occupational Health advisers are obliged to assess diabetic employees carefully in relation to their fitness for work and for safety critical duties. Safety related work tasks are tasks which would impact on the individual's safety, colleagues' safety, the travelling public's safety and/or negatively impact on customer service or the first respondent's reputation. Generally, safety related tasks involve working with company vehicles, working at height, working on or near the track, and making safety critical decisions.

30 Occupational Health must have regard to the guidance on diabetes and must look for clear evidence that the employee's diabetes is "well controlled" or "under stable control". Evidence of diabetes being under stable control requires two things. Firstly, the need to be sure that the blood sugar levels are stable and not too high or too low. Secondly, testing the average blood sugar levels over a period of two to three months which can be measured by a one-off blood test called HBA1c. This would indicate whether it is stable, that is at a level of around 48mmol/mol. However, HBA1c, on its own, is not enough because it does not show if the diabetic is having frequent hypo or hyper episodes, as it simply records an average.

31 The only way of assessing the frequency of hypo and/or hyper episodes is to monitor blood glucose levels on a regular, daily basis, over a period. This is done by the diabetic's use of a memory meter. A blood glucose reading is taken and stored in the meter to be accessed electronically. Occupational Health requires diabetic employees to check their blood sugar levels twice daily and at times relevant to the performance of their duties by using the meter. They would be required to bring their memory meter to the Occupational Health appointment which will then be downloaded, and the data assessed to determine whether the blood sugar levels over the previous three months have been "well-controlled". If not and the risk is too high, the Occupational Health adviser is likely to recommend that the diabetic employee should be restricted in carrying out safety-related activities. It is then a management decision whether, and for how long, the employee can be accommodated in that role with the restrictions.

32 Mr Painter arranged a case conference with the claimant for 24 October 2016 to discuss the Occupational Health report, but again this was later cancelled as the claimant was unable to attend. A further case conference was arranged for 23 November 2016, but this too was cancelled by the claimant as he informed Mr Painter that his trade union representative was not available.

33 We find that an employee has three options, following an Occupational Health appointment, of stating that they would not like to see the report; that they are "happy" to receive the report at the same time as their manager; or

that would like to either see or receive the report before it is sent to their manager. In respect of the last option, the employee is given 48 hours to view the report and during that time withdraw their consent. The employee is informed of their statutory right to withhold their consent to the report being sent to their manager. (125)

34 Having regard to the evidence given by Mr Painter, we were satisfied that by November 2016, he reminded the claimant of the importance of taking his blood sugar meter readings and it appeared that the claimant reassured him that he was doing so.

35 Mr Painter emailed the claimant on 23 December 2016, expressing his disappointment that the claimant had not provided him with two months' meter readings by 22 December. He stated that Occupational Health had requested readings in the past and more recently on 20 December. He explained that the information was necessary as Occupational Health had to ascertain whether they should assess him again or if they needed to consider his medical status at work. He instructed the claimant to return to work on 27 December for the night shift and to give the required information to him so that he could pass it on to Occupational Health. He reminded him that his cooperation was required and of the importance of the information being in the possession of Occupational Health. (64)

36 Mr Painter's email was responded to by Mr Mashud Ali, union representative, who wrote:

> "On behalf of my TU Member, S10 ERA refers
>
> I am very concerned that you are requesting from my TU member information which is classified as medical information to be supplied to yourself a non-medically qualified individual. This information has been requested by LUOH and will be supplied to LUOH. Please be advised that in future if medical information is requested by yourself please make sure you obtained a signed medical consent form. I will ask the new Jubilee line north RMT rep to add this item on to the next level on agenda." (64)

37 Mr Painter contacted Occupational Health in January 2017, as he became concerned that the claimant was not keeping his blood sugar levels under control. An appointment was arranged for 3 February 2017, but as the claimant was working on the night shift during that week, the appointment had to be cancelled.

38 From 11 February to 2 March 2017, the claimant was absent from work with flu.

39 On 7 March 2017, Mr Painter contacted Occupational Health and made an appointment for him to see an Occupational Health adviser on 3 April 2017. (65i)

40 He attended the appointment and met with Dr Chavda who saw him for "a fitness for present duties assessment" and was expecting him to attend with his three months' blood sugar readings for her to review. As he did not produce

his readings, Dr Chavda carried out a one-off blood test which showed a very high blood sugar reading of 18.8 glucose in his urine, suggesting poor control. The claimant told her that he had been monitoring his blood sugar twice a week rather than twice daily and did not have his memory meter with him.

41 We find that during the assessment they discussed the importance of his diabetes being controlled. The claimant understood what was required of him in terms of twice daily monitoring and did not raise any objections or concerns. He was clearly advised of the steps he should take to review the restrictions. (65n to 65r)

42 In her report, sent to Mr Painter on 5 April 2017, Dr Chavda wrote that the claimant's diabetes was;

> "not well controlled and that he had not been monitoring his blood sugars twice daily. His restrictions needed to continue: no work on or near live track; no work on platform edge (unless there is a train in the station); no work in machine rooms; no work alone for prolonged periods of time (ie more than one hour)." (65o)

43 On 10 April 2017, Mr Painter emailed the claimant inviting him to a case conference to discuss the recent Occupational Health report and restrictions, on Wednesday 19 April 2017. He was advised of his right to be accompanied by either a trade union representative or a work place colleague. (72-73)

44 The claimant's immediate line manager, Mr Uchenna Duru, Service Manager, Willesden Green Area, emailed the claimant copying Mr Euan Taylor, People Management Advice Specialist. In it he stated that based on the Occupational Health report from Dr Chavda, the claimant must not pick up any CSS2 duties and would not do so until the outcome of the case conference with Mr Painter. He would only cover the Ticket Hall at Willesden Green in partnership with the on-duty CSA. He was given work in line with the new restrictions. (70)

45 On 14 April 2017, he was absent from work due to stress until 18 April 2017. On 18 April, his union representative requested an adjournment to the case conference "due to a lack of time for my release, I could not arrange for a release for tomorrow's case conference with Julian Opoku" (71-72)

46 The case conference was again rescheduled to take place on 25 April 2017 but had to be cancelled as the claimant went on sick leave on 23 April due to work related stress and was still on sick leave. (75-76)

47 On 26 April 2017, Mr Painter again wrote inviting him to another case conference scheduled to take place on 4 May 2017. Amongst other things, he stated the following:

> "I have attempted on numerous occasions to undertake a case conference with you dating back into last year, However, as yet, you have not attended any of

> these. Your medical situation concerns me and the fact that the restrictions on your working arrangements have been even further extended by LUOH recently.
>
> The purpose of the case conference will be to discuss your ongoing inability to undertake the full duties of a Customer Service Supervisor and to the next steps from this. I have to inform you that should you fail to attend this case conference a management decision may be taken on your continued employment in your absence."

48 We find that the letters sent are standard proforma documents but the first of the above quoted paragraph being bespoke to the claimant. (77-78)

49 The very day of the meeting, at 8:58 in the morning, the claimant emailed Mr Painter stating:

> "As my union rep is double booked, he is attending a meeting today, can we reschedule for next week? He has requested for Monday 10 May providing he is released from duty." (80)

50 Mr Painter emailed the claimant the following day expressing his disappointment at another cancelled case conference. He wrote;

> "Disappointed that again you did not attend a case conference with me yesterday and will not be able to reschedule this as per your request. This is yet another meeting that you have chosen not to attend to discuss your present medical situation despite my attempts to do so.
>
> I stated in my last letter to you that if you didn't attend the case conference yesterday I may take a management decision on your continued employment in your absence. I shall be writing to you next week formally informing you of my decision and the next steps associated with this." (80)

51 Mr Euan Taylor, People Management Advice Specialist, emailed Dr Chavda on 8 May 2017, informing her that Mr Painter was not in the office but had instructed him contact her as the claimant was off work due to stress and had not attended the case conference. Mr Painter had been unable to directly discuss the source of the claimant's work-related stress. Mr Taylor then wrote:

> "In the light of this, and having seen him recently for an appointment, would you be able to advise on the following, please?
>
> - Is Mr Opoku fit for redeployment?
> - If not, is there a timeline associated with when Mr Opoku will become fit for redeployment?" (80a)

52 Dr Chavda responded on 11 May 2017 but had not seen the claimant prior to her report and was, therefore, unable to give advice regarding his absence due to stress which was neither raised nor discussed at the Occupational Health assessment in April 2017. She confirmed the restrictions in relation to his diabetes and stated that he would be fit for redeployment with those restrictions. She then wrote:

> "When Mr Opoku becomes fit for redeployment will be dependent on the stress issue and how this is addressed. Please update me following your discussions and do let me know if you need additional advice." (81)

53 On 12 May 2017, the claimant refused to give his consent to the disclosure of the Occupational Health Report to Mr Painter. (81b)

54 Mr Painter was by this time becoming frustrated and concerned at the number of cancelled case conferences and wrote to the claimant on 16 May 2017 stating:

> "Dear Julian,
>
> I have attempted to convene a case conference with you on a number of occasions (30 August 2016, 23 September 2016, 23 November 2016, 19 April 2017, 25 April 2017 and most recently 4 May 2017). You have not attended any of these case conferences and I have rescheduled the case conference on a number of times. The reasons you gave me for not attending these were due to the unavailability of a rep or sickness. This non-attendance is of concern to me.
>
> The purpose of the case conference was to discuss your ongoing inability to undertake the full duties of a Customer Service Adviser, to discuss your medical condition and for me to decide on the next step following on from this. In my latest letter of 26 April 2017, I advised you that should you fail to attend this latest case conference a management decision may be taken on your continued employment in your absence. You did not then attend this case conference.
>
> You were last seen by LU Occupational Health on 3 April 2017. In her memo, Dr Chavda reaffirmed the restrictions that she had recommended in October 2016 - *no work on/near live track; no work at platform edge; no working alone for prolonged periods of time and added a new restriction – no work in machine rooms.* These were put in place at that time in consequence of your recent diagnosis of type 2 diabetes.
>
> She also noted that the next steps that she had outlined (in October 2016) that would enable her to review the restrictions (principally, you carrying out blood sugar monitoring to ascertain how well your diabetes is controlled) has not taken place and that she was therefore unable to lift or modify your restrictions. These restrictions have now been in place since October 2016 and they are no longer sustainable from a business operational prospective, particularly as it seems that you have not been prepared to engage with the guidelines on monitoring that Dr Chavda set down last year.
>
> Since you were last seen by LU Occupational Health, you went off sick with 'stress'. Your last day of sickness being 24 April 2017. In the light of this, and mindful that these restrictions can no longer be sustained, a new referral was made to LUOH seeking advice on your fitness for redeployment. I have now received notification from LUOH that you have withdrawn your consent for LUOH to follow advice on your medical condition to me. This is of concern to me as it is principally LUOH advice that I use to make business decisions on a way forward. I would ask that you reconsider this decision and give your consent, which would then allow me to take into account all the medical advice in making my decision.

> In the light of this, I am now inviting you to a further case conference to discuss the last available LUOH Report, your medical condition and your decision to withdraw your consent. This will take place on Thursday 25 May 2017 at 11:30 am in the AM's Office, Willesden Green Station… I would urge you to attend this case conference as it is very important that I have the fullest picture possible of your current health conditions and to listen to any concerns that you have. Following this meeting, I will make a business decision on your future employment based on the information available to me at this stage. I must remind you that this may include medical redeployment or medical termination.
>
> I have to inform you that should you fail to attend this case conference a management decision may be taken on your continued employment in your absence…." (82-83)

55 We find, having heard the evidence given by the respondent's witnesses, particularly Mr Painter and Mr Taylor, that for an employee not to be able to secure for themselves a union representative on five separate occasions, was very unusual and quite rare because there is a notice board in every Mess Room at each station detailing trade union activities and contact details. There are also several trade union representatives. The claimant is the only person in 20 years of Mr Painter's experience, who had been unable to get a union representative on five different occasions. The tribunal accepted this evidence and took into accout that first case conference to discuss the claimant's medical condition was scheduled to take place on 30 August 2016.

56 At the case conference held on 25 May 2017, at which the claimant attended in the company of Mr Jared Wood, RMT union representative, the claimant said that he was absent due to stress because he had been sent an email by Mr Painter stating that a decision would be taken regarding terminating his employment. Mr Painter responded by saying that the last thing he wanted was to upset the claimant or to cause him any worry about his position at work. He pointed out that the claimant's medical condition had deteriorated. They then discussed the Occupational Health report.

57 Mr Wood asked whether medical termination was on the table and under consideration at the meeting. Mr Painter replied by saying "potentially" but Mr Taylor clarified the position that it was something they needed to discuss, and that medical termination would not take place at the meeting.

58 The claimant accepted that he had not been monitoring his blood sugar readings to the level stipulated. He said that he had been doing so since April but needed a further six weeks in order to supply Occupational Health with three months' readings.

59 Mr Painter said that if the claimant's restrictions increased he could not be accommodated as a CSS2 and the continuous delays in the process meant that he had no confidence that the claimant would cooperate and do as promised by providing the data to Occupational Health. There was no certainty that the medical restrictions would be removed or lessened such

that Mr Painter could keep the claimant in his CSS2 role. He then moved the discussion on to talking about redeployment. He said:

> "Being at redeployment would give you time. If over the period you are at redeployment the restrictions remain in place and your situation does not change then we can send you back to LUOH and get further advice and clarification on what you can do and the options available. You will also get the opportunity to see any non-operational roles that become available. There are various reasons we ask if you could go to redeployment and doesn't mean that you are going to lose your job".

60 Mr Wood asserted that the policy required the first respondent to engage in a discussion about reasonable adjustments which it failed to do by engaging in a discussion about redeployment. He suggested that a reasonable adjustment would be to accommodate the claimant's request for him to continue to monitor his blood sugar levels to enable him to submit the three months' readings. Mr Wood further suggested that the claimant could work in a Control Room environment at another location.

61 Mr Taylor asked the claimant whether he was prepared to give his consent to the disclosure of the recent Occupational Health report. There was then an adjournment after which the claimant gave his consent and later emailed the report to Mr Painter.

62 With medical redeployment being off the agenda at that meeting, the claimant agreed to monitor his blood sugar levels for a further period of six weeks and to supply the readings to Occupational Health. Further, that he would return to work the following Monday or Tuesday, at Kilburn, working as a CSA assisting the Supervisor. His shift would be 8am to 4pm, Monday to Friday. Mr Painter then said:

> "I am hoping that they (LUOH) will say that the restrictions don't apply any more. You can come back to full duties or you can come back to where you were before and we can have you back to what you were doing in the past."

63 The claimant wanted some time to think about what had been proposed and agreed to inform Mr Painter the following day at 10am of his decision.

64 The claimant did not contact Mr Painter at 10 am as he had agreed. Later in the afternoon Mr Painter decided that he would have to reconvene the case conference to continue the discussion about medical redeployment or medical termination. He emailed Mr Wood on 26 May 2017 at 3.17pm, informing him that the claimant had failed to contact him at the scheduled time that morning and that he decided to reconvene the case conference for 7 June at 11:15am at his office, Willesden Green. (101)

65 Mr Painter received an email from the claimant on 30 May 2017, who requested clarification on what had been agreed. He stated that he had recently moved home and had no way of contacting Mr Painter as he was unable to pay his mobile phone bill. He then wrote:

> "…To my knowledge its agreed that I will return to work in my current role, however with restrictions set out by LUOH, I will act on the orders of the on duty Station Supervisor. The hours agreed are Monday-Friday 08:00 to 16:00. Is this correct?"

66 Mr Painter responded thanking the claimant for his belated response and then wrote:

> "As was agreed at the case conference you would return to work today and would undertake duties from 08:00 to 16:00 on a Monday to Friday basis and work under the CSS as your restrictions. As you have not returned to work today I would like you to do so tomorrow.
>
> This will be for a period of around six weeks before reassessment at LUOH as agreed.
>
> Please indicate that you will or not be returning to work tomorrow or on the basis described above so that a Return to Work interview can be arranged. If you decide not to return then a case conference may be reconvened as discussed.
>
> I look forward to your prompt response." (101a)

67 We find that the claimant's late response was unreasonable. He was due to commence at Kilburn station on 30 May 2017 and had promised Mr Painter that he would reply to the matters agreed with his union representative, by 10am 26 May. There was nothing preventing him from emailing Mr Painter by that time as he had promised although he was experiencing problems with his mobile phone due to a bill. He conceded in evidence before us that he could have used someone else's mobile phone to contact Mr Painter.

68 We find that Mr Painter was keen to have the claimant return to work, but the claimant would not comply with Occupational Health requirements for 12 weeks blood glucose monitoring records.

69 In an email dated 31 May 2017, from Mr Painter to the claimant, he referred to the claimant being unable to respond to his email of 30 May and suggested that he should return to work on Monday 5 June to take up the duties as agreed at the case conference on 25 May. He repeated the requirements for blood testing and wrote the following:

> "I believe I have been reasonable in both offering you the opportunity to demonstrate to LUOH that you are managing your diabetes and moving your date to return to work by a further week. However, I am disappointed that you failed to respond within the timescales we all agreed at the case conference last week and then again to my email yesterday. This offer cannot remain open ended and this will be your final opportunity to take it up. Should you not return, fail to respond or reply that you do not wish to take it up then it will no longer be available and we shall return to meet formally again.
>
> To this end I have taken the step of arranging a case conference for Wednesday 7 June at 11:15 at my office, where, if needed we can review your medical condition to discuss what options are available to you and any relevant surrounding issues. I must remind you that this may include medical

> redeployment or medical termination. If you fail to attend this meeting then I may make a managerial decision in your absence…
>
> I am hoping that you will return to work, as per the arrangements that we have discussed and you have highlighted below. If that is the case then I shall cancel the above case conference and you will do your six weeks at Kilburn. If you do wish to take up this offer then please respond to this email in advance of Monday 5 June so that I can arrange for a CSM to undertake a Return to Work Interview on that day.
>
> Lastly, if you have changed address then you need to inform us of your new location. Please include this in your response to me." (102-103)

70 On 1 June 2017, the claimant emailed Mr Painter at 10.25pm in which he wrote:

> "Initially this was an email to agree to return to work on Monday 5 June. However, my elderly father, who has been a stroke victim for six years, was rushed into hospital today with heart complications and high blood pressure.
>
> This is all adding to my stress and would request that you allow me to remain off till my medical certificate runs out so I can be there for both him and my mother.
>
> I appreciate you have been flexible and accommodating over the past few weeks and would ask for this one last thing."

71 The claimant was invited by Mr Painter to inform him whether he would be returning to work on 31 May, but he did not do so. The incident concerning his father was on 1 June and not on 31 May. It was unclear to this tribunal why he was unable to contact Mr Painter either on 31 May or on 1 June during work hours.

72 Mr Painter replied on 2 June 2017, stating that he fully understood the claimant's circumstances and had cancelled the case conference planned for 7 June 2017.

73 The claimant returned to work on 16 June 2017, working at Kilburn station as a CSA assisting the duty CSS. It appeared that he was engaged in gateline work, that is helping passengers through the ticket gates at the station. He was then on leave from 2 July for two weeks. (115)

74 He attended an Occupational Health appointment with Dr Chavda on 17 July 2017 and brought with him his memory meter. The readout did not show consistent, twice daily readings until 11 July 2017 and Dr Chavda, therefore, only had one week's worth of data to work with. There were some intermittent readings prior to that date which did not provide enough information for her purposes. She again explained to the claimant the importance of monitoring his blood sugars at least twice a day. The claimant could not recall his last blood test with his doctor and was unable to recall when his insulin dose was increased. He said to Dr Chavda that he had increased it without consulting either his doctor or his diabetes nurse.

Dr Chavda noted the claimant's poor engagement and poor compliance in general.

75 As a result of his failure to comply with twice daily blood glucose readings, Dr Chavda was unable to consider lifting the medical restrictions until she had three months' history of his blood sugar readings.

76 In Dr Chavda's report to Mr Painter and to Mr Taylor, she wrote:

> "As you know, he has chronic condition of diabetes for which he takes insulin. I do not have evidence of twice daily BM monitoring for three months today and therefore, I am not in a position to lift his restrictions. I have reviewed his memory meter and there are consistent readings from 11 July 2017. Therefore, the earliest I can review him again will be the second week of October 2017. If you would like an assessment at that stage, please update us closer to the time confirming that Mr Opoku has all the information regarding his condition that I have requested. I have already outlined the other steps that will need to be followed after this, so I will not reiterate this again, but please let me know if you are not clear on the process." (118b to 118f)

77 The tribunal noted that nine months after the claimant was first instructed to take twice daily test readings, he had still failed to do so despite frequent reminders from Mr Painter and Dr Chavda. There was no credible reason for such a significant failure. He demonstrated to us his understanding of what was required of him in controlling his blood sugar and keeping it within acceptable levels. He referred to the fact that diet and exercise helped as avoiding certain foods and taking regular medication.

78 He emailed Mr Painter on 18 July 2017, complaining about his treatment and asked for a copy of his medical file. He then wrote:

> "Secondly, I feel I am being discriminated against because of my diabetic condition. The restrictions put in place by LUOH is a detriment to me. It's stunted my career progression by not allowing me to carry out operational work as a Customer Service Supervisor 2. It prevents me from any overtime as a CSS2 as well as any CSM3 overtime. This goes against the Disability Discrimination 1995.
>
> The LUOH adjustment is unjust as they have not properly managed me yet have penalised me with these restrictions whilst fact finding. Paul Ogunleye Oluwole Osinuga or Erden Caner have not been put on demoted CSA duties but I have. Why am I being treated less favourably than my Nigerian and Turkish colleagues? Is it an attack on my race/ethnicity or religion? I am being treated less favourably than Paul Ogunleye. This goes against the race and discrimination Equality Act 2010.
>
> Since being diagnosed with diabetes, in Jan 2015, I have never had an episode where my life or any others were in danger. I've never collapsed or had any diabetic incidences in my history with the disease. LUOH should not have made these restrictions so this adjustment is actually a detriment.
>
> Finally, I hope I will be given CSS duties and CSM duties if asked and won't be denied on grounds of any medical condition.

> This isn't a complaint as such but I hope my issues will be handled professionally and fairly. I don't want to be victimised for being a complainant under the above protected acts and under the Equality Act 2010 Julian Opoku…" (119)

79 On 18 July 2017, he confirmed that he was withdrawing his consent to the disclosure of Dr Chavda's report to Mr Painter or to anyone else. (118g)

80 On the same day, Mr Haydor Khan, CSS, emailed Mr Painter stating that there was a medical necessity for twice daily blood testing and that the appropriate and applicable test was the HBA1c as this would display the average reading over a long period of time. Mr Khan further stated that the claimant was under the impression that his employment/career was at risk based on the alleged inaccurate tests that Occupational Health conducted on him. (122)

81 In the claimant's email to Mr Painter on 18 July 2017, he referred to three named CSS2s who were allegedly treated more favourably than him. Mr Painter gave evidence that he was familiar with the three named individuals' circumstances. He told us, and we accepted his evidence, that with two of them their sugar levels were within the accepted range; they had done the required monitoring; had kept the first respondent informed and had engaged with Occupational Health regarding their condition and their restrictions. Their diabetes was well-controlled. The third CCS2 was demoted to CSA position because his diabetes was so serious that he could not undertake duties safely.

82 We accepted Mr Painter's evidence as he had all the relevant information concerning the claimant and the three named individuals whereas the claimant admitted that he did not and relied on conversations with them and others.

83 Mr Painter wrote to the claimant on 19 July 2017, informing him that a case conference had been arranged for 26 July 2017 at 2pm. He stated that a possible outcome may be medical redeployment or medical termination. (120-121)

84 Both the claimant and Mr Painter engaged in further correspondence during which Mr Painter became aware that the claimant objected to Dr Chavda's most recent report on his failure to provide twice daily readings. He was advised that he could appeal to report. (127-139)

85 The scheduled case conference did not go ahead on 26 July 2017.

86 Dr Chavda was led to believe that the claimant had appealed against her July 2017 report and submitted her response which was to confirm her approach, her observation of the claimant, and her recommendations. (139a-139b)

87 On 7 August 2017, the claimant submitted a complaint alleging harassment discrimination, victimisation and bullying against Mr Painter to Mr Tunde Alaoye, Performance Manager, Jubilee line. He referred to the provisions in

the Equality Act 2010, in relation to disability, and gave the background to his diagnosis and attendances at Occupational Health. He alleged that Mr Painter's actions were discriminatory because of his diabetes and referred to statements made by Mr Painter to the effect that he, Mr Painter, was unable to accommodate the claimant as a CSS2 and that the April 2017 Occupational Health report stopped him from carrying out his substantive role. He stated that he was not suggesting reasonable adjustments because he had performed his CSS2 role at all material times. He would, however, request reasonable adjustments if management were unable to identify reasonable adjustments. In the absence of any reasonable adjustments he should return to his CSS2 position. He asked that the matter be investigated impartially, by an accredited manager and that he be given the opportunity to explain his complaint in more detail, supported by relevant documents. He asked for a response within seven calendar days. (140-145)

88 As a result of Mr Painter being cited as the perpetrator, he was asked to relieve himself from managing the claimant's condition. In his place was Mr Peter Sanders, Area Manager-Stations for the London Bridge Area.

89 The claimant's grievance was considered by Mr Mark Cullen, Accredited Harassment Manager, who decided that the claimant was complaining about steps taken under the Attendance at Work Procedure and was, therefore, largely a procedural complaint. It did not meet the definition of harassment and bullying but came under the grievance procedure. He wrote to Mr Taylor on 11 August 2017, setting out his rationale behind his decision that it should be treated as a grievance. (151-152)

90 Mr Cullen was not making a determination on the claimant's complaint but deciding on the course of action to be taken.

91 The grievance was investigated by Mr Marlon Osborne, Head of Customer Service on the Jubilee Line, who never previously had any dealings with the claimant. The claimant was invited to attend grievance meetings on 7 September and 12 October but was unable to do so for a variety of reasons. (171-175)

92 By the date he presented his claim form to the Employment Tribunal on 25 October 2017, he had not attended a grievance meeting.

93 He admitted in cross-examination that his grievance was investigated but was after proceedings were issued before this tribunal.

94 He was invited by Mr Sanders to attend a case conference on 23 August 2017. The purpose was to discuss his medical condition, his restrictions, the recent Occupational Health advice and options including medical redeployment and medical termination. He was again informed of his right to be accompanied. (155-156)

95 The claimant requested a postponement of the case conference because it was being held on his union representative's rest day. It was rescheduled

for 30th August and then later for 1 September 2017. The first respondent's managers were not available on 30 August and the claimant's trade union representative was also unavailable on 1 September. (157-158)

96 There were three attempts at rescheduling the case conference. The final attempt was by letter dated 31 August 2017, inviting the claimant to attend on 25 September 2017 at 10am at Willesden Green station, which was sent by post as well as by email. (169-170)

97 It was confirmed by Mr Nazir Ali, CSM, that the claimant had been issued with a copy of the letter. (164-165)

98 We noted that the letter was sent to the claimant's address as on the first respondent's records, but the claimant told the tribunal that that was his partner's address with whom he had a disagreement and had left that accommodation and moved to his parent's address in London. There was no evidence in the possession of the first respondent that it had his parents' address for use in correspondence.

99 The case conference was arranged to take place on 25 September as the claimant was on leave from 3 to 24 September 2017. (173)

100 Mr Sanders told us, and we do find as fact, that at the handover with Mr Painter, he was given a bundle of documents by Mr Painter who told him what was in them. The first time he saw the claimant's complaint was when he was provided with a copy of the tribunal bundle.

101 On 25 September, Mr Sanders waited for about 45 minutes for the claimant to arrive and was satisfied that the claimant was properly notified of the case conference and believed that he deliberately decided not to attend. Having reviewed the position and having discussed it with Mr Taylor, he decided that it was appropriate to refer the claimant to redeployment on medical grounds as there was nothing to suggest that he was going to engage with Occupational Health to revise or remove the restrictions, or in assisting the first respondent in finding an alternative position for him. Due to the restrictions the claimant had not been undertaking his full substantive role for nearly a year and it was putting pressure on the rest of his work colleagues to cover his duties. He could not cover a station without another staff being present and would be unable to respond to an incident on the tracks or platform.

102 Mr Sanders wrote to him on 25 September 2017, setting out his decision and reasons for it. He stood the claimant down from duties because he thought it would be beneficial for him to have a break prior to redeployment as he might not be in the right frame of mind to be working.

103 In Mr Sander's letter he wrote:

> "Dear Julian,
>
> I refer to my letter of 31 August 2017, inviting you to a case conference on Monday 25 September 2017.

> I note that you did not attend this case conference this morning, nor did you give any reason for your non-attendance. This third date was offered following you advising me that you were unable to make the previously arranged date for your case conference (1st September 2017) due to your representative not being available. You had also been invited to a case conference on 25 August 2017 but you advised your rep was unavailable.
>
> As I stated in my letter of 31st August 2017, in the event of your non-attendance at this case conference, a management decision would be taken in your absence.
>
> Taking into account the latest LUOH advice on 17th July 2017 and all the other circumstances of the case, I am now informing you that it is my decision to refer you to the Redeployment Unit. You will be informed of the exact date and time of your redeployment induction, but this is likely to be Thursday 28th September 2017.
>
> As per Dr Chavda's advice of 17th July 2017, I will arrange an LUOH review for you in mid-October – You will be informed of the date of this. We may need to convene a case conference to discuss the outcome of this review. Irrespective of this, I will need to meet with you for a redeployment review approximately four weeks after your induction into redeployment.
>
> Pending your redeployment induction, it is my decision that you be stood down from duties and sent home on full pay.
>
> Should you have any questions please call me on …" (176)

104 After Mr Sander's letter had been typed and sent, he received an email from Mr Mashud Ali, the claimant's union representative, later in the day at 2:28pm. Mr Ali wrote that the claimant was at work that day at Kilburn station following his return from annual leave. The claimant had told him that he was not called to attend the case conference held at Willesden Green station. The claimant had informed him that he would be placed in redeployment and the decision was of concern to Mr Ali. He asserted that it was contrary to the provisions in the Equality Act and may constitute disability discrimination as the first respondent had failed in its duty towards the claimant to implement reasonable adjustments. Mr Ali was also concerned that the claimant had been removed from his role as a CSS2 in the absence of supporting information justifying such a decision. He asked that the decision to place him in redeployment be withdrawn and that a case conference be reconvened to explain the basis for management's actions as they were detrimentally affecting the claimant's employment. (179-180)

105 Mr Sanders responded to Mr Ali's email the following day stating that the claimant was invited to a case conference at Willesden Green on 25 September and that he, Mr Sanders, had not received notification that the claimant was unable to attend or would not attend. He stated that the invitation letter was sent to the claimant on 31 August by email; it was posted to the claimant's home address, and it was handed to him personally by Mr Nazir Ali. Mr Sanders stated that it was the third attempt to convene the case conference, the first two attempts the claimant turned down due to

his representative not being available. Mr Sanders was satisfied that the claimant was properly informed of the case conference and was given every opportunity to attend. He explained the reasoning behind referring him to the Redeployment Unit. He informed Mr Ali that the claimant was due to attend redeployment induction on Thursday 28 September 2017 at 10am (181).

106 In evidence the tribunal put to the claimant whether he challenged Mr Sanders' account in his email to Mr Ali on 26 September 2017. The claimant replied by saying that he could not recall whether he had been handed the letter inviting him to the case conference. He said it would not make sense for him not to have attended. He also said that he did not enquire about the rescheduled case conference after having asked that the previous scheduled case conferences to be postponed and rearranged.

107 We were satisfied that the respondent did notify the claimant of the case conference on 25 September 2017 by three different means.

108 After the decision to redeploy him, he was absent from work on grounds of stress from 26 September 2017.

109 Dr Chavda was asked by Mr Sanders for a report on his absent from work due to stress and reported without seeing the claimant, on 18 October 2017. She advised that the first respondent should attempt to discuss the work-related issues directly with him as they were likely to be the main barrier to his return to work. Occupational appointment would not be appropriate to discuss those matters. (189)

110 The claimant complained about Mr Sanders' conduct of his case and the decision was taken that the management of the claimant's condition would be transferred to Mr Daly Antwi-Safee, Area Manager for Waterloo, Jubilee Line.

111 Mr Antwi-Safee met with the claimant, who was accompanied by his trade union representative, Mr Hadel Khan. After listening to the claimant's concerns, he concluded that the decision taken by Mr Sanders was the correct one and told the claimant that he would be referring him to redeployment. (234-236)

112 Dr Chavda saw the claimant on 29 January 2018 and reported that she was unable to carry out an assessment as he did not bring with him the memory meter. She stated she would rearrange the appointment for the following week. (252)

113 There was a further Occupational Health appointment on 7 March 2018 with Dr Chavda who reported that the claimant did not attend with three months' readings. He told her that he had lost his previous monitor and that his current monitor only had readings for the last four days. She was, therefore, unable to review any of his restrictions and reiterated them. (346-351)

114 The claimant challenged Dr Chavda's assessments on or around 1 December 2017 and she was removed from being involved in any further assessments of him. She responded to his concerns on 12 March 2018, stating that the correct procedures had been followed. (352-353)

115 On 31 July 2018, the claimant was seen by Dr Julia Chapman, Occupational Health, who noted that his blood sugar readings varied from very low to very high and that both could have an effect on his cognitive function and on his general health. She added to the existing restrictions, two further restrictions, namely no safety related decision making; and no driving of company vehicles. (439-440)

116 In later report by Dr Chapman, dated 16 November 2018, she stated that she had reviewed the claimant on that day and had brought with him his glucose meter. She reviewed the readings and stated that the claimant was going to email the printout to her. She was pleased to report that compared with the readings seen at the last assessment, diabetic control had improved "mainly to improve the very high readings he was producing". His diabetes was, however, not yet stable. She stated that, in her opinion, his control was likely to stabilise following his attendance at a specialist diabetic clinic. All of her previous restrictions remained unaltered. (453)

117 We find that at no point up to the presentation of the claim form in October 2017, had the claimant submitted three months, twice daily, blood meter readings to Occupational Health. At the date of the tribunal hearing he was receiving his full CSS2 salary though not performing that role.

Submissions.

118 The tribunal read the submissions by Ms Hodgkin, counsel on behalf of the claimant and Ms Shepherd, counsel on behalf of the respondent. There were no oral submissions as Ms Hodgkin had to leave early.

119 Ms Hodgkin told the tribunal that because there was no evidence that Mr Sanders was aware of the grievance dated 7 August 2017 prior to his decision to redeploy the claimant on 25 September 2017, the claimant decided to withdraw the victimisation claim as he would be unable to establish a causal link between the protected act and the decision to redeploy him. Accordingly, that claim was dismissed upon withdrawal.

The law

120 Section 6 and Schedule 1 of the Equality Act 2010, "EqA" defines disability. Section 6 provides;

> "(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."

122. Section 212(1) EqA defines substantial as "more than minor or trivial."

123. The material time at which to assess the disability is at the time of the alleged discriminatory act, Cruickshank v VAW Motorcast Ltd [2002] IRLR.

124. In Appendix 1 to the Equality and Human Rights Commission, Employment: Statutory Code of Practice, paragraph 8, with reference to "substantial adverse effect" states,

> "A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people."

125. Diabetes can be a disability, BT v Pousson [2005] UKEAT/0347/04-0508.

126. Section 20, EqA on the duty to make reasonable adjustments, provides:

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

127. An employer's failure to adhere to its own time limits during a disciplinary procedure could not amount to either a provision, criterion or practice and "taking care" cannot amount to a reasonable step. "Incompetence, a lack of application or a failure to stick to time limits cannot be properly be characterised as a provision, criterion or practice.", Carphone Warehouse Ltd v Martin [2013] EqLR 481.

128. Langstaff J, President, Employment Appeal Tribunal, Nottingham City Transport Ltd v Harvey [2013] EqLR 4, held,

> "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability…disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply.", paragraph 18.

129. Guidance has been given in relation to the duty to make reasonable adjustments in the case of Environment Agency v Rowan [2008] IRLR 20**,** a judgment of the EAT. An employment tribunal considering a claim that an employer had discriminated against an employee by failing to comply with the duty to make reasonable adjustment must identify:

> (1)the provision, criterion or practice applied by or on behalf of an employer, or
>
> (2)the physical feature of premises occupied by the employer;
>
> (3)the identity of a non-disabled comparator (where appropriate), and
>
> (4)the identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the provision, criterion or practice applied by or on behalf of an employer and the physical feature of premises. Unless the tribunal has gone through that process, it cannot go on to judge if any proposed adjustment is reasonable because it will be unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.
>
> A tribunal deciding whether an employer is in breach of its duty under section 4A, now section 20 Equality Act 2010, must identify with some particularity what "step" it is that the employer is said to have failed to take.

130. The employer's process of reasoning is not a "step". In the case of General Dynamics Information Technology Ltd v Carranza [2015] ICR 169, the EAT held that the "steps" an employer was required to take by section 20(3) to avoid putting a disabled person at a disadvantage, were not mental processes, such as making an assessment, but practical actions to avoid the disadvantage. In order to decide what steps were reasonable, a tribunal should, firstly, identify the pcp. Secondly, the comparators. Thirdly, the disadvantage. In that case disregarding a final written warning was not considered to be a reasonable step.

131. In O'Hanlon v Revenue and Customs Commissioners [2007] EWCA Civ 283, [2007 ICR 1359, the Court of Appeal held that increasing the period during which the disabled employee could claim full pay while on sick leave to alleviate financial hardship following a reduction in pay, would not be a reasonable step to expect the employer to take as it would mean that the employer would have to assess the financial means and stress suffered by their disabled employees.

132. In the earlier case of Meikle v Nottinghamshire County Council [2005] ICR 1, the Court of Appeal held that where the disabled employee's sickness absence was caused by the employer's failure to implement a reasonable adjustment, it may be a reasonable adjustment to maintain full pay.

133. On sick pay, paragraph 17 of the EHCR Code 2011, states:

> "Workers who are absent because of disability-related sickness must be paid no less than the contractual sick pay which is due for the period in question. Although there is no automatic obligation for an employer to extend contractual sick pay beyond the usual entitlement when a worker is absent due

> to disability-related sickness, an employer should consider whether it would be reasonable for them to do so., 17.21.
>
> However, if the reason for absence is due to an employer's delay in implementing a reasonable adjustment that would enable the worker to return to the workplace, maintaining full pay would be a further reasonable adjustment for the employer to make." 17.22.

134. In relation to the shifting burden of proof, in the case of Project Management Institute v Latif [2007] IRLR 576, EAT, it was held that there must be evidence of a reasonable adjustment that could have been made. An arrangement causing substantial disadvantage establishes the duty. For the burden to shift;

> "…it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.", Elias J (President).

135. Paragraph 6.10 of the Code 2011 provides:

> "The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one off decisions and actions."

136. In relation to the comparative assessment to be undertaken in a reasonable adjustment case, paragraph 6.16 of the Code states:

> "The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly and unlike direct or indirect discrimination - under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's."

137. The proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements. It is not with the population generally who do not have a disability, Smith v Churchills Stairlifts plc [2006] IRLR 41, Court of Session.

138. In the case of Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216, a judgment of the Court of Appeal, Elias LJ gave the leading judgment. In that case the claimant, an administrative officer, was employed by the Secretary of State for Work and Pensions. She started to experience symptoms of a disability identified as viral fatigue and fibromyalgia. She was absent for 62 days for a disability related sickness. After her return to work her employer held an attendance review meeting. Its attendance management policy provided that it would consider a formal action against an employee if their absence reached an unsatisfactory level known as "the consideration point". "The consideration point" was 8 days per year but could be increased as a reasonable adjustment for disabled employees. The employer decided not to extend the consideration point in relation to the

claimant and gave her a written improvement notice which was the first formal stage for regular absences under the policy. She raised a grievance contending that the employer was required to make two reasonable adjustments in relation to her disability, firstly, that the 62 days disability related absence should be disregarded under the policy and the notice be withdrawn. Secondly, that in future “the consideration point” be extended by adding 12 days to the eight days already conferred upon all employees. Her employer rejected her grievance and proposals.

139. Before the Employment Tribunal the claimant argued that her employer failed to make the adjustments and was in breach of the section 20 EqA 2010, the duty to make reasonable adjustments. It was conceded that she was disabled within the meaning of the Act. The tribunal, by a majority, found that the section 20 duty was not engaged as the provision, criterion or practice, namely the requirement to attend work at a certain level in order to avoid receiving warnings and possible dismissal, applied equally to all employees. The Employment Appeal Tribunal dismissed the claimant’s appeal upholding the tribunal's findings and adding that the proposed adjustments did not fall within the concept of "steps". It further held that the comparison should be with those who but for the disability are in like circumstances as the claimant.

140. The Court of Appeal held that the section 20 duty to make reasonable adjustments had been engaged as the attendance management policy had put the claimant at a substantial disadvantage but that the proposed adjustments had not been steps which the employer could reasonably have been expected to take. The appropriate formulation of the relevant pcp in a case of this kind is that the employee had to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. Once the relevant pcp was formulated in that way, it was clear that a disabled employee's disability increased the likelihood of absence from work on ill health grounds and that employee was disadvantaged in more than a minor or trivial way. Whilst it was no doubt true that both disabled and able-bodied alike would, to a greater or lesser extent, suffer stress and anxiety if they were ill in circumstances which might lead to disciplinary sanctions, the risk of this occurring was obviously greater for that group of disabled workers whose disability resulted in more frequent, and perhaps longer, absences. They would find it more difficult to comply with the requirements relating to absenteeism and would be disadvantaged by it.

141. The nature of the comparison exercise under section 20 is to ask whether the pcp puts the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they are treated equally and may both be subject to the same disadvantage when absent for the same period of time does not eliminate the disadvantage if the pcp bites harder on the disabled, or a category of them, than it does on the able-bodied. If the particular form of disability means that the disabled employee is no more likely to be absent than a non-disabled colleague, there is no disadvantage arising out of the disability but if the disability leads to disability related

absences which would not be the case with the able-bodied, then there is a substantial disadvantage suffered by the category of disabled employees. Thereafter the whole purpose of the section 20 duty is to require the employer to take such steps as may be reasonable, treating the disabled differently than the non-disabled would be treated, in order to remove a disadvantage. The fact that the able-bodied are also to some extent disadvantaged by the rule is irrelevant. The Employment Tribunal and the Employment Appeal Tribunal were wrong to hold that the section 20 was not engaged simply because the attendance management policy applied equally to everyone.

142. There is no reason artificially to narrow the concept of what constitutes a "step" within the meaning of section 20(3). Any modification of or qualification to, the pcp in question which would or might remove a substantial disadvantage caused by the pcp is in principle capable of amounting to a relevant step. Whether the proposed steps were reasonable is a matter for the Employment Tribunal and has to be determined objectively.

143. In the case of Kenny v Hampshire Constabulary [1999] IRLR 76, a judgment of the Employment Appeal Tribunal, it was held that the statutory definition directs employers to make reasonable adjustments to the way the job is structured and organised so as to accommodate those who cannot fit into existing arrangements.

144. The test under is an objective test. The employer must take "such steps as….is reasonable in all the circumstances of the case." Smith v Churchills Stairlifts plc [2006] IRLR 41.

145. In relation to discrimination arising in consequence of disability, section 15 provides,

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

146. In paragraph 5.7, Equality and Human Rights Commission Code of Practice on Employment (2011), unfavourable treatment means being put at a disadvantage. This will include, for example, having been refused a job; denied a work opportunity; and dismissal from employment, paragraph 5.7.

147. In paragraph 4.9 it states the following,

> " 'Disadvantage' is not defined by the Act. It could include denial of an opportunity of choice, deterrence, rejection or exclusion. The courts have found that 'detriment', a similar concept, was something that a reasonable person would complain about - so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker could reasonably say that they would have preferred to be treated differently."

148. In the case of Pnaiser v NHS England [2016] IRLR 170, the EAT, Mrs Justice Simler DBE, held that the "something" that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant or more than trivial, influence on the unfavourable treatment and amount to an effective reason for or cause of it. A tribunal should not fall into the trap of substituting motive for causation in deciding whether the burden has shifted. A tribunal must, first, identify whether there was unfavourable treatment and by whom in the respects relied on by the claimant. Secondly, the tribunal must determine what caused the treatment or what was the reason for it. An examination of the conscious and unconscious thought processes of the alleged discriminator will be required. Thirdly, motive is irrelevant as the focus is on the reason or cause of the treatment of the claimant. Fourthly, whether the reason or cause of it was something arising in consequence of the claimant's disability. The causation test is an objective question and does not depend on the thought processes of the alleged discriminator. Fifthly, the knowledge required in section 15(2) is of the disability.

149. A similar approach was taken in the case of City of York Council v Grosset UKEAT/0015/16 relying on the guidance in Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305, Langstaff P.

150. In determining justification, an Employment Tribunal is required to make its own judgment as to whether, on a fair and detailed analysis of working practices and business considerations involved, a discriminatory practice was reasonably necessary and not apply a range of reasonable responses approach, Hardy & Hansons plc v Lax [2005] ICR 1565.

151. Under section 13, EqA direct discrimination is defined:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

152. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

153. Section 136 EqA is the burden of proof provision. It provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.

> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred."
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

154. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions have an important role to play where there is room for doubt as to the facts, they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other.

155. In Madarassy v Nomura International plc [2007IRLR 246, CA, the Court of Appeal approved the dicta in Igen Ltd v Wong [2005] IRLR 258. In Madarassy, the claimant alleged sex discrimination, victimisation and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

156. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more , sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

157. The Court then went on to give a helpful guide, "Could conclude" [now "could decide"] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the

claimant is like with like, and available evidence of the reasons for the differential treatment.

158. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

159. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, for example, either race, sex, religion or belief, sexual orientation, pregnancy or gender reassignment.

160. In the case of EB-v-BA [2006] IRLR 471, a judgment of the Court of Appeal, the employment tribunal applied the wrong test to the respondent's case. EB was employed by BA, a worldwide management consultancy firm. She alleged that following her male to female gender reassignment, BA selected her for redundancy, ostensibly on the ground of her low number of billable hours. EB claimed that BA had reduced the amount of billable project work allocated to her and thus her ability to reach billing targets, as a result of her gender reassignment. Her claim was dismissed by the employment tribunal and the Employment Appeal Tribunal. She appealed to the Court of Appeal and her argument was accepted that the employment tribunal had erred in its approach to the burden of proof under what was then section 63A Sex Discrimination Act 1975, now section 136 Equality Act 2010. Although the tribunal had correctly found that EB had raised a prima facie case of discrimination and that the burden of proof had shifted to the employer, it had mistakenly gone on to find that the employer had discharged that burden, since all its explanations were inherently plausible and had not been discredited by EB. In doing so, the tribunal had not in fact placed the burden of proof on the employer because it had wrongly looked at EB to disprove what were the respondent's explanations. It was not for EB to identify projects to which she should have been assigned. Instead, the employer should have produced documents or schedules setting out all the projects taking place over the relevant period along with reasons why EB was not allocated to any of them. Although the tribunal had commented on the lack of documents or schedules from BA, it failed to appreciate that the

consequences of their absence could only be adverse to BA. The Court of Appeal held that the tribunal's approach amounted to requiring EB to prove her case when the burden of proof had shifted to the respondent.

161. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory. In the case of B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not lead to the legal conclusion that the dismissal occurred because she was a woman.

162. The tribunal could pass the first stage in the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex.

163. A similar approach was approved by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.

164. Under section 123 EqA a complaint must be presented within three months;

> "starting with the date of the act to which the complaint relates" (a), "or such other period as the employment tribunal thinks just and equitable," (b) and "conduct extending over a period is to be treated as done at the end of the period," (3)(a).

165. Whether the same or different individuals were involved in the alleged discriminatory treatment is a relevant factor but not a decisive one in determining whether the conduct extended over a period, Jackson LJ, Aziz v FDA [2010] EWCA Civ 304.

166. Indirect discrimination is defined in section 19 EqA 2010. It states:

> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the particular characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

167. To be proportionate, a measure has to be both an appropriate means of achieving a legitimate aim and reasonably necessary in order to do so, Homer v Chief constable of West Yorkshire Police [2012] UKSC 15.

168. We have also taken into account the case of High Quality Lifestyles Ltd v Watts [2006] IRLR 850, under direct disability discrimination.

Conclusion

Direct disability discrimination

169. In relation to the claim of direct disability discrimination, the claimant asserted that on 14 April 2017, Mr Painter instructed him not to carry out his duties. In fact, it was Mr Duru who took that decision and informed the claimant. The decision was taken based on Dr Chavda's advice. Mr Duru believed that he had to relieve the claimant of all CSS2 duties as a precaution as he did not see how else to accommodate the restrictions.

170. Compared with a hypothetical comparator, namely a CSS2 who had the same restrictions but without the claimant's disability or any disability, who had failed to engage in the requirements of Occupational Health and management, that comparator, in this tribunal's view, would not have been treated any differently and would have been told that they could not continue in their role as a CSS2 or to engage in CSA duties. We took into account that the CSS2 position is a safety critical role; the claimant did not engage with what was expected of him by Occupational Health in terms of his twice daily blood testing; the provision of three months readings; and a well-controlled blood sugar reading. The respondents tried to meet with the claimant by arranging case conferences to discuss his case but for several months that did not take place. The respondent had to have regard to the claimant's health and safety, his colleague's health and safety and the public's health and safety. Following Madarassy, we have come to the conclusion that the burden did not shift to the respondent to show a non-discriminatory reason for the treatment.

171. The claimant also alleged that on 26 April 2017 and 16 May 2017, Mr Painter informed him that he was considering him for medical termination or medical redeployment because of his disability. We have already found that Mr Painter had tried to arrange, unsuccessfully, several case conferences with the claimant. It was unheard of that an employee would be unable to secure union representation on five occasions. Mr Painter's 26 April 2017, correspondence to the claimant referred to the possibility of a management

decision being taken regarding his continued employment should he fail to attend the case conference. We find that the claimant was not informed by Mr Painter that he was considering, at that time, medical termination or medical redeployment because of his disability. We made no such findings of fact in support of this assertion with regard to the 26 April correspondence.

172. In relation to 16 May 2017 correspondence inviting the claimant to a further case conference, Mr Painter did inform him that a possible outcome may be medical redeployment or medical termination. We bear in mind that by that date the claimant had been the subject of restrictions for 10 months from July 2016. During that time, he had failed to engage in the process regarding monitoring his blood sugar levels and attending meetings with Mr Painter. The restrictions prevented him from being engaged in a number of tasks including working alone for more than one hour.

173. There was only ever one CSS2 working at any one time across the four stations and only be one person on shift throughout the night.

174. In determining whether the claimant had been treated less favourably, applying the hypothetical comparator, by 16 May 2017, there were pressures on the first respondent in trying to accommodate the restrictions on the claimant work. At that stage, we conclude that the hypothetical comparator would have been informed of the possibility of either medical redeployment or medical termination. In that regard, the claimant was not treated any less favourably because of his diabetes.

175. The claimant next referred to his grievance being rejected without being investigated. Mr Mark Cullen, Accredited Harassment Manager, had to make an assessment as to the nature of the grievance and he formed the view that it was not a complaint that fell within the Bullying and Harassment policy but came within the Grievance policy. It was also possible, following a grievance investigation, that the outcome may give rise to a bullying and harassment investigation and vice versa. The claimant's grievance was investigated and during the course of his cross-examination he acknowledged that that was the case.

176. The hypothetical comparator, having presented a similar complaint, would have had his or her complaint assessed at the initial stage and a decision taken as to whether it came either under the Bullying and Harassment policy or under the first respondent's Grievance policy and, in that regard, the claimant had not been treated any differently.

177. In relation to the decision taken by Mr Sanders on 25 September 2017, that the claimant be medically redeployed. We conclude that the hypothetical comparator would not have been treated any differently if they had been warned, based on their previous conduct, that failure to attend the meeting on 25 September, may lead to a decision being taken regarding their continued employment. We found and were satisfied that the claimant was notified, by various means, of the meeting and did not attend. Mr Sanders,

at the time he took the decision. He genuinely did not know of the claimant's whereabouts and whether he was at work at Kilburn station.

178. In relation to the various acts relied upon by the claimant in support of his direct disability discrimination claim, we have concluded that they are not well-founded and are dismissed.

Discrimination arising from disability

179. As regards discrimination arising in consequence of disability, the claimant asserted that "the something arising" was the advice from Occupational Health that he could do his job subject to certain restrictions. The detriment was that the respondent had failed to allow him to carry out his role as a CSS2 with the restrictions.

180. We agree with Ms Sheppard that Occupational Health had advised the claimant and the respondents that there would be restrictions on certain safety critical duties for two reasons. Firstly, his diabetes was not adequately controlled and that the evidence presented by him showed that his blood glucose levels meant he could be at risk to himself, his colleagues or the travelling public. The respondents accepted that this was something arising in consequence of the claimant's disability.

181. The second reason why the restrictions were imposed was that he failed to cooperate with management and Occupational Health in providing the required evidence to show that his condition was adequately controlled. We were satisfied that this does not amount to something arising in consequence of the claimant's disability because the respondents acted on the Occupational Health advisers' advice and recommendations, and considered the availability of resources because he failed to engage in the monitoring of his blood glucose levels. The something arising was his failure to ensure that his blood glucose levels were stable and well-controlled. There was no medical evidence to show that his failure was because of his diabetes.

182. As it was not well-controlled it would have been irresponsible for the respondents to allow him to carry out his CSS2 role with the restrictions. There was no dispute that this is a safety critical role. At any one of the four stations in the Willesden Green area, there is only one CSS2 on duty. The claimant would, therefore, have been the only safety critical member of staff present and any other staff would be at CSA level and would not be permitted to engage in safety critical work. He would be required to work alone on the night shift at each station and for parts of early or late turns or at weekends. At Dollis Hill station, the CSS2 works alone without the assistance of a CSA. This was something the claimant's managers had to take into account when looking at how he would be able to perform his CSS2 duties with the restrictions. They were so wide-ranging that they could not be accommodated in the claimant's CSS2 role. This was the decision of his manager, Mr Duru, in his email to the claimant on 14 April 2017, who instructed him to engage in CSA duties pending the outcome of his meeting with Mr Painter.

183. We considered that if the respondents had allowed the claimant to work as a CSS2 from April 2017 and he suffered either a hypoglycaemic or hyperglycaemic episode, injuring himself or others, the respondent would likely to be held responsible for failing to appreciate the risks involved in allowing him to carry out a safety critical role.

184. Even if the claimant was treated unfavourably because of something arising in consequence of his disability and was disadvantaged in not being allowed to engage in CSS2 duties with restrictions, we have concluded that such a decision was justified. The legitimate aim was to ensure the safety of the claimant, his colleagues and members of the public in a safety critical role. The first respondent had engaged in proportionate means of achieving that legitimate aim by instructing Occupational Health to monitor the claimant's diabetes. The requirement for 12 weeks regular, twice daily, blood sugar readings was to monitor whether on certain days the claimant may experience either hypoglycaemic or hyperglycaemic episode in a safety critical role. There were also the case conferences to review his condition. The regular monitoring and case conferences were both necessary and appropriate and this approach was consistently applied having regard to the three named individuals referred to by the claimant. The claimant was given work as a CSA with restrictions by Mr Duru. This was a management decision based on the safety critical nature of the CSS2 role and the availability of resources to cover the tasks the claimant could not do. Accordingly, this claim is not well-founded and is dismissed.

Indirect disability discrimination

185. As regards indirect disability discrimination, the provision, criterion or practice relied upon by the claimant was that there was a requirement that unless persons suffering from diabetes (or persons suffering from any other manageable condition) optimally manage that condition, they could not perform their duties without restriction.

186. We do accept that the first respondent applied such a provision, criterion or practice as it requires all employees in safety critical roles to be medically fit to carry out their role without risk to themselves, other staff members or to the public. Where a diabetic employee is using insulin, they must demonstrate regular blood glucose monitoring. This is requirement that applies only to diabetics. They are allowed to carry out their substantive role but the diabetes have to be well controlled. This was the position the claimant was in rom January 2015 when he was first diagnosed with type 2 diabetes as he was allowed to carry out his substantive CSS2 role without restrictions. Dr Wyer reported for the first time on 4 July 2016, that the claimant's diabetes was not well controlled. We were not shown evidence that those not suffering from diabetes but from another medical condition, were also required to optimally managed their condition before they could perform their duties without restriction but assume that that may be the case.

187. The claimant was not at a disadvantage as he had failed to engage in the process and it was possible for the restrictions to be removed if his blood sugar levels were within the accepted range. He did not engage in the process of managing his blood sugar levels and in giving the required information to Occupational Health.

188. Even if he had suffered a particular disadvantage when compared with those who are not diabetic or disabled, in that he was removed from his CSS2 role and the burden shifted to the first respondent or to the respondents, we have come to the conclusion that the decision taken was justified. We rely on the reasons given above under the discrimination arising inconsequence of disability. We also agree with Ms Shepperd's submissions that the first respondent provides an underground rail service and its legitimate aim is to ensure that those employed in a safety critical role, like the claimant, are fit and do not present a risk of harm to themselves, their work colleagues and/or to the travelling public. Its guidance on diabetic employees and the requirements for monitoring and restrictions on safety critical duties, are a proportionate means of achieving the legitimate aim as they are both necessary and appropriate in keeping the disabled employee, his or her work colleagues and members of the public, safe from harm. Accordingly, this claim is not well-founded and is dismissed.

Failure to make reasonable adjustments

189. In relation to failure to make reasonable adjustments, the claimant relied on the same provision, criterion or practice as set out under indirect disability discrimination in support of this claim.

121 The substantial disadvantage relied upon was the claimant not being allowed to perform his CSS2 role and being placed in the Redeployment Unit.

122 Even if the claimant suffered the substantial disadvantage as he had stated, the steps taken by the first respondent were reasonable. When Occupational Health applied the restrictions to his CSS2 duties, made reasonable adjustments to accommodate them. From July 2016 it ensured, in line with Occupational Health advice, that the claimant did not do any track work or to work at the platform edge when a train was not in the station. In April 2017, the restrictions were widened. The first respondent made reasonable adjustments by placing him on CSA duties at Willesden Green. He was not required to engage in elements of his work which were restricted. Further, he was not required to work alone for longer than one hour.

123 Due to his lack of co-operation and his failure to either take control of his diabetes, or provide evidence that he was doing so, the respondent could not make the adjustments indefinite. We also bear in mind that the claimant was being paid his CSS2 salary throughout which currently remains the case and his colleagues were covering his CSS2 duties.

124 With no prospect of the restrictions being lifted due to the lack of co-operation by the claimant, it was reasonable to refer the claimant to the Redeployment Unit, to find a role to accommodate the restrictions. This was to give him more time to control his condition with a view to returning to a CSS2 role. If that was not possible, then to obtain and alternative role that he could do while accommodating the restrictions.

125 Accordingly, we have come to the conclusion that the first respondent did not fail in its duty to make reasonable adjustments. This claim is not well-founded and is dismissed.

126 Of note, having regard to Dr Chapman's report dated 16 November 2018, the claimant's blood sugar levels were still not within the acceptable range and she stated that his diabetes was not yet stable.

127 Mr Sanders was at pains to stress that the claimant's CSS2 position had not been filled and that he was receiving his substantive CSS2 salary while on the Redeployment Unit. Further, we bear in mind that the claimant had been on the Redeployment Unit for over a year. In our view, he has had ample opportunity to improve his blood sugar readings to enable a return to CSS2 duties.

128 The provisional remedy hearing listed for 26 July 2019, is hereby vacated.

Employment Judge Bedeau

Date: 19 March 2019

Sent to the parties on: 20 March 2019

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For the Tribunal Office