



**THE EMPLOYMENT TRIBUNAL**

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE TRUSCOTT QC  
Ms L Grayson  
Mr G Henderson

**BETWEEN:**

Mr O Adekoya

Claimant

AND

London Underground Limited

Respondent

**ON:** 18, 19 and 20 March 2019

**Appearances:**

**For the Claimant:** in person

**For the Respondent:** Ms V Brown of Counsel

**JUDGMENT**

The unanimous judgment of the Tribunal is that the claimant's claims of disability discrimination contrary to sections 15 and 20 of the Equality Act are not well founded and are dismissed.

**REASONS**

**PRELIMINARY**

1. The claimant gave evidence on his own behalf and represented himself. The respondents were represented by Ms V Brown barrister who led the evidence of Mr Matthew Hack, who was, at the time, Area Manager, Canary Wharf, Ms Patricia Thomas, who was, at the time, an Organisational Change and Redeployment Consultant and Mr Marlon Osborne, Head of Customer Service on the Jubilee line and Mr Hack's line manager.

2. There was a volume of documents to which reference will be made where necessary.

## ISSUES

3. The issues for the Tribunal to decide are limited to liability [33] and were determined at the Preliminary Hearing on 4 May 2018 [29]-[30] as follows:

### **Section 15 Equality Act 2010 (“EqA 2010”):**

i. Whether Mr Adekoya was treated unfavourably (by reason of being dismissed) because of something arising in consequence of his disability, namely his inability to undertake at least some of the safety critical duties of a Customer Service Manager (“CSM”)?

### **Section 20 EqA 2010:**

- ii. Whether the respondent applied a PCP of requiring CSMs to be capable of undertaking all safety critical duties of the role?
- iii. Whether that put Mr Adekoya at a substantial disadvantage in that he could not undertake all such roles and was assigned to the Temporary Alternative Duties (“TAD”) team, and ultimately dismissed?

## FINDINGS OF FACT

4. In 2015 and early 2016, the organisational structure of the respondent’s stations was significantly changed as part of the “Fit for the Future Stations” project as a result of which many of the existing station ‘groups’ were changed and the new ‘areas’ were redefined.

5. The claimant commenced employment with the respondent in June 1995 as a station assistant. He worked in a number of posts until he became a Customer Service Manager 1 (“CSM1”) at Canary Wharf in March 2015. Mr Hack became Mr Adekoya’s line manager in April 2016. When Mr Hack first took up his position, he had a chat with Mr Adekoya who mentioned he suffered from sleep apnoea. He did not mention narcolepsy. He also said he was managing it well and that it did not affect him at work. Mr Hack took this at face value. Mr Adekoya disputed this and said he told Mr Hack that he had narcolepsy. The Tribunal find that Mr Hack’s account is more reliable as the manner in which he dealt with the claimant later is consistent with his account.

6. CSM1 roles are the more senior of three Customer Service Manager roles. A copy of the job descriptions for the Customer Service Manager 1 and Customer Service Manager 2 are in the bundle [226 to 229 and 230 to 233 respectively]. In essence, CSM1 roles are most relevant to the respondent’s crucial “Gateway” or “Destination” stations. Canary Wharf and North Greenwich are both “Destination” stations, being an important business/commuter destination and the station for the O2 respectively. Canary Wharf is a primary example of a Destination station because it receives around 120,000 customers a day as an important London business/commuter destination. Canary Wharf can also require points failure work, which can require CSMs to access the track. Canary Wharf was also in the top 10 stations for slips, trips and falls, primarily due to its size and the sheer number of customers it receives. It is a huge premises and operation to be responsible for. The role of the CSM1 is best described as having overall responsibility for the station whilst they are on duty. Customer Service Assistants can be found on the

platforms or gate-line (providing day-to-day customer service) and Station Supervisors are usually in the Station's control room providing oversight of the CSAs. Above them, the CSM has overall responsibility. The CSM must be able to take charge and responsibility in the event the respondent needs to evacuate the station. It is imperative they are available and able to do it if such an event occurs. Whilst the 'job purpose' and 'key accountabilities' of all three roles are largely the same, with a particular focus on customer service and safety, some of the key differences are:

6.1 CSM1s are placed at Gateway or Destination stations. Examples of Gateway stations include Victoria Station and Kings Cross Station.

Examples of Destination stations include Canary Wharf and London Bridge.

6.2 As contained in the Additional Information section on page 229, the CSM1 role required Mr Adekoya to be qualified in all aspects of the operation of control room equipment and have an advanced level of knowledge in terms of station assets and incident response; and

6.3 CSM1 employees need to be licensed for safety critical activities such as "section 12". This is a set of requirements arising from the Kings Cross fire report, particularly in terms of fire response for deep-level underground train operations. The job description for CSM1 expressly states that *"CMS1 will be required to demonstrate competence at a higher level due to the more complex combination of assets and higher frequency of incidents found at Gateway and Destination stations"*.

7. CSM roles are 'safety critical' roles, meaning that it is vitally important, from a staff and customer safety perspective, that employees are fully fit to perform aspects of their roles which have a safety critical element. Examples of safety critical duties for a CSM include overseeing evacuations from the station or trains, resolving points failures, or entering machine chambers to re-set escalators. Safety critical incidents occur throughout the day.

8. Mr Hack received an email on 4 September 2016 from a Customer Service Supervisor at Canary Wharf, Sam Elliot [38]. Whilst this was generally critical of Mr Adekoya's work ethic and management that particular evening, it did say that Mr Adekoya had been asleep at work. Mr Hack spoke to the claimant on 5 September 2016. This was disputed by the claimant but the Tribunal accepted Mr Hack's account as it was consistent with how he dealt with the matter thereafter. During the discussion, Mr Adekoya disclosed that he had been falling asleep at work and had even fallen asleep in the middle of conversations with colleagues. The fact that Mr Adekoya was falling asleep on duty concerned Mr Hack and needed to be investigated. Mr Hack decided to stand Mr Adekoya down from the safety critical aspects of his duties to enable him to investigate the matter with the respondent Occupational Health ("LUOH"). Mr Hack completed a referral on 7 September 2017 [39]. Mr Hack explained that Mr Adekoya had overall responsibility for running of stations, being the first responder to incidents and, for example, entering machine rooms to re-set escalators. Mr Hack sent Mr Adekoya a letter on 8 September 2016 confirming his decision and that Mr Adekoya would, pending advice from LUOH, perform gateline duties only. Gateline duties are limited duties whereby station staff only man the ticket gatelines. He explained that his decision was purely precautionary in nature. Mr Adekoya accepted why he had taken this decision [45].

9. Mr Hack received advice from LUOH on 13 September 2016 [49 to 50]. This explained that Mr Adekoya had been diagnosed with a sleep disorder and his

symptoms were not well controlled. He was also under investigation for another sleep condition at that time. As a result, Mr Adekoya was restricted from:

- 8.1 Work on or near a live track.
- 8.2 Work on platform edge.
- 8.3 Make safety critical decisions, respond to or deal with emergencies.
- 8.4 Customer facing duties. The reason for this restriction was not explained to Mr Hack at the time, but he found out from Mr Adekoya in March 2017 that this restriction related to Mr Adekoya's condition which caused him to lose control of his face and the embarrassment Mr Adekoya felt when this took place.

9 LUOH stated it was likely that Mr Adekoya could fall asleep whilst dealing with an incident or walking around the station. LUOH were not able to provide a timescale on how long this was likely to be the case but explained that his condition would need to be investigated and further treated to enable LUOH to review the situation. Mr Hack concluded that this meant it was not possible to keep the claimant on the station. Mr Adekoya's restrictions would need to be accommodated, together with adequate rest breaks, in order to manage his condition.

10 In accordance with the Attendance at Work Policy, Mr Hack obtained advice from Human Resources and arranged to meet with Mr Adekoya for a case conference. The purpose of the case conference was to discuss the condition/absence, next steps and options available to both parties in terms of managing the situation. Mr Hack first met with Mr Adekoya on 19 September 2016 [51 to 53]. They discussed his condition and some tests that he had recently had carried out. In light of the advice from LUOH, Mr Hack referred Mr Adekoya to the Temporary Alternative Duties team ("TAD"). This is a team which accommodates those who work within the respondent who are, for a temporary period of time, unable to complete their substantive role. Mr Adekoya felt that he was still able to do some of his role and objected to the decision. However, Mr Hack decided that TAD was necessary given the extent of his restrictions and the LUOH advice. The Tribunal finds that Mr Hack's decision was appropriate in the circumstances.

11 Following the case conference, Mr Hack completed the form [47 to 48] on 20 September 2016. As outlined in that form, TAD is only designed to be a temporary option, and referrals are generally limited to a period of 12 weeks. As part of that referral, Mr Hack also reduced his working hours to 6 hours per day, to include his travel time to and from home. This was because Mr Adekoya had said that he was getting tired easily. As can be seen from the email chain at pages 54 to 55, Mr Adekoya spent some time in the LUOH administration team as well time with the IM Devices Team.

12 Mr Hack held a further case conference with Mr Adekoya on 2 November 2016 [56 to 57]. Mr Adekoya was accompanied by a trade union representative. Mr Adekoya reported an improvement in his condition after he had been prescribed medication, dexafataminesulfate. In terms of returning to full duties, Mr Adekoya stated that he felt good and ready to go. Mr Hack explained he would obtain further LUOH advice in relation to the medication he was taking and to see if any of the restrictions could be lifted.

13 On 25 November 2016, Mr Hack received further advice from LUOH which advised that Mr Adekoya should be reassessed by LUOH once he had received

further treatment and made lifestyle changes which had been recommended by his medical team.

14 Mr Hack held a further case conference on 22 December 2016 [60]. Mr Adekoya was accompanied by a trade union representative. Mr Adekoya was less positive about his condition during this meeting. He explained that he often felt tired in the afternoon. He also explained he was waiting for a device for his jaw to be fitted on 24 January 2017. Mr Hack therefore arranged for Mr Adekoya to be seen again by LUOH 26 January 2017 and for a further case conference to take place.

15 Mr Hack met with Mr Adekoya on 30 January 2017 who explained that he had been fitted with a device to his jaw to assist his sleeping. Mr Adekoya also explained that, despite medication, he was continuing to have instances of falling asleep during his time in TAD but was generally more aware of when this was about to happen. Mr Hack wrote to LUOH on 30 January 2017 and sought advice on these developments [61]. Throughout this time, on the basis of what he was told, Mr Hack thought that Mr Adekoya would be coming back to work as a CSM1.

16 By this time, the impact of Mr Adekoya's long-term absence was becoming harder to manage operationally. For example:

- 16.1 Mr Hack was having to fill Mr Adekoya's shifts with overtime duties for other members of staff at significant cost;
- 16.2 At that time, he also had another CSM1 who, due to their medical condition, was restricted from night-shifts; and
- 16.3 Combined, this was impacting team morale at Canary Wharf. In particular, the other CSMs were now doing night shifts every 3 to 4 weeks, instead of every 6. As the Area Manager, he could see that this was impacting levels of fatigue, home life, morale and the general level of work being carried out.

17 Following Mr Hack's email of 30 January 2017, he received advice from LUOH on 7 March 2017 [62]. By this time, Mr Adekoya had been unable to complete his substantive role for six months. The advice explained that:

- 17.1 Mr Adekoya had been seen by LUOH in person on 6 March 2017.
- 17.2 Mr Adekoya was initially diagnosed with narcolepsy and, following that, had also been diagnosed with sleep apnoea.
- 17.3 Mr Adekoya had noticed an improvement in his symptoms but continued to have some residual drowsiness meaning that his condition was not fully controlled and further/improved control of his symptoms may not be possible in the short-term.
- 17.4 As a result, Mr Adekoya was restricted from:
  - 17.4.1 Work on or near a live track.
  - 17.4.2 Work on platform edge.
  - 17.4.3 Responding or dealing with emergencies
  - 17.4.4 No night shifts.

18 This meant that the restrictions from the original LUOH advice from 13 September 2016 which had been 'lifted' were (i) no customer facing duties; and (ii) no safety critical decision making. The report went on to add that:

- 18.1.1 Mr Adekoya would need additional breaks so that he could rest or nap whenever needed; and
- 18.1.2 Mr Adekoya could not be in charge of a station on his own or work shifts without a Station Supervisor or another CSM.

19 The above adjustments would need to be in place for the foreseeable future and LUOH had explained to Mr Adekoya that whether these adjustments could be accommodated or not was matter for Mr Hack as his employing manager.

20 Having received the updated advice from LUOH, Mr Hack arranged a case conference for 14 March 2017 [63 to 65]. Mr Adekoya was accompanied by a trade union representative. Mr Hack read out the LUOH report in full. Mr Adekoya explained that he was due to see his specialist in April 2017 to discuss his medication. Mr Hack explained his view that Mr Adekoya's restrictions could not be accommodated at Canary Wharf. This was because the CSM1 role needed to be able to deal with emergencies and, as required by LUOH, it was not always possible to guarantee that another Customer Service Manager would always be on duty to cover this need. Mr Adekoya's trade union representative raised a number of suggestions which he adjourned to consider. These included:

20.1 Putting in a request to the Operational Resourcing team to see if additional Station Supervisors or CSMs could be provided to cover the aspects of Mr Adekoya's role that he was unable to perform.

20.2 That Mr Adekoya could return to work but only complete non-essential aspects of the role, such as Performance and Development or disciplinary matters.

21 Mr Hack did consider his suggestions. In relation to Mr Adekoya only performing administrative aspects of the CSM1, he considered this was not a reasonable suggestion. Mr Adekoya was employed as a CSM1 and his primary responsibility was to be in charge of a busy and challenging operational environment, including responsibility for responding to emergency and safety critical incidents. It was not reasonable to adjust Mr Adekoya's role to simply an administrative role. In any event, there was not enough administrative work of that nature to occupy a full-time CSM1. It was also important for the other CSM1s at Canary Wharf to have responsibility for their own administrative work. He also called Operational Resourcing and was told it was not possible to accommodate employing someone to 'buddy' with Mr Adekoya so that the aspects of the role that Mr Adekoya was restricted from could be carried out. Further, in relation to both the suggestions, this would require him to find the budget to, at all times when Mr Adekoya was working, roster a CSM1 who did not have any medical restrictions who would be able to respond to or deal with emergency situations at the CSM1 level. This was to ensure the respondent complied with the "Section 12" requirements. Mr Hack therefore explained to Mr Adekoya that it was necessary to refer him to Redeployment. Mr Adekoya's trade union representative then raised a further objection. He raised a suggestion that, as part of Fit for the Future, Phil Hufton, then the Managing Director for the respondent said that anyone with an existing medical condition at the time of the reorganisation would be found an alternative location that could accommodate that condition. Mr Adekoya's trade union representative also asked whether Mr Hack had considered redeploying Mr Adekoya as a Customer Service Assistant. A Customer Service Assistant ("CSA") is also a stations based role, but is a number of grades lower than Mr Adekoya CSM1 role. Mr Hack took a further short adjournment to consider these points. When he reconvened the meeting, they discussed whether Mr Adekoya had disclosed his condition as part of the Fit for the Future process. Mr Adekoya explained that he had been assigned to Canary Wharf because it was important for him to be able to get home for his son, who has epilepsy. Mr Hack also explained that it wasn't until around September 2016 that Mr Adekoya's condition

had become unmanageable and was affecting his ability to do his role. He therefore didn't view this as a reason not to refer Mr Adekoya to Redeployment. Mr Adekoya and his trade union representative were encouraging Mr Hack to wait, rather than take the decision to refer Mr Adekoya to Redeployment. He therefore asked Mr Adekoya what he believed he could do in the meantime. In response, Mr Adekoya's trade union representative suggested "training work around the Group". This was a suggestion that Mr Adekoya attend training sessions pending improvements in his condition. In Mr Hack's view, this wasn't a sensible suggestion. Whilst there is an ongoing need for station staff to be trained, it would not have been appropriate for Mr Adekoya to spend an unknown period of time, full-time, taking training courses. Mr Hack therefore queried whether Mr Adekoya thought he could do the CSA role. Before the first adjournment, Mr Adekoya's trade union representative had suggested this. However, this was flatly rejected by Mr Adekoya. Mr Adekoya explained that one of the symptoms of his condition was that he could lose control of his face and body which would result in him being embarrassed in front of customers. He explained that LUOH had lifted this restriction in their report of 7 March 2017 because Mr Adekoya had told LUOH he did not need to spend much time at the Gateline as a CSM1. Mr Adekoya advised Mr Hack that this restriction would, in his view, need to be reinstated for the purposes of considering him for a CSA role. This was quite an important objection to raise, bearing in mind that Mr Adekoya's CSM1 role is, ultimately, a "Customer Service" role. His objection to being permanently assigned to customer facing duties effectively ruled out considering him for a CSA role.

22 Mr Hack therefore decided to refer Mr Adekoya to Redeployment for the following reasons:

22.1 Firstly, the Redeployment team is an internal team of consultants who support employees who are no longer able to carry out their substantive role, either through reorganisations and redundancy or for medical reasons. During this time, they are still 'on the books' of their substantive role. Redeployment generally lasts for a period of 13 weeks, during which time they are encouraged to look for alternative roles within the respondent and Transport for London. The primary purpose is to help the employee find alternative work or, ideally, improve their condition sufficiently that they can return to their role. The employing manager has regular reviews throughout their period of Redeployment and no decision on their ongoing employment with the respondent is made until the Redeployment period has concluded.

22.2 For that reason, Mr Hack did not see the merit in 'waiting' for a further report as was being recommended by Mr Adekoya on 14 March 2017. There was sufficient time built into the Redeployment process for Mr Adekoya to continue to try and improve the management of his condition, either through lifestyle changes and/or medication and treatment.

22.3 There was no clear timeline for future medical intervention which might lead to an improvement in Mr Adekoya's condition. Mr Hack noted that the LUOH report said that Mr Adekoya was not awaiting any further treatment at the time.

22.4 The restrictions contained in the LUOH report prevented Mr Adekoya from carrying out his role because:

22.4.1 Mr Adekoya's restrictions from working on or near live track, the platform edge or responding/dealing with emergencies

meant he was unable to carry out some crucial safety critical aspects of the role.

22.4.2 Mr Adekoya would not have been able, as the most senior member of staff on duty, respond to or deal with emergency situations.

22.4.3 It was not possible, with the resourcing available, to ensure that there was another CSM or Station Supervisor available at all times to cover the safety critical elements of Mr Adekoya's role.

23 The Redeployment Centre is based at Endeavour Square, Stratford and is equipped with a number of computers to allow individuals to access the internet to look for roles. The Redeployment Centre is also equipped with learning facilities to assist individuals in applying for jobs. Staff at the Redeployment Centre assist employees with CV development, job applications and interview technique and practice. Further, Redeployment Consultants would review roles advertised on a weekly basis to see whether there were any positions that appeared to be suitable alternative roles for the employees who had been displaced or medically redeployed from their previous roles. If any such position was identified for a particular employee, that employee's Redeployment Consultant would encourage the employee to apply for the role. This is known within the team as "Skills Matching".

24 Employees in the Redeployment Centre have first access to vacancies within the TfL Group through a priority website. If an employee applies for the job through the Redeployment Centre and it appears that they have the minimum skills, knowledge and experience for the role, then the vacancy is not advertised to the rest of the business until the recruitment process has been exhausted. Although Redeployment Consultants assist employees in the Redeployment Centre with job applications and encourage them to apply for certain roles, ultimately it is up to employees to submit applications for jobs they are interested in. They need to be proactive and this is made clear to employees when they join the Redeployment Centre. Employees do not have to check get approval before submitting applications. Employees are usually informed that their referral to the Redeployment Centre will last for a maximum of 13 weeks, commencing from the date of their induction. They are informed that this will only be extended in exceptional circumstances.

25. Mr Adekoya was referred to the Redeployment Centre on 17 March 2017 [66 to 70]. The first step is to have an induction meeting. Jordan James sent Mr Adekoya a letter on 17 March 2017 inviting Mr Adekoya to an induction meeting on 23 March 2017 [75]. Mr Adekoya was off sick at this time and the induction was rearranged for 4 April 2017 [78 and 82 to 84].

26. Velrose Myers completed Mr Adekoya's induction on 4 April 2017. Following that meeting, she sent Mr Adekoya a number of links which would give Mr Adekoya access to set up a profile on the internal jobs website, to the specific Redeployment intranet page containing guidance and support, and links to access the e-learning zone. He was also provided with templates so that he can create a CV and a personal profile [88 to 91]. Velrose Myers also sent the Claimant's line manager, Matthew Hack, a confirmation email that the Claimant had been inducted into the Redeployment Centre [92].



27. Mr Adekoya confided in Ms Thomas that he was still struggling with his condition. He was allowed to work from home when he requested to do so to help him manage his condition. Ms Thomas remembers Mr Adekoya, on a handful of occasions, falling asleep at his desk whilst he was attending the Redeployment Centre. The claimant said this was because he was bored and was tired after working a number of hours.

28. Throughout an employee's time in Redeployment, a record of activities and interactions with the employees is kept on a Redeployment Client Record document. A copy of Mr Adekoya's finalised Redeployment Client Record is at pages 188 to 194 which shows that:

- a. He met with another of the Organisational Change & Redeployment Consultants, Shaheda Begum, on 9 May 2017. They talked about the sort of roles that Mr Adekoya was interested in. Mr Adekoya was looking for an active role. Further, Mr Adekoya was focused on obtaining a role with the respondent as this would attract protected earnings for a period of time (meaning that Mr Adekoya would retain his CSM1 salary in the event he secured a lesser paid role within the respondent) [191].
- b. Mr Adekoya was helped on his CV [126 to 128 and 143]. Mr Adekoya attended the CV Skills Workshop on 7 April 2017 [189]. A copy of the presentation slides are at pages 233L to 233V.
- c. Mr Adekoya also attended the Interview Skills Workshop on 13 April 2017 [189]. A copy of the presentation slides are at pages 233A to 233K.
- d. Mr Hack was kept up to date on Mr Adekoya's progress [130, 140].
- e. Mr Adekoya was supported through periods of sickness absence and treatment [191].
- f. Due to annual leave and sickness absence, Mr Adekoya was in Redeployment for double that, between April 2017 and October 2017 [154, 157-158, 160].

29. One of the key vacancies was a vacancy for a Line Information Specialist ("LIS") role on or around 10 July 2017 [page 191]. It was arranged for Mr Adekoya to shadow someone who was carrying out the role to help with his application for the vacancy. Mr Adekoya covered the early and middle shifts as he was unable to do the late shift due to his restrictions. The LIS shadowing took place on 26 and 27 July 2017 [148]. After his shadowing, Mr Adekoya wasn't particularly impressed or excited by the role. On 15 August 2017 an entry was made on the Redeployment Client Record which mentioned he found some tasks difficult, but that he was not interested in the role [193]. In May 2018, Ms Thomas made enquiries with the recruitment team about Mr Adekoya's application for the LIS role and was told that Mr Adekoya was initially rejected for the role but, having noticed that Mr Adekoya had a disability, then invited him to the next stage (an assessment). Mr Adekoya was contacted on four occasions between 22 September 2018 and 18 October 2018 in relation to that invitation but he never responded [196A to 196M]. The claimant denies that he was not contacted at all but the Tribunal noted that the email contact with him used the same email address that earlier emails were sent to without any apparent difficulty [132, 196J and 196K]. The Tribunal find that he was contacted but did not respond. There were 1414 applications for that role and there were around 15-20 vacancies, with successful candidates being placed on a waiting list.

30. As the Redeployment Client Record shows, on 13 September 2017 Ms Thomas discussed two short-term secondment opportunities that had arisen for

Administrators. One of these was a “Local Administrator” (for 3 months) and also the Administrator for the TfL Volunteers department (for 12 months). The job descriptions are at pages 217A to 217F. Employees need to demonstrate that they have the required skills, knowledge and experience to do the role through an interview or selection and assessment process. However, applications submitted by employees in Redeployment are given priority status. This means that their applications are considered prior to the position being advertised, but they must meet the criteria/essentials for the role to be shortlisted. Mr Adekoya felt like he didn’t have the skills, because the roles were more aligned to a secretarial or PA type role. He agreed to be put forward. On 14 September 2017, Ms Thomas emailed the recruitment consultant, Maria Lee, to confirm that Mr Adekoya would like to be considered (see entry on 13 September 2017 at page 193). Mr Adekoya was not successful. In May 2018, Maria Lee confirmed that Mr Adekoya was not short-listed for either role because he did not meet the minimum criteria for the role [216]. The key skills required were for (i) SAP knowledge (i.e. in terms of administering payroll, timesheets, sickness, and absences); and (ii) attention to detail, administration and verbal and numerical skills.

31. Mr Hack received a number of emails about Mr Adekoya’s induction into the Redeployment team [66 to 87]. In particular, Mr Hack received an update on Mr Adekoya’s induction on 7 April 2017 [92]. He met Mr Adekoya on 11 May 2017 and sent Mr Adekoya a short record of the meeting by email on 18 May 2017 [131]. Mr Adekoya said that his specialist, who he had seen on 26 April 2017, had said he would write to Mr Adekoya’s GP about the fact he should be able to manage his condition. Mr Hack agreed to refer Mr Adekoya to LUOH at the next meeting on the basis that, by then, Mr Adekoya would hopefully be in receipt of that further medical advice.

32. Mr Hack received an update on 12 May 2017, which included a copy of Mr Adekoya’s Redeployment record (pages 130). He emailed Mr Adekoya on 13 June 2017 to arrange a further review meeting [138 to 139]. Mr Hack reminded Mr Adekoya that he would need to refer him to LUOH.

33. Mr Hack met Mr Adekoya on 20 June 2017 and sent him a short record of the meeting by email on 4 July 2017 [142]. Mr Adekoya explained that it was not possible to increase the levels of medication because it appeared to be increasing his blood pressure. Mr Adekoya explained he had good and bad days. There is reference in this email to a letter from his specialist and that he “had this with [him]”. However, Mr Adekoya did not provide Mr Hack with a copy of the letter but assured him he had it with him and he would hand it LUOH. The subsequent LUOH report does not refer to such a letter.

34. Mr Hack received an update from the Redeployment team on 20 June 2017 about Mr Adekoya’s redeployment activities [140]. Following the meeting on 20 June 2017, Mr Hack referred Mr Adekoya to LUOH and received a report on 30 June 2017 [141]. This explained that:

- a. Mr Adekoya had stopped taking the medication which had been introduced to improve the symptoms of his condition;
- b. There had been no change in his symptoms; and
- c. Therefore, the safety related restrictions set out in the LUOH report of 7 March 2017 remained in place.

35. Mr Hack decided to arrange a further case conference to consider the overall situation. On 2 August 2017, he sent Mr Adekoya a letter inviting him to a case conference on 7 August 2017 [150 to 151]. This had been rearranged a number of times to accommodate cancellations by Mr Adekoya and his trade union representative on 20 July 2017 and 1 August 2017. The purpose of the case conference was to consider the medical situation and decide on his future with the respondent. One of the possible outcomes of the case conference could be the termination of his employment on medical grounds.

36. The case conference went ahead on 7 August 2018 as arranged. Mr Adekoya was accompanied by his trade union representative [152 to 153]. Mr Hack raised whether Mr Adekoya had completed an ill-health pension request form. Mr Hack decided to adjourn the case conference until 4 September 2017 to ensure that Mr Adekoya had time to consider and complete the ill-health pension paperwork. He also asked if Mr Adekoya had anything else he wanted to raise. At this point, Mr Adekoya's trade union representative suggested there was a conflict of interest or bias because of Mr Hack's involvement in the disciplinary process relating to another employee at Canary Wharf. Mr Hack rejected this as he had been managing Mr Adekoya's health issues long before the disciplinary matters relating to the other employee had arisen and, in any event, that was an entirely separate process. The Tribunal find that Mr Hack was not influenced by this disciplinary process.

37. The reconvened case conference went ahead on 4 September 2018 as arranged. Mr Adekoya was accompanied by his trade union representative [164 to 165]. Mr Adekoya advised that he had not completed the ill health pension form because he didn't think there was any point in handing it back. Mr Hack decided to proceed with the case conference. In relation to Redeployment. Mr Adekoya explained that the only job he applied for was a Line Information Specialist role. Mr Adekoya said that "probably 200 people applied and [I] didn't get through to the next stage". Mr Adekoya explained that there had been no improvement and that "it was never going to improve". Mr Adekoya confirmed that they had been unable to increase his medication due to the impact on his blood pressure. Mr Adekoya and his representative raised the following points:

- a. That the Fit for the Future 'commitment' should be taken into account. This is the same point that had also been raised at the case conference on 14 March 2017.
- b. That Mr Hack should have asked Operational Resourcing for an extra CSM1 to shadow/accompany Mr Adekoya at all times in order to address the elements of the role that Mr Adekoya was restricted from carrying out.
- c. That, as part of the duty to make adjustments, the respondent should consider the circumstances of a Duty Station Manager who, with sleep apnoea, was allowed to carry out his role. Mr Hack asked for more details of this individual so that he could investigate the circumstances of that case.
- d. That they had a letter from Mr Adekoya's GP which stated that Mr Adekoya's condition had been brought about by shift work over the years. Mr Hack asked for a copy but it never materialised.
- e. That Mr Hack should take account of Mr Adekoya's length of service and contribution.

38. At this point, Mr Hack thought that Mr Adekoya had actually fallen asleep in the middle of the case conference. As the notes record, Mr Adekoya woke up

startled [165]. Mr Adekoya said he had his head in his hands as he was distressed. It is not necessary for the Tribunal to make a finding on this but if it was the Tribunal preferred Mr Hack's account. Mr Hack explained that he would consider all the evidence and arrive at a decision.

39. After the case conference Mr Hack took the following steps:

a. He contacted LUOH to see whether, in light of Mr Adekoya's upcoming appointment, whether it was appropriate to see him again or whether the restrictions could be lifted in the short to medium term [166]. LUOH responded on 7 September 2017 [169] confirming that the advice (and restrictions) from 7 March 2017 still applied.

b. He contacted Operational Resourcing to explain Mr Adekoya's circumstances and the restrictions in place [167]. The response explained that the restriction, in particular, of not being able to respond or deal with emergencies prevented Mr Adekoya from being able to carry out the role of CSM or Station Supervisor in any Area across the respondent's network. Mr Hack was advised that it may be possible to accommodate Mr Adekoya's restrictions in the role of CSA, but only at a location where he isn't counted as minimum numbers and would not be required to deal with any emergency activity or evacuations. The reference to having 'minimum numbers' generally applies to central London stations where regulations require that stations can only open where the required number of staff are present and available.

40. Given the comments made about Fit for the Future, Mr Hack asked the Operational Resourcing team on 12 September 2017 to provide the paperwork relating to Mr Adekoya as part of that process. In particular, he asked if the Fit for the Future team were aware of Mr Adekoya's condition as part of that process [170], he noted that:

a. Sylvia Davey, Operational Resourcing, explained that the first they were aware of any medical restrictions or issues in relation to Mr Adekoya was when he had contacted them on 12 September 2017 [170];

b. The preference form completed by Mr Adekoya for the Fit for the Future process stated "no" in response to following questions: (i) Do you have a medical condition that impacts on the locations where you can work; and (ii) Do you have any other circumstances that you believe may impact on your potential work location and that you would like us to take into account as part of the location planning process? [174]; and

c. Sylvia Davey also noted that Mr Adekoya had appealed (or reviewed) his original placement as a CSM1 at Elephant & Castle. In asking for a review, Mr Adekoya had cited the childcare issues arising from his son's epilepsy as wanting to be placed on a Jubilee Line station. There was no reference to his own medical condition [176].

41. Mr Hack decided to dismiss the claimant and delivered this decision to Mr Adekoya on 4 October 2017 [181 to 186] in which he said:

a. that he had taken into account the medical advice from LUOH on 13 September 2016 (page 49), 7 March 2017 (page 62), 30 June 2017 (page 141) and 7 September 2017 [169].

b. he outlined the circumstances in which Mr Adekoya's conditions had come to his attention and steps he had taken to ascertain, with LUOH, the impact of his conditions on his role. He explained that, together with obtaining regular LUOH advice, he had referred Mr Adekoya to TAD for a period of 6 months before taking the decision to refer Mr Adekoya to Redeployment.

- c. Mr Adekoya had benefited from extended periods (i.e. beyond the norm) in TAD and Redeployment, which he had hoped would enable him to get his condition under control and return to his substantive role.
- d. that Mr Adekoya's restriction from carrying out duties which would involve dealing with emergency situations was a consistent theme of all the LUOH advice. This made it impossible to place Mr Adekoya into a CSM1 role as this is such an important part of the role, particularly at Canary Wharf. It is important to note that the advice from Operational Resourcing was that it would not have been possible to accommodate Mr Adekoya's restrictions in a CSM or Station Supervisor role anywhere on the respondent network.
- e. The restrictions in place restricted Mr Adekoya from undertaking any other operational role at Canary Wharf.
- f. Mr Adekoya had not been able to secure an alternative role during his period of time in Redeployment.
- g. the Fit for the Future "commitment" was not relevant and did not impact on his decision, bearing in mind that Mr Adekoya had not raised his medical condition previously or as part of that process.
- h. the response from Operational Resourcing which suggested that it may be possible to accommodate Mr Adekoya at another location in the role of CSA. However, he explained that, as an experienced Area Manager responsible for CSMs, Station Supervisors, and CSAs, he felt that Mr Adekoya's restrictions were at odds with the requirements of a CSA role which, as outlined in his letter, also require CSAs to deal with emergency situations. Mr Adekoya's condition, either as CSM1 or CSA, posed a material risk to the safety of himself, customers and colleagues on the basis that he may not be physically able to carry out his role at a given time. He also took account of Mr Adekoya's previous objections, raised on 14 March 2017, to the idea of carrying out a CSA role.
- i. he also investigated the comparator case that had been raised at the case conference. Mr Hack did discover that there was an individual on the Northern Line who had sleep apnoea and was still in his role. However, crucially, he was advised that his condition was under control, was under no restrictions by LUOH and was therefore carrying out full duties. He distinguished that case from Mr Adekoya's circumstances given that his restrictions were more onerous.

42. On 9 October 2017, Mr Adekoya appealed against the decision to dismiss him [187]. He stated that his grounds for appeal were, severity of decision, disregard of the respondent's policy, and disability discrimination. Mr Adekoya did not provide any detail in relation these headings.

43. On 12 October 2017, Mr Osborne wrote to Mr Adekoya to acknowledge his appeal and to inform him that he had been appointed to hear his appeal against dismissal. He invited Mr Adekoya to attend an appeal hearing on 8 November 2017 [195 to 196].

44. At Mr Adekoya's request, the appeal hearing was rearranged on two occasions. Initially to 1 December 2017 [197 to 198] and then to 14 December 2017 [199 to 200].

45. Mr Adekoya attended the appeal hearing on 14 December 2017. He was accompanied by a trade union representative. The meeting was also attended by Euan Taylor, PMA. Notes of the meeting can be found at pages 201 to 206 of the

bundle. Some of the key points raised by Mr Adekoya and his trade union representative were:

- a. That reasonable adjustments had not been considered. For example, not allowing Mr Adekoya to carry out only administrative work.
- b. They were critical of Matthew Hack's decision to refer Mr Adekoya to the Temporary Alternative Duties ("TAD") team.
- c. That there was a comparator, in a Customer Service Manager ("CSM") role at Canary Wharf, with a degenerative illness who Mr Adekoya felt was being accommodated in a way which Mr Adekoya was not.
- d. That Matthew Hack had not considered what Mr Adekoya, with his condition, was able to do and had instead focused on the restrictions and what he could not do.
- e. That Matthew Hack was not impartial due to the recent involvement of both Mr Adekoya and Matthew Hack in the disciplinary ("CDI") appeal of another employee.
- f. Mr Adekoya felt that he had been poorly treated in terms of the management of his condition, particularly bearing in mind his years of service for the respondent.

46. At the end of the appeal hearing, Mr Osborne informed Mr Adekoya that he would respond to his appeal in writing in due course. The appeal hearing notes were typed up and sent to Mr Adekoya [207]. He spoke to both Matthew Hack and Euan Taylor, the People Management Advice Specialist assigned to the case, about the case and its history. Mr Osborne took time to consider the chronology of this case, the medical evidence and the submissions from Mr Adekoya. He set out his decision in writing to Mr Adekoya by letter dated 11 January 2018 [212 to 215]. He initially dealt with the concerns Mr Adekoya had raised about reasonable adjustments and his referral to TAD in September 2016. He reviewed the case conference notes of 19 September 2016 [51-53] and the advice from LUOH on 13 September 2016 and noted that these restrictions meant that he was not able to carry out his role of CSM1. In light of the medical advice and what had been discussed at the first case conference (in terms of his timeframes for further investigation) it was entirely appropriate to refer Mr Adekoya to TAD. This, in his view, is itself a reasonable adjustment that Matthew Hack made to accommodate Mr Adekoya at an early stage. He noted that Mr Adekoya actually remained in TAD for nearly six months, which is much longer than is usually allowed. This approach was designed to allow Mr Adekoya time to understand his condition and explore the potential treatment available. It is unfortunate that Mr Adekoya, in that time, was unable to find a way of managing his condition which enable him to carry out his role.

47. Mr Osborne did not agree that Mr Hack was simply 'going through the motions' with a view to exiting Mr Adekoya from the business. The number of meetings and the time that Matthew Hack took before taking difficult decisions to refer Mr Adekoya to Redeployment and subsequently dismiss Mr Adekoya were evidence of a careful and measured approach. In particular, Matthew Hack had consulted with Mr Adekoya before taking any key decisions and obtained up to date LUOH advice throughout the process. He noted how the restrictions from LUOH had changed slightly between the initial LUOH advice on 13 September 2016 and 7 March 2017. It was evident that, at every stage along the way, Mr Adekoya was taking steps to establish, through LUOH, what the latest medical position was.

48. Ultimately, Mr Osborne agreed that it was not possible to accommodate Mr Adekoya in a CSM1 role or, possibly, in any operational role due to the extent of the medical restrictions imposed on him as a result of his conditions. In particular:

a. He was not able to deal or respond to emergencies. Mr Adekoya's vulnerability to falling asleep on duty and, further, his inability to perform the emergency incident related aspects of his role was not a risk that the respondent could take.

b. Mr Adekoya would also need to be given additional breaks and a nap whenever needed. This also created an unacceptable risk.

c. Ultimately, Mr Adekoya would require the respondent to ensure that, whenever he was on duty, someone else was also rostered to cover the safety critical aspects of Mr Adekoya's role that he was unable to carry out. This placed an unsustainable practical and financial burden on the Canary Wharf area. His long-term absence from the CSM1 role since September 2016 had already put a significant strain on the area and it was not possible for him to return to his role at the time of his appeal. As well as the fact he would not be able to take control in the event of an emergency situation, his restrictions also meant that he would not be able to intervene in relation to certain station assets (e.g. escalator machinery or live track).

49. Mr Osborne reviewed the circumstances of Mr Adekoya's comparator. This was a CSM1 at Canary Wharf who had an underlying condition of Multiple Sclerosis. He established that this individual, who had periods of sickness absence, had attended a number of case conferences and the business had obtained LUOH advice, was still working at Canary Wharf. In that case, the only restriction advised by LUOH was that this person should not do any night-shifts. This was something Matthew Hack was able to accommodate long-term. This individual was not otherwise restricted from safety related duties in the way that Mr Adekoya was.

50. Mr Osborne discussed the issue of whether Mr Hack was impartial with him. He explained that he had no knowledge of any information or involvement by Mr Adekoya in the disciplinary appeal of the colleague. That appeal was being heard by the then Performance Manager, Tunde Alaoye. Matthew Hack explained he had no involvement in that case other than investigating the matter and referring the case to a CDI. As a result, Mr Osborne had no concerns over Matthew Hack's impartiality or his capacity to deal with Mr Adekoya's case.

51. The Tribunal find that the steps taken by Mr Hack did not suggest that he just wanted Mr Adekoya "out of the business" as Mr Adekoya had alleged. He addressed matters carefully and considerately. Mr Osborne considered that Mr Hack had handled the case sensitively and supportively and the Tribunal agrees with his findings.

52. Mr Adekoya did not raise any appeal in relation to Matthew Hack's findings that it was not possible to accommodate him in a CSA role. This meant that there were no grounds on which to overturn Matthew Hack's decision. Mr Osborne confirmed that Mr Adekoya remained dismissed with effect from 7 October 2017.

## **SUBMISSIONS**

53. The Tribunal heard submissions from both parties, without intending any disrespect, these submissions are not repeated here.

## LAW

### Discrimination arising from disability

54. Section 15 EqA provides as follows:

- “(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.”

55. Albeit in the context of indirect discrimination, Lady Hale addressed the justification defence (which is the same in section 15) in **Essop v Home Office; Naeem v Secretary of State for Justice** [2017] ICR 640 SC and stated at [29]:

“A final salient feature is that it is always open to the respondent to show that his PCP is justified - in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test. Some reluctance to reach this point can be detected in the cases, yet there should not be. There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question - fitness levels in fire-fighters or policemen spring to mind. But, as Langstaff J pointed out in the EAT in *Essop*, a wise employer will monitor how his policies and practices impact upon various groups and, if he finds that they do have a disparate impact, will try and see what can be modified to remove that impact while achieving the desired result.”

56. In **Homer v Chief Constable of West Yorkshire** [2012] ICR 704 SC the Supreme Court considered the justification defence (again in the context of indirect discrimination) and Lady Hale stated:

“19. The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim...

...

20. As Mummery LJ explained in *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:

“. . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group.”

He went on, at [165], to commend the three-stage test for determining proportionality derived from *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80:

“First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to



the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?”

As the Court of Appeal held in *Hardy & Hansons plc v Lax* [2005] EWCA Civ 846, [2005] ICR 1565 [31, 32], it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.

...

22. The ET (perhaps in reliance on the IDS handbook on age discrimination) regarded the terms “appropriate”, “necessary” and “proportionate” as “equally interchangeable” [29, 31]. It is clear from the European and domestic jurisprudence cited above that this is not correct. Although the regulation refers only to a “proportionate means of achieving a legitimate aim”, this has to be read in the light of the Directive which it implements. To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so.

...

23. A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate. The EAT suggested that “what has to be justified is the discriminatory effect of the unacceptable criterion” [44]. Mr Lewis points out that this is incorrect: both the Directive and the Regulations require that the criterion itself be justified rather than that its discriminatory effect be justified (there may well be a difference here between justification under the anti-discrimination law derived from the European Union and the justification of discrimination in the enjoyment of convention rights under the European Convention of Human Rights).”

57. Proportionality was considered by the Supreme Court in **Bank Mellat v HM Treasury (No 2)** [2014] AC 700 where Lord Reed JSC stated at page 791:

“74 The judgment of Dickson CJ in *Oakes* provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The approach adopted in *Oakes* can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measures effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The first three of these are the criteria listed by Lord Clyde in *de Freitas*, and the fourth reflects the additional observation made in *Huang*. I have formulated the fourth criterion in greater detail than Lord Sumption JSC, but there is no divergence of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.”

## Reasonable Adjustments

58. Section 20(3) EqA 2010 states:

“The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.”

59. Schedule 8, section 20(1)(b) EqA 2010 provides that an employer is not subject to a duty to make reasonable adjustments if they do not know, and could not reasonably be expected to know, that the relevant employee has a disability and is likely to be placed at the identified disadvantage.

60. Section 20 must be interpreted consistently with Article 5 of the Equal Treatment Framework Directive, so that there is no duty to take measures which would impose a disproportionate burden on R. Article 5 states:

“Reasonable accommodation for disabled persons

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.”

61. Sometimes, there is simply no reasonable adjustment that can be made that would have an efficacious practical benefit in terms of preventing the PCP putting the claimant at the substantial disadvantage: **Dyer v London Ambulance NHS Trust** EAT 0500/13 where it was said:

“13. Finally, I would observe that the requirement is not to take a step which is reasonable for the comfort of the disabled person concerned, not one which meets her requests. The reasonableness of the provision is by statute linked to whether it avoids the disadvantage or not, “disadvantage” being a substantial disadvantage caused by the application of the provision, criterion or practice concerned. Thus, in a case in which an employee reasonably wishes to continue to work for what may be very powerful social and personal reasons, in an environment in which it is not reasonably possible to remove or ameliorate the risks to her of the disadvantage which the PCP causes, that desire is not directly relevant to the decision a Tribunal objectively has to make. It has to apply the statute and the statutory words, which require the assessment of reasonableness not in relation to the way in which the employer treats the employee but whether the steps which it is proposed it should take are those which it should have to take to avoid the particular disadvantage referred to in the statute.”

## **DISCUSSION and DECISION**

62. It was not until September 2016 that the respondent knew that the claimant was at risk of falling asleep at work. That risk was brought to Mr Hack's attention on receipt of an email from a CSS [38]. Mr Hack then spoke to Mr Adekoya, who disclosed that he was falling asleep at work due to his sleep apnoea. He did not disclose his diagnosis of narcolepsy. The claimant's evidence that he was

diagnosed with narcolepsy in 2015 and disclosed that fact to Mr Hack in April 2016 when Mr Hack became his manager is not accepted by the Tribunal. The claimant accepted that he was told, at the point of diagnosis, that the condition was lifelong and could not be cured. He knew this would impact on his ability to carry out his duties. However, he carried on working until September 2016 when the email [38] was received by Mr Hack.

63. The Tribunal finds that the claimant deliberately gave the respondent the impression that his condition was sleep apnoea which did not impact upon his ability to do his role because:

- a. it is recorded in the contemporary documentation [45];
- b. it is consistent with Mr Hack immediately thereafter standing Mr Adekoya down from duties [45] and referring him to OH [39];
- c. the stand down letter [45] refers to the causative link with sleep apnoea, which Mr Elliot's email does not and could not [38]. Mr Hack is more likely than not to have been told of that link by Mr Adekoya;
- d. it is consistent with the OH / case conference records that follow; and
- e. it was put to Mr Adekoya by Mr Hack in the meeting of 14 March 2017 [64] and Mr Adekoya made no attempt to correct it.

64. The Tribunal find that the respondent did not know and could not reasonably have discovered Mr Adekoya had narcolepsy or that he could not undertake safety critical duties in the long term before March 2017:

- a. Mr Adekoya worked in a senior, highly paid, role at the respondent who was entitled to rely on provision of information by Mr Adekoya. Mr Adekoya had led the respondent to believe otherwise;
- b. Mr Adekoya specifically denied on the Fit for the Future ("FFTF") form that he had any medical condition capable of affecting his location [174]. Mr Adekoya appealed his placement and still did not mention his medical condition [176];
- c. The evidence shows that the respondent is operating on the understanding that Mr Adekoya had sleep apnoea (only) throughout the early stages of the process;
- d. in the initial referral to OH on 8 September 2016, Mr Hack describes Mr Adekoya's condition as "*sleep apnoea*" [40];
- e. the OH report of 13 September 2016 responds to the 8 September referral and states that and states "*as you know, he has been diagnosed with a sleep disorder*" [49]. The Tribunal infers that OH were also under the impression the condition was sleep apnoea. One could reasonably expect that if Dr Chavda was aware that Mr Adekoya had narcolepsy, she would have made that distinction clear to the respondent;
- f. further, in the 13 September report, in response to Question 2 Dr Chavda states that treatment of another condition "*may lead to better control of his overall symptoms*" [49] and in response to Question 5 that the Dr "*would expect that with appropriate treatment, his symptoms will be better controlled*" [50].
- g. The respondent wrote to Mr Adekoya on 8 September 2016 and states that he had "*fallen asleep at work several times due to your sleep apnoea*" [45]. Mr Adekoya did not seek to challenge this characterisation at any point;
- h. during the 19 September 2016 case conference, the respondent referred to Mr Adekoya's condition as "*temporary*" and to his time in TAD being a "*brief spell*" designed to get him "*back to work as soon as possible*"

[52]. The respondent refers to other employees in their employ with 'sleep apnoea' [52]. Despite Mr Adekoya's claimed knowledge of the permanence of his condition, he did not make any attempts to correct this obvious misunderstanding by the respondent;

i. on 2 November 2016, the respondent suggests Mr Adekoya might return to his full duties (something the respondent plainly would not accept if aware that Mr Adekoya might still fall asleep unexpectedly) and Mr Adekoya contends that he "*feels good and ready to go*" [56];

j. on 21 November 2016 an OH report suggested that Mr Adekoya be reviewed "*once he has received further treatment and been able to make lifestyle changes*" [59A];

k. Mr Adekoya's trade union representative agreed in a meeting of 22 December 2016 that monitoring progress whilst treatment was underway / investigations were ongoing sounded "*like a plan*" and that Mr Adekoya was "*being compliant in trying to get back ASAP*" [60];

l. as of 30 January 2017, it can be seen in the OH referral that the respondent is still under the impression that Mr Adekoya will return to his full duties imminently [61]; and

m. on 7 March 2017 OH indicated for the first time that "*further control of his symptoms may not be possible at least in the short-term*" and that the listed restrictions were "*likely to be for the foreseeable future*" [62].

65. In relation to section 20, the respondent accepts the application of the PCP. The substantial disadvantage is also admitted. The key issue is whether the respondent took such steps as were reasonable to avoid the disadvantage. Any adjustment must prevent the PCP putting Mr Adekoya at the substantial disadvantage identified, namely "*that Mr Adekoya could not undertake all such roles and was assigned to the Temporary Alternative Duties ("TAD") team, and ultimately dismissed*". The claimant accepted that there was no adjustment that could facilitate him undertaking the safety critical elements of his role. His condition was not 'under control'. His disability impact statement clearly intends to convey the message that he continues to fall asleep without warning [237/para 5]. That is consistent with the most recent medical evidence from the claimant's GP [234], specialist [236] and his own description at the time that things "*will never improve*" [164].

66. The Tribunal concluded that no adjustment could alleviate the disadvantage and that this case was an example of the extreme case referred to in **Dyer**.

67. Whilst this addresses the first of the two issues identified in paragraph 3 hereof in relation to section 20 in order to address the second issue the Tribunal went on to consider the steps taken by the respondent to redeploy the claimant. The Tribunal find that the respondent did all that could reasonably be expected of them:

a. Mr Adekoya was placed in TAD and allowed to remain there for 6 months, which (as he accepted in cross examination) was more than double the usual 13 week period;

b. The respondent offered to consider placing Mr Adekoya into a CSA role [65]. Mr Adekoya was either unable or did not wish to undertake that role [65]. Mr Osborne gave evidence that if a suitable role had been identified, the respondent has a committee in place which would meet to manage that transition and any consequences for other staff members;

- c. Mr Adekoya's induction to redeployment was re-arranged and accordingly extended by a number of weeks [66], [75] and [86];
- d. As part of Redeployment, Mr Adekoya decided to limit applications to the respondent's roles which would attract protection of earnings. Mr Adekoya's applications were given priority over other internal candidates (who in turn had priority over external candidates) [88] and the respondent sent Mr Adekoya potential roles [93], provided assistance with his CV and training courses [188]-[194]. Any role Mr Adekoya secured within the respondent would, by reason of Mr Adekoya's medical condition, result in protection of his earnings for a period of 10 years;
- e. Mr Adekoya was allowed to spend 5 months in Redeployment, almost double the usual 13 week period;
- f. Whilst in Redeployment, Mr Adekoya identified two roles he was interested in. One of those was the LIS role and the respondent arranged shadowing of a current employee. Mr Adekoya was initially rejected for the LIS role [196I], but the requirements were adjusted in consequence of his disability [215A]. Mr Adekoya's application was not taken forward because he failed to respond to any of the email or telephone communication attempts made by the respondent's contractor, Capita [196J]-[196M]. Notably, Mr Adekoya does not deny receiving news of his rejection for the role, placed via the same system;
- g. The respondent re-arranged the final case conference twice [146] and [150] and accordingly extended Redeployment [148] and [160].

68. The remaining adjustments suggested were not reasonable. Providing a 'buddy CSM' for Mr Adekoya was not reasonable, as he himself (very fairly) accepted during cross examination. Operational Resourcing explained that this was not possible within the TfL budget [167]. It is self-evidently an unreasonable burden on the respondent to effectively employ and remunerate two CSMs undertaking the same role at the same time. It is, additionally, not fair to the remaining CSMs who would have been undertaking significantly greater volumes of work for the same remuneration. For the same reasons as a 'buddy', it was not reasonable for Mr Adekoya to undertake only non-operational/administrative duties. This amounts to precisely the same restriction as a buddy: Mr Adekoya could not be on shift alone. Doing so would remove (what Mr Adekoya accepted in cross examination was) the core of Mr Adekoya's role as a CSM. As Mr Adekoya accepted in cross examination, it was neither possible nor reasonable for Mr Adekoya to undertake his role in another station group. As Mr Adekoya put it himself, "*it would be the same anywhere so I wouldn't have thought moving would make any difference*". Indeed, it would be potentially worse elsewhere, as Canary Wharf station has glass-barriers on the platform.

69. In relation to section 15, the respondent accepted that, by reason of narcolepsy, the claimant could not undertake all the safety critical duties of his role. It is further accepted that the claimant was dismissed as a result and that dismissal amounted to unfavourable treatment. The key issue for the section 15 claim is justification.

70. The claimant accepted that the respondent's conduct was "*without a doubt*" done to protect the safety of Mr Adekoya and others, including customers, the public and employees of the respondent. That is the legitimate aim. The respondent is responsible for a significant underground operation. Canary Wharf alone is a huge operation. The respondent is responsible for safeguarding the

safety of thousands of customers who travel of the network every day, as well as the significant numbers of employees at work at any given time. If the respondent gets that wrong, they risk falling foul of health and safety legislation and indeed, may well risk criminal prosecution. The CSM role is a senior management position within that overall picture: Mr Adekoya had responsibility for a large, and particularly busy, destination station. The scale of potential risk of breaching safety critical requirements at Canary Wharf is unthinkable. The importance of that aim cannot be overstated.

71. As to proportionality, the importance of the aim has to be balanced with the disadvantage to Mr Adekoya, namely his dismissal. The Tribunal considered that there was no way in which the respondent could have responded less onerously:

- a. the adjustments made by the respondent, set out in paragraph 64. All alternatives were explored and the respondent did all reasonably possible to assist Mr Adekoya;
- b. Mr Adekoya was a particularly senior member of staff who had very high levels of responsibility. The ability of a CSM to undertake safety critical duties is crucial to the respondent's operation;
- c. Mr Adekoya had been unable to do safety critical roles for one year and there was no evidence that he would ever be able to do so again in the future; and
- d. The respondent is a local government body with significant financial constraints. As Mr Osborne explained in evidence, the head count at the respondent reduced by 30% in the months before September 2016.

72. Mr Hack's decision was not 'reckless'. He made five referrals to LUOH and held numerous case conferences over the course of one year. Mr Hack granted extensions to Mr Adekoya at every stage of the process. In relation to the final decision, Mr Hack looked into each of C's suggestions more than once and took a period of one month to deliberate [164] and [181]. In terms of Mr Hack's investigations, he:

- a. asked Operational Resourcing if Mr Adekoya's restrictions could be accommodated at another location or in another role [167] (this being the second request of this type [64]);
- b. referred Mr Adekoya once more to OH [166] (this being the 5<sup>th</sup> referral);
- c. investigated the comparator raised by Mr Adekoya [184]; and
- d. investigated the 'Hufton commitment' and established it did not apply to Mr Adekoya [170].

73. Even when faced with the inevitability of terminating Mr Adekoya's contract of employment, the respondent made a further attempt to limit the impact on Mr Adekoya. Namely, the respondent encouraged Mr Adekoya to apply for ill-health retirement and adjourned the final meeting to allow Mr Adekoya time to do so [152].

74. The claimant's appeal was comprehensively and fairly considered. Mr Adekoya raised a new matter at appeal stage, a new comparator, which was investigated and addressed [213].

75. The claimant's dismissal/ill-health retirement was justified: it was a proportionate response to the legitimate aim of protecting the safety of Mr Adekoya and others. There was no adjustment the respondent could have made to alleviate

the disadvantage caused by the PCP. Alternatively, the respondent made all adjustments that were reasonable and no other adjustments were reasonable.

**Employment Judge Truscott QC**

**Date 8 April 2019**