Case Number: 2207048/2017

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Miss T Chevalier **v** **East Coast Mainline Company Ltd**

Heard at: London Central **On**: 25, 26, 27, 28 and 29 November 2019

Before: Employment Judge A James
Mr P M Secher
Ms M Jaffe

Representation

For the Claimant: In person

For the Respondent: Ms S Omeri, counsel

JUDGMENT

(1) The claim for unfair dismissal (s98 Employment Rights Act 1996) is not upheld and is dismissed.
(2) The claims for disability discrimination (ss13, 15, 20 and 27 Equality Act 2010 are not upheld and are dismissed.
(3) The claim for redundancy pay (s163 Employment Rights Act 1996) is not upheld and is dismissed.
(4) The claims for breach of contract (pay/redundancy pay) (Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994) are not upheld and are dismissed.
(5) The claim for unpaid wages (s23 Employment Rights Act 1996) is not upheld and is dismissed.

REASONS

Preliminary matters and rulings

1 The claims are for disability discrimination, unfair dismissal, redundancy pay (statutory and contractual) and unpaid wages/breach of contract. The issues are set out in Annex A to this judgment.

2 The hearing took place over 5 days. The first day was spent dealing with the list of issues and rulings upon it and reading into the case. Evidence and submissions on liability/remedy were dealt with on the second, third and fourth days. Submissions were made on the fourth day at the conclusion of the evidence. It was arranged that for the rest of the fourth day and on the fifth day, the tribunal would deliberate and make its decision but that the decision would be reserved. The tribunal concluded its deliberations at about 4.30 pm on the fifth day.

Procedural rulings

3 We made several procedural rulings during the hearing.

4 On reading into the case, it became clear that the issues that had been identified at the preliminary hearing on 22 February 2018 needed to be further developed. The main changes required were due to the reasonable adjustments section not identifying any PCP, or substantial disadvantage arising from the PCP (or, as the case may be, from any alleged failure to provide an auxiliary aid). Had the claim proceeded on that basis, the reasonable adjustments claims would necessarily have failed because some of the essential building blocks in relation to those claims were not present. Whilst it did take some time to fine-tune the issues further, we considered it proportionate and just to do so since this enabled the tribunal to engage with and decide on the substance of the claims, rather than be forced to dismiss some of them on a technicality.

5 During these discussions, the claimant asked to change the dates of certain allegations; for example, in relation to issue 19, to refer to the August 2016 grievance, rather than the July 2015 grievance. We refused that amendment, on the basis that it would involve too substantial a change in the claimant's case from that which the respondent had come prepared to meet.

6 Further in relation to this fine-tuning of the issues exercise, we agreed to allow the respondent's counsel more time to take instructions from witnesses or to call evidence in chief orally at the hearing, as appropriate, in order to deal with the amended issues. In the event, that was not required.

7 We were asked by counsel for the respondent to strike out certain sections of the claimant's witness statement referring to alleged drug taking, and to exclude certain pages from the bundle, namely pages 296 to 309, for the same reason, since those allegations were defamatory and were not relevant to the issues. We concluded that those documents, and those parts of the witness statement were not relevant to the issues in the case and agreed to the exclusion of the evidence on that basis.

8 At the beginning of day two, during further finessing of the issues, (the parties having considered those overnight), we agreed to limit issue 18 regarding the irregular shift patterns to the period July to December 2015, which, again, was how the matter had originally been put previously by the claimant and the case that the respondent had come prepared to meet. The claimant had applied to change the dates to refer to the period between February and April 2016. That again was a substantial change.

9 On the morning of day three, the claimant applied to admit further documents in evidence. Having had the opportunity to consider those documents, it

appeared that several were already in the bundle in any event. Other documents were included, by agreement.

10 The claimant sought leave to introduce an email between her and the respondent's solicitors about an expert report. This was refused, on the basis that it was only one of several emails in relation to an expert report. For whatever reason, an expert report was not obtained, despite there being a direction to obtain one. It was therefore not appropriate to only include the one email, since that would not have given a complete picture. Although there is some correspondence on the employment tribunal file in relation to the expert report issue, no applications were subsequently made for any further orders in that respect. It was too late, by the time of the hearing (which had already been rearranged on two occasions), to remedy that (and there was no application to do so). The emails between the parties' representatives on that issue were not relevant in those circumstances.

11 The claimant had provided further information in relation to her disabilities to the employment tribunal. Unfortunately, that document had not been included in the bundle. It was clearly a highly relevant document and it should have been included. We allowed its inclusion in the bundle. Pages 4 to 10 of that document were adopted by the claimant as part of her evidence in chief. The claimant was re-sworn in on day three, in order to confirm the contents were true, and an opportunity given to Ms Omeri to cross-examine her on those matters and for questions from the tribunal.

Adjustments

12 On the basis that the claimant might have disabilities, we considered it appropriate to make several adjustments during the hearing. These included more frequent breaks, as and when requested by the claimant; and that the breaks themselves be longer than would usually have been the case (15 to 20 minutes rather than 10 to 15 minutes).

13 As is not uncommon with a litigant in person, we also helped the claimant to formulate questions at times, for the purpose of cross-examination; and ensured that counsel for the respondent asked, as far as possible, short questions. On a small number of occasions, we reformulated the cross-examination questions to enable the claimant to understand them.

14 Further, in relation to submissions, we asked counsel for the respondent to provide a copy of her written submissions to the claimant and allowed the claimant to both listen to the oral submissions, and to consider the written submissions, prior to providing her own. The claimant provided her own submissions verbally. She was not able to provide written submissions due to technical issues connecting to Wi-Fi; but given the time already taken to hear the case, we did not consider it appropriate to adjourn for the rest of the day to allow the claimant to provide written submissions on the final day. The claimant was not disadvantaged by that. Our decision has turned on the evidence, not on the submissions at the conclusion of the case.

15 The tribunal heard evidence from the claimant; and for the respondent from Mr Paul Allen, (who at the time of the events complained of was Onboard Services Manager, then in January 2107 Regional Customer Experience Manager), Balbinder Bains (who at the time of the events complained of was

a Crew Manager), Zuber Hussain (who at the time of the events complained of was a Crew Leader), and Jennie Pitt (who at the time of the events complained of was the People Engagement and Corporate Responsibility Leader). There were two hearing bundles, the first of about 400 pages and the second, consisting of relevant medical evidence, of about 250 pages.

Findings of Fact

16 The claimant, (Miss Chevalier) started work for the respondent's predecessor in September 2000 but then left that employment to study. She re-joined Great North Eastern Railways in August 2003 as a Customer Services Assistant (CSA).

17 The respondent, East Coast Main Line Company Limited, trading as Virgin Trains East Coast (VTEC) subsequently took over the operation of the east coast main line route between London and Scotland and remained in control of the operation at the time of the matters about which the claimant complains. (Then on 24 June 2018, London North East Railway Limited took over the franchise of the East Coast Mainline but that transfer does not impact on this claim.)

Evidence on Disabilities 1 and 3

18 On 30 November 2011 the claimant saw an Educational Psychologist, who produced a report. The report makes clear that "this assessment was undertaken for educational study purposes and is not appropriate for any other situation or environment. Study at a higher-level places particular requirements on an individual and such requirements are not typically duplicated elsewhere".

19 In the conclusion of the report, on page 250 of the bundle, it is stated: "Tanya presents a profile indicative of specific learning difficulties based on weaknesses within her short term auditory sequential memory and visual processing skills".

20 At page 251, in relation to examination support, it was suggested that the claimant be allowed 25% more time for written examinations or equivalent forms of assessment. Finally, we note, page 252, that it is recorded that the use of a blue coloured overlay to reduce the contrast between font and paper colour "may prove useful".

21 In the further particulars given about her disability, on page 26I of the bundle, at paragraph 20, the claimant states that she finds it hard to concentrate on reading and writing and is easily distracted when she is in a busy or noisy office environment. She finds it quite hard to concentrate when working on a screen as the blue light on laptops, phones and iPads can cause visual disturbances which lead to her eyes hurting and her getting headaches. She finds it difficult to read long documents and normally must read them at least three or four times before what she is reading starts to make sense. We accept her evidence on these points.

22 On 8 August 2013 Miss Chevalier suffered a myocardial infarction, or heart attack. A report dated 14 August 2013 notes that she had a severe mid LAD stenosis and that "the vessel was hanging by a thread". She was diagnosed with single vessel coronary disease. She underwent surgery and had a stent

inserted. She was placed on six different types of medication. She still takes four different types of medication for her heart condition.

23 On 24 September 2013 an Occupational Health (OH) report was prepared which suggests that Miss Chevalier's heart condition could be classed a disability. The writer of the report also suggested that her previous sickness absence could be linked to her heart problems.

24 An OH report dated 28 October 2013 stated that the claimant was fit for work of a non-manual nature. She continued however to receive medical certificates from her GP which stated that she was not fit for work. This continued until February or March 2014 when she commenced a temporary placement in the post of Service Support.

25 An OH report dated 17 March 2014 confirmed that Miss Chevalier was still not fit for work as an on-board CSA. This situation prevailed until 2 June 2014 when OH confirmed that Miss Chevalier could return to her duties as CSA. The OH letter confirms that Miss Chevalier was not complaining of any symptoms now and felt fit to resume normal duties on board. The chances of a further heart attack were said to be insignificant.

26 We also note at this point that the claimant had, as early as November 2013, obtained permission from her GP to go to a gym and in January 2014, five months after the event, travelled to Australia. Whilst there, she tried surfing.

27 In the further information provided to the tribunal and to the respondent about her disabilities, she refers to the effects of her heart condition. She says that she is always conscious of it; she used to enjoy travelling and visiting countries all around the world but does less now; there is an impact on her ability to have children because she would have to stop taking her medication to have children and would need to be monitored throughout any pregnancy; she used to like going on rides on rollercoasters but does not go on them anymore; when doing household and gardening chores she gets a lot more out of breath than she did before the heart attack; things like hoovering can be a bit of a struggle; and she is not able to walk as far as she did before she had a heart attack. She also says that if she was not taking medication for her heart condition, the effects would be much greater. She would be more drained and out of breath and more physically limited in what she could do.

28 Finally, in relation to her heart condition, we note that on 11 June 2014, the claimant was able to return to her duties as a CSA on the east coast mainline route, which was a relatively demanding physical job.

Promotion to Crew Leader

29 On 6 July 2014 the claimant was permitted to transfer from Leeds, where she had been carrying out her duties from, to Kings Cross. This was to enable her to study at a London University.

30 On 27 August 2014 Miss Chevalier applied for promotion to the role of On Train Crew Leader (Crew Leader). On 27 September 2014 a selection interview took place. The Claimant was offered a temporary roster, of 9 hours a week. Arnold Billingsley, a colleague, was offered 16 hours a week. The Claimant says that she scored higher, in the interview. She scored 36, her colleague 35. Both of those scores were less than the score which the respondent had set as the benchmark for being able to carry out the role of

Crew Leader. They were however still placed in the role on a temporary basis, to see if they were capable of it. No explanation was given as to why the claimant was given 9 hours and Mr Billingsley 16 hours, although that did not form the basis of any of the legal claims before us.

Training and equipment issues

31 Miss Chevalier says she only received two days of training, whereas normally a Crew Leader would receive ten days, mainly through shadowing other Crew Leaders. She was given 2 days training with her then line manager, Sameer Gujar. Further training was not requested by the claimant. She simply asserts in her statement that she was entitled to 10 days and did not get it. She rightly accepted in cross-examination that there was no evidence that her line managers did not provide further training because of her heart condition.

32 In September 2014 the claimant asked Mr Allen for her roster to be printed on blue paper. The request was not granted. The request was repeated to both Mr Allen and Ray Barrow in December 2014 and the claimant linked her requests to her dyslexia. We accept the claimant's evidence on this point. Mr Allen could not recall the request but we find that it was made. The issue was not however raised with Jodie Slater, when she became the claimant's manager, nor with Ms Bains.

33 When she commenced the Crew Leader role in September 2014, Miss Chevalier was not provided with a pull along trolley bag but a standard issue shoulder bag. The bag she was provided with cut into her shoulder. Miss Chevalier says she asked Paul Allen and Ray Barrow for a trolley bag in October, November and December 2014. At the time, the procedure was to ask Ann Burkin for any uniform items, including trolley bags. The claimant did end up with a trolley bag, after about five months. Paul Allen told us, and we accept, that he was responsible for authorising the issue of trolley bags, as they were not standard kit for crew leaders. However, he had no recollection of authorising a trolley bag for the claimant. Neither he nor Miss Chevalier were able to tell us how she ended up with that trolley bag, who authorised it, or when. It is very difficult in these circumstances to determine where the truth lies but on the balance of probabilities we find that Miss Chevalier did make a request for a trolley bag of Mr Allen in October, November and December 2014.

34 There was however no convincing evidence that the claimant complained to any of her managers about the difficulties caused by carrying around a heavy bag, and in particular, that she had difficulties walking with a heavy bag because of her heart condition, and she became short of breath. We find that she did not do so.

Absences and lateness

35 Between the claimant returning to work in 2014, and the time of her return to her substantive role as a CSA in April 2016, there were a number of occasions on which the claimant was absent from work because of short-term sickness absences. There were also several occasions when she was late arriving for her shift.

36 For example, in December 2014 she had three days absence for a chest infection - page 160. In April 2015, she was off again for a chest infection; for a migraine in April 2015; and a bruised arm in August 2015. She was

recorded as being late for duty on 18 August 2015 - the records say that the claimant told her manager that she was confused about her days off. She was late again on 18 October 2015, the recorded reason being that the claimant went back to her flat to find her flatmates fighting and she had to separate them. She submitted a self-certificate for time off for a migraine on 22 October 2015. On 24 November 2015 she was late for work because of concussion, for which she received an absent without leave letter. On 28 January 2016 she was late for work, and as this was the third time, an investigation was started. An oral warning was subsequently issued.

37 It is readily apparent that a number of these absences/lateness incidents were in no way linked to the claimant's disabilities – the bruised arm and the concussion for example. The claimant argued, in relation to the chest infections, that she was more vulnerable to catching those due to her underlying medical conditions. However, there was no medical evidence to support that contention. In the absence of such expert medical evidence, we were not in a position to find that she was susceptible, as claimed.

38 The occupational health report which is on page 59 suggested that previous short-term absences could be linked to her heart condition, but that was the period before the claimant's heart operation. Again, there was no medical evidence to suggest that her heart condition continued to cause any short-term absences after her operation, her recovery from that and her return to work.

39 An OH report was produced by Health Management on 1 February 2016. In this report it is stated that the claimant's "poor sleeping pattern had been ongoing for the last six years. It is of unknown origin and she has been told that it may have been a contributing factor to her cardiac problem. She has been cleared of any cardiac condition at the moment. Ms Chevalier admits to having a few concerns privately which could contribute to her poor sleeping pattern."

40 This indicates that far from the claimant's heart condition being the cause of the sleeping problem, the sleeping problem predated her heart condition. The claimant argued that the medication she was taking could impact on her sleeping pattern. But there was no medical evidence before us to establish such a link. From what she told OH at this time, personal problems may have been the reason for her sleeping problems. The cause in any event was said to be "unknown" and that is our central finding on this point.

Request to change shifts and alleged bullying

41 In July 2015, the claimant asked her then line manager, Ms Balbinder Bains to arrange a transfer to a different shift. The claimant alleges that Ms Bains told her that she wasn't going to arrange the transfer because she had heard "bad things" about her. We find that those words were not used.

42 Ms Bains contacted Ray Barrow because although he was not the claimant's line manager, he knew more about how to facilitate a transfer between shifts. Ms Bains did not know how to do so because she had only recently joined. That was why she passed the matter to Ray Barrow to resolve. Unfortunately, it took a while for him to do so and it was not until late September 2015 that the transfer was arranged. The claimant emailed Mr Barrow about her hours and about her pay on 24 September 2015. In his emailed reply on the same

day, Mr Barrow apologised to the claimant for the lateness in dealing with her request.

43 About a week after the conversation with Ms Bains, the claimant went to see Paul Allen. She says she raised the matter with Mr Allen but he did not take her complaint seriously. She did not raise a formal grievance at this stage. Even if this could be classed as an informal grievance, the claimant did not go back to Paul Allen and ask what was happening with that "grievance".

44 Following the change of shift, Jodie Slater became the claimant's line manager. The claimant was content with Jodie Slater as her manager.

45 The claimant's role as Crew Leader was extended twice, the second time on 6 October 2015, to 2 April 2016.

46 On 2 December 2015 Ray Barrow became the claimant's line manager.

47 Ms Bains told us that she did not know of the claimant's heart condition until February 2016. We accept her evidence on that point.

48 It is the claimant's case that in about February 2016, Ms Bains asked a colleague of the claimant, Aneka Lewis, to monitor her. Having heard the evidence on this issue, we accept Ms Bains' evidence that she asked Ms Lewis to report back to her as to whether the claimant had arrived for her shift that day. Ms Bains did so because on checking the signing in sheet for the day in question, she noted that the claimant had not by that stage signed in. Ms Bains was responsible for ensuring that trains went out fully staffed, and therefore went along to the train in question to check if the claimant was there but had just forgotten to sign in. She had a conversation with Aneka Lewis in which she asked Ms Lewis to report back as to whether the claimant did in fact turn up for work. The claimant did turn up in time.

49 In February 2016, the claimant says that Zuber Hussain's shift as Crew Leader became available because he became her manager. It is not clear whether he did in fact become her manager at that time, although as will be seen in due course, nothing ultimately turns on that. It appears that a shift did become available, on a short-term basis. This is evidenced by an email from Paul Allen to Michael Mensah and others dated 9 February 2016, in which he refers to him placing Michaela Pirjol into the role. He explained in cross-examination why this was the case. In particular, the posting was short term, and if it had been opened up to competition, he would have ended up having to move several people around in relation to their shifts. Because it was only a short-term vacancy, he decided to use his managerial discretion to place Ms Pirjol into the role. Ms Pirjol was the partner of Ray Barrow at that time.

50 On 25 February 2016 a meeting was held with the claimant by Mr Barrow to discuss her lateness for shifts. She said at that meeting that she had been stressed and that "the nurse thinks it might be depression". At a further meeting on 21 March 2016, there was again a reference by the claimant to depression and anxiety. A verbal warning was issued on 11 April 2016. The Claimant felt bullied by these meetings to discuss her absences and lateness. We accept she did so (although we do not consider that her perception was a reasonable one, in the circumstances – there was an issue with the claimant's attendance, which the respondent was entitled to speak to her about).

Return to CSA role

51 On 3 April 2016, the Claimant was returned to her substantive CSA post. No formal process appears to have been followed, nor any warnings given about her performance (save for the lateness issue), prior to her being returned to that position. Mr Billingsley's role was converted to a permanent position. Mr Billingsley did not have the same issues with lateness or short-term absences. We did not hear from Mr Barrow and so he was not able to explain to us why such a change took place. Miss Chevalier felt very aggrieved by her return to the CSA position and the lack of any process being followed. She had every right to feel that way.

Further sickness absence

52 Miss Chevalier felt stressed by the move and her mental health deteriorated. She came close to committing suicide and suffered what she described as a mental breakdown. She was signed off as being unfit for work by her GP on 3 May 2016. The fit note referred to stress at work. The further fit notes in the bundle for May, June, July and August 2018 also referred to "stress at work" as being the reason for her sickness absence.

53 The record of an OH meeting dated 8 June 2016 confirms that the claimant's mental health was "much improved". The claimant did however remain on sick leave for a further two months because she felt unable to return to her CSA role. She was very upset about her removal from the crew leader position, and her perception that she had been bullied and discriminated against.

54 On the recommendation of occupational health, a mediation meeting was held between Ms Bains and the claimant. Ms Bains' view of the meeting was that they sorted matters out and hugged each other at the end of the meeting. As far as she was concerned, the matter had been resolved. The claimant says she felt differently; but that contradicts what she told OH on 8 June 2016 - see above. No record was made summarising the outcome of the meeting, nor was any email sent to the claimant following the meeting to confirm that it was considered that the issue had been resolved. We do find that surprising.

Disability 2

55 In the claimant's further particulars, she reports a substantial impact on her normal day-to-day activities caused by her mental impairment. These include not being able to read books, not being able to watch TV, having no libido, and not seeing any of her friends and family for weeks on end. She reports trouble sleeping and having to take tablets and other remedies to help her sleep. She lost her appetite; she had no desire to eat and lost about two and a half stone in weight.

56 There is no indication however as to how long those matters continued for. The claimant was given 28 days' supply of the drug citalopram. She took one every other day for a month and decided at the end of the period not to ask for a further prescription. See also the paragraph 57 below.

Temporary medical placement

57 By 23 August 2016, the Claimant was considered fit for alternative employment and commenced a temporary medical placement at King's Cross, assisting on community projects for the south route. The notes of the meeting with OH on that date confirmed that she was fit for a phased return to

work. The notes record that the claimant "reported that she feels a lot better after the mediation meeting". She continued with group therapy sessions, and we understand from her evidence that those continued until about January/February 2017.

58 We note in passing at this point that the claimant stated that she was placed in a role; the respondent's position was that she was placed into a temporary medical placement – it was not an actual role within the company. We accept the respondent's case although we do not consider that the distinction between role or placement is particularly important in this context, as will become clear from our conclusions.

59 On starting the temporary medical placement based at King's Cross, the claimant met with her manager Ms Jennie Pitt, who we heard evidence from. We found Ms Pitt to be a particularly believable witness. She made concessions when it was appropriate to do and clearly had a good recollection of the events she described. She explained to the claimant what the placement involved and gave the claimant projects to work on. She told us that the claimant did not ask for specific training in relation to Outlook. We accept her evidence on that point.

60 Ms Pitt was very complimentary about the claimant's abilities. She stated for example that in relation to one particular project, the claimant exceeded what Ms Pitt had expected of her. The claimant was proactive and took projects on herself. There were weekly catch-up meetings, and at none of those meetings did the claimant ask for further training.

61 There was a discussion, during a train journey back from Edinburgh, when the claimant told Ms Pitt that she would like some training in project management, as a development opportunity. That was not arranged.

62 Shortly after the claimant started the placement she asked to be provided with a laptop. She was having to work in either the Learning Resource Centre or main office at King's Cross. In the latter there were only two computers, although in the Learning Resource Centre there were ten to twelve desktops. We accept Ms Pitt's evidence that at no point did the claimant say to her that she needed a laptop because of her disability. Ms Pitt was clear during cross examination that had the claimant raised this, together with issues such as her feelings of isolation, and that she needed a laptop as an adjustment, the adjustment would have been made.

63 Ms Pitt quite rightly conceded that no DSE workstation assessment was ever carried out for the claimant. Ms Pitt was aware that the claimant was studying for University and produced a high standard of work during the placement. Ms Pitt was not aware of the claimant suffering from any learning difficulties. That was not mentioned in any of the occupational health reports that she saw. Those reports referred to her anxiety condition. The report recommended a phased return to work and that was arranged.

64 On 17 October 2016 the Claimant raised a grievance requesting backdated pay arising out of her return to the CSA role in April 2016. The grievance also raised a concern about the payment of overtime to part-time workers. The email complained that "part-time staff don't get overtime until they've done 35 hours, and they don't get attendance allowance for the extra hours, this policy is discriminatory as essentially you are paying two rates of pay for the same

job. As most of the part-time staff are female, this is actively discriminatory against women".

65 On 17 November 2016 Mr Allen sent the claimant a text message about meeting up in Peterborough. The claimant replied on 18 November 2016, saying that she was in difficulties making it to the meeting due to late running trains. Mr Allen replied: "Are you coming as Cat Woman?" This was a reference to a fancy-dress costume which the claimant was planning to wear. A female colleague of hers was planning on dressing up in a Wonder Woman costume at the same time, in order to fundraise on a train travelling between King's Cross and Peterborough.

VR application

66 On 18 November 2016, the claimant expressed an interest in applying for Voluntary Redundancy (VR). The circumstances in which she made an application for VR were that in or about October 2016, VTEC informed its employees that there was a potential redundancy situation and invited applications. The claimant expressed an interest and a letter was sent to her home address by the respondent. Unfortunately, because the claimant had failed to update her address details with the respondent, the letter was not received by her because it was sent to her previous address.

67 As she did not hear anything, the claimant contacted Sue Short, who was based in York. Ms Short emailed the claimant on 31 October 2016, with the contents of the previous letter pasted into that email. This set out the terms of the scheme, including that the scheme would close on 28th of October, and that "once an application has been submitted, it cannot subsequently be retracted".

68 Sue Short asked the claimant to contact her. The claimant tried to do so but could not get through.

69 As a result, she went to see Paul Allen on 18 November 2016. There was an email exchange between him and Sue Short on the same day. Ms Short confirmed that even though the deadline was 28 October 2016, that would be extended, if the claimant still wanted to apply. Miss Chevalier filled in a form, there and then, on 18 November 2016. That was sent to the respondent. There was some dispute by the claimant as to the authenticity of that document but she accepted in cross examination that it was her handwriting and her signature that appeared on the form. We find that she did make an application for voluntary redundancy. That was accepted. Importantly, the form she signed states: "I confirm that I have read and understand the terms of the voluntary redundancy scheme".

70 Miss Chevalier claimed that she was placed under pressure by Paul Allen on 18 November 2016 to complete the form. We find that she was not placed under any pressure by him during that meeting. We find that the claimant voluntarily filled in the form because she wanted to take a VR package so she could go travelling.

71 On 23 November 2016 the Claimant had a meeting with Paul Allen and Stacey Hinge in Peterborough about her grievance. Ms Chevalier alleges that at that meeting, Mr Allen told her she would need to drop the 'other parts' of her grievance if she wanted to continue working for Jennie Pitt. We do not accept that. We find that the written grievance which is at pages 230A to 230E

of the bundle was not actually received by Mr Allen and therefore he would not have asked her to drop any of the grievances set out in it.

72 The claimant also alleges that at this meeting, she asked for her redundancy to be cancelled. We find that such a request was not made. Such a request is inconsistent with her telling Ms Pitt and Mr Hussain that she was intending to go travelling after her employment came to an end (see further below). We accepted their evidence on this matter as being more reliable. Had the claimant been serious about her redundancy being cancelled, we find that she would at some point have put that in writing to somebody working for the respondent. No such written request was made.

73 On 26 January 2017 the claimant was sent a letter telling her that her redundancy application would be accepted and that her employment would end on 25 March 2017. That was sent to her previous address but it was emailed to her on 2 February 2017. The claimant says that once she saw the actual figures for the redundancy payment she was unhappy because it was less than what she had been expecting. She says she therefore tried to retract her redundancy application. We accept that the claimant had second thoughts about leaving after seeing the figures. But if that was the case, she failed to make that clear to the respondent.

74 Shortly before her employment came to an end, the claimant was taken out for lunch by Ms Pitt, together with another colleague, Katie. During that lunch, the claimant did not give any indication that she was unhappy about her redundancy. On the contrary, she told Ms Pitt and her colleague Katie about her plans to go travelling.

Community engagement manager roles

75 Ms Pitt was unequivocal in her evidence, which we fully accept, that the claimant had done a fantastic job in the temporary medical placement, and that she would welcome an application from the claimant for the role of community engagement manager, if and when funding was approved by the Department for Transport. We specifically find that Miss Chevalier was told that by Ms Pitt.

76 A meeting took place on 21 March 2017, just before the claimant's employment ended, between her, Paul Allen and Stacey Hinge. The meeting was to discuss the grievance in relation to her claim for backpay arising out of her return in April 2016 to the substantive CSA role from the Crew Leader role. At that meeting, Mr Allen indicated that he was prepared to authorise a payment up to October 2016 which was after the date when Miss Chevalier started in the temporary medical placement role, but not beyond that. He mentioned a figure just short of £4000, from which tax and national insurance were to be deducted.

77 We accept Mr Allen's evidence that at that meeting, a figure was put to her, and that was the purpose of the meeting. Further, we find that the claimant did not make her position clear at that meeting, in relation to any doubts she had about being made redundant at that stage. As noted above, that is inconsistent with what she told Mr Hussain and Ms Pitt.

78 On 25 March 2017 the claimant's employment came to an end as a result of her application for voluntary redundancy. Before that, Ms Pitt had approached Mr Allen about the claimant being involved in a project which she would not

be able to finish before her employment ended. Mr. Allen agreed that she would be allowed to continue working until 25 March and that her two weeks annual leave would be paid in lieu instead.

79 On 13 April 2017 the claimant received a text message from a former colleague Fahim Ishtiaq, alerting her to the fact that the community engagement manager roles had been advertised. She went to Kings Cross and spoke to Zuber Hussain. She alleges that during her conversation with Mr Hussain, he told her that she could not apply for the community engagement manager role. We reject her evidence in that regard. Mr Hussain did not have any responsibility for the recruitment exercise for those positions. Him telling her that she could not apply makes no sense in those circumstances. That responsibility for the recruitment exercise lay with Ms Pitt. Miss Chevalier did not contact Ms Pitt about the roles. Had Mr Hussain told her she could not apply, that would have been the logical thing to do.

80 Ms Pitt told us, and we accept, that the Department of Transport had notified her a few days before the advert went out, that the application for funding had been agreed. As part of the application to the department, job descriptions had been drafted. Therefore, once notification was received that funding had been approved, she was able to act quickly. We therefore find that by the time the Department for Transport had informed Ms Pitt that the funding had been approved, the claimant had left VTEC's employment.

81 Miss Chevalier emailed Mr Allen on 15 June 2017 about the payment which she says she was due to be paid arising out her grievance about her being returned to a CSA role, as well as the two weeks leave she had been promised. Mr Allen sent an email to Miss Chevalier on 22 June 2017 about the money owed, which was just short of £4,000, not the £6,000 she says had been agreed. There wasn't a satisfactory explanation as to why those sums had not been paid before. Nor was there any satisfactory explanation why no record was made of 21 March 2017 meeting; nor why no document was sent to the claimant confirming what the company was intending to pay to her. The claimant had a right to feel aggrieved about all of that too.

82 Acas early conciliation took place between 23 June 2017 and 6 August 2017. The claimant's ET1 was presented on 3 September 2017.

The Law

Time limits

83 The relevant time-limit in a discrimination case is set out at section 123(1) Equality Act 2010. The tribunal is usually only able to hear a claim if it is presented within three months of the act complained about. By subsection (3), conduct extending over a period is to be treated as done at the end of the period. If the claim is presented outside the primary limitation period of three months, the tribunal may still consider the claim if it was brought within such other period as the employment tribunal thinks 'just and equitable'. For reasons which follow, the 'reasonably practicable' test which is applicable to wages, redundancy payment and breach of contract claims is not material in this case.

Unfair dismissal

84 The law relating to unfair dismissal is set out in S.98 of the Employment Rights Act 1996 (ERA). In order to show that a dismissal was fair, an employer needs to prove that the dismissal was for a potentially fair reason (S.98(1) and (2) ERA). A tribunal must then consider the question of fairness, by reference to the matters set out in section 98(4) ERA. The employee must have been 'dismissed' – s95 ERA.

85 The respondent accepts that a voluntary redundancy scheme can amount to a dismissal. Neither party referred us to any case law. For the sake of completeness, we note that in Birch and Humber v University of Liverpool [1985] IRLR 165**,** [1985] ICR 470, the claimants were members of the University's technical staff who applied for retirement under the University's Retirement Compensation Scheme. They had volunteered to be retired after the University had announced to all its staff that there had been a reduction in funds and that there would, accordingly, have to be a reduction in the number of staff employed. The tribunal held that in these circumstances there was a dismissal. They relied upon the case of Burton Allton and Johnson Ltd v Peck [1975] IRLR 87**,** [1975] ICR 193, a case which establishes that where an employer states that some workers will have to be made redundant, and volunteers come forward to accept redundancy, this is still treated as a termination by the employer and not a mutual agreement to terminate the contract. In *Birch,* the EAT upheld the University's appeal (*[1984] IRLR 54***)** and distinguished the *Burton* case as follows:

> *" … the fact than an employee has no objection to being dismissed, or even volunteers to be dismissed, does not prevent his dismissal, when it occurs, from being a dismissal within the meaning of the Act. We do not read the judgment as encroaching in any way upon the distinction which exists in law between a contract which is terminated unilaterally (albeit without objection, and perhaps even with encouragement from the other party) and a contract which is terminated by mutual agreement. The phrase "consensual dismissal" which the [employment] tribunal used seems to us, with respect, to blur this critical distinction. In every case it will be necessary to determine what it is that has had the effect, as a matter of law, of terminating the particular contract, and on the undisputed facts of the present case it seems to us clear for the reasons already given that the termination was effected by mutual agreement and not by dismissal'.'*

86 The Court of Appeal upheld the decision of the EAT, and the comments quoted above from the decision of Nolan J, giving judgment for the EAT, were 'wholeheartedly endorsed' by Ackner LJ. Slade LJ added that in deciding whether or not the contract had been terminated by the employer 'the authorities … require one to look at the realities of the facts rather than the form of the relevant transactions'. Ultimately, therefore, as Ackner LJ recognised, the issue is essentially one of fact and degree. As he put it:

> *"was there any pressure placed upon the employee to resign and if so was the degree of pressure such as to amount in reality to a dismissal?"*

Disability

87 A person has a disability if she has a mental or physical impairment which is long term (i.e. has lasted 12 months or more or is likely to do so); and has a substantial adverse effect on her ability to carry out normal day to day activities (S.6 and Schedule 1 Equality Act 2010). The term 'normal day to day activities' includes the ability to participate in professional working life.

88 In determining whether an impairment has a substantial adverse effect, a tribunal should determine the effect the disability would have if it was not for the effects of any ongoing medical treatment – the 'deduced effects'. In the case of Woodrup v London Borough of Southwark *[2002] EWCA Civ 1716*, *[2003] IRLR 111*, Miss Woodrup claimed that if her medical treatment for anxiety neurosis were to stop, her condition would deteriorate and she would be a 'disabled person' for the purposes of the Disability Discrimination Act. The Court of Appeal, upholding the decision of the employment tribunal, was of the view that she had not done enough to prove that stopping her treatment would have the relevant adverse effect. The court made a point of emphasising the 'peculiarly benign doctrine under para 6' and Simon Brown LJ commented at paragraph 13:
'In any deduced effects case of this sort the claimant should be required to prove his or her alleged disability with some particularity. Those seeking to invoke this peculiarly benign doctrine under para 6 of the schedule should not readily expect to be indulged by the tribunal of fact. Ordinarily, at least in the present class of case, one would expect clear medical evidence to be necessary'.'

Direct discrimination

89 Under s13(1) of the Equality Act 2010 (EQuA), direct discrimination takes place where a person treats the claimant less favourably because of disability than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

90 Discrimination includes, in the employment context, subjecting a worker to a detriment, or dismissing her (S.39 EQuA 2010).

91 In a direct discrimination case, where a tribunal is concerned with the state of mind of an alleged discriminator which caused him or her to act in the way alleged, the alleged discriminator must have actual knowledge rather than constructive knowledge of the disability; or at least the actual facts from which it can be concluded that the employee was potentially disabled.

92 In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of the protected characteristic; here, disability. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as she was.

93 Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.

94 Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can consider the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

95 The Court of Appeal in Madarassy, a case brought under the then Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. LJ Mummery stated at paragraph 56:

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.'

96 Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in Hewage v Grampian Health Board [2012] IRLR 870 at para 32:

They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Discrimination arising from disability

97 Section 15 Equality Act 2010 reads:

(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.

98 In a disability discrimination claim under section 15, an employment tribunal must make findings in relation to the following:

98.1 The contravention of section 39 of the Equality Act relied on – in this case section 39(2)(d).

98.2 The contravention relied on by the employee must amount to unfavourable treatment.

98.3 It must be "something arising in consequence of disability"; for example, disability related sickness absence.

98.4 The unfavourable treatment must be because of something arising in consequence of disability.

98.5 If unfavourable treatment is shown to arise for that reason, the tribunal must consider the issue of justification, that is whether the employer can show the treatment was "a proportionate means of achieving a legitimate aim".

98.6 In addition, the employee must show that the employer knew, or could reasonably have been expected to know, that the employee or applicant had the disability relied on.

99 See the decisions of the EAT in T-Systems Ltd v Lewis UKEAT0042/15 and Pnaiser v NHS England [2016] IRLR 170 (EAT). As for objective justification, an employer must demonstrate that any unfavourable treatment that is found to be linked to the disability, must be objectively justified. In other words, that it is it is a proportionate means of achieving a legitimate aim.

Reasonable adjustments

100 Section 39(5) of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer.

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

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

103 In *Environment Agency v Rowan 2008 ICR 218* and *General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4 EAT* gave general guidance on the approach to be taken in the reasonable adjustment claims.

104 A tribunal must first identify:

(1) the PCP applied by or on behalf of the employer;

(2) the identity of non-disabled comparators; and

(3) the nature and extent of the substantial disadvantage suffered by the claimant in comparison with those comparators.

105 Once these matters have been identified then the Tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified. The issue however is whether the employer had made reasonable adjustments as a matter of fact, not whether it failed to consider them - Tarbuck v Sainsbury Supermarkets Ltd [2006 IRLR 664, EAT.

106 The test of reasonableness imports an objective standard. The Tribunal must examine the issue not just from the perspective of the Claimant but also

consider wider implications including the operational objectives of the employer.

107 The Statutory Code of Practice on Employment 2011 published by the Equalities and Human Rights Commission contains guidance in Chapter 6 on the duty to make reasonable adjustments. Paragraph 6.28 sets out some of the factors which might be considered in determining whether it is reasonable for an employer to have to take a particular step in order to comply with the duty to make reasonable adjustments. These include whether taking the step would be effective in preventing the substantial disadvantage, the practicability of the step, the cost to the employer and the extent of the employer's financial and other resources.

108 As for knowledge, for the S.20 EQuA duty to apply, an employer must have actual or constructive knowledge both of the disability and of the disadvantage which is said to arise from it (EQuA para 20, Schedule 8). In the case of Secretary of State for the Department of Work and Pensions v Alam [2010] IRLR 283**,** [2010] ICR 665, the EAT held that an employer is under no duty under section 4A (as it then was) of the Disability Discrimination Act 1995 (now S.20 EquA) unless the employer knows (actually or constructively) both (1) that the employee is disabled and (2) that he or she is disadvantaged by the disability in the way set out in section 4A(1) (now S.20(3)). As Lady Smith points out in Alam, element (2) will not come into play if the employer does not know element (1).

Victimisation

109 In order to succeed in a victimisation claim, a claimant must demonstrate that she did a protected act. This includes making a complaint of discrimination covered by the Equality Act. The claimant must then show that she was subjected to a detriment as a result (S.27 EQuA).

Redundancy payment

110 A redundancy payment is payable under the ERA 1996, where an employee is dismissed by reason of redundancy (SS.135 and 136). The amount payable depends on age and service at the date of dismissal and is subject to a statutory limit on a week's pay (SS.162 – 164 ERA) .

Breach of contract

111 A worker is entitled to be paid the amounts agreed in her contract with her employer. This may include allowances, and contractual redundancy pay which exceeds that payable under the ERA 1996.

Unauthorised deduction of wages

112 A worker is entitled to be paid the amounts payable to her, whether under the terms of her contract with her employer, 'or otherwise' (such as under statute, for example, statutory sick pay or holiday pay – see S.23 Employment Rights Act 1996)). The latter words – 'or otherwise' - are not relevant in Miss Chevalier's case. Again, a worker's wages may include allowances, such as London-weighting and shift allowances (S.27 ERA).

Conclusions

113 We now apply the law to the facts to determine the issues. If we do not repeat every single fact, it is in the interests of keeping these reasons to a manageable length.

Unfair dismissal (Issues 2 to 8)

114 The first issue to be decided in relation to this claim is whether there was a dismissal, either express or constructive? We have little hesitation in finding that there was a dismissal in this case. The claimant, by applying for voluntary redundancy (VR), agreed to be dismissed, by reason of redundancy.

115 In those circumstances, there is potentially a fair reason for the dismissal – namely, redundancy. The question of fairness then falls to be determined under S.98(4).

116 As for that question, we have found that the claimant was not placed under any pressure to accept the role by Paul Allen, as she alleged. We have found that she voluntarily made an application for VR which was accepted. If the claimant did not understand the terms of the scheme, it was incumbent on her to make further enquiries of her employer before she made her application. We have concluded that even if the claimant was ambivalent about being dismissed by reason of redundancy, she did not make that position clear to the respondent at any stage. In those circumstances, we do not consider that there was any unfairness to the claimant in the process followed.

117 We are not convinced that there was any duty on the respondent to offer to the claimant suitable alternative employment, in the absence of any application by her for that; or any indication from her that she did not want to be dismissed if there were other jobs for her to do. In any event, the job that she did want to be considered for was the community engagement manager role. That job did not become available until after her employment had ended. In those circumstances, the respondent cannot have been under any obligation to offer that post to her.

118 We therefore find that the dismissal was fair, by reason of redundancy (Issues 1 to 5). So it is not necessary to consider issues 6 to 8.

Disability (Issue 9)

119 The first issue to be determined in relation to a disability discrimination claim is whether the claimant has a disability. The claimant relies on three potential disabilities, as follows:

119.1 Her heart condition (single vessel coronary disease) (Disability 1).

119.2 Depression and anxiety (Disability 2).

119.3 Learning difficulties (dyslexia, dyspraxia and memory problems) (Disability 3).

120 In relation to disability one, the heart condition, this was clearly a serious condition for the claimant. At one stage, her life literally appears to have been hanging by a thread. However, on the basis of the facts as found above, Miss Chevalier appears to have recovered relatively quickly. Whilst we accept that there was some continuing effect, we were not convinced, on the basis of the evidence put forward, that the continuing effects were substantial. We particularly note that in June 2014, less than 12 months after the heart attack, she was able to return to the fairly demanding role of Customer Service Assistant for the respondent.

121 We note the claimant's assertion that were she not continuing to take the four different types of medication she takes for her heart condition, she would be much more physically limited as to what she could do. That may well be the case. However, as the Court of Appeal made clear in the Woodrup case, in order for us to make a finding in relation to that, we would have required some evidence, most probably in the form of expert medical evidence; or at the very least, clear oral evidence to that effect. That evidence was not put before us in this case. We were not able to determine the deduced effects.

122 Therefore, whilst we find this was clearly an extremely serious condition when it first occurred, the effects were not long term, and it therefore does not amount to a disability for the purposes of the Equality Act.

123 In relation to disability two, depression and anxiety, we find that there was no diagnosis of depression. We note that this was the label put on the disability in the list of issues, although we do not think that anything turns on this in terms of our analysis. We are concerned to deal with issues of substance in this judgment, not form. We find that the claimant did have a mental impairment, namely stress and anxiety. Again, initially, this was a serious condition. The claimant suffered a form of mental breakdown and came close to committing suicide.

124 However, the facts we have found show that the condition occurred as a reaction to life events. The claimant's evidence in the further particulars provided about her disabilities refers to substantial impacts. But no clarity is provided as to how long those effects lasted. The objective evidence, such as the OH records, suggest that those substantial adverse effects were not long term. We note also Ms Pitt's evidence that the claimant carried out the tasks given to her in the temporary medical placement extremely effectively. Indeed, the claimant exceeded Ms Pitt's expectations. We therefore conclude that following her phased return to work, and with the help of the continuing therapy sessions, the claimant's mental health improved quickly. The substantial adverse effects of the impairment did not last for 12 months or more. We conclude therefore that Miss Chevalier did not have a disability in relation to this condition.

125 In relation to disability three, we conclude that the claimant does have learning difficulties, caused by dyslexia and memory problems. She suffers from specific weaknesses within her short-term auditory signal sequential memory and visual processing skills. In examinations or similar assessments,

she was to be allowed 25% extra time. We refer to but do not repeat our other findings of fact in relation to this disability. Those effects are long-term and are substantial in that they are more than minor or trivial. There was no specific evidence in relation to dyspraxia, although in our view nothing turns on that condition in relation to this case. We shall return below, to the issues of knowledge, and substantial disadvantage, in relation to this disability.

Direct disability discrimination (Issues 10 to 12)

126 Each of the allegations set out in the list of uses will be considered in turn.

Training issue (Issue 10.1)

127 As this is said to be linked to Disability 1, this claim falls in any event. However, for the sake of completeness, given that direct discrimination can occur in relation to a perceived disability, we have also made the following conclusions.

128 We conclude that since Paul Allen was not the claimant's line manager at this point, he was not responsible for arranging any further training. Further, given our finding of fact that the claimant did not make further requests for the training, and her concession in cross-examination that she did not have any evidence that any failure to provide further training was in any way linked to her heart condition, then even if we had found in her favour on the disability issue, this claim would not have succeeded. There was simply no basis on which we could reasonably have concluded that there was any link between Disability 1 and the alleged lack of training.

Pull along trolley (Issue 10.2)

129 Again, since this issue is said to relate to Disability 1, it cannot succeed (subject to any perceived disability issue) and we will deal with the other issues briefly. We found that a request for a trolley bag was made of Mr Allen. However, we conclude that any failure to provide one did not have anything to do with the claimant's heart condition. On the contrary, the fact that she had a heart condition would have made it more likely in our view that Mr Allen would have made one available.

Bullying and harassment (Issue 10.3)

130 This claim again fails because of our finding on the disability issue. Even if we were wrong on that however, our finding that Ms Bains was not aware of the claimant's heart condition until in or about February 2016, means that there could not have been any link between the heart condition and the alleged bullying and harassment in July 2015. Further, we have found that the words alleged to have been used by Ms Bains were not used – therefore there wasn't any bullying and harassment – and therefore no detriment.

131 Yet further, Ms Bains passed on the request to another crew manager, Ray Barrow, because of her own inexperience in dealing with transfer requests at that stage. It was not because of her heart condition. We do not consider that passing the issue to Mr Barrow could be said to amount to less favourable treatment, or to a detriment. Her application was dealt with by Mr Barrow, although it took him about two months to sort it out for her. But this allegation was not made against Mr Barrow.

132 As for the second element of this issue, we have found that by February 2016, Ms Bains was aware of the claimant's heart condition. Again, because we have found that it was not a disability, this element of this issue would be unlikely to succeed. But even if we were wrong on the disability issue, we do not consider that the circumstances in which Ms Bains asked Ms Lewis to report back to her as to whether the claimant turned up for her shift, amounted to a detriment. On the contrary, it was simply a reasonable management action by Ms Bains, given her responsibility for ensuring that trains left King's Cross fully-crewed. Further, it was not because of her heart condition, perceived or otherwise.

Zuber Hussain not giving claimant Community Engagement Manager's role (Issue 10.4)

133 This is how the matter was put in the list of issues, which were fine-tuned at the outset of the hearing. There was no application by the claimant to change the way this particular allegation was put.

134 This claim must fail because of our finding in relation to Disability 2 (subject to any arguments about perceived disability, which we were not addressed on). However, even if we had found that the claimant had a disability in relation to Disability 2, this part of the claim would not have succeeded. This is because of our finding that Mr Hussain had no responsibility for deciding who was to be interviewed for the role, or any involvement whatsoever in the recruitment for these roles. Mr Hussain did not have any power to "give" the claimant one of those roles.

135 The claimant's case shifted in the hearing, in that she alleged that Mr Hussain told her she could not "apply" for the position. That was not the way the case had been put in the list of issues before the employment tribunal, as agreed at the outset of the hearing. But in any event, we do not accept that Mr Hussain said words to that effect to the claimant.

136 In reaching our conclusions on the direct discrimination claims, we have considered the application of the burden of proof under the Equality Act 2010. However, this was a case where we were able to make clear findings of fact, as to whether the treatment occurred, and if not what the explanation for it was. The respondents' explanation was so connected with the incident itself that we considered it at stage one when deciding whether the burden of proof shifts. We considered each alleged incident of discrimination separately and we have also considered them collectively.

Discrimination arising from disability (Issues 13 to 16)

137 We refer to the list of issues in Annex A. There are three allegations by the claimant in relation to this heading of her claim. We will deal with each in turn.

Community engagement manager role, April 2017 (Issue 13.1)

138 We refer to our finding above in relation to issue 10.4. Mr Hussain did not have any authority to "give" the claimant one of the community engagement manager's rules in April 2017. This claim therefore necessarily fails. There wasn't any detrimental treatment as alleged and no unfavourable treatment either. This claim would have failed in any event due to our finding on

Disability 2. We consider the 'something arising' issue below, at the conclusion of this section.

Not agreeing to request for regular hours in March 2016 (Issue 13.2)

139 Again, because of our finding in relation to Disability 1, this claim cannot succeed. For the sake of completeness, even if we had found for the claimant in relation to Disability 1, there wasn't any request to work regular hours in March 2016. To that extent, the claim is not made out.

140 We note from the respondent's counsel's written submissions that it is suggested that the claimant is referring to the request to change shifts in July 2015. Assuming that is indeed the date referred to, we have concluded, in relation to that request, that it was properly passed on by Ms Bains to Mr Barrow to deal with. Further, although he took about two months to deal with it, he did eventually do so. That request was therefore not refused, as alleged. On the contrary, it was agreed to.

141 Any delay in dealing with it was due to Ms Bains' inexperience in the role and her passing it onto Mr Barrow to deal with. Mr Barrow's email of 24 September 2015 to the claimant apologised for the lateness in dealing with her request. Most likely, it was his own workload that led to the short delay. In any event, there was no evidence to suggest that the delay had anything to do with the claimant's sickness absence. Yet further, the way this matter is put in the list of issues does not complain of any delay in dealing with it.

142 We also refer to our finding below in relation to the alleged connection between the claimant's absences/lateness in this period and Disability 1 and 2.

143 March 2016, refusal to allow interview for Crew Leader role (Issue 13.3 – Disability 1)

144 This claim also fails due to our conclusion on the disability issue.

145 In any event, we note how the claimant's case was put in the list of issues, as summarised above. There do not appear to have been any interviews for the role of Crew Leader in or about March 2016. We have found as a fact that Mr Allen did place Ms Pirjol into a Crew Leader role on a temporary basis in February 2016. He did so because he considered it expedient, from a management point of view, to do so. This was because the position was only available for a short period of time. Opening it up to full competition could have meant having to move several individuals around in relation to their shifts. We note the claimant took exception to Ms Pirjol's appointment, and alleged that there was favouritism or nepotism involved, because Ms Pirjol is the partner of Mr Barrow. That however is not the way the claim was put before us and we make no finding about that un-pleaded allegation.

146 In any event, we find that there was no connection between the placing of Ms Pirjol in that role and the claimant's absences.

147 Due to these clear findings, it is not strictly necessary to consider the extent to which the absences and the instances of lateness which the claimant was being questioned about between December 2014 and January 2016 were related to ('something arising' from) her heart condition. We simply conclude that in any event, based on our findings of fact above, that these absences

were not linked to Disability 1 or 2. They were for example by reason of chest infection, a bruised arm, concussion, and migraines. Whilst the claimant contended that some of these, such as chest infections and migraines were linked to her heart condition, there was no medical evidence supporting that assertion, in relation to these absences. These section 15 claims cannot succeed for this reason too.

148 It is not proportionate or necessary in these circumstances to consider the objective justification issue.

Reasonable adjustments (Issues 17 to 22)

The pull along trolley (Issue 17)

149 We find that there was a failure to provide an auxiliary aid. The auxiliary aid required was a pull along trolley bag whilst she was Crew Leader, from September 2014 to February 2015. This claim necessarily fails however because of our finding in relation to Disability 1.

150 The substantial disadvantage alleged is that the claimant's heart condition, Disability 1, affected her ability to walk about and to breathe normally. She alleges that the shoulder bag she was issued with cut into her shoulder, was difficult to carry and caused her problems with her breathing and walking. We have found that the claimant did not complain to her managers about being short of breath and having difficulty walking with the bag. The respondent did not therefore have knowledge, either actual or constructive, about any substantial disadvantage which she alleges she was subjected to. This claim therefore cannot succeed for that reason too.

151 It is not proportionate to consider whether there was any substantial disadvantage and whether it would have been a reasonable step to provide the pull along trolley at an earlier stage, given our findings above.

Irregular shift patterns between July and December 2015 (Issue 18)

152 This claim necessarily fails because of our finding in relation to Disability 1.

153 We refer in any event to our finding that the request for a different shift pattern was made in July 2015 and had been agreed by the end of September 2015. We also note that it was the claimant's case that Jodie Slater then became her line manager and she had no issues with her. We presume therefore that the failure to make a reasonable adjustment is actually between July and September 2015. See our conclusions above in relation to issue 10.3. As set out in those conclusions, the request was approved, although it did take about two months to sort this out. For this period, the PCP of being required to work irregular shift patterns was applied.

154 Further, we refer to our finding above in relation to the OH report of 1 February 2016 on the sleeping problem issue. The substantial disadvantage relied on by the claimant is that her heart condition led to her having a disturbed sleeping pattern. Yet there was no objective evidence that the claimant's heart condition led to a disturbed sleeping pattern. The claimant is not therefore able to establish that the PCP caused her to suffer a substantial disadvantage.

155 Yet further, her managers were not aware of any possibility that Miss Chevalier was at any substantial disadvantage, due to her heart condition interrupting her sleeping patterns. Similarly, there was no evidence that she had raised with any of her managers the issue of needing to take her medication on a regular basis and eating regular meals. The respondent did not therefore have any knowledge of substantial disadvantage, even if any had been made out on the evidence.

156 In the light of these clear findings it is not proportionate to consider whether the adjustment would have been reasonable.

Dealing with grievances in an untimely fashion (Issue 19)

157 This claim necessarily fails because of our finding on Disability 2.

158 In any event, in the light of our finding that the claimant's grievance at this stage was not a formal one and that she did not ask Mr Allen (or any other manager) what was happening with it, the respondent did not have actual or constructive knowledge that any substantial disadvantage was being suffered by her, even if her anxiety was being heightened due to her grievance not being dealt with. Her employer did not know she wanted anything further to be done at all, let alone that the failure to deal with her grievance was causing her mental health to suffer.

159 In the light of these clear findings it is not proportionate to consider the other sub-issues in relation to this claim.

Printing rosters on blue paper (Issue 20)

160 In relation to the PCP of printing rosters on white paper, the substantial disadvantage alleged is that the claimant struggled to read the rosters when they were printed on white paper. This occurred between September 2014 and April 2016. The step or adjustment required was to print rosters on blue paper (Disability 3).

161 We have found that the claimant's dyslexia did amount to a disability, and that she did make a request for this adjustment. We also conclude that this would have been a reasonable step to take, being relatively cheap and simple to provide.

162 However, we conclude that the claimant was not at a substantial disadvantage in relation to the roster issue. The Educational Psychologist's report simply noted that the provision of a blue coloured overlay "might prove useful". She had coped between 2003 and 2011 and continued to cope after that point. She did not raise it with other managers such as Ms Bains or Ms Foster, the latter who she says she had a good working relationship with.

163 Even if this claim had succeeded, we would have had to consider the time limit issue in relation to it, a point we come back to below.

Lack of training for Community Engagement role in August 2016 (Issue 21)

164 This is linked to Disabilities 2 and 3, the latter which we have concluded is a disability.

165 The respondent placed some emphasis on this being a temporary medical placement rather than a formal role. We do not consider that the distinction relied on matters in this context. The claimant was entitled to be provided with

the training necessary to enable her to carry out the duties given, whether those related to a formal role or temporary placement.

166 The alleged PCP is that the respondent required its employees to commence new roles without adequate training. It is the claimant's case that she took on the placement in August 2016, without full training for that role, and that state of affairs persisted until her employment ceased in March 2017. We have found that Ms Pitt explained to the claimant what the placement involved and gave her projects to work on. She told us that the claimant did not ask for specific training in relation to Outlook. The claimant did not ask for further training for the role itself. The claimant was more than capable of carrying out those duties and did so competently. On both Ms Pitt's and the claimant's account, she made a great job of it. The PCP is not therefore made out.

167 As for the project management training, which was discussed but was not arranged, that training was not necessary for the claimant to carry out her role. It would clearly have been useful training for her development. But the respondent was not under an obligation to offer that developmental training, as a reasonable adjustment, to reduce any substantial disadvantage arising from her disability.

168 Even if the PCP was made out, which we conclude it was not, the facts we have found as summarised above show that the claimant was not under any substantial disadvantage, as a result of any lack of training. The competent way she carried out her duties shows otherwise. She was not therefore under any substantial disadvantage.

169 Knowledge of substantial disadvantage does not therefore arise. We further conclude that in any event, she was provided with the necessary training and support, to allow her to carry out her duties.

Failure to provide laptop computer - September to December 2016 (Issue 22)

170 This is linked to Disability 3 which we have concluded is a disability. A laptop was not provided for about three months.

171 However, we conclude that the respondent did not have knowledge, actual or constructive, that the claimant was at a substantial disadvantage in relation to this matter. We accept Ms Pitt's evidence that the claimant never mentioned any learning difficulties. None of the OH reports she saw mentioned that disability. In the light of the excellent way that the claimant was carrying out her duties, Ms Pitt had no reason to suspect that the claimant suffered any learning difficulties. None of the occupational health reports she was rightly provided with referred to learning difficulties. They referred to her anxiety condition, which was why the temporary medical placement was arranged.

172 The respondent's failure to carry out a DSE test is noted but given that such reports deal mainly with ergonomic issues, we do not consider that it would have led to the respondent becoming aware that the claimant was subject to a substantial disadvantage.

173 Further, the substantial disadvantage alleged by the claimant is that she had to print documents off in another centre and carry around bags in order to do so. We do not consider that amounted to a substantial disadvantage for her, as somebody with dyslexia, compared to somebody who did not have that

condition. People without dyslexia would have been equally inconvenienced in those circumstances. And it did not prevent her doing a good job.

174 Had it been necessary to do so, we would have concluded that the provision of a laptop was a reasonable step – it was relatively low cost for a respondent of this size and easy to arrange. But it fails on the other grounds in any event.

Victimisation (Issues 23 to 24)

175 We conclude that the contents of the email to Paul Allen of 17 October 2016 did amount to a protected act. The question is whether any detriment was caused to the claimant because of it. There are six allegations under this heading, which are dealt with in turn below.

Losing position as Crew Leader 2016; being provided with only two days training for Crew Leader role; failure to provide pull along trolley; lack of training for Project Assistant duties (Issues 24.1, 24.4, 24.5 and 24.6)

176 These alleged acts of unfavourable treatment/detriments could not possibly have resulted from the protected act because they predate it. (In relation to 24.4, this refers to 2 days of training for the crew leader role in October 2016, but in fact that must refer to the training which the claimant argues she was not provided with in 2014, well before the protected act occurred.)

Catsuit comment (Issue 24.2)

177 As for the cat-woman (or catsuit) comment, clearly that was made. However, we consider that in the particular context in which it was made (one text about a meeting), and the timing of it, the comment was meant as a light-hearted remark. We do not consider therefore that it amounted to a detriment.

178 In any event, we conclude that there was simply no causal connection between the comment and the protected act. It occurred in the context of the claimant's decision to wear a cat-woman suit during a fund-raising activity.

Refusal to cancel redundancy (Issue 24.3)

179 As for the alleged failure to cancel redundancy, we have found that no such request was made between November 2016 and March 2017. This allegation cannot therefore succeed.

Redundancy payment/breach of contract claim (Issues 25 and 26)

180 As for the redundancy payment/breach of contract claim, it became clear at the conclusion of the claimant's evidence that this claim arose out of an argument that if she had been paid redundancy on the basis of the Crew Leader position, the redundancy payment would have been higher. Miss Chevalier has received the statutory redundancy payment she was entitled to at the time that she was dismissed, on the basis of the salary she was then in receipt of.

181 Further, there was no evidence to suggest that the claimant had a right to a higher redundancy payment under the terms of her contract. These claims do not therefore succeed and are dismissed. What has been set out as a redundancy payment or breach of contract claim, were in fact matters that would only have been relevant in relation to remedy, if the claimant's claims in

relation to her removal from the Crew Leader role in April 2016 had succeeded.

Breach of contract/unauthorised deductions claims (Issues 27/28)

182 As for the breach of contract/unauthorised deduction of wages claims, these had been reduced at the beginning of the hearing because it was apparent that the claimant did not have a contractual or other entitlement to be paid the wages that she was claiming. Rather, as with issues 25 and 26, those amounts may have been payable as part of any remedy, in relation to some of the discrimination claims, if they had been successful.

183 At the conclusion of the claimant's evidence, it became clear that the remaining matters which were set out as breach of contract/wages claims - see Annex, paragraphs 27.1 to 27.3 below - were also matters of remedy, rather than separate claims for which liability could be established. The claimant was paid all of the wages and other allowances that she was due to be paid, under the terms of the contract, for the various roles that she carried out. She did not have a contractual entitlement to be paid any more. These claims therefore do not succeed and are dismissed.

Time-limits

184 Acas early conciliation was commenced on 23 June 2017 and lasted until 6 August 2017. The ET1 was presented on 3 September 2017, less than a month later. All of the alleged unlawful acts taking place prior to 24 March 2017 were potentially out of time. This means everything except the unfair dismissal claim.

185 Since we have not found that any disability discrimination occurred at all, we could not possibly conclude that any act of discrimination extended over a period such as to bring any earlier incidents in time. In view of our decision not to uphold the claims for disability discrimination the issue of whether to exercise our discretion to allow such claims out of time is academic and apart from one claim, it is not proportionate to consider the issue further.

186 The only claim which the claimant came close to succeeding in is her request for her rosters to be printed on blue paper rather than white paper. The last request was made in December 2014, over two years prior to ACAS early conciliation being commenced. Even if, for the sake of argument, we treated time as running from the end of December 2014, we would not have considered it just and equitable to extend the primary time limit of three months and accept jurisdiction in relation to that claim.

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Employment Judge A James
London Central Region

Dated 19 December 2019

Case Number: 2207048/2017

Sent to the parties on:

20 December 2019

For the Tribunals Office

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant (s) and respondent(s) in a case.

ANNEX A – LIST OF ISSUES

Time limits

1 Has the claimant submitted any of her claims outside of the period of three months (with the exception of the claim for unfair dismissal which the respondent accepts has been brought in time)? If not, is it just and equitable to extend the time limit; and or was it reasonably practicable to present her claims in time?

Unfair dismissal

2 Was there a dismissal, either express or constructive?

3 If so, was the reason for the dismissal a potentially fair reason?

4 Was a fair process followed by the respondent?

5 Was the decision to dismiss within the range of reasonable responses available to an employer?

6 Did the claimant's conduct contribute to the dismissal?

7 If the respondent had adopted a fair procedure would the claimant have been fairly dismissed in any event, if so when?

8 If the claimant was not expressly dismissed, she alleges she was constructively dismissed and relies on her demotion and the bullying and harassment she was subjected to as breaches of contract.

Disability

9 Was the claimant disabled for the purposes of the Equality Act 2010 on the basis of:

9.1 Her heart condition (single vessel coronary disease) (Disability 1);

9.2 Depression and anxiety (Disability 2);

9.3 Learning difficulties (dyslexia, dyspraxia and memory problems) (Disability 3)?

Direct discrimination on grounds of disability

10 Has the respondent subjected the claimant to the following treatment, namely:

10.1 Paul Allen not giving her the full period of training in December 2014 (Disability 1)?

10.2 Paul Allen not giving her a pull along trolley from October 2014 to February 2015 (Disability 1)?

10.3 Subjecting the claimant to bullying and harassment on 12 July 2015 by Bal Bains telling her she could not transfer and in February 2016 by Bal Bains asking a crew member to monitor her (Disability 1)?

10.4 Zuber Hussain not giving her the community engagement manager's role in April 2017, post dismissal (Disability 2)?

11 If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude the difference in treatment was because of her disability?

12 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Discrimination arising from disability

13 Was the claimant subjected to a detriment and to unfavourable treatment? The claimant relies on the following acts as being both acts of detriment and unfavourable treatment:

13.1 Zuber Hussain not giving her the community engagement manager's role in April 2017, post dismissal (Disability 2).

13.2 In March 2016 not agreeing to the claimant's request for regular hours (Disability 1)?

13.3 In March 2016, the refusal to allow her to interview for the job of Crew Leader, due to the amount of time she had taken off? (Disability 1 and 2)

14 Did the respondent treat the claimant as aforesaid because of "something arising" in consequence of the disability? Specifically, the claimant relies on her absence as the "something arising" from her disability.

15 Is the claimant's period of absence from work something which arises as a consequence of any of her disabilities 1 and 2?

16 If so, has the respondent proven that the treatment was a proportionate means of achieving a legitimate aim?

Reasonable adjustments

17 Was the claimant, as a disabled individual, placed at a substantial disadvantage due to a failure by the respondent to provide an auxiliary aid? The substantial disadvantage is that her heart condition, disability 1, affected her ability to walk about and to breathe normally. She alleges that the shoulder bag cut into her shoulder, was difficult to carry, and caused her problems with breathing and walking. The auxiliary aid required was a pull

along trolley bag whilst she was Crew Leader, from September 2014 to February 2015.

18 Was the claimant placed at a substantial disadvantage as a result of the PCP of the claimant having to work irregular shift patterns between July and December 2015? The substantial disadvantage relied on is that her heart condition led to her having a disturbed sleeping pattern. In addition, after her heart incident and surgery on her heart, she had to take medication at regular intervals and to eat meals at regular intervals and irregular shift patterns made it more difficult for her to do so. The adjustment required was to allow her to work a fixed roster (Disability 1).

19 In relation to the PCP relied on of dealing with grievances in an untimely fashion, the substantial disadvantage suffered by the claimant is that disability 2 caused her anxiety which was heightened due to her grievance not being dealt with in a timely fashion. The step required was to deal with her grievance more quickly in July 2015 (Disability 2).

20 In relation to the PCP of printing rosters on white paper, the substantial disadvantage alleged is that the claimant struggled to read the rosters when they were printed on white paper. This occurred between September 2014 and April 2016. The step or adjustment required was to print rosters on blue paper (Disability 3).

21 As for the PCP of requiring employees to commence new roles without adequate training, and the claimant taking on the role of Community Engagement in August 2016, without full training for that role, until that employment ceased in March 2017. The substantial disadvantage arose from the fact that she had just returned to work from a breakdown in her mental health and a suicide attempt. She was more susceptible to suffering stress in the new role. Further, her learning difficulties meant it took her longer to understand the new role. Was training required in order to prevent a further breakdown in her mental health and assist her with her learning difficulties? (Disabilities 2 and 3)

22 The substantial disadvantage arising from the failure to provide a laptop computer from September to December 2016 was that the claimant was less able to print documents off and had to go to another centre to print those documents and had to carry bags around in order to do so. The auxiliary aid required in order to reduce the substantial disadvantage was to provide a laptop computer for that period (Disability 3).

Victimisation

23 Has the claimant carried out a protected act? The claimant relies upon an email to Paul Allen of 17 October 2016 in which she raised allegations of sex discrimination in relation to pay arrangements for part-time workers.

24 If there was a protected act, has the respondent subjected the claimant to any of the unfavourable treatment set out below because the claimant had done a protected act?

24.1 Losing her position as a Crew Leader in April 2016;

24.2 Being asked by Paul Allen if she was going to wear a catsuit on 18 November 2016?

24.3 The respondent's refusal to cancel redundancy on 23 November 2016 and 21 March 2017;

24.4 Only being provided with two days of training for the Crew Leader role in or about October 2014;

24.5 Not being provided with a suitable bag to carry crew leader equipment between September 2014 and February 2015;

24.6 Not being provided with any training for the role of Project Assistant between September 2016 and March 2017.

Redundancy payment/breach of contract

25 Was the claimant entitled to a statutory redundancy payment/contractual redundancy payment?

26 If so, did the respondent fail to pay the claimant a statutory redundancy payment/contractual redundancy payment and if so, how much was due?

Unlawful deduction of wages/breach of contract

27 Was the claimant contractually entitled to receive the following sums, namely:

27.1 Overtime pay between November 2016 March 2017

27.2 Increases in London allowance and attendance allowances from November 2016 to March 2017

27.3 Salary for role as Crew Leader from April 2016 until March 2017?

28 If so, has the respondent failed to pay the above sums to the claimant and what sums are due for those periods?