EMPLOYMENT TRIBUNALS

FULL MERITS HEARING

Claimant		***Respondent***
Ms K Greenfield	**AND**	London Underground Limited

Heard at: London Central - **On**: 9-12 November 2020

Before: Employment Judge Nicolle
Members: Mrs C Brayson
Ms L Jones

Representation
For the Claimant: In person but accompanied by her friend Ms J Mitchell
For the Respondent: Mr S Liberadzki of Counsel

JUDGMENT

1. The claims of direct disability discrimination under s.6 of the Equality Act 2010 (the EQA), discrimination arising from disability under s.15 EQA, detriment under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 [SI 2000/1551] (the Part-time Workers Regulations) and of unfair dismissal fail and are dismissed.

REASONS

1. It had been my intention to give an extempore judgment on Friday 13 November 2020, but the Claimant said that she would rather receive written reasons. Mr Liberadzki did not object and I agreed that this would be a reasonable accommodation given the Claimant's wish to avoid any possibility of further distress.

The Hearing

2. There was an agreed bundle comprising 957 pages. The Claimant gave evidence and Michael Bowles, Occupational Health Advisor (Mr Bowles), Nassir Jameel, Train Operations Manager at Acton Town, (Mr Jameel) and Chris Taggant, Head of Line Operations for the District, Circle and Hammersmith Lines (Mr Taggart) gave evidence on behalf of the Respondent.

The Claim and Issues

3. Following a period of ACAS early conciliation between 23 December 2019 and 23 January 2020 the Claimant issued a claim on 20 February 2020. At a Case Management Hearing on 18 June 2020 a list of issues was agreed and set out in an annex to the Case Management Order of Employment Judge James dated 18 June 2020. The list of issues is appended to the Judgment.

Disability

4. Mr Liberadzki confirmed that the Respondent conceded that the Claimant's depression and irritable bowel syndrome (IBS) constituted disabilities. The Respondent did not, however, accept that her psoriasis was a disability.

Findings of Fact

5. The Claimant commenced employment with the Respondent as a full time Station Assistant at Earls Court on 21 January 2001. In 2004 the Claimant became a Train Operator.

6. On 25 March 2012, the Claimant transferred to Acton Town and at her request her working days were reduced from five to two days per week, Saturday and Sunday. In May 2014 this was increased to three days to include Fridays.

Contracts of Employment

7. The Respondent has four standard contracts of employment. These are as follows:

- Five day a week working (full time)
- Weekend only working
- Four day a week working
- Job share.

8. The Claimant's working days of Friday to Sunday are non-standard and because of a local agreement. Mr Jameel said that there was no business requirement for the Claimant to work on a Friday and often there would be surplus capacity with a train operator unutilised. This was in effect costing the Respondent approximately £12,000 a year. He says that he allowed the arrangement to continue as a favour to the Claimant.

The Claimant's absence record between 2001 and 2010

9. The Claimant had a substantial number of absences for a multitude of different conditions during this period. These absences varied from a single day to substantial periods to include the following absences with a duration of 50 or more days:

11 November 2003 – 22 February 2004	74 working days for depression
2 December 2005 – 11 March 2006	72 working days for a viral infection
16 July 2008 – 6 October 2008	58 working days for blepharitis
26 April 2009 – 26 September 2009	198 working days for stress
17 January 2010 – 2 May 2010	76 working days for depression

The Respondent's Attendance at Work Procedure dated 25 April 2004

10. Relevant provisions of the Attendance at Work Procedure (the Attendance Policy) are as follows:

> 2.3 Should an employee be expected to be off work through sickness for 28 calendar days or more, the employee will be given reasonable notice by their manager of any meeting to discuss their continued non-attendance.

Attendance Review

> 4.2 Standards of satisfactory attendance have not been met when:
>
> - In any 13 weeks, there are two or more items of non-attendance.
> - In any 26 weeks, there are two or more items of non-attendance totalling five or more shifts/working days.
>
> 5.1 This sets out types of non-attendance which will not normally count towards disciplinary action and it includes accidents at work.

Fitness for Work

> 5.2 This relates to a need for managed rehabilitation. It provides for the holding of case conferences which at step one would consider making reasonable adjustments, at step two actively pursue suitable alternative employment and at stage three may as a last resort consider termination of employment on medical grounds.
>
> 5.2.1 Provides that a case conference consists of the employee concerned, their representative, the manager and a representative from Human Resources. It provides for the production of an agreed action plan.

2010 Case Conference

11. On 22 October 2010, the Claimant attended a case conference with Mr C Rogerson, Train Operations Manager at Earls Court (Mr Rogerson). The

Claimant was advised that the issue was one of sustainability and how she could maintain an acceptable level of attendance. She was advised that if she did not improve her attendance, she would face medical termination.

The Claimant's absences from 2010 to 2014

12. The Claimant continued to have a substantial number of absences with the following exceeding 50 working days.

4 July 2011 – 30 January 2012	151 working days for appendicitis
7 February 2013 – 8 November 2013	78 working days for depression.

Drugs Trial

13. The Respondent's previous practice had been that any train operator prescribed anti-depressants would be prevented from driving for safety reasons. The Respondent introduced a new policy in 2013 pursuant to which train operators using anti-depressants could continue driving subject to successful completion of the trial.

14. The Respondent's medical advisory team approved the Claimant's participation in the anti-depressant programme on 3 January 2014.

15. A train operator must be established on the SSRI medication for a minimum of two months prior to being considered for the programme. If a train operator does not have any side effects from their medication in the first six weeks of the trial, then they can drive a train whilst taking these medications.

16. Mr Taggart said that the drugs trial entailed a balance between the Respondent's duties of care to employees and customers. It involved trying to manage and mitigate risks.

17. The Claimant undertook the drugs trial in 2014. A logbook was completed. The Claimant was successful and was therefore able to continue driving trains.

18. The Claimant says that she was not given the opportunity to use a train simulator and was not provided with ongoing support.

2015

Psoriasis

19. Between 12 February 2015 and 14 May 2015, the Claimant was absent for 39 working days because of psoriasis.

20. The Respondent does not accept that the Claimant's psoriasis constitutes a disability under s.6 of the EQA.

Disability Impact Statement

21. In her disability impact statement, the Claimant says that she took various medications for her psoriasis. She used to be on methotrexate but came off it as she was concerned that it depressed her immune system and made her more vulnerable to other conditions. The Claimant referred to it being difficult to find clothes that do not irritate her when her psoriasis has a flare up.

GP Notes

22. The bundle contained the Claimant's GP notes to include:

19 March 2015	Guttate psoriasis – ongoing for years – past methotrexate – 25mg stopped then psoriasis flared.

23. The Claimant says that in 2015 she suffered a particularly bad flare up and this included a very painful area on her ankle. She had to have a skin patch and was unable to wear her normal work shoes.

24. Whilst she has not consistently taken methotrexate, she continually applies topical creams. The psoriasis can become very itchy and uncomfortable. The Claimant says that it will typically flare up following stressful events.

25. In April 2015 Mr Jameel became Train Operations Manager at Acton Town.

26. On 8 May 2015 Mr Jameel held his first case conference with the Claimant regarding her absence levels.

27. Mr Jameel held a further case conference with the Claimant on 26 June 2015. He stated that 96% attendance was normally expected but that he was going to make a reasonable adjustment to allow the Claimant a lower figure of 94% over the next 12 months. Matthew Bright, ASLEF representative (Mr Bright) referred to the drugs trial programme and the Claimant being surprised that no member of management had shown a duty of care by speaking to her about how she was feeling or coping with being on the programme, taking medication and driving trains. Mr Jameel expressed surprise and said that he would try to make sure that support was provided to the Claimant in the future.

28. The Claimant attended a further case conference with Mr Jameel on 4 December 2015. He advised her that her attendance over the last five years had not been acceptable.

2016

29. On 11 March 2016, the Claimant attended a case conference with Mr Jameel. She was asked whether she intended to move closer to work.

30. On 17 May 2016, the Claimant was referred to Occupational Health because of only managing to achieve 87% attendance over the last 12 months.

31. In a letter dated 27 May 2016 Mr Jameel advised the Claimant that she was required to attend a further case conference on 24 June 2016 and that one option was the termination of her employment.

32. On 31 May 2016 Doctor Paul Obi, Staff Grade Occupational Physician sent a memo to Mr Jameel following his appointment with the Claimant on 27 May 2016. He advised that the Claimant's long-standing conditions of psoriasis, IBS and depression were all stable and controlled and were in his opinion unlikely to impact on her attendance at work. He said that she was unlikely to meet the attendance target of 94% as result of her current social/domestic situation. He concluded by saying that in his opinion her situation at that time was largely social and not medical.

33. The Claimant attended a case conference with Mr Jameel on 24 June 2016. He advised her that she should take up counselling and make lifestyle changes. Mr Bright conceded that the Claimant's attendance record had been unacceptable. Mr Jameel advised her that her attendance had not been satisfactory in the last seven years. At the conclusion of the meeting she was advised by Mr Jameel that any non-attendance of three days or more would mean that she was in breach of the agreed non-attendance target.

2017

34. The Claimant attended a case conference with Mr Jameel on 17 March 2017. He advised her that he would continue to monitor her attendance for the next 12 months but that if she fell below 94%, he would terminate her employment. He asked the Claimant whether a change of role would be likely to improve her attendance to which she replied no.

35. The Claimant attended a further meeting with Mr Jameel on 21 July 2017. He asked her how things were with her ex-husband.

36. The Claimant was off work between 13 October 2017 and 17 December 2017 because of symptoms related to the menopause.

37. The Claimant attended a case conference with Lisa Wyness, Acton Trains Manager (Ms Wyness) on 5 December 2017.

38. She attended a further case conference with Mr Jameel on 8 December 2017. He said that he was concerned regarding her overall attendance. He said that whilst he had previously started from 2010, he had subsequently looked back at her overall attendance record and said that it had not been good. He said it was very difficult to sustain her poor attendance.

39. During an adjournment to the meeting the Claimant says that Mr Bright had said that he believed that her employment may be terminated. Mr Bright reverted after the adjournment to propose a further period of review under s.5.2 of the

Attendance Policy which Mr Jameel accepted. He advised the Claimant that further failure to meet required attendance standard could result in the termination of her employment on medical grounds.

2018

40. The Claimant attended a case conference with Mr Jameel on 27 April 2018. She was praised for her improved attendance and told that the current 12-month attendance review process would end on 16 December 2018.

41. On or about 19 August 2018 the Claimant had an accident at work when she fell on the platform at Acton Town. She sustained facial cuts and damage to her eye. The Claimant was off work until 22 January 2019 because of concussion and other injuries sustained in this accident. The Respondent does not accept liability for the accident.

42. On 2 October 2018 Mr Jameel travelled to a location near to the Claimant's home for an attendance review meeting. Whilst the meeting primarily focussed on symptoms arising from the Claimant's accident Mr Jameel asked how her psoriasis was. The Claimant says that this was an unrelated and inappropriate question. A significant discussion took place regarding the circumstances of the accident but is not necessary for me to record this.

43. The Claimant attended a case conference with Mr Jameel on 7 December 2018. He offered the Claimant reduced hours on the stations to facilitate her return to active employment which she declined.

2019

44. The Claimant was off work on account of what was initially referred to as a urinary tract infection but then IBS from 5 April 2019 to 22 August 2019.

45. The Claimant did not respond to a series of letters from the Respondent during her absence to include those dated 10 April 2019, 20 May 2019, 22 May 2019, 2 and 16 July 2019 and 15 August 2019. The Claimant says that she was typically opening letters but not reading them.

46. On 21 August 2019, the Claimant was referred to Occupational Health. The Occupational Health Advisor was asked to advice on whether it would be reasonable to expect that the Claimant would be able to manage the IBS quicker than the 140 calendar days she had been absent. Further, he was asked to opine on whether it would be reasonable to assume that her past at attendance is an indicator of her future attendance.

47. Following the Claimant's return to active work she attended a review meeting with Mr Jameel on 6 September 2019. She had driven a train in advance of this meeting. No people management assistant (now referred to as employee relations partner) was in attendance. The meeting was therefore not

regarded as a case conference. Mr Jameel once again said that he was concerned with the Claimant's overall attendance since she had been with the company. He explained that the number of train operators at Acton was very tight. He referred to the case conference on 8 May 2015 when he had advised the Claimant that her attendance needed to improve. He also referred to the Claimant's meeting with Mr Rogerson on 5 December 2011 when he had said the same.

48. Mr Jameel asked the Claimant whether there were any reasonable adjustments which could be made but advised that as a last resort it may be necessary to terminate the Claimant's employment on medical grounds. The Claimant was informed that she could continue to drive trains in the meantime.

Occupational Health Report

49. Mr Bowles produced a report dated 13 December 2019. He said that in his opinion the Claimant was fit to work at present without adjustments. He indicated that her sickness stems from various isolated causes. He said that the best indicator of future sickness for a condition is likely to be previous sickness absence.

50. Mr Bowles says that he looked at the Claimant's sickness absence from 2013. We find that this was likely to be on the basis that he was only provided with the second page of the computer printout showing the Claimant's absence history. He based his projection on the Claimant's likely level of future absences based solely on her psoriasis and IBS.

20 September 2019 Case Conference

51. Mr Jameel once again conducted the meeting and Mr Bright acted as the Claimant's representative. Amrit Phlora, ERP (Mr Phlora) attended via telephone. Mr Bright said this was contrary to the Attendance Policy.

52. Mr Jameel said that looking over a 10-year period that the Claimant's attendance had not been at a reasonable level. He asked the Claimant whether moving from three days to two days a week would be likely to improve her attendance to which she replied no and that she had her conditions under control. He also asked the Claimant whether being placed in the redeployment pool would help and whether moving closer to London would help and again she/ Mr Bright said that they would not.

53. In an email to Mr Jameel of 3 October 2019 Mr Phlora stated:

> "We are not dismissing her for medical reasons in that she is too ill to do her job. We are dismissing her as she can't sustain an acceptable level of attendance due to her medical ailments".

He went on to say that the case conference process was an appropriate one with the business having to look holistically at her absence and making a decision based on that despite her currently being well enough to do her job.

54. Mr Jameel held a case conference with the Claimant on 4 October 2019. The meeting was adjourned and then reconvened on 11 October 2019. The Claimant was advised that in the interim she would not be required to drive a train but would remain on full pay.

55. In a letter dated 4 October 2019 Mr Jameel advised the Claimant of the time of the reconvened meeting on 11 October 2019 and that one possible outcome could be the termination of her employment.

56. The meeting on 11 October 2019 lasted from 12:40 to 14.20. The Claimant was represented by Mr Bright. Qaisar Mahmood, ERP also attended. Mr Bright raised the possibility of redeployment and explained that whilst the Claimant wished to continue driving trains that this would give her a fresh start. No explanation was given as to role why redeployment would improve her attendance record. Mr Bright said that the Claimant was prepared to enter into a two-year agreement to achieve 96% attendance and that a failure to do so would result in the termination of her employment. Mr Jameel adjourned to consider this proposal but advised the Claimant that he had decided to terminate her employment with effect from 12 October 2019.

Letter of Dismissal dated 16 October 2019

57. In a letter to the Claimant dated 16 October 2019 Mr Jameel confirmed the termination of her employment. He said that he had taken account of her absence over the previous 10 years. He set out the percentage annual attendance rates for 2017 and whilst her at work percentage was 97.7%, he also included a figure of 70.6% in parenthesis which included absences related to her menopause. For 2018 her at work attendance percentage was also 97.7% but once again in parenthesis he included a figure of 63.9% which included absence attributable to the accident at work. Her at work percentage for 2019 was 56%.

58. Mr Jameel stated that he believed that there was a repeating pattern that would not change with time and one that could not be sustained by the business.

59. He said that he had not included absence attributable to the accident at work in his consideration. In relation to absence attributable to the menopause he said that whilst on its own it would not be the trigger to review her attendance that there had been no review meetings following this period of sickness. We do, however, find that the Claimant was required to attend a case conference on 8 December 2017 after her return from absence related to her menopause.

Appeal

60. In an email of 31 October 2019 Mr Bright, on behalf of the Claimant, appealed Mr Jameel's decision based on its severity and misdirection.

61. The Claimant attended an appeal hearing conducted by Mr Taggart on 6 December 2019. The Claimant was represented by Finn Brennan of ASLEF (Mr Brennan). Mr Brennan contended that the correct procedure was not followed, the Claimant was terminated whilst still driving and that the decision was predetermined. He said there was a lack of clear medical evidence and that Mr Jameel did not give any real consideration to alternatives to dismissal.

62. In a letter dated 6 January 2020 Mr Taggart upheld the decision to terminate the Claimant's employment. He was satisfied that Mr Jameel had gone through all the possible options. He considered its unlikely that the Claimant's attendance would improve.

63. In evidence Mr Taggart said that that he applied a situational and holistic approach when considering the Claimant's absence record.

Ill Health Early Retirement Pension

64. After the termination of her employment the Claimant successfully applied for an ill health early retirement pension. In support of her application a form was completed by Dr Juliette Bennet, the Claimant's GP on 17 January 2020. She stated that the Claimant's predominant medical condition is anxiety with depression. She said that the Claimant's mood had begun to deteriorate about six months ago. She said that the Claimant had been fit to work at the time of her dismissal but went on to refer to the adverse effect of the Claimant's accident at work on her health. She said that the Claimant was currently unable to work in any capacity as a result of a progressive deterioration in her health over the last 18 months and that she was extremely unlikely to be ever able to return to her duties as a train operator.

65. The Claimant was awarded a pension of £14,586.17 a year plus a lump sum payment of nearly £60,000.

The Claimant's Comparators

66. In support of her claim for direct disability discrimination the Claimant relies on both actual and hypothetical comparators. She names Miquel Colon (Mr Colon), Amy Chris Adams, Danillo Fiocco (Mr Fiocco) and Gemma Tandy as actual comparators.

67. Computer printouts of the named comparators' absence records were included in the bundle. The Claimant focussed on Mr Fiocco and Mr Colon and therefore I make no reference to the other named individuals.

Mr Fiocco

68. Mr Fiocco's absence record in the period from 24 November 2013 to 29 August 2019 was included. It was calculated that he had been absent for 181 working days in this period. He works full time which equates to 217 working days a year. The Claimant says that during an equivalent period that she had been absent for 219 working days, but she excluded absences attributable to her menopause and the accident at work.

69. We find that Mr Fiocco's circumstances were materially different to the Claimant's. His absence of 181 days needs to be considered as a percentage of a five day a week working whilst the Claimant's 219 days absence in an equivalent period is reflective of her working a three-day week and therefore her absence levels as a percentage are significantly higher than Mr Fiocco's.

Mr Colon

70. Mr Colon's computerised absence records were produced for the period 19 October 2016 until 2 November 2019. It was calculated that in the period from 1 December 2017 he had been absent for 85 working days. Mr Colon works five days a week. The Claimant says that during an equivalent period she had been absent for 61 working days but once again disregarding absence attributable to her menopause and accident at work.

71. We once again find that the circumstances of Mr Colon were materially different to those of the Claimant. We reach this finding based on his comparative period of absence being much shorter than the period over which the Claimant was assessed by Mr Jameel over the previous ten years and we have no evidence of what Mr Colon's absence record had been prior to October 2016. We also considered that his 85 days absence post 1 December 2017 was a lower percentage of his working time than the Claimant with 61 working days in an equivalent period.

Business needs

72. The Respondent relies on the legitimate aim of effectively managing staff absence to reduce the negative affects staff absence have on the Respondent's ongoing operations, including train provision.

73. Mr Jameel referred to a reduced number of train operators because of a change of operating arrangements and 10 operators being reassigned as instructor operators. He said that capacity was particularly limited at weekends because of rostering arrangements being designed with the unions to minimise the requirement for weekend working. At weekends, an operator would typically be assigned to a single route and there would be a disproportionate impact in the event of unanticipated absence.

74. Mr Jameel said that the Respondent was precluded from hiring additional training operators without one of the existing operators leaving. Whilst there is a significant cost in recruiting and training a new operator ultimately this needed to

be balanced against the disadvantage of retaining an operator with a very poor attendance record. It takes 19 weeks to train an operator with the associated costs involved.

The Law

Definition of Disability under s.6(2) of the EQA

75. A person has a disability if he or she has "a physical or mental impairment" which has a "substantial and long-term adverse effect on his or her ability to carry out normal day to day activities". The burden of proof is on the Claimant to show that she satisfies this definition.

Direct Disability Discrimination

76. Under s.13 (1) of the EQA a person (A) discriminates against another person (B) if, because of a protected characteristic, (A) treats (B) less favourably than (A) treats or would treat others. For the purposes of the comparison required in relation to direct discrimination between (B) and an actual or hypothetical comparator, there must be no material difference between their circumstances.

Discrimination arising from a disability

77. S.15 EqA provides that a person (A) discriminates against a disabled person (B) if:

- A treats B unfavourably because of something arising in consequence of B's disability; and
- A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

78. In a disability discrimination claim under S.15, a tribunal must make findings on:

- The contravention of section 39 of the EQA relied on – in this case sections 39 (2) (c) and (d).
- Whether the contravention relied on by the employee amounts to unfavourable treatment.
- It must be "something arising in consequence of disability", for example, disability related sickness absence.
- If unfavourable treatment is shown to arise for that reason, the tribunal must consider whether the employer can show the treatment was "a proportionate means of achieving a legitimate aim".

79. There is no need for a comparator in order to show unfavourable treatment under s.15. It is possible to demonstrate 'unfavourable' treatment without

needing to resort to a 'compare and contrast' exercise. A claimant bringing a claim of discrimination arising from disability under s.15 is entitled to point to treatment that he or she alleges is unfavourable in its own terms.

80. In Pnaiser v NHS England and anor 2016 IRLR 170, EAT, Mrs Justice Simler summarised the proper approach to establishing causation under s.15. First, the tribunal has to identify whether the claimant was treated unfavourably and by whom. It then has to determine what caused that treatment focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant. The tribunal must then determine whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

81. An employee who is treated unfavourably as a result of having to take a period of disability-related absence would have a claim under s.15 unless the employer can justify the unfavourable treatment on the basis that it is a proportionate means of achieving a legitimate aim.

Burden of proof

82. S.136 EQA provides that once a claimant has proved facts from which a tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof shifts to the respondent to prove a non-discriminatory explanation. In the context of a s.15 claim, in order to prove a prima facie case of discrimination and shift the burden to the employer to disprove his or her case, the claimant will need to show:

- that he or she has been subjected to unfavourable treatment;
- that he or she is disabled, and that the employer had actual or constructive knowledge of this;
- a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment; and
- some evidence from which it could be inferred that the 'something' was the reason for the treatment.

83. If the prima facie case is established and the burden then shifts, the employer can defeat the claim by proving either:

- that the reason or reasons for the unfavourable treatment was/were not in fact the 'something' that is relied upon as arising in consequence of the claimant's disability; or
- that the treatment, although arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.

84. Any allegation of discrimination arising from disability will only succeed if the employer is unable to show that the unfavourable treatment to which the claimant has been subjected is a proportionate means of achieving a legitimate aim.

Time limits

85. S.123 (1) (a) provides for a time limit of three months starting with the date of the act which the complaint relates to or under s.123 (1) (b) such other period as the tribunal thinks just and equitable

86. S.123 (3) (a) provides that conduct extending over a period is to be as done at the end of that period. For acts extending over a period it is relevant to consider whether a discriminatory regime, rule, practice or principle, which had a clear and adverse effect on a complainant, existed. There is a distinction between a continuing state of affairs and a one-off act with ongoing consequences.

87. We also need to consider is whether it would be just and equitable for the Tribunal to exercise its discretion to extend time taking into account the relevant criteria set out under s.33 of the Limitation Act 1980.

88. For a tribunal to exercise its discretion the onus is on a claimant to convince the tribunal that it is just and equitable to do so. The claimant needs to evidence and explain the reason for the delay.

Part Time Workers Regulations

89. Under Regulation 5 (1) a part-time worker has the right not to be treated by his or her employer less favourably than the employer treats a comparable full-time worker and not to be subject to any detriment by any act, or deliberate failure to act, of his employer.

90. Under Regulation 5 (2) the right conferred by 5 (1) applies only if:

(a) the treatment is on the ground that the worker is a part-time worker; and
(b) the treatment is not justified on objective grounds.

Regulation 5(3) provides in determining whether a part time worker has been treated less favourably than a comparable full-time worker the pro rata principal shall be applied unless it is inappropriate.

Unfair Dismissal

91. Under s.98 (1) (a) of the Employment Rights Act 1996 (the “ERA”) it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under s.98 (1) (b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to

justify the dismissal of an employee holding the position which the employee held. At this stage, the burden in showing the reason is on the respondent.

92. Under s.98 (4) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.

93. In reaching their decision, tribunals must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of s.207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question.

Mr Liberadski's Submissions

94. Mr Liberadzki says that the Respondent relies on capability or alternatively some other substantial reason (SOSR) as the reason for dismissal. He says that for direct disability discrimination it would be necessary to consider the position of a hypothetical comparator without disability. He accepts that the Claimant's IBS was at least in part a factor resulting in the termination of her employment and as such that it partly arises from disability together with earlier reference to periods of absence on account of her depression and if found to be a disability her psoriasis. He says that the Respondent is able to establish the existence of a legitimate aim to justify her dismissal under s.15 of the EQA.

95. Mr Liberadzki helpfully referred us to relevant case law authority. This included the following:

96. Lynock v Cereal Packaging Limited EAT 1988 involved unfair dismissal and intermittent absences. Particularly at paragraph D in the judgment of Wood J he referred us to the following:

> "Where one is dealing with intermittent periods of illness each of which is unconnected, it seems to us to be impossible to give a reasonable prognosis or projection of the possibility of what will happen in the future".

He also referred us to the final paragraph of Wood J's judgment which included:

> "The approach of an employer in this situation is, in our view, one to be based on sympathy, understanding and compassion. There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair.".

Wood J sets out the following factors which may be relevant:

- The nature of the illness

- The likelihood of it recurring or some other illness arising
- The length of the various absences and the spaces of good health between them
- The need for the employer for the work done by the particular employee
- The impact of the absences on others who work with the employee
- The adoption and carrying out of the policy
- The important emphasis on a personal assessment in the ultimate decision
- The extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return may be approaching

97. Mr Liberadzki further referred us to Davis v Tibbett & Britten Group PLC EAT/460/99. This also involved a case of intermittent absences. He referred us to paragraph 16 which said that in a case such as this it would not be helpful to seek medical evidence and that employers were entitled to look at the whole history.

98. He referred us to paragraph 16 in the EAT's decision in Royal Liverpool Children's NHS Trust v Dunsby [2006] IRLR 351 which indicated that there was no absolute obligation on the employer to refrain from dismissing an employee who is absent wholly or in part of ill health due to disability.

99. He referred us specifically to paragraph 76 in the Court of Appeal's decision in Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265 to include:

> "There is nothing unreasonable, it seems to me, in the employer being entitled to have regard to the whole of the employee's absence record when making that decision. The fact that some of the absence is disability related is still highly relevant to the question whether the disciplinary action is appropriate".

100. Mr Liberadzki referred us specifically to paragraph 20 in the EAT's decision in Kelly v Royal Mail Group Ltd UK EAT/0262/18/RN to include:

> "The issue is not so much whether or not the Claimant was capable or unable to do his work as a result of ill health, but that his attendance was unreliable and unsatisfactory. That, it seems to me is perfectly capable of falling into the residual category of some other substantial reason".

101. He referred us specifically to paragraph 29 in Department of Work and Pensions v Boyers UK EAT/0282/19/EAT to include:

> "A Tribunal must weigh the real needs of the undertaking against the discriminatory effect of the proposal. There must, in this context, be an objective balance between the discriminatory effect of the dismissal and the reasonable needs of the employer"

Conclusions

102. I will now set out our conclusions in accordance with the list of issues save that I will deal with the question of jurisdiction on the grounds of time within the individual grounds of claim.

Disability

103. Was the Claimant disabled on account of her psoriasis from 2010? We find that the Claimant's psoriasis constituted a disability at the material time in 2015 when she had a substantial period of absence on its account. We reach this finding for the following reasons:

(a) The Claimant was taking strong medication in methotrexate and we need to consider the effect of her psoriasis without the benefit of medication.

(b) She was unable to attend work for a substantial period partly attributable to discomfort on her ankle which required a skin patch and prevented her from wearing her normal work shoes.

(c) The Claimant clearly has a substantial level of psoriasis in that it is not confined to isolated body parts but is widely spread and prone to significant flare ups particularly at times of stress.

(d) She continues to take medication whether topical or in the form of pills or injections.

(e) She is restricted in the clothing that she can wear and says that woollen items as part of her uniform would cause irritation and that tight trousers can be uncomfortable around her midriff.

104. As such we are satisfied that the Claimant's psoriasis had a substantial and long-term adverse effect on her ability to carry out her normal day to day activities.

105. The Respondent accepts that it had knowledge of the Claimant's psoriasis.

Direct disability discrimination

Did Mr Jameel bully the Claimant by regular requesting that she work a two-day instead of a three-day week, at the sickness absence meetings from 2013 onwards up to the termination of her employment on 12 October 2019?

106. We find that this did not constitute direct discrimination on account of the Claimant's disabilities. We reach this find for the following reasons:

(a) Having considered the notes of the numerous case management conferences we do not consider that Mr Jameel's conduct could be

characterised as bullying the Claimant. Whilst we accept that the Claimant found the meetings stressful and on some occasions Mr Jameel's questions may have been unnecessary or unduly repetitive from one meeting to another we find that when looked at overall they were reasonable in the context of the meetings.

(b) We do not consider that the questions raised by Mr Jameel during these meetings were directly attributable to the Claimant's disabilities but rather his concern at her overall level of absence. In other words, he would have adopted the same approach to an employee with an equivalent level of absence but for non- disability related reasons.

(c) We find that Mr Jameel was at least in part motivated by asking questions regarding the Claimant changing from a three day to a two-day week by his awareness that her three-day working week was nonstandard and in effect represented unnecessary cost to the business given that there were surplus train operators on Fridays. In any event this was merely posed by Mr Jameel as a possibility and no pressure was applied on the Claimant to agree to it.

The Claimant was placed on the Respondent's anti-depressant drugs trial in 2014 when she returned to work in or about 2014. The Claimant alleges that no monitoring took place and that she was not supported. She alleges that if she had been monitored, she may have been taken off train driving duties and allocated an alternative role.

107. First, we find that this matter is out of time in that it did not constitute a continuing course of conduct, for the purposes of s.123 (3) (a) of the EQA and nor would it be just and equitable under s.123 (1) (b) of the EQA to extend time. We reach this finding for the following reasons:

(a) The trial took place in 2014 and the Claimant raised no grievance in respect of it.

(b) The Claimant did not suffer any further absences attributable to depression after being on the trial.

(c) She was able to continue driving whilst taking anti-depressants. As such we find no continuing act.

(d) In any event we do not consider that the treatment of the Claimant whilst on the anti-depressant drugs trial could constitute direct discrimination on account of her depression. The raison d'être of the trial was to help those train operators taking anti-depressants to be able to continue driving. This was to the benefit of the Claimant. It goes without saying that it would only be operators suffering from depression who would be able to participate.

(e) We do not find that the absence of ongoing monitoring and support constituted acts of direct discrimination. We find that this would not

have been capable of constituting less favourable treatment on account of the Claimant's disability particularly in circumstances where all others participating would have had the same disability.

(f) We do not accept the Claimant's contention that if she had been monitored, she would have been taken off her train driving duties and allocated an alternative role. We find this inconsistent with the Claimant's approach at numerous case conferences when she rejected the possibility of redeployment and said that it would have made no difference to the circumstances of her ill health absences.

The Claimant alleges that the sickness absence process was carried in a discriminatory manner due to Mr Jameel regularly asking her at sickness absent meetings:

About her psoriasis:

108. We find that this is out of time. This is on the basis that the last meeting during which Mr Jameel asked the Claimant about her psoriasis was on 2 October 2018. The Claimant raised no grievance. We find that this was not a continuing act and therefore not one we need to consider.

109. In any event we do not find that the questions raised by Mr Jameel relating to the Claimant's psoriasis were acts of direct disability discrimination. Whilst we acknowledge that the Claimant may have found his questions unnecessary, intrusive and embarrassing we do not consider that they were of a level of inappropriateness to be capable of constituting direct disability discrimination.

To go onto a two-day week:

110. For the reasons set out above in relation to the same allegation concerning bullying we find that this was not an act of direct disability discrimination.

To move nearer to London:

111. Whilst this was referred to regularly by Mr Jameel at the case conferences, we do not consider that this was attributable to the Claimant's disabilities. It was rather a product of his concern regarding her overall level of absences. In any event we consider that Mr Jameel had legitimate grounds to be concerned about the length of the Claimant's journey and the impact this may have on her wellbeing. We also find that Mr Jameel's questions did not extend beyond enquiry and did not involve applying unnecessary pressure on the Claimant to relocate.

To talk about her background history which was painful for her to recall due to the abuse she had suffered as a child and as an adult:

112. As the last meeting during which Mr Jameel asked the Claimant about her husband was on 21 July 2017, we find this allegation to be out of time and not a continuing act. In any event we do not consider that Mr Jameel's questions

regarding the Claimant's personal circumstances were attributable to her disabilities but rather as a result of the circumstances to which she had originally referred at the time of her moving from full time to initially two days a week as a result of her relocation following difficulties with her former husband.

If she was still taking her medication:

113. We find that it was perfectly appropriate for Mr Jameel to ask the Claimant about her medication at case conferences given that it was relevant to the management of her conditions. It was also relevant in the context of operator safety given the Claimant's participation in the anti-depressant drug trial. As such any change in the Claimant's medication would be a relevant factor from the Respondent's operational perspective.

Conclusion on direct disability discrimination

114. We therefore find that the Claimant was not subject to any less favourable treatment on account of disabilities. We reach this finding both in respect of hypothetical comparators but also the Claimant's named actual comparators. As set out above we find that the circumstances of the named comparators, and in particular Mr Fiocco and Mr Colon, are materially different to those of the Claimant.

Discrimination arising from disability (s.15 EQA)

Did Mr Jameel bully the Claimant by regularly requesting that she work a two-day instead of a three-day week, at the sickness absence meetings from 2013/14 onwards up to the termination of her employment on 12 October 2019?

115. We find that Mr Jameel's requests in this respect were at least in part arising from those absences of the Claimant attributable to her disabilities. However, we do not find that such proposals constituted unfavourable treatment and we reach this finding for the following reasons:

(a) It was a proposal and not something which was applied.

(b) The three-day week had originated at the Claimant's instigation for reasons unrelated to her disabilities.

Did Mr Jameel regularly ask the Claimant at sickness absence meetings:

If she would go on to a two-day week:

116. Whilst this was consistently raised as set out above, we do not consider that it constituted unfavourable treatment.

If she was still taking her medication:

117. As we have found in relation to direct disability discrimination above, we do not consider that such questions were unreasonable and nor did they constitute unfavourable treatment to the extent to which the questions related to conditions constituting disabilities.

Did the following thing[s] arise in consequence of the Claimant's disabilities?

Her sickness absence (or part of it)?

118. We find that the Claimant's sickness absence was at least in part attributable to her disabilities.

Her request to work three-days a week:

119. We find that on the Claimant's own evidence that the request was not attributable to her disabilities but rather because of her relocation following difficulties with her former husband.

Dismissed her on 12 October 2019:

120. We find that the Claimant's dismissal was at least in part attributable to her disabilities given that a significant part of her absence was attributable to her depression, psoriasis and IBS. This is conceded by Mr Liberadski.

121. We therefore need to consider whether the Respondent has been able to show the treatment i.e. the Claimant's dismissal was a proportionate means of achieving a legitimate claim. We find that it was, and we reach this decision for the following reasons:

(a) Given the Claimant's very substantial and intermittent absences for a plethora of different medical conditions over a period of 10 or more years it was reasonable for the Respondent to conclude that it was likely that she would continue to have a very poor absence record and that this would cause significant disruption to its business. We accept that the Claimant's absences, particularly at weekends when the number of operators is lower than during the week, would cause the Respondent significant disruption potentially resulting in the cancellation of services and cause additional cost. We also accept that the Respondent has entered a new operating model with a reduced number of train operators available and this has resulted in unscheduled absences causing additional disruption than had previously been the case.

(b) Whilst we must consider the detriment to the Claimant of her dismissal this has to be balanced against the business requirements of the Respondent. We consider that the Respondent had given the Claimant multiple opportunities to improve her attendance and whilst there was some improvement from 2015 onwards that the significant period of absence as a result of IBS from April to August 2019 was

ultimately the final straw in the context of the Claimant's long-term absence record.

(c) We find that it was reasonable and appropriate for Mr Jameel to consider a 10-year absence history. We also consider that Mr Taggat applying a situational and holistic approach was appropriate given the overall circumstances.

122. The claims of discrimination arising from disability (s.15 EQA) therefore fail.

Part-time Workers Regulations

Was the Claimant in a comparable role to full-time train operators?

123. We find that she was.

Was the Claimant treated as follows?

Did Mr Jameel bully the Claimant by regularly requesting that she work a two-day instead of a three-day week, at the sickness absence meetings from 2013 onwards up to the termination of her employment on 12 October 2019?

124. We do not find that such requests constituted bullying. In any event we do not find that they were attributable to the Claimant being a part-time worker but rather her working three days as opposed to the Respondent's standard two-day weekend contract. Further, we do not find this constituted less favourable treatment given that it was merely raised as a possibility and not imposed.

Did the percentage attendance record applied under the sickness absence procedure disproportionately affect her as a part-time employee?

125. We find that it did not. The Claimant alleges that her percentage absence level given her three-day working week would have been higher than that of a comparable full-time employee. She gives as an example an employee working a three-day week and being absent for one of those days having an absence level of 33.3% as opposed to one day of a five-day full-time week being 20%. We find this to be misconceived given that it involves applying the same percentage to absence levels based on a pro rata of the working week. For example, a full-time and a part-time employee being absent for a three-month period would both have an absence level of 25% of the whole working year.

126. The claims under the Part-Time Workers Regulations therefore fail.

Unfair dismissal

127. We accept that the Claimant was dismissed on the grounds of capability or alternatively some other substantial reason. We do not consider it necessary to specifically attribute the dismissal to one of these categories as they are both potentially applicable to the circumstances.

128. We find that the Respondent reached the dismissal fairly having a genuine belief that the Claimant's attendance record gave rise to an issue of capability and following a reasonable investigation being undertaken.

129. Whilst we consider that there were some inconsistencies and ambiguities in the approach adopted by the Respondent, we find that looked at overall the procedure was fair. For example, we consider the Respondent's position as to the duration of the retrospective period taken into account was uncertain with Mr Bowles looking at a seven-year period, Mr Jameel a 10 year one and Mr Taggat over the entirety of the Claimant's employment. Nevertheless, which ever time period was referenced we consider that the overall conclusion would have been the same and all were potentially reasonable in the context of the Claimant's employment and absence history.

130. We also consider there was ambiguity regarding whether absence attributable to the Claimant's menopause and accident at work were discounted. We find that they were to a degree considered, for example, Mr Taggat said that he looked at all absences but in a holistic way. Mr Jameel expressly discounted the time attributable to the accident at work in the Claimant's termination letter but was more equivocal regarding absence attributable to her menopause in that it was not expressly discounted but nevertheless was not seen by him as a trigger for the termination of her employment. Overall, we consider this approach to be reasonable when placed in the context of the Claimant's overall attendance record.

131. We did have some concern regarding whether Mr Jameel's decision was predetermined. This was based on Mr Phlora's email of 3 October 2019 which appeared to suggest that a decision to dismiss had already been reached. However, having carefully considered the notes of the case conferences on 4 and 11 October 2019 we found that that Mr Jameel continued to consider all available options. Not only did these combined meetings last for approximately three hours but there were adjournments and consideration given to other options to include possible redeployment. We therefore find that Mr Jameel was not merely going through the motions and had he already made up his mind he would have been unlikely to have adjourned and reconvened the meeting on 4 October 2019.

132. We find that the procedure was overall fair. We do not accept that the Respondent was materially in breach of the Attendance Policy and in any event, we find that there were multiple meetings and it was repeatedly made clear to the Claimant over many years, and specifically subsequent to her return from absence attributable to her IBS in September 2019, that dismissal was a potential outcome. This can therefore have come as no surprise to her.

133. We considered a situation where the Claimant was dismissed at a time when she was fit to undertake her duties. Whilst we find this to be a relatively unusual situation, we do not find it to be unreasonable. At least in part the reason why action had not been taken when the Claimant was off work with IBS was a product of her failing to respond to numerous letters from the Respondent.

Had she done so it is possible that there may have been earlier case conferences and a process leading to termination. Overall, we find that it was reasonable for the Respondent to have concluded that the Claimant's absence levels were unsustainable and that there would have been a high probability, bordering on an inevitability, that had she continued in employment there would have been further absences. We therefore find that her dismissal was fair.

134. We therefore conclude that in all the circumstances that the Claimant's dismissal was fair on the grounds of capability. Alternatively, we consider that the respondent was entitled to a terminate the Claimant's employment on the grounds of some other substantial reason.

Miscellaneous matters referred to in paragraph 20 of the list of issues

135. In relation to those matters set out in paragraph 20 (a) to (e) of the list of issues we do not consider it necessary to refer to these in detail given our findings and conclusions above. Nevertheless, for completeness we record that we do not consider that any of these matters caused or contributed to the Claimant's dismissal.

136. Referring to the individual contentions:

(a) *Part-time staff working at the Respondent are detrimentally affected by the Attendance Policy and subsequent disciplinary actions associated with it.*

137. We have already found that the Claimant as a part-time worker was not subject to less favourable treatment.

(b) *That she was not properly monitored or supported in relation to the anti-depressant drug trial.*

138. First, we have found that the Claimant's allegations of discriminatory treatment in relation to the implementation of the drugs trial are out of time. Further, we have found that it was not capable of constituting direct discrimination on account of the Claimant's disability i.e. depression. In any event we do not consider that the process applied by the Respondent in relation to the drugs trial in 2014 was in any way a contributory factor to the Claimant's dismissal in 2019.

(c) *That if she had been properly supported and monitored, she may have been taken off train driving duties and allocated an alternative role.*

139. We have already found no basis for this contention which, in any event, would be contrary to the Claimant's response whenever the possibility of redeployment was raised with her which was to decline the suggestion and state that it would make no difference to the causes of her sickness absences.

(d) *She was placed on under undue pressure as set out above at 6 (a) and 6 (c).*

140. Given our findings above it follows automatically that these allegations could not have been a contributory factor to the Claimant's dismissal.

(e) *That mental health problems were frowned upon by the Respondent.*

141. We find no evidence to support this contention and, in any event, do not in any way consider it a contributory factor to the Claimant's dismissal. In any event all the Claimant's sickness absences from 2013 onwards were for reasons other than mental health problems.

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Employment Judge Nicolle

Dated: **8 December 2020**

Judgment and Reasons sent to the parties on:

08/12/2020

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For the Tribunal Office