THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **Employment Judge Harrington**
Mrs V Blake & Mr A Peart

BETWEEN:

Ms A Adeyemo-Animashaun
Claimant

and

Govia Thameslink Railway Limited
Respondent

ON: **16, 17, 18 November 2020 & 1, 2, 3, 18 February 2021**
and
4, 5 February 2021 (In Chambers)

Appearances:

For the Claimant: **Mr G Brown, Lay Representative**

For the Respondent: **Ms C Jennings, Counsel**

REASONS FOR TRIBUNAL JUDGMENT DATED 18 FEBRUARY 2021

Introduction

1 By an ET1 received on 17 December 2018 the Claimant, Mrs Aderonke Adeyemo-Animashaun, brings claims of unfair dismissal and disability discrimination against the Respondent, Govia Thameslink Railway Limited [1-12]. The Claimant was employed by the Respondent as a Gateline Assistant on or around 13 August 2013 until 15 November 2018.

2 At a Preliminary Hearing on 22 July 2019 [26] the liability issues in the Claimant's claims were identified as follows:

3 Unfair dismissal –

3.1 What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ('ERA')? The Respondent asserts that it was a reason relating to the Claimant's capability.

3.2 If so, was the dismissal fair or unfair in accordance with ERA section 98(4) and, in particular, did the Respondent in all respects act within the so-called 'band of reasonable responses'?

4 Disability –

4.1 Was the Claimant a disabled person in accordance with the Equality Act 2010 ('EQA') at all relevant times because of the following condition(s): injury to her ankle as a result of an injury at work?

4.2 The Respondent accepts that the Claimant is disabled for the purpose of the EQA.

5 EQA: Section 15 Discrimination arising from disability

5.1 Did the following thing(s) arise in consequence of the Claimant's disability?

The Claimant's inability to work full-time hours and to stand throughout her work hours.

5.2 Did the Respondent treat the Claimant unfavourably as follows:

a. By ending her part-time position with sitting facilities at Queens Road, Peckham? The Respondent's case is that this was a supernumerary position created temporarily to accommodate the Claimant;

b. By not moving her to another position where she could work part-time hours with sitting facilities? She particularly relies on the failure to provide her with a job in the ticket office. The Respondent's case is that the Claimant was offered the opportunity to apply for a ticket office role but failed the numeracy test.

c. By not following the recommendations made by its occupational health advisers and the Claimant's hospital consultants as to reasonable adjustments in October 2018?

d. By dismissing her. The Respondent's case is that the Claimant was dismissed under its capability procedure, on the basis of the available medical evidence, the lack of other positions to offer to her and her

refusal to accept the post of a part-time Gateline Assistant at another location.

5.3 Did the Respondent treat the Claimant unfavourably in any of those ways?

5.4 If so, has the Respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

5.5 Alternatively, has the Respondent shown that it did not know and could not reasonably have been expected to know, that the Claimant had the disability?

6 <u>EQA: Sections 20 & 21 Reasonable Adjustments</u>

6.1 Did the Respondent not know and could it not reasonably have been expected to know the Claimant was a disabled person?

6.2 A 'PCP' is a provision, criterion or practice. Did the Respondent have the following PCP(s):

a. The requirement for full-time working;
b. The non-continuation of part-time work arrangements.

6.3 Did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparision with persons who are not disabled at any relevant time?

6.4 If so, did the Respondent know or could it reasonably have been expected to know the Claimant was likely to be placed at any such disadvantage?

6.5 If so, were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage?

6.6 If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?

7 At the full merits hearing, it was confirmed that the Respondent did not take issue with having the requisite knowledge of the Claimant's disability. Further, whilst issues regarding time limits had been recorded at the Preliminary Hearing, it was agreed by the parties that those matters were no longer in issue.

8 The Tribunal conducted a hearing with the parties over a period of seven days, with a further two days in chambers. The Claimant was represented by Mr Brown, a former colleague and lay representative and the Respondent was represented by Ms Jennings of Counsel. The Tribunal heard oral evidence from the Claimant and Mr Brown and for the Respondent from Mrs Wasley, Mr Akinniyi, Mr Wyborn and Mr Robey.

Each witness had provided a written witness statement. From the second day of the hearing, the Claimant had a Yoruba interpreter.

9 The Tribunal was referred to the following documentation:

9.1 hearing bundle, paginated 1 - 546;

9.2 supplemental hearing bundle, paginated 547 - 635;

9.3 a clip of email dialogue dated December 2017 - June 2018, paginated A - G;

9.4 a summary sheet with details of three other employees;

9.5 written closing submissions from Ms Jennings.

10 The Tribunal wishes to record its gratitude to both parties for presenting their cases in a focused way and assisting the Tribunal with the hearing of this case remotely.

11 For the avoidance of doubt, the numbers appearing within square brackets in this judgment refer to pages within the trial bundle.

12 Following the commencement of the full merits hearing in November 2020, the Tribunal produced further case management orders requiring additional evidence to be provided. In addition to that evidence and at the start of the resumed hearing in February 2021, the Claimant sought to rely upon, and to add to the tribunal bundle, four photographs and eleven pages of additional evidence. The four photographs were taken on 18 November 2020 and were said by Mr Brown to demonstrate the Respondent's use of agency staff and chairs. The documentary material was described as evidence of changes made to the employment of other employees. The Tribunal had already received evidence concerning the provision of chairs and the Respondent's use of agency staff. This was not in issue and the comparatively recent photographs did not progress these matters further. The documentary material was selected correspondence referring to the circumstances of the three other employees previously identified. The Respondent referred to there being other documentary evidence available regarding these employees. Taking this into account, the Claimant's agreement to the summary sheet produced referring to the three other employees and the full opportunity the Claimant had to cross examine the Respondent's witnesses as to changes made to other individual's employment, the Tribunal decided that neither photographs nor the eleven pages of documentary material would be added to the bundle.

13 During the hearing, Mr Brown also made an application to amend the Claimant's claims. The application was unparticularised and was refused by the Tribunal. A summary of reasons for that refusal was given to the

parties at the time and neither party has requested full written reasons of that decision.

Findings of Fact

14 The Claimant commenced her employment with the Respondent on 19 August 2013 as a Gateline Assistant, Station Staff Level 1B Shift, based at Streatham train station. She was contracted to work full time, 35 hours per week, on rotating shifts. Her full Terms of Employment are in the hearing bundle [37].

15 It is agreed by the parties that the Claimant's role included prolonged standing, in the vicinity of the ticket barriers, and that it was a customer facing role. The Gateline Assistant role also included the following:

15.1 Being accountable for the safe operation of the Ticket gates;

15.2 Responding to and recording emergencies and incidents involving the general public and colleagues;

15.3 Seeking out and assisting customers that require assistance and ensuring onward travel stations are aware should further help be needed, providing a seamless customer experience;

15.4 Providing assisted travel, with the use of a ramp, to disabled customers;

15.5 Physically carrying out station security checks twice per shift in accordance with the station security plan.

16 On 4th January 2014 the Claimant had an accident at work. She completed the accident report as follows,

'Coming down the stairs and I accidentally step on my bad leg, it was a bit swollen, I let me colleague…..know about it but the pain was getting too much so I phoned my doctor to booked an appointment' [440]

17 Whilst the Tribunal has heard some evidence about an alleged failure to provide appropriate safety boots to the Claimant, that is not an aspect of the factual context upon which we are required to make detailed findings, it being sufficient for the Tribunal's purposes to note that the accident happened and the Claimant sustained a physical injury to her left leg.

18 Following the accident, the Claimant was absent from work. Her GP certified her as unfit for work for an initial period of 4 weeks [76] and then for a further 2 weeks [78]. In the event, the Claimant's period of sickness absence extended until May 2014.

19 On 9 May 2014 the Claimant was seen by the Respondent's Occupational Health advisor [297]. At that stage, the injury to the Claimant's left foot was noted. It was also recorded that her mobility was improving and that

she could return to work on a gradual phased basis. The Claimant returned to work on or around 19 May 2014. She returned to restricted duties at Streatham Hill station. Her work at this time included some seated work in the ticket office assisting with posters.

20 At a follow up Occupational Health appointment on 4 June 2014, it was noted that the Claimant had been working 5 hour shifts on 3 days per week but that she had been finding this very difficult with levels of pain at the end of a shift [298]. A further Occupational Health appointment on 23 June 2014 recorded that the Claimant still awaited physiotherapy treatment but that a change to her medication had helped with her pain levels [299].

21 On 22 July 2014 the Claimant attended another Occupational Health review [300]. There had been no significant change at this point and the Claimant continued to await the start of her physiotherapy treatment, with an appointment booked for the following day. By the time of the next review on 19 August 2014, the Claimant had attended 4 physiotherapy appointments [301]. There was reference to the Claimant working on the Gateline, albeit with reduced hours. Nurse Pollard recommended that the Claimant's manager consider *'temporary office based recuperative duties'* which would enable the Claimant to '*sit and stand at will'*.

22 At the next Occupational Health review on 23 September 2014 it was recorded that the Claimant was happy with the adjustments that she had agreed with her manager and that she was continuing with her weekly physiotherapy treatment [302]. It was noted that a GP report had been requested and that a follow up review should be conducted once this had been received. The Claimant was next seen by Occupational Health on 11 November 2014. The Claimant reported that she was pain free at rest and had pain after 5 hours of standing. It was recommended that the Claimant work 4 hours per shift on the gateline and the next 3 hours seated – making a total of 7 hours per shift, 5 days per week.

23 On 1 December 2014 the Claimant had a meeting with her manager, Ms Fairbass [350]. Following that meeting it was recorded that the Claimant was able to return to work at her home station of Streatham, where a chair would be made available for her use. The Claimant was noted to be capable of working 4 hours at the gateline, although she would not be required to use ramps or to carry out security checks. For the last 3 hours of each shift, the Claimant would be seated providing customer service information. It was arranged that the Claimant would return to Streatham from January 2015 and that she would attend Peckham Rye Station the following day to trial the chair available at that station, to see if it was more suited to her needs.

24 In the event, the Claimant was unwell in January 2015 and could not attend for work. From 14 January until 24 January 2015 she was certified as unfit for work because of a swollen ankle. Thereafter the Claimant did return to work at Streatham. At her Occupational Health review meeting

on 12 February 2015 it was recommended that she work in line with the previous recommendations – namely 4 hours on the gateline and 3 hours seated [304].

25 Within the bundle prepared for this Tribunal are the following policies from the Respondent: Managing for Attendance Procedure ('MFA') [58A], Long Term Sickness Monitoring Policy [58K] and Southern Ill Health Capability Guidelines [55-58]

26 The MFA Procedure sets out a 5 stage process beginning with an informal stage (stage 1), leading to dismissal on the grounds of unsatisfactory attendance at stage 4 and an appeal stage at stage 5. Long-term sickness is covered by the Long Term Sickness Monitoring Policy. This Policy covers employees who have not been off sick but become medically restricted and those who have been off for 4 weeks or more. The Ill Health Capability Guidelines refer to an employee who is unable to continue in their original substantive post due to ill health or medical restrictions.

27 On 27 January 2015, following the Claimant's return to work at Streatham, she attended a meeting with Mr Stephen Lethorn, Station Manager. This is confirmed in the Claimant's witness statement (see paragraph 18). After that meeting, Mr Lethorn handed the Claimant a letter of that date [352]. That letter invited the Claimant to a stage 1 MFA meeting on 3 February 2015. There are no further references in the documents to that meeting having taken place and, on the balance of probabilities, the Tribunal has concluded that it did not.

28 In March 2015 the Claimant was moved to work at Streatham Hill Station. At an Occupational Health review on 13 July 2015 it was recorded that the Claimant awaited further treatment of her ankle following a recent scan. At that stage the Claimant was said to be fit to work 5 hours per shift on the gateline and 2 hours seated [305].

29 On the balance of probabilities, the Tribunal has concluded that the Claimant did attend a further meeting with Mr Lethorn on 7 August 2015. Such a meeting is referenced in a further letter from Mr Lethorn to the Claimant dated 4 January 2016 [117]. The meeting on 7 August 2015 does not appear to have been held in line with the MFA Policy which required a letter to be sent from the manager to the employee confirming the outcome of the informal meeting.

30 In November 2015 the Claimant was absent from work with illness, unrelated to her foot injury, for approximately 10 days. Following this absence, there is a noted Return to Work interview with the Claimant. In the record of that interview the following is written,

'MFA is already on MFA 3' [92]

31 A further meeting took place between the Claimant and Mr Lethorn on 25 January 2016. A subsequent letter, dated 25 January 2016, confirms the outcome of the Stage 2 meeting, namely that the Claimant is placed on Stage 2 and her absences will be monitored going forward [116]. Whilst it has been submitted by the Claimant that some of the meetings with Mr Lethorn did not take place and relevant letters within the bundle have been falsified, the Tribunal is satisfied that a discussion did take place between Mr Lethorn and the Claimant on 25 January 2016. In reaching this finding the Tribunal also noted the emailed notes of a discussion on that day, sent to Mr Lethorn on 25 January 2016 at 3.10 pm [129].

32 On 9 February 2016 the Claimant attended an Occupational Health review [306]. At that stage it was recorded that the Claimant had an appointment for an MRI scan of her left ankle on 22 February 2016. It was proposed that the situation be reviewed after receipt of the specialist report.

33 In April 2016 the Claimant was moved to work at Balham. Her duties at Balham included some work on the gateline. The Claimant attended for further Occupational Health reviews on 7 April 2016 [307] and on 28 July 2016 [308]. It was noted that the Claimant had an injection on 18 April 2016 which provided pain relief for approximately 2 months. By July 2016 the Claimant's pain had returned and she awaited an appointment with her specialist to discuss surgery.

34 On 30 August 2016 the Claimant was sent a letter of invitation to attend a Stage 3 MFA meeting [131]. Again, on the balance of probabilities, the Tribunal is satisfied that a discussion did take place between Mr Lethorn and the Claimant in September 2016. The outcome of that meeting was to keep the Claimant on Stage 2 and this was confirmed in a letter dated 17 September 2016 [124]. In concluding that Mr Lethorn and the Claimant did meet in September, the Tribunal noted Mr Lethorn's knowledge of the Claimant's medical situation – for example, he referred in his letter to the Claimant's specialist appointment arranged for 4 October 2016 at the Royal London Hospital.

35 Before continuing with our relevant factual findings, we do note that whilst we have accepted that the Claimant had discussions with Mr Lethorn, the MFA policy was not followed – including the Claimant not being accompanied to meetings and no formal minutes being produced for the meetings which were purported to be the formal stages of that process. The result of the failure to follow the process was a lack of information and clarity provided to the Claimant as to what process was being followed in her case.

36 In November 2016 the Claimant attended hospital for surgery but a complication arising from the anaesthetic procedure meant that it was not possible to proceed with the surgery. In the event, the Claimant was absent from work after this until June 2017 [263-264].

37 It was during this period that the Claimant met with Mr Stephen Norris, the Respondent's Group Station Manager. They met on 19 January 2017 for a medical review meeting [359] and again on 6 February 2017 for what was referred to as a 'capability meeting' [272]. During this second meeting, Mr Norris terminated the Claimant's employment with 12 weeks notice [276]. This decision was confirmed in Mr Norris letter dated 22 February 2017. The Claimant's last day of employment was stated to be 29 April 2017 [361].

38 The Claimant instructed solicitors to write to the Respondent objecting to her dismissal. Their detailed letter was dated 28 February 2017 [362]. Following receipt of this letter, a letter was sent from Occupational Health to Mr Parker, the Claimant's treating Orthopaedic Surgeon [281] and the Claimant attended a further meeting with Mr Norris on 8 March 2017. At that meeting, it was said that the capability would be suspended and that further medical information would be obtained in order to understand what job the Claimant was capable of [444]. In effect, the Respondent had revoked its decision to terminate the Claimant's employment at this time.

39 In or around May 2017 Mr Akinniyi became the Claimant's line manager. The Claimant was ready to return to work on 20 June 2017 but as this was not supported by Occupational Health, Mr Akinniyi ensured that the Claimant was put on paid leave. On 29 July 2017 the Claimant attended for an Occupational Health review. It was noted that the Claimant had improved and was able to manage up to one hour's uninterrupted walk. A phased return to work was recommended starting with up to 4 hours per day, avoiding heavy manual handling [283]. In the event, the Claimant returned to work, undertaking part of the Station Host's role at Queen's Road, Peckham.

40 At her next Occupational Health Review on 16 September 2017 it was noted that the Claimant continued to be fit to work her restricted duties. The Claimant had been referred back to her specialist and it was advised to review her after this appointment, regarding a possible return to full duties [310]. It is agreed by the parties that thereafter, either at the end of September or during October 2017, Mr Brown, the Claimant and Mr Akinniyi had a brief meeting. It is also agreed that the purpose of that meeting was intended to be a Stage 3 MFA meeting. At the start of the meeting Mr Brown queried where the minutes were of the earlier meetings held with Mr Lethorn. Mr Akinniyi attempted to find those documents but was unable to do so. Accordingly it was agreed that the meeting would have to be postponed.

41 In the event, the meeting was reconvened on 2 November 2017. Mr Akinniyi sent a letter of invitation [366] which incorrectly referred to a Stage 3 meeting whereas at the meeting Mr Akinniyi confirmed that he would 'kick start the process again to stage 1' [463]. During the meeting, Mr Akinniyi discussed some alternative roles. Reference was made to a temporary role at Balham; this role was a Gateline Assistant role that did

not require lone working. The outcome of the meeting was confirmed in a letter to the Claimant of the same date [367].

42 On 15 November 2017 the Claimant attended for some physiotherapy provided by the Respondent. At that appointment some concerns were raised about the Claimant's medical condition and she was advised to contact her GP urgently [198]. Following this, she was referred to hospital for urgent treatment for a DVT. The Claimant required treatment with anticoagulants.

43 It was around this time that Mr Akinniyi invited the Claimant to a meeting on 11 January 2018 to discuss the outcome of her last medical [368]. At that stage, the Claimant had not returned to work following her absence from 16 November 2017.

44 On 27 December 2017 the Claimant attended another Occupational Health review [311]. The Claimant remained unfit for work with a compensatory gait pattern, reduced range of movement in the left ankle and pain on palpation.

45 During the Claimant's extended absence from work, Mr Akinniyi regularly telephoned her and made home visits. On 20 December 2017, during one such home visit, Mr Akinniyi offered the Claimant a permanent Gateline Assistant role at Balham, working the late turn (the fixed evening shift). This role was considered particularly suitable for the Claimant as it did not require her to work on her own and therefore could accommodate the Claimant's need to refrain from certain duties such as lifting and the positioning of ramps. The Claimant's initial response to the suggestion of working at Balham, was that she was unable to work in the evenings due to increased pain at that time of the day and her medication causing additional tiredness.

46 At this stage in its findings, the Tribunal notes that the Claimant gave conflicting accounts of how Mr Akinniyi's behaved during meetings at her home. At one point the Claimant suggested to the Tribunal that Mr Akinniyi had been threatening towards her, although later during her evidence, she appeared to accept this had not been the case. For the avoidance of doubt, the Tribunal does not accept that Mr Akinniyi behaved in a threatening or inappropriate way towards the Claimant. From the totality of the evidence heard in this case, the Tribunal was entirely satisfied that at all times Mr Akinniyi was a manager, who behaved appropriately and tried to do his best for the Claimant.

47 On 11 January 2018 the Claimant attended the medical review meeting with Mr Akinniyi [207]. At that stage she continued to experience significant pain and was awaiting a further consultation with her treating doctor to discuss what more could be done for her condition. On 5 March 2018 the Claimant attended the next Occupational Health Review [192]. It was noted that once a report had been received from the Claimant's

specialist, it would be 'very likely' that the outstanding queries raised by Mr Akinniyi could be responded to.

48 On 21 May 2018 the Claimant emailed Mr Akinniyi. She informed him that she would be having an injection into her leg on 31 May 2018. She also said that she would like to *'Take On Balham Back Gate That You Told Me About if It's Still Available'* [373]. However at that stage, that role was not still available. Following the Claimant informing him that she could not work the late turn, Mr Akinniyi had asked the other employee who worked the early turn whether he was able to swop shifts with the Claimant. He was not able to change. Mr Akinniyi had not heard again from the Claimant about the role and so had offered it to another employee who also required a role with certain restrictions and was able to work in the evenings.

49 On 31 July 2018 the Claimant saw Dr Phillips, Occupational Health [288]. With regards to the Claimant's fitness for work, Dr Phillips stated as follows,

'..she is currently fit to work full time in a sedentary job. If a role is available I would suggest that she takes short microbreaks to mobilise and has a foot stool to elevate her foot when sitting…..

If such a role is not available she could return to work as a gateline assistant on a part time basis. Initially she would probably be able to manage about 4 hours per shift providing that she can sit whenever possible. …..She may find that 4 hours is the most she can manage or she may feel able to gradually increase gradually.' [288]

50 On 7 August 2018, Dr Phillips provided an update following receipt of a report from the Claimant's specialist. Dr Phillips stated that the Claimant's specialist thought it unlikely that she would be able to work full time '*if her job involves significant time on her feet'.* Dr Phillips then quoted from the specialist's report,

'Unless the patient can be redeployed to a desk-based occupation with the required relevant training then I doubt she would be able to return to full time work in the near future.' [289]

51 On 13 August 2018 the Claimant sent an email to Mr Akinniyi requesting reasonable adjustments to enable her to continue in her employment [380]. The Claimant stated that she wanted to work part time 6am to 11am Monday to Friday, with provision of a seat. Mr Akinniyi responded to this email on 15 August 2018 telling the Claimant that he would look into her email and would advise 'accordingly' [381]. It was at around this time that the Claimant also became a patient Champion. This was a voluntary position at a GPs surgery. The Claimant had put her name forward in May 2018 [374]. In a letter dated 1 August 2019 from Dr Ahmed, it is confirmed that the Claimant began this role on 13 August

2018 and that it involved lots of organising, participating in group activities and improving the services already provided by the GP practice [430].

52 On 16 August 2018 the Claimant met with Mrs Wasley (nee Arnott) and Mr Akinniyi. A note taker and a colleague, supporting the Claimant, were also in attendance [216]. At the meeting, there was discussion about the most recent occupational health report. The Claimant stated that she agreed with the medical opinion [219].

53 The Tribunal is satisfied that it was clear at this stage that the Claimant was unable to continue working in her substantive full time role. The Claimant could either work in a full time sedentary role or work part-time as a gateline assistant with adjusted duties. The adjustments were that the Claimant was unable to work alone, she was unable to carry out the ramp duties or the heavier manual handling aspects of the job, and she needed a station where there was a lift.

54 Whilst it has been suggested in questioning by Mr Brown that, as the Respondent's operation included a large number of stations, there were roles which could have been offered to the Claimant on the gateline, no particular stations and roles were identified by him and put to the Respondent's witnesses. There was in fact, no particularised evidence to challenge the Respondent's case that the only non-lone working gateline assistant roles were at Balham and these were all filled at the relevant time. Accordingly the Tribunal accepts that, as a matter of fact, this was the situation.

55 At the meeting in August, Mr Akinniyi was focused on finding the Claimant an alternative suitable role. His tone at the meeting was a proactive one. He referred to exploring all avenues of getting the Claimant back to work [220]. Mr Akinniyi had made enquiries with recruitment to see what roles were available that might suit the Claimant's circumstances. He referred to an administrative position at Three Bridges where the hours were flexible and part-time. It was agreed that the closing date would be extended to enable the Claimant to apply for this position. It was also agreed that the Mr Akinniyi would begin to send the Claimant the Respondent's vacancy lists [220].

56 Mrs Wasley emphasised that the Claimant would need to apply for alternative roles in the same way as anyone else. She told the Claimant '*We can't be seen to be favouring you'* [217]. In this way, other than Mr Akinniyi's support, no particular steps were taken to identify suitable alternative work for the Claimant as an employee who was medically incapable of continuing to work in her substantive role.

57 In an email sent later that morning, Mr Akinniyi requested that the Three Bridges application window be extended for the Claimant. At this time, he also asked for the link for the Ticket Office assessment to be sent to the Claimant '*just in case any Ticket office role comes up'* [226]. In order

to perform such a role, an applicant was required to have passed the assessment.

58 On 23 August 2018 the Claimant sent through her draft CV to Mr Akinniyi. He provided brief comments to her later that day [230]. On 29 August 2018 the Claimant was emailed by the GTR Recruitment Team. She was informed that after a careful review of the applications for the Three Bridges role, she had been unsuccessful [382]. Mr Wyborn, Area Manager for the High Weald, reviewed the Claimant's application for this role. Mr Wyborn considered that the Claimant's answers on the form had been too brief and that it had been filled out *'as though she had put little or no effort into it'* [paragraph 13, witness statement].

59 On 3 September 2018 Mr Akinniyi forwarded the job vacancy list to the Claimant [228]. That same day the Claimant applied for the role of customer services part-time. The Claimant considered that she would be able to do this role at the City Thameslink Station [383]. Confirmation of the Claimant's application was received [384] and Mr Akinniyi confirmed that he was happy to provide her with a reference for the role [385]. It is noted that regular job vacancy lists were sent to the Claimant from this time.

60 On 13 September 2018 the Claimant was sent the link to undertake the Ticket Office numeracy assessment [245]. On 28 September 2018 Mr Akinniyi and Mrs Wasley were informed that the Claimant had achieved an overall score of 23%. The Claimant had answered 16 out of the 38 questions [244].

61 The Claimant was invited to a meeting on 27 September 2018 [59]. In the event a second invitation letter was sent, with a date for the meeting of 4 October 2018 [370].

62 On 2 October 2018 the Claimant sent an email to Mr Akinniyi reminding him of her request for reasonable adjustments [387]. In that email the Claimant stated that she felt she was being targeted for dismissal as the Respondent had failed to adhere to the medical recommendations and the Respondent's Equal Opportunities and Anti Harassment Policy [387].

63 On 4 October 2018 the meeting with Mr Akinniyi, Mrs Wasley and the Claimant went ahead. The Claimant was informed that she had failed the Ticket Office numeracy assessment. During the meeting there was an adjournment. It was at this time that Mrs Wasley telephoned others within the business to see if there were any roles available within the company. Following the resumption of the meeting, Mr Akinniyi told the Claimant that she was being given 6 weeks notice and that her employment would be terminated on 15 November 2018 if no other role was found for her meanwhile [457].

64 By an email dated 8 October 2018, from the Claimant to Mr Akinniyi, the Claimant submitted a grievance against the Respondent's decision to

terminate her employment [389]. On 9 October 2018 Mrs Wasley told the Claimant that she would receive a letter formally setting out the decision to dismiss her and the reasons for that decision and that following receipt of that letter, the Claimant could then appeal the decision [390].

65 On 14 October 2018 Mr Akinniyi sent a company wide email asking whether there were any positions available that might suit the Claimant's situation [391A]. This email was sent to approximately 100 managers and received one response, which was negative. On 15 October 2018 Mr Akinniyi confirmed in a letter to the Claimant that her employment would terminate on 15 November 2018 [46]. On 25 October 2018 the Claimant wrote an email appealing against the decision to terminate her employment [401].

66 On 13 November 2018 Mr Akinniyi emailed the Claimant. He told her that he had followed up on the Thameslink Customer Services role application. He said that the roles were for 'future application' and that all applicants shortlisted would be put into a talent pool and as soon as a role became available, they would progress through the recruitment process [410]. It was not clear from that email whether the Claimant had been placed into the talent pool or if her application was still 'live' at that time. Mr Akinniyi also said that he had asked about any other suitable role but that there was nothing currently available.

67 On 15 November 2018 the Claimant's employment with the Respondent came to an end.

68 On 12 December 2018 the Claimant attended a capability appeal meeting. Mr Wyborn was tasked with hearing and deciding upon the appeal. At that meeting, the Claimant handed in a 7 page statement [431]. As this was quite a lengthy document, Mr Wyborn decided to adjourn the appeal hearing to take time to consider the Claimant's written submissions. The appeal hearing was reconvened on 6 February 2019 [446]. The Claimant was unsuccessful in her appeal and this outcome was notified to her by a letter dated 15 March 2019 [51].

69 Following her dismissal and her unsuccessful appeal, the Claimant continued to receive some correspondence from the Respondent. For example, vacancy details were emailed to her on 14 May 2019 [421] and 29 May 2019 [422]. The Claimant also applied for the role of 'Amended Traincrew Diagram Planner' [428]. This application was unsuccessful.

Legal Summary

Unfair Dismissal

70 An employee has the right not to be unfairly dismissed by his employer (section 94 of the Employment Rights Act 1996 ('the ERA 1996')). Sections 98(1) and (2) of the ERA 1996 set out the potentially fair reasons for dismissing an employee. The list includes a reason related to the capability of the employee. If such a reason is established, the

determination of whether such a dismissal is actually fair then rests on an application of section 98(4) of the ERA 1996. Section 98(4) of the ERA 1996 deals with the fairness of dismissals. It reads in part as follows:

'(4)… where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's understanding) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with the equity and the substantial merits of the case.'

71 In respect of the meaning of 'reasonable' the EAT provided some guidance in **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17. The EAT stated that the correct approach in answering the questions posed by Section 98(4) of the ERA 1996 was as follows:

(a) The starting point should always be the words of section 98(4) themselves.

(b) In applying this section the Employment Tribunal must consider the reasonableness of the employer's conduct, not simply whether the members of the Employment Tribunal consider the dismissal to be fair.

(c) In judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

(d) In many though not all cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another.

72 The function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses, which a reasonable employer might have adopted. If the dismissal falls within a band then the dismissal is fair. If the dismissal falls outside the band it is unfair.

73 The 'band of reasonable responses' test does not apply solely to the decision to dismiss. It applies also to the procedure followed by the employer. Whether or not a procedural defect is sufficient to undermine the fairness of the dismissal as a whole, for the purposes of section 98(4) ERA 1996, is a question for the Tribunal. Not every procedural error will do so. The fairness of the whole process should be looked at alongside the other relevant factors.

74 In a case of capability, the employer must have an honest belief based on reasonable grounds that the employee was incapable of returning to his or her post. A tribunal will look at whether the employer found out about the employee's current medical position and whether an employee could be offered an alternative position more suitable to his or her state of health. If an employee is considered to be disabled, there will be a consideration as to whether any reasonable adjustments could be made. A central question will be whether a reasonable employer would have waited longer before dismissing and, if so, how long.

75 An employer won't act unreasonably where the offer of alternative employment is at a lower rate of pay, where that is the only suitable employment available.

Discrimination arising from Disability: Section 15 Equality Act 2010

76 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.

77 This section raises two questions of fact: what was the relevant treatment and was it unfavourable to the claimant. Unfavourable treatment is that which the putative discriminator does or says or omits to do or say, which places the disabled person at a disadvantage. There must be a connection between the 'something' and the claimant's disability. The unfavourable treatment must be because of the 'something' which arises out of the disability.

78 Discrimination arising from disability is not established where the less favourable treatment is justified – this requires the respondent to show that the treatment is a proportionate means of achieving a legitimate aim. The test of justification is an objective one to be applied by the tribunal. The respondent is required to show that the unfavourable treatment was a reasonably necessary and proportionate means of achieving a legitimate aim.

79 In addition to these principles, the Tribunal has reminded itself of the caselaw including Sheikholeslami v University of Edinburgh [2018] IRLR 1090 EAT, Pnaiser v NHS England [2016] URKR 170, EAT and Hensman v Ministry of Defence UKEAT/0067/14/DM, [2014] EqLR 670, as summarised in paragraphs 25, 27 and 29 of Ms Jenning's written submissions.

Reasonable Adjustments: Sections 20 & 21 Equality Act 2010

80 Section 20 of the Equality Act 2010 imposes a requirement on an employer whose provisions, criteria or practices puts a disabled person at a 'substantial disadvantage' in relation to a relevant matter in comparison with persons who are not disabled, to 'take such steps as it

is reasonable to have to take to avoid the disadvantage' or to provide the auxiliary aid (as appropriate). A failure to comply with this requirement is treated as a failure to comply with a duty to make reasonable adjustments which, in turn, amounts to an act of discrimination (s.21(2) Equality Act 2010).

81 The Tribunal must identify: the relevant provision, criteria or practice ('PCP'), the persons who are not disabled with whom comparison is made, the nature and extent of any substantial disadvantage suffered by the claimant and any steps it would have been reasonable for the respondent to take.

82 In order for the duty to arise the employee must be subject to a 'substantial' disadvantage in comparison with persons who are not disabled. Substantial is defined as 'more than minor or trivial' (section 212(1) Equality Act 2010). The question of whether any adjustments were reasonable in the circumstances, will be determined by the Tribunal objectively (Morse v Wiltshire County Council [1998] IRLR 352).

Tribunal's Conclusions

83 The Tribunal has carefully considered the entirety of the evidence in this case, both documentary and oral, and the submissions made by both parties.

Unfair Dismissal

84 It is agreed by the parties that the Claimant's employment with the Respondent came to an end on 15 November 2018 and that the reason she was dismissed was due to her capability; a potentially fair reason for dismissal.

85 The Tribunal is satisfied that the Respondent had an honest belief based on reasonable grounds that the Claimant was incapable of returning to her substantive post as a full time Gateline Assistant.

86 Mr Akinniyi made this decision following receipt of the Occupational Health Report dated 31 July 2018 and the supplemental letter from Dr Phillips, dated 7 August 2018. In providing the Occupational Health recommendations in the summer of 2018, further medical evidence had been sought from the Claimant's treating specialist and taken into account. In addition to the medical evidence from the Claimant's treating specialist and the Occupational Health opinion, the Claimant also confirmed to her line manager, Mr Akinniyi, in the meeting in August 2018 that she agreed that she was unable to return to work in her substantive post. In these circumstances, the Tribunal readily accepts that Mr Akinniyi's conclusion that the Claimant could not go back to her substantive role was based on an honest belief on reasonable grounds.

87 The Tribunal must then consider whether the Claimant's dismissal for being incapable of performing her substantive role was fair in all the circumstances. This necessarily includes a consideration of whether the Claimant could have been offered an alternative position more suited to her state of health. In this regard, the Tribunal has heard evidence about the possibility of working part time as a Gateline Assistant and also about other available roles within the Respondent business.

88 The role of Gateline Assistant ordinarily included physical tasks such as prolonged standing at the Gateline, carrying out security checks around the station and positioning ramps to help with accessibility issues for particular customers. It is agreed by the parties that the Claimant was, at all relevant times, physically incapable of carrying out the entirety of the Gateline Assistant role and that she could only carry out aspects of the role, on a part time basis. Mr Akinniyi told the Tribunal that a part time Gateline Assistant role could only have been provided to the Claimant at Balham Station. This is because Balham was the only station within the Respondent's business where lone working was not required as a Gateline Assistant. All other stations required a Gateline Assistant to work alone, carrying out the entirety of the role. Mr Akinniyi also told the Tribunal that there were no vacancies at Balham from August 2018 for a part time Gateline Assistant. Accordingly the Respondent would have had to create a role for her there, at a cost to the business, when no such role was required by the business.

89 As already noted in this Judgment, Mr Brown referred to the entirety of the Respondent's business operation and its large number of stations in submitting that there must have been capacity for a part time Gateline Assistant role, with the necessary limitations that the Claimant required. Mr Brown also referred the Tribunal to what he said were relevant changes that had been made to the working arrangements of other employees. He contended that this demonstrated that appropriate arrangements could have been made for the Claimant.

90 Having considered the entirety of the evidence available to the Tribunal on this issue, the Tribunal is satisfied that the Respondent did not act unreasonably in not creating a part time Gateline Assistant role for the Claimant. The Tribunal accepts the evidence from Mr Akinniyi that the only location for such a role was Balham because of how that particular station operated, with additional gatelines, and that there were no vacancies at Balham at the relevant time. The Tribunal is satisfied that it was not reasonable to expect the Respondent to create an additional role there, at a cost to the business, when there was no business need for an additional role. Whilst Mr Brown referred to other stations where the Gateline Assistant could work part time and with assistance, the Tribunal was not taken to any specific examples of such stations. The Tribunal preferred the evidence of Mr Akinniyi on this matter and concluded that there were no such other stations.

91 Next, the Tribunal turned to what steps were taken by the Respondent in considering whether there was other work, to that of a Gateline Assistant, which they had and which might be suitable for the Claimant. The material time when considering what was done in this regard, is after receipt of the medical evidence in early August 2018. As noted, there were meetings with the Claimant on 16 August 2018 and 4 October 2018. The specific steps taken by the Respondent particular to the Claimant can be summarised as follows:

91.1 The date for applying for the Three Bridges role was extended by one day;

91.2 The Claimant was enrolled to take a numeracy assessment required for Ticket Office roles;

91.3 Mr Akinniyi looked over the Claimant's CV and made a suggestion as to its contents;

91.4 Mrs Wasley telephoned others in the business, during a brief adjournment in the meeting on 4 October 2018, to make enquiries about the availability of a job;

91.5 Mr Akinniyi sent a company wide email making similar enquiries, on 14 October 2018.

92 Beyond this, the Tribunal has concluded that there were no significant additional steps taken by the Respondent, when considering suitable alternative employment for the Claimant, and which were particularly focused on the Claimant as an employee who was medically restricted. The Tribunal particularly noted the following:

92.1 The Respondent did not have a specific written policy for situations of medical redeployment. This probably contributed to basic steps being missed by the Respondent in its approach to identifying suitable work for the Claimant. For example, there was no effort to formally identify with the Claimant what roles she would like to work in and what her skills were, beyond those required for the role of Gateline Assistant. There was also a lack of clarity as to the process followed – for example, the Claimant was not told in the meeting in August what timescales would be followed going forward or that the next meeting would proceed to dismissal if no job had been found at that stage. Further, in the letter inviting the Claimant to the October 2018 meeting, there was reference to wanting to discuss next steps and *'what support we can provide you'* but there was also reference towards the end of the letter to an outcome of termination of employment.

92.2 The Claimant was not provided with active ongoing assistance with her job search from the Respondent's human resources personnel. Rather, she was reliant upon Mr Akinniyi for any regular contact and assistance. It is to be remembered that Mr Akinniyi had his ongoing managerial duties

to perform at the relevant time and was not employed as a human resources professional with oversight of the Respondent business as a whole. As such his help was always going to be limited;

92.3 Mr Akinniyi had contacted recruitment and identified a potentially appropriate role at Three Bridges. Recruitment had then opened the computer portal to allow for a late application. Such actions were taken by the Respondent because that role was considered an appropriate role for the Claimant to apply for. However, despite this, no specific guidance was provided to the Claimant with the completion of her application form. Further, as is apparent from Mr Wyborn's witness statement, no information was provided to him, as the manager in charge of recruitment to that role, as to the Claimant's particular circumstances and the position regarding her medical capability. There was no suggestion made, for example, that the Claimant should attend for an interview for the role as opposed to being assessed purely on her application form;

92.4 Whilst job lists were sent to the Claimant from early September 2018, she was not provided with any assistance with navigating or reviewing the content of those lists. Nor was any information provided to her as to what vacant roles might be suitable for her or could be the subject of adjustments to render them suitable;

92.5 Following receipt of the first jobs bulletin, the Claimant applied for the role of Customer Service at City Thameslink. This was advertised as either a full time or part time role. Again the Claimant was not provided with any assistance with the completion of the application for that role nor did the Claimant receive any answer to her application. On 3 September 2018 the Claimant's application was acknowledged and it was said that the Claimant would be contacted *'shortly'* when she would be told if she had been successful *'at this stage of the recruitment process'* [384]. However the Claimant was not contacted again about this role. When Mr Akinniyi sent a further email about the role, no specific information was provided about the Claimant's application but rather general guidance as to the process being followed [410];

92.6 Finally, very limited and late enquiries were made by the Respondent in seeking to identify suitable roles for the Claimant. Mrs Wasley made some telephone calls to others within the business, to see if there were any suitable roles available, during an adjournment in the meeting on 4 October 2018. She was told there were no suitable roles. These telephone enquiries, made during the meeting at which Mrs Wasley knew that the Claimant was to be given notice of the termination of her employment, demonstrate the lack of a structured and pro-active approach taken by the Respondent's human resources personnel to the Claimant's medical redeployment. This was the sum total of Mrs Wasley's contribution to supporting the Claimant with identifying suitable alternative work with the Respondent. Mr Akinniyi had had a discussion with recruitment ahead of the meeting on 16 August 2018 and on 14 October 2018 he sent out an email to approximately 100 colleagues

asking whether any roles were available. As previously noted, he received one response in the negative from one colleague shortly afterwards. The language used within Mr Akinniyi's email failed to indicate to the recipients any obligation to consider whether available roles could be performed on a part-time basis and / or with adjustments. Neither Mr Akinniyi or Mrs Wasley had made such broad enquiries in August or September 2018.

93 Following a detailed consideration of this matter, the Tribunal concludes that the Respondent acted unreasonably in its consideration of an alternative position for the Claimant. Some additional assistance was needed in the Claimant's case beyond the approach that would be taken for any other employee seeking to apply internally for another role – in other words, there had to be more than a level playing field in the Claimant's job search.

94 There were opportunities for the Claimant to be moved into an alternative role – for example, the Three Bridges role and the Customer Service role. Whilst it is noted that this latter role is referred to by Mr Akinniyi as for 'future application', the Respondent was advertising these vacancies continually from at least early September 2018. The Tribunal is satisfied that the Respondent had an ongoing rolling recruitment because there was a need for applicants. There was a need for applicants because there were roles that needed to be filled. It is clear from the advertisement that the roles were available full time or part time. The Claimant had experience in customer service duties both as a Gateline Assistant and when she had performed adjusted roles during her phased returns. Some of these adjusted roles had included specific customer service focused tasks. No particularised response was given to the Claimant regarding her application for the role despite the fact that her application was acknowledged and she was told that she would be advised *'of the progress of your application'* [384].

95 In the circumstances of this case the Respondent acted unfairly and unreasonably in not giving sufficient consideration to finding the Claimant alternative work that she could do – namely, a part-time non sedentary role or a full time sedentary role. The Respondent's failures regarding finding the Claimant alternative work placed its conduct outside of the so-called 'band of reasonable responses'. The Claimant's dismissal was unfair.

Disability Discrimination

96 By reason of an injury to her left ankle, at all relevant times the Claimant was disabled for the purposes of the Equality Act 2010.

Discrimination arising from Disability – Section 15 EQA 2010

97 The 'something' in this case is said to be the Claimant's inability to work full-time hours and to stand throughout her working hours. The evidence

from the occupational health report and Dr Phillips' letter, as referred to above, is clear that this limitation arises from the Claimant's disability. The Tribunal is then required to consider whether the Claimant suffered unfavourable treatment because of the 'something' which arises from her disability.

98 The Claimant refers to four matters of alleged unfavourable treatment, set out in paragraphs 5.2 a - d of this Judgment. The Tribunal was not satisfied that the first of these could properly found a claim of discrimination arising from disability. The Tribunal entirely accepted that the Claimant's role at Queen's Road, Peckham was a supernumerary position created temporarily to facilitate a return to work.

99 The Tribunal considered that the remaining allegations of a failure to move the Claimant into a part-time role and to follow the medical recommendations were actually elements of encapsulated within the fourth allegation of unfavourable treatment, namely the Claimant's dismissal. They were essentially multiple sides of the same coin and could therefore all be appropriately considered under the heading of the Claimant's dismissal.

100 The Claimant asserts that she has suffered unfavourable treatment by being dismissed and that her dismissal was because of something arising in consequence of her disability, namely her inability to work as a full time Gateline Assistant. The Tribunal has been reminded that the 'something arising' that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant influence on the unfavourable treatment, thereby amounting to an effective reason or cause of it.

101 The Tribunal is satisfied that the Claimant's inability to work as a full time Gateline Assistant because of her disability had a significant influence on the Respondent's decision to dismiss her. In circumstances in which the Respondent had knowledge of the Claimant's disability, the Respondent will be liable for that unfavourable treatment, namely her dismissal, unless it can show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

102 In considering the Respondent's defence of justification, the Tribunal must determine whether the measures taken were appropriate, necessary and proportionate. To be proportionate, a measure has to be both an appropriate means of achieving a legitimate aim and a reasonably necessary means of doing so. The Tribunal has concluded that the Respondent's aims of an efficient use of their resources and an effective organisation of their workforce were legitimate but it is satisfied that the decision to dismiss the Claimant was not a proportionate means of achieving those aims. In reaching this conclusion, the Tribunal has taken into account the needs of the Respondent's business and has objectively made its own judgment as to whether the Respondent's decision to dismiss the Claimant was proportionate. The Tribunal was

not satisfied that the Claimant's dismissal was a reasonably necessary means of achieving the stated legitimate aims.

103 The Claimant could not continue in her substantive role but the Respondent's stated aims, of an efficient use of resources and effective organisation of the workforce, could have been furthered by enabling the Claimant to work in a vacant role, such as the advertised Customer Services Thameslink role, that she was able to perform with her disability. The Respondent's failure to engage with the Claimant and enable her to perform an alternative role, doing other work that they had available, drove them to dismiss her. In the circumstances, their decision to dismiss her cannot be justified.

Reasonable Adjustments – Sections 20 & 21 EQA 2010

104 The Tribunal is satisfied that at the time of the alleged discrimination, there was a provision, criteria or practice ('PCP') as alleged by the Claimant, namely a requirement for full time working in the role of Gateline Assistant.

105 This PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, as she was unable to work full time hours as a Gateline Assistant. The Respondent knew the Claimant was at that disadvantage as the medical evidence obtained expressly told them this.

106 Following on from our factual findings and conclusions in respect of the other claims brought, the Tribunal is satisfied that there were steps that were not taken by the Respondent that could have been taken by them to avoid the disadvantage. Those steps were providing a process for medical redeployment which enabled the Claimant to move into a vacant role, which she was able to perform with her disability, on a full time basis or on a part time basis.

107 As referred to above, Mrs Wasley told the Claimant during the meeting in August 2018 that she could not be treated any differently from anyone else. That was the essence of the Respondent's approach to the Claimant's situation. However the Tribunal is satisfied that it was possible and reasonable for the Respondent to make adjustments to its process for internal applicants seeking an alternative role. The Respondent was actively advertising customer service roles. As a disabled person, the Claimant needed additional assistance and for the Respondent to take positive steps to assist her in securing such a suitable role.

Conclusion

108 In conclusion, it is the Judgment of the Tribunal that the Claimant's claims of unfair dismissal and disability discrimination, both discrimination arising from disability and a failure to make reasonable adjustments, are well founded and succeed.

Employment Judge Harrington
12 April 2021