EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT		RESPONDENT
MR E JAYARAM	V	NETWORK RAIL INFRASTRUCTURE LTD (1) BABCOCK INTERNATIONAL PLC (4)

HELD AT: LONDON CENTRAL **ON: 12-15, 18-22, 25-27 JANUARY 2020**

EMPLOYMENT JUDGE: MR M EMERY
MEMBERS: MR D SHAW
MS T SHAAH

REPRESENTATION:

For the claimant:	Mr C Barklem	(Counsel)
For respondent 1:	Ms S Tharoo	(Counsel)
For respondent 4:	Mr G Graham	(Counsel)

JUDGMENT

All claims against both respondents fail and are dismissed.

REASONS

1. This Hearing heard five claims brought by the claimant, the first of which was issued on 8 December 2017 the last on 6 January 2020, consolidated under the case number above. The claimant was employed by the 1st respondent as a Signaller Grade 2 under the terms of an employment contract and Apprenticeship Agreement from 24 July 2017 to 27 December 2019. The terms of his Apprentice Agreement required him to attend and successfully complete a 13 week course at Signalling School, followed by 39 weeks in practical training at his employment location, the Cuxton Signal Box. The 2nd respondent ran the Signalling School course on behalf of the 1st respondent, which included providing trainers, training materials, and learning support specialists.

2. The claims centre around the claimant's failure to progress on three occasions beyond the 1st practical observation assessment, "normal mode of signalling", at weeks 2/3 of signalling school, the consequence being he was sent home on each occasion, leading to the events set out below. The respondents accept the claimant was disabled by way of Attention Deficit Attention Disorder, there is a dispute about when the respondents had actual knowledge of this condition. The claimant alleges the 1st respondent failed to make reasonable adjustments from on/around 22 August 2017, that the 1st respondent directly discriminated against him, subjected him to discrimination for a reason arising out of his disability, discriminated him on grounds of his race, harassed him on grounds of his disability, and victimised him following three protected acts (two of which are accepted as such by the respondents). The claimant argues the 2nd respondent failed to make reasonable adjustments; the 2nd respondent concedes it is an employment service provider of vocational training (s.55 & 56(2)9(a) EqA). The claimant alleges he was unfairly dismissed, also that the 1st respondent failed to pay him the pay rate of a Grade 2 Signaller meaning he suffered an unlawful deduction of wages. The respondents deny all allegations.

The Issues

3. Did the Respondent(s) have knowledge of the Claimant's ADHD at the time of any of the alleged discriminatory treatment? The claimant alleges knowledge from 22 August 2017, the respondents accept knowledge from 20 September 2017.

4. Direct discrimination s.13 EqA and discrimination arising from disability s.15 EqA.

   Were:

   4.1 Geoff Orman's refusal in August 2017 to reconsider its decision not to allow the Claimant to re-take the signaller's course; and/or

   4.2 Irma Vermaning's failure in November 2017 to recommend that he be allowed to re-take the course:

a. Less favourable treatment than either was or would have been afforded to a non-disabled person, pursuant to s.13 EqA? And/or

b. Less favourable treatment because of something (i.e. his inability to pass the signallers' course in August 2017) arising because of his disability?

5. Reasonable adjustments – s.20 EqA – claims 1 & 2

5.1 Were the following provisions, criteria or practices ("PCPs") applied by R1 in relation to the Claimant:

a. The requirement to achieve 70% for the Underpinning Knowledge Assessment of the signaller course ("the Assessment"); and

b. The requirement to achieve within 5% below the threshold to pass the Assessment, so as to be considered a suitable candidate to re-take the signaller's course following the grievance in November 2017?

5.2 If so, did either or both of the PCPs put the Claimant at a substantial disadvantage by reason of his disability?

5.3 If so, was R1 aware (or could either reasonably have been expected to have been aware) that the Claimant would be put to said disadvantage?

5.4 If so, would it have been a reasonable adjustment to allow the Claimant to re-take the signallers' course notwithstanding that he had not met either of the criteria in 2.1 above?

5.5 If so, did R1 make or offer to make the adjustment?

6. Reasonable adjustments – s.20 EqA – claim 4

6.1 Was the following provision, criterion or practice ("PCP") applied by R1/R4 in relation to the Claimant

6.1.1 The requirement that the Claimant undertake the signallers' course commencing 5.11.18 ("the second signallers' course") without adjustments for his disability?

6.2 If so, did the PCP put the Claimant at one or more of the following substantial disadvantages as compared with someone who was not disabled:

6.2.1 Difficulty concentrating for more than 15 minutes at a time during lectures and the written examination;

6.2.2 Difficulty organising his study time in the evenings after lectures;

6.2.3 Tutors mistook his ADHD for aggression and agitation;

6.2.4 Insufficient time allocated during lectures to enable him to take good notes;

6.2.5 Becoming tongue tied when asked questions "on the spot" during lectures;

6.2.6 Inability to focus and multi-task.

6.3 If so, was R1/R4 aware (or could either reasonably have been expected to have been aware) that the Claimant would be put to said disadvantage?

6.4 If so, were any or all of the following reasonable adjustments which would have alleviated the disadvantage?

6.4.1 An appropriately trained mentor

6.4.2 an iPad and/or laptop with mind mapping software

6.4.3 written or electronic class notes

6.4.4 time out cards

6.4.5 access to a chill out room;

6.4.6 placing the Claimant in a group of 2 rather than 3 for practise time on the simulator?

6.5 If so, did R1/R4 make or offer to make any of the adjustments?

7. <u>Reasonable adjustments – s.20 EqA – claim 5</u>

7.1 Was the following provision, criteria or practice ("PCP") applied by R1/R4 in relation to the Claimant:

7.1.1 The policy that audio recording equipment was prohibited for use by students as a learning aid (or otherwise) in training sessions during the signallers' course commencing 23.9.19 ("the third signallers' course")?

7.2 Was the following provision, criteria or practice ("PCP") applied by R1 in relation to the Claimant:

7.2.1 The decision to dismiss the Claimant on 10.12.19 rather than offer him another (non-signaller) role within R1?

7.3 If so, did either of the PCPs put the Claimant at a substantial disadvantage as compared with someone who was not disabled in that:

7.3.1 The prohibition on the use of recording equipment exacerbated not disabled in that the prohibition on the use of recording equipment exacerbated his difficulty concentrating and prevented him from taking comprehensive notes of the lectures for private study; and

7.3.2 His dismissal left him, as a disabled person, at a particular disadvantage in the open job market.

7.4 If so, was/were R1/R4 aware (or could they reasonably have been expected to have been aware) that the Claimant would be put to said disadvantage?

7.5 If so, would it have been a reasonable adjustment which would have alleviated the disadvantage for R1 and/or R4 to allow the Claimant to utilise the recording function of the Notability software he had been provided with by R1 during the third course? And/or

7.6 For R1 to slot him into another role within R1 without having to undergo a competitive interview process as an alternative to dismissal?

7.7 If so, did R1/R4 make, or offer to make, the adjustments?

8 <u>Victimisation pursuant to s.27 EqA</u>

8.1 Were the following acts of the Claimant:

8.1.1 His race discrimination claim issued by the Claimant in August 2017;

8.1.2 His grievance dated 22.8.17; and

8.1.3 His grievance appeal hearing on 5.1.18, during which he alleged that R1 had failed to make adjustments

"protected acts" pursuant to s.27(1)(a) EqA?

8.2 If so, did Mr Rudkin advise the Claimant on 5.1.18 that the grievance procedure was not the correct procedure by which to appeal the decision to remove him from the signallers' course?

8.3 If so, was this advice in accordance with the Claimant's contract/R1's policies?

8.4 If not, was this advice less favourable treatment of the Claimant for having done a protected act?

9 Unlawful deductions

9.1 What were the terms of the Claimant's contract of employment in relation to pay?

9.2 Was he paid in accordance with this throughout his employment?

10 Victimisation pursuant to s.27 EqA

10.1 The Claimant relies on the same protected acts as in paragraph 8.1 above.

10.2 Were any or all of the following less favourable treatment of the Claimant for having done a protected act?

10.2.1 Placing the Claimant in a class with the same tutor Daniel Jones, who had taught him previously and was involved in claim 1 and one of the Claimant's grievances.

10.2.2 Placing the Claimant in a group of 3 students rather than 2 students to use the simulator;

10.2.3 The critical content of the report in November 2018 produced by his tutor detailing his time on the second course;

10.2.4 His manager, Sam Fenwick's refusal on 29.11.18 to allow him to re-take the course with adjustments he had requested and advising him that he would be dismissed unless he found another job within R1;

10.2.5 His dismissal from his post on 2.1.19?

11 Race discrimination pursuant to s.13 EqA

11.1 Did R1 give one of the Claimant's white colleagues, Mark Holderness, who also failed his probation as a signaller, a different role within R1 as an alternative to dismissal?

11.2 If so, was this less favourable treatment on the ground of race?

12 Harassment pursuant to s.26 EqA

12.1 In providing the Claimant with the same line manager who had dismissed him earlier in the year (i.e. Sam Fenwick) following his reinstatement, did R1 engage in unwanted conduct relating to his disability which violated his dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for him?

13 Unfair dismissal

13.1 Did R1 unfairly dismiss the Claimant when it dismissed him on 10 December 2019 rather than slotting him into another (non-signaller) role within R1?

The Law

14. Equality Act 2010

s.13 Direct discrimination

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

s.15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

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

s.20 Duty to make adjustments

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

s.21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

s.23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case.

(2) The circumstances relating to a case include a person's abilities if—

a. on a comparison for the purposes of section 13, the protected characteristic is disability;

s.26 Harassment

(1) A person (A) harasses another (B) if—

a. A engages in unwanted conduct related to a relevant protected characteristic, and

b. the conduct has the purpose or effect of—

i. violating B's dignity, or

ii. creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(2) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

a. the perception of B;

b. the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

s.27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

a. B does a protected act, or

b. A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

a. …
b. …
c. doing any other thing for the purposes of or in connection with this Act;

d. making an allegation (whether or not express) that A or another person has contravened this Act.

s.136 Burden of proof

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

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Schedule 8 – Duty to Make reasonable Adjustments; Part 3 Limitations on the Duty - *Lack of knowledge of disability, etc.* Reg 20

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

a. …
b. than an employee has a disability and is likely to be placed at the disadvantage…

15. <u>Employment Rights Act 1996 – Dismissal</u>

s.94 The right

1. An employee has the right not to be unfairly dismissed by his employer

s.98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show

a. the reason (or, if more than one, the principal reason) for the dismissal, and
b. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

a. Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

….

(3) In subsection (2)(a)-

a. ‘capability’, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

b. ‘qualifications’, in relation to an employee, means … technical … qualification relevant to the position which he held.

(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 undertaking) 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 equity and the substantial merits of the issue

Relevant case law

16. Direct Discrimination

a. Has the claimant been treated less favourably than a comparator would have been treated on the ground of his disability and (in relation to one allegation) on the ground of his race? This can be considered in two parts: (a) less favourable treatment; and (b) on grounds of the disability / race (*Glasgow City Council v Zafar [1998] IRLR 36)*

b. The requirement is that all *relevant* circumstances between complainant and comparator are the same, or not materially different; the tribunal must ensure that it only compares 'like with like'; save that the comparator is not disabled (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2013] ICR 337*)

c. The tribunal has to determine the *“reason why”* the claimant was treated as he was (*Nagarajan v London Regional Transport [1999] IRLR 572)* and it is not necessary in every case for the tribunal to go through the two stage procedure*;* if the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial *(Igen v Wong [2005] EWCA Civ 142). “*Debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of.*” (Chondol v Liverpool CC UKEAT/0298/08)*

d. Was the claimant treated the way he was because of his disability, or because of his race? It is enough that his disability (or race) had a 'significant influence' on the outcome - discrimination will be made out. The crucial question is: 'why the complainant received less favourable treatment … Was it on grounds of [disability] / [race]? Or was it for some other reason..?” *Nagarajan v London Regional Transport [1999] IRLR 572, HL*. “What, out of the whole complex of facts … is the “effective and predominant cause” or the “real and efficient cause” of the act

complained of?" (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372*, *[1997] ICR 33)*

e. *London Borough of Islington v Ladele*: *[2009] EWCA Civ 1357* provides the following guidance:

> (1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport [1999] IRLR 572, 575*—"this is the crucial question". In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator
>
> (2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in *Nagarajan* (p 576) as explained by Peter Gibson LJ in *Igen v Wong [2005] EWCA Civ 142*, *[2005] ICR 931*, *[2005] IRLR 258* paragraph 37
>
> (3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test, which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in *Igen v Wong*
>
> (4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one.
>
> (5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the *Igen* test: see the decision of the Court of Appeal in *Brown v Croydon LBC [2007] EWCA Civ 32*, *[2007] IRLR 259* paragraphs 28–39.
>
> (6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are.

> (7) It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in *Watt (formerly Carter) v Ahsan [2008] IRLR 243*, *[2008] 1 All ER 869* … paragraphs 36–37) …"

f. *Chondol v Liverpool CC UKEAT/0298/08*, *[2009] All ER (D) 155 (Feb), EAT*: A social worker was dismissed on charges which included inappropriate promotion of his Christian beliefs with service users. His claim for direct religious discrimination failed as the tribunal found that 'it was not on the ground of his religion that he received this treatment, but rather on the ground that he was improperly foisting it on service users'. The EAT accepted that the distinction between beliefs and the inappropriate promotion of those beliefs was a valid one, and it was correct to focus on the reason for the claimant's treatment. Citing *Ladele*, the EAT again confirmed that 'debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of'.

17. Discrimination arising from disability

1. There are two steps, *"both of which are causal, though the causative relationship is differently expressed in respect of each of them"*:

   i. did A treat B unfavourably because of an (identified) something? and
   ii. did that something arise in consequence of B's disability?

   "The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence." (Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305).

2. If the employer knows (or has constructive knowledge) of disability, it need not to be aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability (*City of York Council v Grosset [2018] EWCA Civ 1105*). In this case a lack of judgment by a teacher was contributed to by stress, which was significantly contributed to by cystic fibrosis; the Court of Appeal found that it did not matter that the school was unaware that the lack of judgment had arisen in consequence of his disability when s.15(10(a) is applied. If the employer knows of the disability, it would *"be wise to look into the matter more carefully before taking the unfavourable treatment"*.

3. There must be some connection between the “something” and the claimant’s disability; the test is an objective test, and the connection could arise from a series of links (*iForce Ltd v Wood UKEAT/0167/18)* – but there must be some connection between the “something” and the claimant's disability.

4. The test was refined in *Pnaiser v NHS England [2016] IRLR 170, EAT*:

   i. A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises. The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A, and there may be more than one reason in a s.15 case. The “something” that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

   ii. Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is irrelevant.

   iii. The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. - it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

   iv. “It does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of “something arising in consequence of the claimant's disability”. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to “something” that caused the unfavourable treatment.”

5. The fact that an employer has a mistaken belief in misconduct as a motivation for a particular act is not relevant in considering s.15 discrimination, in a case where the employer had a genuine but mistaken belief the claimant had been working elsewhere during sickness absence: it is sufficient for disability to be *'a significant influence … or a cause which is not the main or sole cause, but is nonetheless an effective cause of the unfavourable treatment'.' (Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893, EAT)*.

6. Justification: *R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213*: three elements of the test: *"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?".* When assessing proportionality, an ET's judgment must be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. *Hensman v Ministry of Defence UKEAT/0067/14/DM*, *[2014]).* The test of justification is an objective one to be applied by the tribunal, while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning. The test under s 15(1)(b) EqA is an objective one according to which the tribunal must make its own assessment" (*City of York Council v Grosset UKEAT/0015/16).* Under s 15(1)(b) the question is whether the unfavourable treatment is a proportionate means of achieving a different objective, i.e. the relevant legitimate aim. *Ali v Torrosian (t/a Bedford Hill Family Practice) [2018] UKEAT/0029/18:* this objective balancing exercise requires that to be proportionate the conduct in question has to be both an appropriate and reasonably necessary means of achieving the legitimate aim; and for that purpose it will be relevant for the Tribunal to consider whether or not any lesser measure might have served that aim. Although there may be evidential difficulties for a Respondent in discharging the burden of showing objective justification when it has failed to expressly carry out this exercise at the time, the ultimate question for the Tribunal is whether it has done so.

18. <u>Reasonable adjustments</u>

a. A failure to make reasonable adjustment involves considering:
   i. the provision, criteria or practice applied by or on behalf of an employer;
   ii. the identity of non-disabled comparators (where appropriate); and
   iii. the nature and extent of the substantial disadvantage suffered by the claimant.

   Environment Agency v Rowan [2008] IRLR 20, *[2008] ICR 218*

   "the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP'. *Newham Sixth Form College v Sanders [2014] EWCA Civ 734*.

b. *Provision, criterion or practice:* It is a concept which is not to be approached in too restrictive a manner; as HHJ Eady QC stated in *Carrera v United First Partners Research UKEAT/0266/15 (7 April*

2016, unreported), 'the protective nature of the legislation meant a liberal, rather than an overly technical approach should be adopted'. In this case the ET were found to have correctly identified the PCP as 'a requirement for a consistent attendance at work'.

c. Pool of comparators: has there been a substantial disadvantage to the disabled person in comparison to a non-disabled comparator? *Archibald v Fife Council [2004] UKHL 32*, *[2004] IRLR 651*, *[2004] ICR 954*: the proper comparators were the other employees of the council who were not disabled, were able to carry out the essential functions of their jobs and were, therefore, not liable to be dismissed.

d. While it is not a breach of the duty to make reasonable adjustments to fail to undertake a consultation or assessment with the employee (Tarbuck v Sainsburys Supermarkets Ltd), it is best practice so to do. The provision of managerial support or an enhanced level of supervision may, in accordance with the Code of Practice, amount to reasonable adjustments (*Watkins v HSBC Bank Plc [2018] IRLR 1015)*

e. The adjustment contended for need not remove entirely the disadvantage; the DDA says that the adjustment should 'prevent' the PCP having the effect of placing the disabled person at a substantial disadvantage. *Leeds Teaching Hospital NHS Trust v Foster UK EAT /0552/10*, *[2011] EqLR 1075:* when considering whether an adjustment is reasonable it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage—there does not have to be a 'good' or 'real' prospect of that occurring. *Cumbria Probation Board v Collingwood [2008] All ER (D) 04 (Sep)* - 'it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made *will* remove the substantial disadvantage'.

f. The test of 'reasonableness', imports an objective standard and it is not necessarily met by an employer showing that he personally believed that the making of the adjustment would be too disruptive or costly. *Lincolnshire Police v Weaver [2008] All ER (D) 291 (Mar)*: it is proper to examine the question not only from the perspective of a claimant, but that a tribunal must also take into account 'wider implications' including 'operational objectives' of the employer.

g. *Employer's knowledge: Gallop v Newport City Council [2013] EWCA Civ 1583*, *[2014] IRLR 211* – a reasonable employer must consider whether an employee is disabled, and form their own judgment. The question of whether an employer could reasonably be expected to know of a person's disability is a question of fact for the tribunal (*Jennings v Barts and The London NHS Trust UKEAT/0056/12*, *[2013] EqLR 326*,) Also, 'if a wrong label is attached to a mental impairment a later re-labelling of that condition is not diagnosing a mental impairment for the first time using the benefit of hindsight, it is giving the same mental impairment a different name'. *Donelien v Liberata UK Ltd UKEAT/0297/14:* when

considering whether a respondent to a claim 'could reasonably be expected to know' of a disability, it is best practice to use the statutory words rather than a shorthand such as 'constructive knowledge' as this might imply an erroneous test. The burden – given the way the statute is expressed – is on the employer to show it was unreasonable to have the required knowledge.

19. Harassment

a. *Driskel v Peninsula Business Services Ltd [2000] IRLR 151*: Determining whether alleged harassment constitutes discrimination involves an objective assessment by the tribunal of all the facts; the claimant's subjective perception of the conduct in question must also be considered. The tribunal is therefore required to determine both the actual effect on the particular individual complainant and the question whether that was reasonable in the circumstances of the case. *Pemberton v Inwood [2018] EWCA Civ 564*: "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))." This means that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for them, then it should not be found to have done so.

b. *Dhaliwal*: "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award.'

c. 'Conduct': *'Prospects for People with Learning Difficulties v Harris UKEAT/0612/11*: suspension or other acts by an employer which would not normally constitute an act of harassment, can amount to acts of harassment; in this case the lack of forethought on the part of the employer and the peremptory nature of the suspension, with scant justification and absent prior consultation with the claimant, justified the tribunal's finding of unlawful harassment in this case.

d. Purpose or effect: Harassment will be unlawful if the conduct had *either* the purpose *or* the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. Where the claim simply relies on the 'effect' of the conduct in question, the perpetrator's motive or intention—which could be entirely innocent – is irrelevant. The test in this regard has, however, both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the complainant's point of view; the subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that requisite effect; the objective element. The fact that the claimant is peculiarly sensitive to the treatment accorded him or her does not *necessarily* mean that harassment will be shown to exist.

e. Related to the prohibited grounds: The conduct must be 'related to' a relevant protected characteristic, including conduct associated with that characteristic. The tribunal has to apply an objective test in determining whether the conduct complained of was 'related to' the protected characteristic in issue. *Hartley v Foreign and Commonwealth Office UKEAT/0033/15:* Where adverse comments were made by managers amount an employee, the fact that the intent of the managers was not to "aim" at her condition was irrelevant – the tribunal must assess *"if the overall effect was unwanted conduct related to her disability.'*

f. *Land Registry v Grant* [2011] EWCA Civ 769: the tribunal must be careful not to cheapen the significance of the statutory wording; is must consider carefully whether the matters above can violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her.

20. <u>Victimisation</u>

a. The parties accept that the claimant made two protected acts.

b. Detriment: *MOD v Jeremiah [1979] IRLR 436*, *[1980] ICR 13, CA:* a detriment exists 'if a reasonable worker would take the view that the treatment was to his detriment'. A detriment must be capable of being objectively regarded as such- *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11*, *[2003] IRLR 285*, *[2003] ICR 337,* 'an unjustified sense of grievance cannot amount to 'detriment'. *Deer v University of Oxford[2015] EWCA Civ 52* - the conduct of internal procedures can amount to a 'detriment' even if proper conduct would not have altered the outcome.

c. Reason for the treatment: **T**he detriment must be 'because' of the protected act. *Greater Manchester Police v Bailey [2017] EWCA Civ 425* - it remains the case as under the pre-EqA legislation that this is an issue of the "reason why" the treatment occurred. Once the existence of the protected act, and the 'detriment' have been established, in

examining the reason for that treatment, the issue of the respondent's state of mind is likely to be critical. However there is no need to show that the doing of the protected act was the legal cause of the victimisation, nor that the alleged discriminator was consciously motivated by a wish to treat someone badly they had engaged in protected conduct. A respondent will not be able to escape liability by showing an absence of intention to discriminate, provided that the necessary link in the mind of the discriminator between the doing of the acts and the less favourable treatment can be shown to exist. *Woods v Pasab Ltd (T/a Jones Pharmacy*) *[2012] EWCA Civ 1578:* 'the real reason, the core reason, for the treatment must be identified'

d. Where there is more than one motive in play, all that is needed is that the discriminatory reason should be 'of sufficient weight' *O'Donoghue v Redcar and Cleveland Borough Council [2001] EWCA Civ 701*, *[2001] IRLR 615, CA*

e. A claim for victimisation is not dependent upon the claim which gives rise to the protected act being successful - *Garrett v Lidl Ltd UKEAT/0541/08*

Witnesses

21. We heard from the claimant. For the respondents we heard from the following witnesses:

1st respondent:

a. Mr Steve Burgess who was a Team Leader and Workforce development Specialist and who was a trainer on the signalling course
b. Mr Daniel Jones who was a Team Leader and Workforce development Specialist and who was a trainer on the signalling course
c. Mr Geoff Orman, at the time a Local Operations Manager and the claimant's line manager for part of his employment
d. Ms Irma Vermaning, an Operations Manager who heard the claimant's 1st grievance
e. Ms Lindsey Finley, National Training Manager for Operations who oversaw the signalling course
f. Ms Samantha Fenwick a Local Operations Manager who became the claimant's Line Manager
g. Mr Ben Rudkin Incidents Officer who dealt with the claimant's first grievance appeal
h. Mr Martin Bastiani, Programme Manager who dealt with the claimant's December 2018 grievance
i. Mr Jamie Rivett Senior Programme Manager who undertook the appeal against the December 2018 grievance decision
j. Mr Brian Lynch Senior Incident Officer who heard the claimant's appeal against dismissal

4th respondent

k. Mr Mark Dougall the Head of Rail who dealt with issues of adjustments on the signalling course
l. Ms Joanne Kerr, a Development Coach who provided assistance to the claimant.

22. The Tribunal spent the first day of the hearing reading the witness statements and the documents referred to in the statements. This judgment does not recite all of the evidence we heard, instead it confines its findings to the evidence relevant to the issues in this case, all of which was known to the parties during the claimant's employment.

23. This judgment incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The relevant facts

24. The claimant was employed as a Signaller Grade 2, his employment as a signaller being conditional on him passing signalling training. His offer letter states that *"… satisfactory passing of signalling training is mandatory to qualify as a signaller. In the event of not passing, whilst alternative opportunities will be considered, it is likely that your employment with Network Rail will be terminated"* (222). The claimant also signed a "Signalling Apprenticeship Learning Agreement" which states, *"Given the safety critical nature of the signalling role it is important that clear performance and assessment standards are maintained both during the twelve week initial signaller training course and during the apprentice's subsequent training at their home location. The apprentice's offer of employment as a signaller is conditional on them reaching the required standard throughout the apprenticeship"* (241-253, at 242-3).

25. The Leaning Agreement states that three practical observations will be undertaken, the first being *"normal mode of signalling"*; and that *"apprentices are required to be competent in each component of each of these practical observations. If an apprentice fails to attain a competent standard in any of the practical observations they will receive a reassessment after development. If they fail to attain a competent standard in the reassessment they may receive a second reassessment, depending on the nature and extent of their mistakes. Apprentices who consistently fail two or more of the practical assessments will be referred to their line manager for a discussion about whether they will continue with IST training, either on their current course or a later one."* The Learning Agreement also states: "*if the apprentice fails to reach the required standard … a number of options may be considered: re-training, this involves the apprentice repeating part or all of the training programme…. Redeployment …. Termination of the training and withdrawal of the offer of employment."* (244-5).

26. The Learning Agreement sets out Line Manager commitments to the apprentice, including the requirement to *"Liaise regularly with the apprentice and with the workforce development specialists while the apprentice undertakes the twelve week initial training Specifically the line managers will be in touch… following*

the written assessments and observations, Areas of weakness will be identified as early as possible and arrangements put in place to address these in subsequent training…. Review the progress reports … and liaise … as appropriate, particularly where additional support may be required. Facilitate additional support, such as a time in the signal box, where required. " (247-8).

27. The claimant commenced his 1st signalling course on 31 July 2017. One issue arose in that the claimant was not provided in advance of the training a Rule Book and National Operating Instructions. These were provided to the claimant at the start of week 2. The Tribunal accepted that this was a failing by the respondents, in that this should have been provided to the claimant *"prior"* to the start of training (247). We also accepted the evidence of Mr Burgess that there was little reference to the Rule Book in week one of the training, and that there was no disadvantage to the claimant as a consequence.

28. An issue arose in the first weeks which is relevant to the claimant's subsequent grievance. The claimant alleges that he was told in front of the class that he had been rude to a security guard and was taken out of the class and told off by Mr Burgess. Mr Burgess argues that a security guard approached him and made an allegation of rudeness by a delegate late the evening before; in the class he asked whether a student had stayed late and was told that the claimant had stayed until after midnight, to which Mr Burgess said to the class is not acceptable to stay so late. Mr Burgess said in his evidence that he had a word with the claimant, *"I challenged him and he was shocked about the allegation of rudeness. So I made further enquiries and spoke to security, I was given description, and it was quite clear that it was not the claimant who had been rude…"* and he spoke to the claimant to confirm this. The Tribunal accepted that this was an accurate account of what had occurred.

29. The claimant failed his first practical assessment at the beginning of week 3, achieving 60% out of a pass mark of 70% and failed his first written knowledge assessment at the end of week 3. The Claimant's Progress Report states that the claimant *"has not met the required benchmark. There was a large gap in his understanding which has been sent to his line manager to review"* (479). Mr Burgess commented in the Report, *"I am concerned as [the claimant] continues to struggle with his understanding of the rules and regulations; he is also struggling to get to grips with how the NX panel works and how each signal interacts with another. He needs to rapidly improve to prevent himself from falling too far behind… Multi-tasking: he cannot seem to signal more than one train at a time; Attention management: this is linked to the above where [the claimant] focussed in on one thing and is unable to spread his attention to other tasks… he doesn't seem to have the ability to read a timetable and put it into practice despite getting lots of practice on the simulator using the same timetable I used for the observation"* (480). Mr Burgess made a decision to send the claimant home from signalling school with instructions to meet with his line manager, Mr Orman. The Tribunal accepted Mr Burgess and Mr Orman's account of what the two of them discussed at the time about the claimant – that Mr Burgess was of the view that the claimant did not have the necessary skill-set to pass the course. A decision was reached that the claimant would not be returned to signalling school.

30. Criticism was levelled at Mr Burgess for failing to record or set out a development action plan when the claimant failed the practical assessment. The Tribunal accepted Mr Burgess explanation, that he should have made notes and documented the issue with the claimant, but *"I did to want to pressure the claimant with the practical and written assessments being so close together. Better to focus on the written assessment.",* that he was expecting the claimant to pass the written assessment. In relation to the 'development action plans' (480) Mr Burgess accepted that these were blank; the Tribunal accepted his evidence that the claimant had not told him he was struggling, that if he had he would have created a development plan (see also page 550).

31. The claimant saw his line manager, Geoff Orman on 22 August 2017 and had a lengthy meeting of about two hours in which the decision not to return the claimant to signalling school was discussed. The same day the claimant saw his GP. There was a dispute as to exactly what he said to Mr Orman. The Tribunal accepted that the claimant told Mr Orman that he was submitting a grievance, this was referred to in an email; we accepted that he referred to a difficulty with learning and this may be a disability, but we did not accept that he told Mr Orman that he was suffering from ADHD at this meeting. We accepted Mr Orman's evidence that the claimant said it was *" a feeling he had, he felt he had a learning disability, and he has seen someone else getting additional time with a disability."*

32. The claimant submitted a grievance, stating he had not been provided with a paper copy of the rule book and National Operating Instructions; he was only offered feedback once; he was told that the whole class had been made aware that there was an allegation he had been rude to a security staff member, that he had been spoken to rudely by Mr Burgess in relation to this incident, that Mr Burgess had told him he could not be in the building after 8.00pm despite having to undertake extra time studying, that he had not signed-out on this date; that he was *"a visual learner"* and the course was *"not geared towards people who learn like me"* that he was confident he could pass second time around; he had not been allowed to retake the course; that he was suffering from the fact he had submitted an ACAS early conciliation form against the 1st respondent (not related to the claims in this Tribunal) and this affected his learning (483-5). A grievance hearing was arranged, and the claimant submitted an extensive request for documents, including his interview notes for two applications he had made for signaller, cctv footage of the incident with the security guard, and information on the names who had passed signalling school (492).

33. On 1 September 2017, the claimant attended a private assessment with a Professor of Psychiatry Prof Anthony Hale, who provided a 'to whom it may concern' assessment dated 9 September 2017 stating *"it seems probable"* that the claimant is suffering from Adult Attention Deficit Hyperactivity Disorder (ADHD) and that *"it is highly probable that it was untreated ADHD which led him to failing his end of course signalman exam, and I would expect him to pass a re-take when he is stabilised on treatment…"* (495).

34. Professor Hale provided a more detailed letter to his GP, dated 18 September 2017. The letter states that it would take 1-2 months to stabilise the condition

with treatment, *"… and I would expect him to pass a re-take when he is stabilised on treatment"* (500-503). The claimant forward the doctors letter to Mr Orman on 20 September 2017 (528) along with details of the medication he was taking (533).

35. The grievance investigation was undertaken by Ms Vermaning, and the claimant was interviewed on 20 September 2017; his trainers at signalling school Steve Burgess and Daniel Jones were also interviewed. In her evidence, Ms Vermaning accepted that she was made aware by the claimant at the grievance meeting that he had been diagnosed with ADHD. She said that the next step would be to refer the claimant to Occupational Health *"which is the starting point for what sort of reasonable adjustments"* could be put in place. We accepted that Ms Vermaning told the claimant that *"I could not guarantee whether or not reasonable adjustments were possible. It would have come out of the OH report, and we had not arrived at this stage. I do not manage the signalling school, so could not make that commitment at this point."*

36. Ms Vermaning stated that she could not make a decision on whether it would have been a reasonable adjustment to allow the claimant to go back to signalling school, as more information was needed from Occupational Health. On the allegation that the '...performance rating can be adjusted' – the 1st respondent's "Reasonable Adjustments Navigator" (page 369), Ms Vermaning's evidence, which we accepted, was that this *"does not apply to pass marks - this is for employees who are on a banded rate of pay - if you have been scored improvement required, or performance exceeded … pass marks are safety critical".* She referenced in her evidence the concerns of Mr Burgess, about the claimant's ability to multi-task, attention, planning and ability to learn, that these were about the claimant's ability to do the job of signaller. She accepted that there may be a stress in not receiving the Rule Book, that this may have been detrimental to the claimant, but that there was little rule book content in first week.

37. The grievance outcome dated 8 November 2017 was that some issues were partially upheld (late arrival of the rulebook and National Operating instructions, and the security guard incident). The rest of the grievance was not upheld. In relation to the decision that he could not continue on the signallers course, this was not upheld, as *"there is no evidence to suggest that the correct process has not been followed"* (541-546). Her evidence was that she did not consider the issue of ADHD as this was not known to the trainers at the time of the course, she was only made aware of this diagnosis by the claimant on 20 September 2017. The claimant appealed the outcome *"as the investigation was biased and the conclusions made were flawed"* (564).

38. Ms Vermaning referred the clamant to Occupational Health – and we accepted her evidence that the 1st respondent *"… needed information from Occupational Health about the course and whether he could work as a signaller. … I recommended he disclose his condition to his line manager to be referred and medication checks could take place."* We did not accept the claimant's contention, put to Ms Vermaning, that the decision made on the claimant's appeal of the grievance outcome - which was to request reconsideration of the decision not to allow him to retake the course - could have been made at this

time. We accepted her evidence which was, *"When I made this initial call I had received feedback from trainers who said there was no real prospect of the claimant passing the signalling course - my decision was based on this - facts I knew at time; and once I became aware of ADHD diagnosis we referred to OH as we needed to know the impact of this condition on a signaller."*

39. On 19 December 2017 the claimant raised a complaint with the 4th respondent, on the basis that it failed to support his learning needs, that he was not provided with a development plan in breach of the Apprenticeship Agreement, and amounted to a *"dereliction of duty"* that it was for the 4th Respondent to *"help and develop apprentices…"* that the issue for him was *"a lack of understanding of terminology and classroom drawings…"* (587-9).

40. The claimant attended a NHS appointment on 28 December 2017 at a specialist ADHD service and a report was sent to his GP stating that he suffered from ADHD, *"predominately inattentive presentation…".* His comments to the Consultant Psychiatrist who assessed him included him stating *"… I could not concentrate and I really struggled to understand the terminology. I feel that some adjustments need to be made…".* He was prescribed medication, given some literature and lifestyle changes were recommended (591-5).

41. Between September and December 2017 there was a delay in referring the claimant to Occupational Health; one of the reasons was that the claimant was reluctant to attend an OH appointment, giving his consent to do so in December 2017. From January 2018 to July 2018 Mr Orman had several welfare meetings with the claimant – in part to discuss medication and the need for OH to assess its potential impact on his ability to undertake the role of signaller. The Tribunal accepted that Mr Orman's focus at these meetings was to advise the claimant of the need for an OH assessment as well as discussions about potential alternative roles. The claimant attended an OH appointment in January 2018, and a holding report was sent while further information was sought by OH.

42. The claimant's detailed spreadsheet - his 'crib notes' for his appeal against the grievance outcome, which he sent to the respondent the day before the appeal meeting which took place on 5 January 2018, state that it would be a reasonable adjustment to allow him to retake the course. His notes state that he struggles to concentrate on a single task, he procrastinates, he loses concentration, and becomes agitated. He states that he was *"unable to concentrate for more than about 15 minutes at a time during the lectures",* he was unable to organise his time, he spent too much time studying into the night which affected him the following day; he would lose his thought patterns when taking notes, leaving him with unfinished notes, that *"on the day of the practical observation, my ADHD caused me to lose focus and multitask, My lack of attention management meant I repeatedly made mistakes".* He stated that the medication would *"improve my focus; improve my concentration… improve my planning…".* He asked for a DWP assessment, a *mentor "who specialises in ADHD",* lessons to be reduced to 30 minutes sessions with a 5 minute break in-between, a "Livescribe 3 Smart pen" which would mean he could *"listen to the lecture and cross reference it with my written notes",* and copies of the ppt slides (602-4).

43. The claimant also sent an appeal against his failure to pass the signallers' course to Network Rail on 10th January 2018 setting out a complaint under the terms of the Apprenticeship Learning agreement; he stated that this was to Mr Burgess' manager, Ms E Lowe as he had submitted a grievance against Mr Burgess (622-626), this set out in similar terms his complaints and requests for adjustments. In the interim his grievance appeal was *"paused"* pending the outcome of the appeal. Mr Rudkin, who heard the grievance appeal stated that the reason for this pause was he felt an appeal against the decision not to allow him to retake the course was a better option than pursuing a grievance; we accepted that this was his genuine reason for suggesting the pause in the grievance appeal process.

44. On 8 February 2018 the claimant was told on his appeal of 10th January 2018 that the decision to fail him on his first assessment was *"upheld";* the reason was that his condition has not been diagnosed and *so "this could not be taken into consideration at the time of the assessment"*; he was told that if he was to attend the course again*, "we would look into the possibility of putting reasonable adjustments in place…"* (694). On the same date, the claimant asked for his grievance to be reopened *"as it is not a question of whether or not my manager will allow me to retake the course"* (709). The claimant questioned the suitability of Ben Rudkin to hear the appeal as he had worked previously on the route the claimant would be employed on (the Three Bridges route), Mr Rudkin advised that he worked on a different route for 10 years and was *"an impartial manager"* for the appeal (753-4).

45. The claimant saw OH on 1 March 2018 and a report was prepared which stated that he *"… is fit to resume signaller training with a reasonable chance that he will now qualify…""* (764-5).

46. The original grievance decision was upheld at a meeting on 4 April 2018 and a letter summarising the reasons for the decision was sent to the claimant on 19 April 2018. In his report Mr Rudkin made a *"further recommendation"*: that given the new evidence of ADHD, further consideration should be given to allowing the claimant to retake the course, that this would also be accompanied by a requirement for an OH report to determine his suitability for the course along with any support and reasonable adjustments which may be required*, "As you are aware, the role of signaller is safety critical and it is therefore crucial that you can fulfil the requirements of the role competently and safely"* (800-804).

47. There followed correspondence between HR and Mr Burgess about how the signallers course was run in practice, the requirement to be *"controlled under pressure"* and the requirement to multi-task (805-8). The claimant was referred to OH and he was referred for an Occupational Therapy Functional Capability Assessment, to take place in part in a signalling box.

48. The claimant was resistant to attend OH and *"… did not want to proceed with the assessment.."* (570) and he reiterated his concerns to Mr Orman, that he had not given consent and a different manager had made the referral, he considered this to be a breach of confidentiality, and he wondered why he was being referred if he was to lose his job; he subsequently agreed to proceed with this assessment.

There was accordingly a delay between sending the claimant the OH consent form and his returning this form of one month; also the claimant was not able to attend an appointment because of sickness.

49. On 1 August 2018 the claimant stated that he would not attend an OH appointment, because he had *"previously seen world renowned experts in the field of ADHD"* and that he would only attend an OH appointment if it was by a psychiatrist of *"an equal or higher authority"* than these experts (841). He was told that this report is *"pivotal"* to establish his work capabilities; he stated that he would attend *"under duress"* (843-4). We accepted the respondent's evidence (Ms Fenwick, Mr Orman) that the 1st respondent's focus at this time was seeking information on reasonable adjustments and the claimant's suitability for the role.

50. The outcome of the OH assessment in a report dated 10 August 2018 was that the following adjustments were recommended: a mentor to support the claimant through signalling school; a laptop with mind-mapping software; the provision of note-taking dictation software such as Speechnotes *"so he can record his thought processes instantly".* Questions about the effect of medication on the role were not answered, being referred to a Dr or specialist. The report states that *"there was no reason"* why the claimant cannot undertake the signalling school training; that he should have *"increased supervision and frequent check-ins with his line manager"* and *"all instructions provided in writing rather than verbal as he will have a means to refer to these if required"* (853-8). A decision was taken by Mr Orman to allow the claimant to retake the training course. At around this time Mr Orman obtained a new role within the respondent and Ms Fenwick was assigned as the claimant's line manager.

51. The claimant queried his pay on 20 September 2018, stating that he was being paid £25,107 instead of what he considered should be his contractual entitlement of £26,665: he was told that this was correct as he was a signaller in training, and his pay was therefore *"… a grade below the pay which they will receive once passed and verified as competent … you are being paid a grade one salary…"* (870).

52. A call took place between Ms Butt from HR and OH in which the following actions were discussed: a *"Learning Support Specialist"* be appointed who would meet with the claimant on his first day at signalling school; that this would entail an *"immediate learning support consultation and put a plan in place or additional support while he is on the course… the LSS will put together coping strategies for [the claimant] and also attend to undertake 121's and follow-up session when necessary"* (889). The claimant and his Union rep attended a meeting with Ms Fenwick on 4 October 2018. He stated that he needed a mentor with *"a good understanding of ADHD"* and he requested an iPad and apple pen and notability software which he could use to make a recording of the training sessions which would help with *"memory retention".* Ms Fenwick stated that she would need to check whether a recording of the lessons was allowed and queried why the types of software recommended by OH would not assist; the claimant stated that *"the way I learn that software would not be useful",* but mind mapping would be useful; he referred to his solicitors letter which asked for notes of the session 24 hours in advance and for the pass mark to be lowered (893-7).

53. The full list of adjustments requested by the claimant, and the training school's comments were as follows:

    a. Mentor with knowledge of ADHD: the 4th respondent's ALN specialist stated that an ALN specialist would be provided *"and further assistance sought if required",* recommended weekly appointments booked in advance.
    b. Laptop with dictation and mind mapping software; an iPad with notability software and apple pen: *"recording classroom sessions is not allowed",* but classroom notes can be provided at the start of each day
    c. Class notes 24 hours in advance: refused as this *"could lead to confusion as they will have no context…"*
    d. Pass mark to be lowered by 5%: *"the pass mark cannot be moved as this is to ensure all of our delegates achieve the required standard to become a signaller"*
    e. Additional breaks and a break-out area during classroom sessions: there *"are many breaks";* but the claimant can take additional breaks, along with *"time-out cards"* to allow the claimant to leave the classroom without challenge; and a quiet room can be provided for the claimant's use.

54. One issue which arose – a decision was taken that the LSS should only meet the claimant if accompanied by another member of staff. Mr Jones was taken to page 1415; that it was *"... not advisable to be in meeting without witness…"* Mr Jones accepted that a reason for this was because of *"previous issues"* with the claimant, including his complaints, grievances and employment tribunal claim. Ms Finlay stated that the reason was that trainers felt *"unprotected"* being alone with the claimant because of the previous issues.

55. An OH report dated 30 October 2018 stated that the claimant was fit to attend signalling school; it recommended an mentor who has *"good awareness of ADHD"* and asked *"if there is any scope to provide an iPad with an ipen with notability software… this would be extremely beneficial to assist…"* the claimant (995-6).

56. The claimant commenced his 2nd stint at training school on 5 November 2018 and adjustments were arranged, including weekly meetings, a key card for a time-out room, the claimant was to be issued with a 'time-out card' and that his mentor would discuss additional learning tools; written notes would be given to the claimant at the start of each day (934) and the claimant could use a laptop with mind mapping software (986). The claimant also attended signalling boxes in advance of the course commencing to see the working in practice. The claimant stated that he was *"disappointed"* he could not have reasonable adjustments including iPad, ipencil and notability, lowering the pass mark and a *"… specialist mentor trained in ADHD facilitating. These are all required in order to put me on a level playing field with other students…"* (988).

57. At the beginning of the claimant's 2nd stint at signalling school he met with Ms Bean the 2nd respondent's learning needs support assigned to assist him.

Shortly after the start of the course the claimant returned the laptop with mind mapping software back to Ms Bean, stating that it was *"not appropriate for his needs"* he asked for an iPad and ipen and notability, and for extra time in the assessments; both were deemed by the 1st respondent not to be recommended requirements or reasonable adjustments (1003-4 & 6). On the notability, the claimant was informed that he cannot record sessions as this *"can lead to delegates feeling uncomfortable and unwilling to ask questions"* (1008). Part way through the course the claimant provided his own iPad, and was again told he could not record sessions (1011-12).

58. The claimant was not provided with time-out cards. In his evidence the claimant said *"these could have been useful for when I was getting overwhelmed with the course…".* Mr Jones evidence was that he was given a key-card to a quiet room and all the needed to do was to put up his hand and he could have left the session; we accepted this evidence. The claimant did not complain at the time about the lack of time-out cards.

59. On the issue of notability and mind-manager. Ms Fenwick's evidence was that Ms Bean's advice was that these programmes *"provide the same elements and fulfil the same needs",* apart from the ability to record lessons. We accepted this as accurate evidence.

60. On 14 November 2018 the claimant raised concerns with Ms Bean that the trainer's teaching style disadvantaged him, he raised concerns about what the mentor's role was in order to provide him with support; (1028). Ms Bean's view was that notability and mind mapping provided similar assistance, that *"both options would be supportive"* for the claimant and that a laptop with mind manager should be adequate to meet his individual requirements (1030); a livescribe smart pen was ordered, which would copy and transfer all that is written and could make the document interactive; the claimant was according to Ms Bean happy that he would have meetings fortnightly *"He has reiterated that he does not require mentoring for his ADHD as he considers this to be … unnecessary"* (1036).

61. The claimant was asked about his concern with Ms Bean: he stated that she was not a specialist in ADHD, that *"I was looking for support with course content, assistance with creating documents for revision…"* which she was unable to provide. He stated that mindmapping was *"useless … and had she been a specialist she would have known this".* His evidence was that he was *"… struggling, but [Ms Bean] could not help me as she did not have the course knowledge".* His e*vidence was that he needed "additional support, specifically with the content and the practical side, having someone to guide me with the signalling equipment. … I needed her as mentor/buddy to step up to the mark and fight my corner … she did not do this."*

62. Mr Dougall gave evidence on the support provided by Ms Bean and Ms Kerr (who provided support at the claimant's 3rd stint at training school). He stated that her role is *"safeguarding , wellbeing and support and signposting to a correct specialist".* He stated that Ms Bean was a *"learning needs specialist"* who had degree level qualifications and is a Chartered Member of the British

Psychological Society with seven years educational learning support specialist experience. While Ms Bean had no specific qualifications in ADHD, she had dealt with *"a wide variety of additional learning needs - ADHD, bi-polar, dyslexia, dyspraxia including with lots of ADHD sufferers".* We accepted his evidence that Ms Bean was *"the most suitable person"* available to undertake this role.

63. At the end of week two the claimant had issues with his first attempt at *"normal mode of signalling"* observation on 15 November 2018, according to the assessor becoming confused on several occasions, including wrongly trying to raise level crossing barriers and wrongly sending trains to the next signal box (1038) and as a consequence was assessed as *"not yet competent" on* 5 out of 10 competences (1041). Mr Jones gave the claimant additional assistance on the simulator at the end of that day. Mr Jones evidence, which we accepted, was that *"we stayed back - we ran the simulator again and again, so there were less errors. But this does not mean he's developing, it's easy if they are following a pattern. He was learning to follow a pattern to get through the observation. We did many many trains. … it was a mixed bag, he can replicate again and again, but if it's not sunk in ... he can make mistakes … he sent train to wrong signal box; it's hedging his bets - he did not understand where he wanted to send it to."*

64. The claimant had a 2nd attempt on 16 November 2018 on the 5 *"not yet competent"* areas, and he failed 3 out of the 5 criteria, including a failure to signal more than one train correctly at the same time, and a failure to correctly send a train out of section (1044). He asked to have a third attempt straight away, and was informed that normally development time is given and that a 3rd failure would mean failing the course. He decided to go ahead, and he failed on one area, the assessment was ended at this point because of this failure *"for this reason [the claimant] is not yet competent for normal mode of signalling"* (1045 and 1057-8).

65. The claimant written to and asked to attend a first performance meeting *"because he had been unable to pass initial signaller training"* and was informed an outcome could be his dismissal (1053-4).

66. The claimant was provided with the notes of his signalling observation by Mr Jones; he responded saying *"…sorry for being like a spoilt kid"* at signalling school; later saying *"I take that apology back, I never stood a chance. See you at the employment tribunal for victimisation"* (1075). He submitted a grievance on 3 December 2018 and an appeal against the decision not to allow him to attend signalling school again, stating that he was not provided with iPad, ipencil and notability, a lowering of the pass mark, ppt slides in advance or a mentor trained in ADHD. He stated that the adjustments provided were not suitable, including no time out cards were provided, he was *"thrown out"* of the quiet room by security, that mind-mapping was not suitable in the classroom, that the Ms Bean had stated another person must be in the room when they met, causing him embarrassment and which meant he could not discuss his issues with her (1077-80). He stated that he was in a group of 3 students on the simulator instead of 2, meaning he did not have as much practice time, that Mr Jones was biased as he had undertaken good practice assessments, that Mr Jones spoke at an unsuitably fast pace. He stated that he had been discriminated against by Ms Fenwick, the 1st respondent, Mr Jones and all HR who had been involved.

He also stated that he had been underpaid (1077-80). He also appealed his assessment fail on grounds he was not provide with his requested reasonable adjustments; he had been discriminated against; a biased tutor had been appointed who was involved in his *"ongoing legal issues";* he had been put in a group of 3, not 2; and the week 2 tutor was not competent and was biased (1101).

67. The claimant was informed that he would be dismissed as he had been unable to meet the standards required and he had not been able to secure an alternative role in spite of his attempts to do so. The letter of dismissal dated 4 January 2019 stated he had not attended meetings to discuss alternative roles; his dismissal was effective immediately and he received one week's pay in lieu and outstanding holiday pay (1149-50).

68. The claimant appealed his dismissal on 13 January 2019, citing a failure to provide the appropriate assistive technology (iPad, ipencil and notability); the 1st respondent had ignored the OH advice on the above; failed to lower the pass mark; failed to provide a specialist in ADHD as a mentor; failed to provide slides in advance; did not appropriately provide a course facilitator as meetings were in the presence of another member of staff; the laptop and mind mapping was inappropriate; and failed to provide legible notes as they were printed with 6 slides per page; failed to provide a time out card or a quiet room (1165-6).

69. On 22 January 2019 a decision was taken by senior management to reinstate the claimant and provide with recommended support, including the iPad and pencil and *"relevant software",* that a *"smooth and supportive return to work",* be undertaken, giving him a *"final chance to qualify as a signaller, with the recommended support"* (1168). A meeting was held with the claimant and he was informed that this decision was reached *"… in the context of concerns that you highlighted about not having been provided with all the equipment and support recommended in the OH assist report dated 30 October 2018 namely the iPad/ipencil and notability software"*; he was provided with backpay; he was told that his grievance would be investigated, to ensure that the issues were discussed and resolved prior to his return to signalling school (1173-4). The claimant raised concerns about some of the contents of this letter, including the fact that it was not just the failure to provide software which led to his failing the course, stating also that he would *"easily pass the course"* as long as all adjustments requested in the past 12 months were provided, along with an unbiased course tutor (1175).

70. On 15 March 2019, the claimant requested the following adjustments for his return to signalling school: the pass mark reduced by 20% for each assessment; an independent private mentor who specialised in ADHD; the appropriate hardware and software; the 12 week course materials provide one month before the start of the course; 15 hours 1-1 study with a class tutor every week; 35 hours of extra simulator time each week one month before the start of the course (1227).

71. A return to work plan was undertaken for the claimant, and an OH assessment was arranged.

72. The claimant's grievance was undertaken by Mr Bastiani, who interviewed the claimant, Ms Fenwick, Ms Finley who oversaw the initial signaller training, Mr Jones and Ms Bean. The outcome of the investigation stated that the claimant would be provided with iPad, ipencil and software; that *"clarity is to be provided"* to the claimant because *"it has already been stated that recording of any classes is not permitted"* (1383); that the 1st respondent *should "look at the provision of a mentor with understanding of ADHD as this is a specific recommendation from the OJ assist reports.."*; that *"there should be no issue"* in providing course materials in advance of the course, even though this was against the advice of managers; and that other adjustments sought, including additional 1-1 study should be considered if OH considered it a reasonable adjustments.

73. The investigation report stated that 35 hours of simulator time was not a reasonable request as it could confer an unfair advantage to the claimant, but that this should be considered by OH as a reasonable adjustment. The provision of a reduction on the pass mark could not be considered a reasonable adjustment as *"pass marks cannot be lowered for safety reasons."* It considered the medical evidence – from Professor Hale that the claimant should pass the signalling school once stabilised on medication; an OH assessment dated 10 August 2018 that stated the claimant' scored within *"normal limits"* on cognitive tests including memory and attention; that adjustments including software had been provided, accordingly that the 1st respondent *"… did provide reasonable adjustments to support…" the* claimant.

74. The report also stated that ppt slides 6 per page may not have been useful, but the claimant did not ask for larger copies. It concluded that he was paid the correct salary as a trainee, that there was no bias by Mr Jones who, the grievance concluded, had provided support to the claimant. He was given support to observe signalling similar to that used on the course, a livescribe smart pen was provided as was a quiet room. *"the investigation concludes that [the claimant] received an appropriate level of support…"*. It concluded that Mr Jones was a competent trainer, contrary to the claimant's view that he could not teach properly, the claimant had failed three simulations in November 2018, that appropriate advice was sought from Access to Work.

75. The grievance was not upheld (Grievance report dated 25 June 2019, pages 1371 – 86). The outcome of the grievance was communicated to the claimant at a meeting on 25 June 2019 and a written outcome was sent to the claimant on 1 July 2019 (1502-07). The claimant appealed this decision.

76. In advance of the claimant's return to signalling school on 8 September 2019 discussions were had about the adjustments to be provided, including a Lexxic referral for a workplace assessment for ADHD. A Workplace Needs Assessment was undertaken by Lexxic on 5 August 2019 and a report dated 13 August 2019 made the following recommendations: the claimant be provide with 9 hours of coaching on reading and proof reading; listening, notetaking and concentrating; organising, planning and prioritising confidence and mindfulness.

77. The report recommended eLearning modules on improving reading, organising workload and listening, concentrating and notetaking. The report also

recommended the claimant's Line Manager (who was now Ms Fenwick) be provided with eLearning modules on ADHD and other conditions. Read and write software was recommended along with training on how to use this; mind mapping software and training was recommended, and stated that consideration should be given to using notability and *"it is recommended that a discussion is held … on the feasibility of recording training sessions."* Overlays were recommended for his equipment; awareness training on ADHD was recommended for the course tutors and his line manager; a buddy/mentor – either a course facilitator or a trainee; and where possible additional one to one training on the simulator or with a course tutor; materials to be provided in advance; and consideration to be given to helping the claimant to develop *"visual guides"* such as flow charts; 25% additional time for exams, and to consider the possibility of providing the claimant with areas of the course material to be examined on prior to the exam; the provision of a visually friendly format for computer documents. Suggestions were also made to the claimant to assist him to improve his concentration (1564-1580).

78. The claimant was provided the first three weeks of notes for the course on 22 August 2019 (1584) and the claimant was provided with details of 3 coaching sessions to take place at the Gillingham East Kent Signalling Centre. In advance of the course he met with Ms Fenwick and was provided with an iPad and ipen and headphones, and was told he could download notability and expense it; he was told to use read/write software and mind mapping. Ms Fenwick advised the claimant that she may be best placed to be his mentor as she would be completing ADHD training and she had the required signalling experience. Ms Fenwick's rationale for being his mentor was that the claimant wanted someone with knowledge of the rules; that while Ms Bean had been a suitable work coach, the claimant was now more specific about his requirements along with the suggestions set out in the Lexxic report.

79. Certain of the adjustments could not be provided, said Ms Fenwick, including additional training, additional exam time and highlighting of exam areas in advance, that facilitators would assist if he was struggling, but the availability of simulators would limit this. He was told that use of audio recording equipment was not permitted *"due to the sensitive nature of the material discussed during the course which could affect the safety and security of the railway"* (1617-9). The effect of this was that the claimant could not use the recording element of Notability. Also, flowcharts and diagrams and a visual training style could not be provided.

80. We heard lots of evidence on the use of notability in the classroom, specifically the requirement that the claimant could not record lessons. We accepted the evidence on this point from the respondents' witnesses – that there was a blanket ban on recording signalling training as there was an *"opportunity to misuse"* recordings, as the training covered both how to use the signalling system and ways the system could be overridden, that there was a *"potential"* if anyone wanted to use the system *"maliciously"* if it was *"in the public forum"* (Mr Burgess's evidence).

81. The day before the week 2 assessment Ms Fenwick attended to see the claimant and she spent an hour with him to prepare him for the next day's assessment. The claimant's evidence was that this was *"not reasonable"* support given when Lexxic were saying he *"needed to pass"* the course.

82. The claimant undertook the two week Normal Signalling Observation on 19 September 2019, undertaken by Alex Roe. He failed 6 of the 10 competencies (1653-5); he re-took the Observation on 20 September and failed 4 of the competencies (1656-8). His third assessment *"following feedback and revision time"* (1661) took place on 23 September 2019. The claimant asked for additional support and 1-1 tuition over the weekend, and was told a trainer could not support him over the weekend. He stated *"I don't feel I am getting the support I need to pass this course"* (1673b). On his 3rd attempt the claimant was assessed as not yet competent on 6 out of 10 competencies (1671-3).

83. The claimant was interviewed on his appeal against the grievance outcome – the issue being the salary he was receiving, as he considered he should receive the salary of a Signaller Grade 2. The decision was that as he was a Signaller in training he was entitled to salary the grade below, that he had not been underpaid under the terms of his contract (1683-4). The claimant asked for a change of manager on the basis that Ms Fenwick was *"inflexible"* and that her management style *"invites my condition to flare"* causing anxiety and chest pain (1686).

84. On 3 October 2019 the claimant submitted a further grievance, complaining of disability discrimination, regarding the refusal to allow the claimant to use the recording function on notability, *"which negated this as a reasonable adjustment";* a failure to guarantee additional training with a Workforce Delivery Specialist or on simulators (1692-4).

85. The claimant was informed that he would now have an opportunity to be redeployed and he expressed interest in the role of Mobile Incident Officer and met with Ms Hutchinson in HR to discuss interview techniques; he was referred to OH and was provided with a stress risk assessment. The claimant was written to on 29 October 2019 and was told that he was in a redeployment period for 4 – 6 weeks, that if he had not secured a role by 11 November 2019 he may be dismissed on two weeks' notice (1774-5). The claimant attended an interview for a Systems Support Manager role and two other roles, but was not successful.

86. The claimant also submitted a grievance on 2 November 2019 saying he was not given appropriate adjustments including not being able to use the voice recording function on software; he had been treated differently from a comparator, Mark Holderness, who he said had failed his probation as a signaller but was given a role as a Mobile Operations Manager without going through a recruitment process; he stated that he had not been given the correct adjustments to pass the course, Mr Holderness was contacted and he stated that he was being *"pressurised"* by the claimant to release his file; that had passed the IST at Grade 9, he was 13 years employed on the railways, that he had passed signaller training, and he had *"plenty of trackside experience"* required for the Mobile Operations Manager role (1787-91). The claimant answered "yes" to the question put to him in evidence that this comparator *had*

"passed the course, so he met all requirements of the course - during 13 weeks of course, unlike yourself …" The claimant also accepted that the comparator's work history, 13 years employment with the respondent, meant that *"his work history is in fact a different situation."*

87. The claimant attended a meeting on 9 December 2019 regarding his signalling school failure; in the letter which followed, the claimant was informed that if he had not secured a permanent role during his notice period, which commenced that day, his employment would be terminated on 27 December 2019 (1846-8). The claimant submitted an appeal against his dismissal, on the basis that his dismissal was premature given his outstanding grievance over the failure to make reasonable adjustments which, if upheld, would mean that he would not be dismissed (1850). The claimant's dismissal was confirmed by letter dated 27 December 2019 (1851-2). He appealed his dismissal; he attended a meeting with his union rep and his argument was that reasonable adjustments were not implemented, including the failure to allow him to record the lessons, *"the benefit … is that it allows me to go back to listen to and reinforce what that 25 minutes of the lecture as all about… because of the ADHD you've zoned out…"* (1858). The outcome of dismissal was upheld, on the basis that the claimant has *"failed to meet criteria to successfully complete the Signalling Course…"* (1865).

88. One issue on which there was significant evidence was the fact that the claimant was placed in a group of 3 trainees on the simulator and not 2 on his training courses. We accepted the evidence that while in a group of 2 you may have more time on the simulator, but you cannot observe the other trainee because of the tasks that the 2nd person undertakes while the simulator is running. However when in a group of 3 you *"you get a go, you can observe and reflect and see what others are doing. So there is more peer-peer learning; when in a group of 2 there is no opportunity to learn from others."* (Mr Burgess).

Closing Submissions

89. We read the parties' written closing submissions in advance of oral submissions.

90. Ms Tharoo for the 1st respondent argued on the claimant's submissions: paragraphs 23 and 26 onwards are not part of the claim as pleaded; paragraph 36 – Mr Rudkin was clear the consultant's letter "is not enough", as borne out by what occurred next. The 1st respondent was "correct to undertake a full Occupational Health process" prior to the claimant's return to signalling school. In fact on the first claim there is no disadvantage because the claimant was returned to signalling school. Paragraph 55 – the grievance dated 22 August 2017: while the claimant characterises this as a protected act, this makes no reference to disability, or any other matter arising from Equality Act – there is at best an oblique reference to race. All the claimant says was that a referral was made but at this date there had been no assessment. The medical records show that the claimant was complaining about concentration and GP his suggests ab assessment. While the claimant does complain about the style of teaching, the claimant does not know he has a disability. Paragraph 66 - this is not an assessment of Mr Rudkin's evidence - this is a misstatement of his account.

91. On the allegation of an unlawful deduction from the claimant's wages: the offer letter is sent with the statement and terms "and as a as a matter of fact these two documents together form part of the claimant's terms & conditions". There is no requirement for there to be a single document. These documents sent together "amounts to the claimant's contractual terms". If the letter needs to be incorporated - see para 66 of R1 submissions – the requirement for certainty, and clearly it's the case that where the claimant is required to pass training, there is a condition in the letter - satisfactory completion of the course, and that a grade lower salary - all comply and meet test in authorities for information. Regarding paragraph 103 - livescribe and tablet. How does this fit into the claimant's strong assertion that he required notability on an iPad? This has been the claimant's case throughout. If this is now his case, notability would not have worked.

92. Mr Graham's oral submission was also mainly in response to the claimant's written submission. He stated that knowledge of disability is admitted, also that the 4th respondent accepts the Tribunal has jurisdiction to hear the claims against it.

93. The only claims against the 4th respondent are failures to make reasonable adjustments. But, he argued, the PCPs relied on by the claimant (if they are able to about to PCPs) do not relate to the 4th respondent at all. If they can amount to PCPs, the claims relate to (i) an appropriately trained mentor and (ii) iPad and ipen notability and (iii) and time out cards.

94. On the issue of mentor: the claimant's case is that he is seeking a go-between with course content knowledge. But this does not deal with fact that Ms Bean was appropriately trained, and she could have acted as go-between. There is no evidence that the claimant suffered "acute embarrassment" at Ms Bean being accompanied – in fact his response is that he would have a union rep present. His email at page 1028 does not suggest he is embarrassed. She is a trained mentor and the issue is not whether or not he was able to divulge information to her. The claimant "is not saying she was not providing support, the issue is whether or not she was an appropriately trained mentor. This demonstrates that the claimant is shifting his case to cherry pick what he wants to put." The claimant is now saying that Ms Bean was not an appropriately trained mentor and that the 4th respondent is not in a position to provide a trained mentor - in fact this is a tacit acceptance that there is no claim against the 4th respondent.

95. Mr Graham argued that paragraphs 101-103 – are "a tacit acceptance" that the 4th respondent got it right on adjustments, by considering notability, livescribe pen. There is "no dispute that a Samsung tablet and livescribe are equivalent to iPad/notability". The only issue for the 4th respondent is timing – that this adjustment should have been provided earlier. In fact the claimant went to the 1st respondent first, came to the 4th respondent on 12 November 2018 and by 15th November the 4th respondent had put this into train. Regarding paragraphs 133-134 – there was no difficulty taking breaks; if anything the claimant was reluctant to take breaks - he did not want to 'use' disability.

96. Mr Barklem for the claimant referenced the ongoing duty of Mr Orman when he was informed about disability and that this continued throughout the OH reports

to 4th April 2018. The relevant information on disability was in front of Mr Orman and Ms Vermaning.

97. Regarding paragraph 55 of his submission: the grievance does include disability as an issue, and this is one of the issues which it was difficult for the claimant to express; see for example the issue of time-out cards – the claimant did not want to use the 'disability card' - but this is the whole point of time-out cards, it is easier to take breaks - without the cards he would be reluctant to be seen as someone to take a break. If it is sanctioned it makes it easier to take this break.

98. Paragraph 95: the key issue is an iPad, but software is important and the 4th respondent understands that this is an issue of software. The most important piece of software is not just a recording function, it is a writing function with apple pen. If Notability cannot be used for recording because of the 1st respondent's policies, there is still the functionality of note taking available with notability.

Conclusions on the law and the evidence

Disability – Knowledge

99. The claimant argues that by 22 August 2017 the 1st respondent was on notice of this condition, that the claimant referenced learning issues. We concluded that the claimant was concerned on this date he may have an issue with learning and he told Mr Orman this and Mr Orman suggested he seek medical advice. At this stage there was no medical information in front of the respondent, nor the claimant. We concluded that by this date the respondent had no information to suggest that the claimant may be disabled. We concluded that the 1st respondent had actual knowledge that the claimant was disabled with ADHD on the date that Professor's Hale's report was provided to Ms Vermaning – 20 September 2017.

Direct Disability Discrimination

100. We considered s.136 Equality Act: that the initial burden is on the claimant to prove facts from which the Tribunal could decide, in the absence of any other information, that discrimination had occurred. We considered firstly whether Mr Orman's refusal to reconsider his decision in August 2017 not to allow the claimant to retake the signaller's course amounted to direct disability discrimination. At this date, the respondents were unaware that the claimant had a disability. Accordingly, Mr Orman's refusal on this date could not amount to disability discrimination – for which actual or constructive knowledge of disability is required.

101. We concluded that by 20 September 2017 the respondent did have knowledge of the claimant's ADHD. We also concluded that, contrary to the submissions of the 1st respondent, this direct disability discrimination claim encompasses the period from and beyond 20 September 2017, that when the respondent had knowledge of disability it was still in the process of assessing the claimant's grievance which was in effect requesting that the decision be changed to allow him to re-attend training school. We concluded that this amounted to an

allegation that there was a continuing obligation after August 2017 for this issue to be reconsidered.

102. We therefore considered whether or not the 1st respondent's failure, once it had knowledge of disability, to change its mind, amounted to an act of direct disability discrimination, in particular whether this decision should have been changed on or after 20 September 2017. We concluded that it was not an act of direct discrimination. We concluded that the reason why the decision was not overturned was because of the clear view held by Mr Burgess and Mr Jones, who had provided training for the claimant over a three week period and had assessed his capability, that the claimant did not have the skill-set required to undertake this course. This decision was communicated to Mr Orman who accepted their judgment and refused to allow the claimant to return to signalling school as a consequence.

103. In reaching this decision, we considered the *Ladele* guidance – that there must be a *"consideration of the mental processes (conscious or subconscious) of the alleged discriminator".* We concluded that Mr Burgess and Mr Jones would have reached the same view had a hypothetical comparator who was not disabled performed at training school exactly as the claimant had done. We concluded that their view on the claimant's abilities, which was then provided to Mr Orman, was the reason why Mr Orman reached the decision he did. We concluded that Mr Orman would have reached the same decision with a hypothetical comparator in the same position as the claimant who was not disabled – i.e. who had failed the course for the same reasons and in the same way.

104. We concluded the same with Ms Vermaning's reasoning between September to her grievance report on 8 November 2017 not to allow the claimant to re-take the course. We concluded that the reason why she reached this decision because, notwithstanding the claimant's disability, there were two reasons she could not change it: firstly this was not her decision to make, it was for Mr Orman in his role as the claimant's line manager under an apprenticeship; secondly her genuine belief that any decision to allow the claimant to re-take would have to be taken after Occupational Health advice on whether or not adjustments were possible. We concluded that Ms Vermaning would have reached the same decision with a non-disabled comparator in this position whose grievance she was investigating, and that the claimant's disability was not the reason why she did not allow the claimant to return to the course.

<u>Discrimination arising from disability</u>

105. We next considered whether the refusals of Mr Orman and Ms Vermaning to allow the claimant to return to signalling school amounted to discrimination arising from disability. We considered the test in *Pnaiser.* We concluded that these refusals amounted to unfavourable treatment – the claimant asked for and was denied at this stage re-entry to signalling school.

106. We considered the reason for this treatment, noting that the focus is on the reasoning for the treatment. We concluded that what caused this treatment was

the belief of Mr Burgess and Mr Jones that the claimant was not capable of passing signalling school, that Mr Orman and Ms Vermaning accepted this judgment.

107. Was this belief that the claimant was not capable of passing signalling school, and Mr Orman and Ms Vermaning's acceptance of this belief and consequent refusal to allow the claimant to return to signalling school in any way influenced or caused by something arising in consequence of the claimant's disability? We noted that there can be a range of causal links, to determine whether this decision arose in consequence of his disability. We noted the claimant's strong belief that his ADHD was a cause of him not passing, also the view of both OH and Professor Hale that this untreated condition was a factor.

108. However, we concluded that the decision to fail him on the course was not in any way influenced or caused by something arising in consequence of the claimant's disability of ADHD. We concluded that the claimant's condition of ADHD was not the cause of him failing to pass signalling school on the first attempt. We reached this conclusion based on the whole of the facts we heard about the claimant's capability, both before and after adjustments had been put in place in advance of his 2nd and 3rd signalling school attempts. We concluded that the claimant's condition may have disadvantaged him in elements of his learning, but that this this disadvantage was not the cause of his failure to pass the course. We concluded that the reason why the claimant failed the course was not because he was disadvantaged in his ability to learn, but it was because he was unable to pick up the specific relevant skills required to be a signaller, including multi-tasking in a technical signalling environment and understanding the different requirements to properly signal trains in any given situation.

109. We noted that the medical reports (Professor Hale and some OH reports) suggested that with adjustments the claimant should pass the course. However the claimant had three opportunities to pass the course, two with adjustments in place. We concluded that no matter what adjustments were given or could have been given, including notability, he would still have failed the course. We concluded that the reason for his failure to pick up these skills was not related to any disadvantage in learning, but was simply an issue of capability – the claimant did not have the skill-set required, and that this for a reason of capability and was not related to any disadvantage he may have had as a consequence of ADHD.

110. Accordingly the reason why the claimant was not allowed at this stage to resit the course was not caused by something arising in consequence of the claimant's disability, because his disability was not the cause of his failing on his first attempt. To put it another way, the claimant's ADHD did not contribute to the claimant failing the course, and his ADHD not therefore in any way the cause of this unfavourable treatment.

111. If we are wrong on this point, and that the claimant's ADHD did contribute to him failing the course, we accepted that the claimant can show that a reason for the failure to return him to the course (Mr Orman) or recommend he be allowed to return (Ms Vermaning) was treatment connected to his disability. Consequently, we next considered the 1st respondent's defence to this claim.

112. The legitimate aim put forward by the 1st respondent, which we accepted as legitimate, was to ensure that it expended public funds appropriately - i.e. that it did not return candidates to signalling school who it reasonably believed had no realistic chance of passing the course. We next considered whether the decisions of Mr Orman and Ms Vermaning not to allow the claimant to reattend signalling school or recommend his reattendance were proportionate means of achieving this legitimate aim.

113. We concluded that they were proportionate: in doing so we carefully considered the objective test – was this a proportionate decision, bearing in mind the requirement to ensure that the means are no more than is necessary to achieve the objective? Mr Orman did not know the claimant was disabled in August 2017. When he and Ms Vermaning did have knowledge from 20 September 2017, Ms Vermaning was working on her grievance report which included a recommendation to refer the claimant to Occupational Health. While the claimant's appeal to Network Rail against Mr Orman's decision was rejected in January 2018, at this stage an OH assessment was in train with the potential that the claimant would be allowed back to signalling school. He remained an employee of the respondent receiving wages.

114. We accepted that it was proportionate for the 1st respondent to seek further occupational health information and carefully consider this information before taking the decision to allow the claimant to return to signalling school – that this was 'no more than is necessary' to achieve the objective. The proportionality of the 1st respondent's process can be measured by the fact that, once it had all the relevant information, it decided to return the claimant to signalling school. In the interim, before the full evidence was available to the 1st respondent, we concluded that its decision making process in reaching this decision was a proportionate means of achieving the legitimate aim of not wasting public funds, that it was trying to ensure that it did not send someone to signalling school without some evidence, given his first failure, that he would achieve the standards required to pass the course.

<u>Reasonable adjustments – claims 1 & 2</u>

115. The 1st respondent accepts that the PCPs of achieving 70% in the knowledge assessment and to achieve within 5% below the threshold to be able to progress at signalling school were applied to the claimant, and that these PCPs put the claimant at a substantial disadvantage by reason of his ADHD.

116. The parties accept that the respondents was unaware of the claimant's disability at the time of the first stint at signalling school, that the 1st respondent was therefore unaware of this disadvantage at the time he failed this stint. The claimant case is that it would have been a reasonable adjustment to allow him to return to signalling school. The Tribunal accepted that, based on the medical evidence available to it by 20 September 2017, the 1st respondent was aware

that the claimant may have been put at a disadvantage by the fact he undertook his first stint at signalling school with undiagnosed ADHD.

117. In fact, the respondent did make this adjustment, albeit he did not return for some 15 months after his first stint. The reasons for the delay were in part caused by the claimant's failure to cooperate and attend OH assessments and in part caused by the lengthy grievance and appeals processes. At the time the claimant submitted his first claim the decision to allow him to return to signalling school had not been made. But this claim does not say that there was a delay in returning him to signalling school, it is a claim that the 1st respondent failed to allow him to return. In his evidence, the claimant did not say why this claim was maintained, and he accepted that this adjustment had been provided. Accordingly, there was no failure to make this adjustment, as in fact it was made. This claim therefore fails.

Reasonable adjustments – claim 4

118. Ms Tharoo argues in her closing that the PCP as defined - the requirement that the claimant undertake the second signallers' course without adjustments for his disability - cannot amount to a PCP as it is a PCP which can only apply to the claimant – it has no general applicability, per *Ishola*. We concluded that this was a narrowly drafted PCP, but that it could be read as a PCP with more general application; that it was a PCP which would apply in the future to the claimant and others, that no candidates with ADSD would be provide with adjustments. We took the PCP to be read accordingly.

119. In fact, we found that the 1st and 4th respondents did make some adjustments for the claimant's return to signalling school, and we concluded that these amounted to reasonable adjustments. Dealing with each of the adjustments sought:

120. An appropriately trained mentor: the Tribunal concluded that on the claimant's return to signalling school for his second stint that Ms Bean was an appropriately trained mentor. She had specific learning needs qualifications and was experienced in dealing with individuals with ADHD. The Occupational Therapy Assessment undertaken on 8 August 2018 referenced an individual who could assist as a work coach who had good knowledge of ADHD. The claimant sought a mentor with a good understanding of ADHD. Accordingly the tribunal considered that providing Ms Bean to assist the claimant was a reasonable adjustment, and that the 4th respondent complied with it. We noted that the claimant subsequently wanted a mentor who also had good signalling knowledge, however this was not at issue at the time of his second stint at training school.

121. An iPad and/or laptop with mind-mapping software: The claimant was provided with a laptop with mind-mapping software but he returned this within in the first day of the course as inappropriate. Accordingly this adjustment was provided by the 1st respondent. The tribunal noted that the claim as argued in the Tribunal encompassed a claim for notability software. For the reasons set out below under the 5th claim, we did not consider that this was an adjustment that was reasonable for the respondents to make.

122. Written or electronic class notes: the tribunal accepted that while notes were provided, these were in a forma (Ppt slides 6 to a page) which were not easily accessible to the claimant. Accordingly, this adjustment was not made by the respondents.

123. Time-out cards: the tribunal accepted that these were not provided to the claimant by either respondents.

124. Access to a chill-out room: the claimant was provided with access to a quiet room and he accepted in his evidence that he was provided with a key card to do so. Accordingly, this adjustment was made by the respondents.

125. Placing C in a group of 2 rather than 3 for practice time on the simulator: it was agreed evidence that the claimant was placed in a group of 3 for his simulator practice time during each of his stints at signalling school. Accordingly, this adjustment was not made by the respondents.

126. Of the three adjustments alleged as reasonable adjustments which were not made:

    a. written/electronic lecture notes,
    b. time-out cards
    c. not placing the claimant in a group of 2 on the simulator

    Did the failure to make these adjustments place the claimant at a substantial disadvantage compared with someone who was not disabled? Dealing with each of the substantial disadvantages pleaded:

127. Difficulty concentrating for more than 15 minutes at a time during lectures and the written examination. The Tribunal accepted that the claimant suffered from this substantial disadvantage in comparison to non-disabled comparators.

    a. The Tribunal could not see how the provision of lecture notes in advance would or could have prevented this difficulty in concentrating during lectures or in the exam – i.e. there was no "prospect" of this difficulty being prevented (per *Leeds Teaching Hospital NHS Trust v Foster*). The claimant may have been able to read the notes in advance of the lecture, but equally the evidence showed that the claimant was staying late to try to consolidate his learning for that day's lecture; it was not suggested how being given notes for the next day's lecture could have assisted the claimant's concentration for the next day's lectures or for the written exam. In fact, the Tribunal accepted that if he had been given notes, this would not have assisted the claimant with his concentration, they were more likely to confuse the claimant who was attempting to consolidate that day's lecture. We noted that this was the view of the 1st respondent at this time – providing notes in advance could be confusing. We concluded also that the respondents did not know and could not reasonably be expected to know that a failure to provide lecture notes in advance would contribute to his difficulty concentrating in class, or their provision would assist him in concentrating.

b. The time-out card was not provided, but we concluded that the claimant was given a key fob which could be used as a time-out card by holding it and bringing it to the attention of the trainer. His trainers were aware the claimant may take time-outs, and he was not prevented from doing so. We concluded when he was having difficulty concentrating, the lack of a time out card did not hinder him having time-out. Accordingly we did not consider that a failure to provide time-out cards placed the claimant at a substantial disadvantage. We also concluded that the respondents did not know and could not reasonably be expected to know that the failure to provide a time-out card would cause him difficulty concentrating for more than 15 minutes during lectures and exams.

c. The claimant's case is that being placed in a group of 3 when practicing on the simulator placed him at the substantial disadvantage of a difficulty concentrating during lectures and exam. The Tribunal did not see how being placed in a group of 2 when practicing on the simulator would have made any difference to the claimant's concentration levels in lectures and in the exam, and no case was advanced on this basis. The claimant does not allege that he had difficulty concentrating when undertaking practical work on the simulator and there was no evidence that this did place the claimant at a disadvantage in lectures and exams and we concluded that there was no substantial disadvantage to the claimant. We also concluded that the respondents did not know and could not reasonably be expected to know that placing the claimant in a group of on the simulator would or could in any way prevent his difficulty concentrating for more than 15 minutes during lectures and exams.

128. Difficulty organising his study time in the evenings after lectures. The Tribunal accepted that this amounted to a substantial disadvantage in comparison with non-disabled comparators.

a. The Tribunal carefully considered whether failing to provide lecture notes caused the claimant difficulty organising his study time in the evenings - whether he was placed at a substantial disadvantage by the failure to provide him with notes. We concluded that there was no substantial disadvantage to the claimant. The claimant was regularly working late to consolidate his knowledge in the evenings from that day's lectures, and he was clearly struggling to consolidate his knowledge. The Tribunal concluded that providing notes for the day ahead would not have assisted him in organising his study time in the evening, and for the reasons given by the respondents' witnesses may have in fact added to his confusion and difficulties learning – it would have been one additional task for him to read and try to understand these notes in advance of the next day's lectures, when he has an admitted difficulty in organising his time. We also concluded that the respondents did not know and could not reasonably be expected to know that providing lecture notes in advance would prevent this substantial disadvantage.

b. The Tribunal failed to see how the failure to provide time out cards during the day placed the claimant at a substantial disadvantage in organising his study time in the evenings. In any event, the lack of a time-out card did not prevent the claimant from taking time-outs during the day. Accordingly, there was no substantial disadvantage to the claimant. We also concluded that the respondents did not know and could not reasonably be expected to know that providing time-out cards would prevent him organising his evening study time.

c. Similarly, the Tribunal failed to see how being in a team of three when practicing on the simulator placed him at a substantial disadvantage in organising his study time in the evenings. At best, we could see that the claimant may have felt he did not have enough practice time (which is dealt with below), but we did not see that there was a prospect that being in a team of two would have assisted him in organising his study time when revising. We concluded that being placed in a group of 2 would not have prevented this substantial disadvantage, also that the respondents did not know and could not reasonably be expected to know that placing the claimant in a group of 2 would have prevented this substantial disadvantage.

129. Tutors mistook his ADHD for aggression and agitation: The Tribunal saw no evidence that the claimant's tutors mistook his ADHD for aggression and agitation. There is no suggestion during his 2nd stint at signalling school that the claimant was seen or thought to be agitated or aggressive. Accordingly the Tribunal concluded that the claimant did not suffer any substantial disadvantage in comparison to a non-disabled hypothetical comparator. If we are wrong on this, and the claimant did suffer this substantial disadvantage, we next considered whether there was at least a prospect the reasonable adjustments sought by the claimant would have prevented this disadvantage:

a. The Tribunal was unable to see how the provision of lecture notes in advance would have prevented this substantial disadvantage. We repeat our findings above, that the provision of lecture notes in advance would not have assisted the claimant during the next day's lectures, accordingly their provision would not have in any way altered this mistaken impression by the respondents. We also concluded that the respondents did not know and could not reasonably be expected to know that providing lecture notes in advance would or could have prevented PTSD symptoms of aggression and agitation from occurring in class.

b. Would the provision of time-out cards have prevented this substantial disadvantage? The Tribunal could see that potentially, if the claimant wanted to leave the lecture, but felt unable to do so, his condition may cause a mistaken impression of agitation or aggression. However, we concluded that the claimant was able to leave lectures if he wanted and he knew this, accordingly the failure to provide a time-out card did not stop him from doing so. Accordingly, there was no evidence that the claimant was placed at a substantial disadvantage by way of a mistaken impression that the tutors thought he was aggressive or agitated by the

failure to provide the time-out cards. We also concluded that the respondents did not know and could not reasonably be expected to know that providing time-out cards would or could prevent him having a difficulty concentrating for more than 15 minutes during lectures and exams.

c. The Tribunal failed to see how being placed in a team of 2 on the simulator would have in any way altered the respondent's mistaken impression that the claimant was aggressive and agitated during lectures. There was no evidence that the claimant became aggressive and agitated when using the simulator, he does not stay so in his evidence. We also concluded that the respondent did not know and could not reasonably be expected to know that placing the claimant in a group of 2 on the simulator would or could prevent this substantial disadvantage of having difficulty concentrating for more than 15 minutes during lectures and exams.

130. Insufficient time allocated during lectures to enable him to take good notes. We concluded that the claimant was placed at a disadvantage by the pace of the lectures, that he had significant difficulties in understanding much of the course content properly as it was being taught, and that this impacted on his ability to take good notes. However, we concluded that the claimant was not placed at a substantial disadvantage by their being insufficient time allocated during lectures to take good notes; that the reason why the claimant was unable to properly learn the detail because of his capability to understand and assimilate the course content. If we are wrong on this point, and there was a substantial disadvantage, we considered whether there is a 'prospect' the reasonable adjustments sought would have prevented it:

a. Whether the provision of notes in advance would have prevented this disadvantage: The Tribunal failed to see that providing lecture notes in advance could have led him to a greater understanding of the next day's lectures which would have led him to take better quality notes. For the reasons stated above, we did not consider that the claimant would have gained any benefit from the provision of notes in advance, they would not have provided him with a greater understanding of the next day's lectures. There was no suggestion that the claimant was unable to take notes during lectures, and in fact the bundle has copies of his lecture notes which suggest he was taking notes as the lecture went on. It was not suggested how additional time should have been given, as we found that the notes were taken while the tutor is talking. The claimant had the opportunity to consolidate his notes and to ask questions on any areas he felt he was weak or did not understand what had been said. If the pace of the lectures was too great, or more time was needed to take notes, this would have led to a longer course, and the claimant is not suggesting it would have been a reasonable adjustment to lengthen the course. Accordingly we did not see that providing notes in advance would or could have ameliorated this substantial disadvantage. We also concluded that the respondents did not know and could not reasonably

be expected to know that provision of notes in advance would have prevented this disadvantage.

b. Provision of time-out cards: the Tribunal considered that the additional time to take good notes would not have been in any way impacted by the provision of time-out cards. If anything, leaving a class would mean that the claimant is unable to take good notes of the points that he had missed. Accordingly we did not consider that the provision of time outs could have prevented this disadvantage. We also concluded that the respondents did not know and could not reasonably be expected to know that providing time out cards could have prevented the substantial disadvantage of having insufficient time to make good notes.

c. Being in a team of 2 on the simulator: the Tribunal concluded that this would not have prevented this substantial disadvantage of not having enough time to take good notes. While we can see a link between the claimant's lack of understanding in the class room lessons and his poor performance on the simulator tests, we did not see how being in a team of two would prevent the disadvantage. We also concluded that the respondents did not know and could not reasonably be expected to know that placing the claimant in a group of 2 on the simulator could have prevented this substantial disadvantage.

131. Becoming tongue tied when asked questions "on the spot" during lectures: there was no evidence that the claimant became tongue tied when being asked questions during lectures. If we are wrong, and it was the case that he became tongue tied, did this amount to a substantial disadvantage? We concluded that a difficulty in answering questions could in fact assist the claimant, as it would show that there was an issue with the claimant understanding a particular topic, meaning this could be addressed by tutors. If we are wrong, and that becoming tongue tied did place the claimant at a substantial disadvantage, we considered the reasonable adjustments sought:

a. Would the provision of lecture notes in advance have assisted in preventing this substantial disadvantage? We concluded not; as the notes, for the reasons above, would not have assisted him in understanding that day's lectures, he would have been equally tongue tied, if that is what he was, had lecture notes been provided in advance. We also concluded that the respondents did not know and could not reasonably be expected to know that providing lecture notes in advance would prevent him from becoming tongue tied.

b. Provision of a time-out card. We concluded that being able to leave lectures may have assisted the claimant if he was unable to concentrate and to enable him to regain his concentration; but for the reasons above, the time out card did not prevent the claimant from leaving the room, he could have taken time out in any event. Accordingly the provision of a time out card would not have prevented this substantial disadvantage. We also concluded that the respondents did not know and could not

reasonably be expected to know that provision of a time out card could have prevented this substantial disadvantage.

c. Group of 2 on simulator: Again, we failed to see how putting the claimant in a group of 2 could have prevented the claimant from being tongue tied in class. Also, the respondents did not know and could not reasonably be expected to know that placing the claimant in a group of 2 on the simulator would prevent this substantial disadvantage.

132. Inability to focus and multi-task: We accepted that the claimant suffered from what are in reality two different substantial disadvantages, the inability to focus and the inability to multi-task, also that these two disadvantages interrelated. We note the 1st respondent's contention that the claimant was observed concentrating in an two hour assessment, as set out in the Occupational Therapist's report (855). However, the main evidence we heard on multi-tasking was in the context of operating the signalling simulator, both when practicing and under test conditions, and we accepted that the claimant's inability to focus and to multi-task affected him when using the simulator and that this was a substantial disadvantage which occurred in the claimant's daily activities. We also accepted that the respondents were aware that this amounted to a substantial disadvantage, for which the claimant sought reasonable adjustments.

a. Was there a prospect that providing notes in advance could have prevented this substantial disadvantage? For the reasons set out in in the "15 minutes concentration" conclusion above, we concluded not. The claimant would not, we found, have been able to assimilate and understand the notes properly, so as to assist his focus in the next day's lectures. We also had no evidence that the provision of notes would assist the claimant to multi-task whether on the simulator or otherwise. We also concluded that there was no prospect that the respondents could have foreseen that provision of notes in advance would assist the claimant to focus and multi-task.

b. Time out cards: We also concluded that the provision of time-out cards would not have assisted the claimant to focus or multi-task, for the reasons set out above – the claimant did not need time-out cards to leave the room, and so the timeout cards would have made no difference to his ability to focus multitask, if leaving the room would have assisted him in doing so. We did conclude that the respondents did know that providing timeout cards may have assisted the claimant to concentrate, as their role was to enable the claimant to leave the room to enable him to regain his concentration. However, as we say above, in practice they were not needed by the claimant.

c. Would ensuring the claimant was in a team of 2 have prevented this substantial disadvantage of an inability to focus and multitask? The claimant's case is that in a team of 2 there is more hands on practice time. The respondents' position is that in a team of 3 there is more time to observe and learn from what others are doing, because in a team of 2 the 2nd person has to undertake other tasks meaning it's difficult to

observe in a team of 2. Also, that the claimant was given additional time on the simulator to assist. We concluded that in the claimant's case there would have been no difference had he been in a team of 2 – that he had significant time on the simulator, and the issue was not operating the simulator, per se, it was his inability to properly respond to the issues and situations which arose during the course of his assessments. This, we concluded, would have been any different had the claimant been in a group of 2 and had more practice time. Again, the reason we reached this conclusion is because we considered that the claimant had been unable to assimilate and learn the rules and the techniques required at this stage of the course and on his second stint at signalling school. Accordingly, we did not consider that there was any prospect of this adjustment preventing the substantial disadvantage. We also concluded that the 1st respondent did not know and could not reasonably be expected to know that placing the claimant in a group of 2 would prevent this substantial disadvantage.

Reasonable adjustments – claim 5

133. The parties accept that there was a PCP that audio recording was prohibited for use by students as a learning aid on the 3rd signallers course.

134. The respondents do not accept that this PCP put the claimant at a substantial disadvantage; the 1st respondent argues that the provision of hardware and software, including notability without audio record, iPad and Apple pen, read and write software, mind-mapping software, electronic class notes in advance, reading rulers, headphones, and access to e-learning modules alleviated any disadvantage that there may have been.

135. The Tribunal considered, notwithstanding the adjustments provided, whether the refusal to allow the claimant to use notability recording software meant he suffered a substantial disadvantage. We concluded that it did place the claimant at a disadvantage. The claimant clearly had difficulty assimilating the information he was being asked to assimilate, and we concluded that being able to record and listen back to a training session may have assisted the claimant in learning information. The prohibition on the use of recording equipment exacerbated his disability as he was unable to take proper notes in class. We note that notability had been suggested as an adjustment, if it was practicable to make.

136. We also concluded that the respondents were aware, via the Lexxic report that the inability to allow the claimant to record may place him at a substantial disadvantage.

137. However, while a disadvantage to the claimant, we did not consider that a failure to allow the claimant to use notability amounted to a substantial disadvantage. We concluded that even if notability had been provided, he would still have faced the same difficulties in the practical assessments. We accepted that the recording of the class lectures may have assisted in the written assessments, but that it would have not made any difference to his ability to move trains correctly in the practical assessment. In other words, recording classes would

have not have affected his ability to put his learning into practice on the simulator. We found that his failure on the simulator was an issue of capability in moving trains in real-time, and this was not an issue that recording lectures would have assisted.

138. We also considered that this was not an adjustment which was reasonable to make. We accepted the respondents' positions that there was a significant safety issue if these recordings were disseminated, whether by accident or by design; that the lectures were providing information which could lead to a catastrophic incident if they fell into the wrong hands. We accepted that the respondents adopted a very cautious approach to safety, that issues were discussed in the lectures which should not be taken out of the lecture in any recorded form, for example issues on override certain safety systems. We also accepted that recording lectures may inhibit frank discussions about some of these issues.

139. We next considered the PCP of a failure to offer the claimant another role instead of dismissing him. We accepted that this could potentially be a PCP, that the 1st respondent operated a policy of dismissing employees who failed the signalling exam unless they managed to secure another role within the 1st respondent. This PCP only applied to the 3rd stint at signalling school; while the claimant was put under threat of dismissal after his first attempt, and was in fact dismissed after his second attempt, on both occasions he was allowed to attend signalling school.

140. We accept that being dismissed as a result of this PCP placed the claimant at a substantial disadvantage as a job applicant with the condition of ADHD. Being out of work is a substantial disadvantage, and the Tribunal accepted that for many roles employers may be cautious offering a role to someone with ADHD. In saying this we accepted the evidence of the claimant that he has plenty of transferrable skills and can perform well at interview.

141. We concluded that it was not a reasonable adjustment to slot the claimant into another role. While the claimant gave evidence of one role he considered himself to be suitable for, mobile incident officer, this role still required significant knowledge of signalling procedures, often in very stressful live events at trackside. We also accepted that the 1st respondent operated a system where employees who failed at signalling school could be redeployed if they secured another role, however this would require an assessment of capability for the role via an application and interview process. We did not accept it was reasonable for the 1st respondent to slot someone into a role for which they had not been through an internal application process. The claimant did not put forward positive evidence as to what role this may be (apart from mobile incident officer), what skills and capabilities he had to be able to undertake a role with the 1st respondent. We accept that there is a document referring to redeployment of employees (369). We also accepted that this is a policy referring to employees who are unable to undertake their role rather than an employee who was unable to gain the skills required for their role.

142. We also accepted that the claimant did apply for several roles, was interviewed for some, but was unable to show that he had the required knowledge and experience for the role. The claimant had no experience of working on the railways. The Tribunal did not consider, in these circumstances, that it was a reasonable adjustment to slot the claimant into an undefined role when he had no experience of working in the railway industry and it appeared he had few skills which were readily transferrable without industry knowledge.

Victimisation pursuant to s.27 EqA

143. The claimant alleges that the advice of Mr Rudkin on 5 January 2018 that he should appeal against the decision to remove him from the signalling course instead of following the grievance process amounted to an act of victimisation. The claimant relies on his race discrimination claim of August 2017, his grievance of 22 August 2018 and the grievance appeal meeting on 5 January 2018 in which he referenced reasonable adjustments as amounting to protected acts. The 1st respondent accepts that the claimant made two protected acts – the first and the 3rd acts. We considered the grievance of 22 August 2017 (486-488). We noted a reference to 'bias' also that the claimant made reference to a claim in tribunal. We noted that there is no information in this grievance which suggests that the claimant is alleging discrimination of any kind. We accepted there is nothing in this document which suggests that he is referencing the Equality Act, that he is either making allegations or that that grievance suggests he was doing something in connection with the Act.

144. We accepted that Mr Rudkin did provide advice to the claimant that he potentially best option was appeal against the finding to take him off the first stint at signalling school. We accepted that the reason he did so was that he believed that to do so may be to the claimant's advantage, because Mr Rudkin believed that the grievance process may not assist him in getting what he wanted, a return to signalling school. In the event, this advice was wrong, as the appeal process did not lead to a decision to return the claimant to signalling school. To that extent, the advice was less favourable treatment as it potentially did delay his return to signalling school as it delayed the grievance process and it delayed his referral to Occupational Health.

145. However, we did not accept that this advice was in any way connected to the claimant's protected acts. We concluded that the claimant's protected acts were not, consciously or unconsciously in the mind of Mr Rudkin when he made this suggestion. He was instead trying to find a solution to the issue which may work. The grievance appeal process was paused while the claimant pursued this option and was then reinstated. We noted that Mr Rudkin suggested in the grievance appeal outcome that consideration be given to returning him to signalling school via an OH assessment, and that this did happen. Had Mr Rudkin been wanting to subject the claimant to any detriment because of his protected acts, we consider that this suggestion would not have been made. We therefore concluded that there was no link, conscious or unconscious, between the claimant's first tribunal claim, or comments made in the grievance appeal hearing, and this decision. It did not amount to victimisation.

146. We next considered whether placing the claimant in the same class as Mr Jones, who taught him previously, amounted to an act of victimisation. We noted that the provision of tutors is essentially random, with attendees at signalling school being given a date to attend and tutors either diarised to teach that group; the claimants could have attended on a different date and had a different tutor, and the dates of his attendance were in part based on provision of OH reports. We also noted that the claimant gave praise to Mr Jones in his grievance interview, stating that he spend additional time assisting him, going the extra mile as the claimant put it (506). We also noted that the claimant did not complain when Mr Jones was allocated to him. We did accept that Mr Jones in his evidence suggested that there had been discussions about the claimant, and a decision was taken that the learning support adviser should not be in a room with the claimant alone, that this was based on the claimant's allegations he had made. However, we saw no evidence that Mr Jones being the classroom tutor was anything other than a random allocation of tutors. We accepted that there was no forethought behind this decision, that it had no connection at all with the claimant's protected acts.

147. Was placing the claimant in a group of 3 rather than 2 to use the simulator an act of victimisation? We noted that there was little evidence as to when the claimant was placed in a group of 3, we accepted that it was likely done during week one of the course when the claimant was being taught by a tutor who had never met the claimant before. We accepted that there had been discussions about the claimant amongst tutors. We also accepted the evidence that being in a group of 3 may mean there is less hands-on time on the simulator, but there is also a 3rd person who can watch others practice (unlike in a group of 2), that this can in itself aid learning. We also noted that the claimant was given practice time outside of lessons, including by Mr Jones. We noted that the claimant at no time communicated that this was disadvantageous to him, that his view was with proper adjustments he could have passed the course. We accordingly saw no link between his protected acts and this decision. We also did not consider that this could in any event amount to a detriment, given there are potential upsides to being in a group of 3. If being in a group of 3 meant it was less likely that a student would pass, we consider that this would have been known to the respondent and it would have taken steps to ensure that there were even numbers of students in each class.

148. We concluded that the content of the November 2018 report was accurate. We saw no link between the contents of this report and the fact that the claimant had made protected acts, accordingly it does not amount to an act of victimisation. The basis of the claimants allegations appear to centre on the fact he had done well in practice on the simulator, that this should have counted in his favour on the assessment or in the report. We accepted Mr Jones's evidence that doing well in practice does not necessarily transfer over to the practical assessment, that credit could not be given for good practice runs.

149. We similarly concluded that the refusal of Ms Fenwick to allow him to retake the course after his 2nd fail and advising him he would be dismissed did not amount to acts of victimisation. We saw no link between these decisions and the fact of

the claimant's prior protected acts. The link was, in fact, the claimant's failing the practical assessment for a 2nd time, after adjustments had been in place. This decision was not Ms Fenwick's, she was provided with a report which suggested that there was little prospect of the claimant passing the course. We noted that the respondent offered assistance with redeployment opportunities. The claimant's contract makes clear that a failure may lead to dismissal, Ms Fenwick was stating what was policy; the same was done after the claimant's first fail, at a time when no protected acts had been made. We concluded that this decision was not an act of victimisation.

150. The claimant was dismissed on 2 January 2019 before being reinstated. Was his dismissal an act of victimisation? Again, we concluded not. There was no link between this decision and the claimant's prior protected acts. The clamant failed to apply for roles until near the end of his notice period despite being sent lists of roles and was offered support to apply which he failed to take up. Because he had no interviews planned we accepted that Ms Fenwick was acting within her discretion to dismiss the claimant at this time.

Direct Race Discrimination

151. The claimant alleges that he was treated less favourably than a named comparator, MH, who he says failed his probation as a signaller, and was given with a different role instead of being dismissed. He alleges that this was less favourable treatment on the ground of race.

152. We considered first whether the claimant can show a difference in treatment. To do so he needs to show that the comparator's circumstances were the same or not materially different than his own. We noted that the comparator had several years' experience working for the 1st respondent, also that he has passed the 13 week signalling school course; both unlike the claimant. We concluded that if this comparator did obtain a role without a competitive interview, it was because he had significant experience and could easily be slotted into this role. The same was not the case with the claimant. Accordingly, we did not consider that the circumstances of the claimant and the comparator were the same, and accordingly there is no evidence that the claimant was treated differently, let alone that the reason why this treatment occurred was because of the claimant's race.

Harassment

153. Was making Ms Fenwick his line manager on his reinstatement unwanted conduct relating to his disability given that she had dismissed him earlier that year? Was this unwanted conduct which violated his dignity, or created an intimidating, hostile, degrading, humiliating or offensive environment for him?

154. We noted that the claimant did not complain on his reinstatement when he became aware Ms Fenwick would be his manager. He did not complain when she put herself forward for ADHD training and became his mentor for his third attempt at signalling school. Ms Fenwick arranged for the claimant to attend other signalling boxes and their relationship appeared good during this period.

We noted that he referred to Ms Fenwick as supportive during this period. We also note that prior to his third attempt at the practical assessment on this third stint at signalling school, Ms Fenwick travelled to York to provide support and assistance to the claimant – and this was in her own time.

155. We concluded that Ms Fenwick's line management of the claimant was not unwanted conduct and that the claimant did not see it as unwanted conduct at this time, prior to and during his 3rd stint at signalling school. We also concluded that during this period, Ms Fenwick as his line manager did not violate the claimant's dignity, nor was it an intimidating, hostile, degrading, humiliating or offensive environment for him.

156. We noted that the claimant did complain about Ms Fenwick after he had failed his course. However, we concluded that his complaint was because of his failure, which was not linked in any way to the conduct of Ms Fenwick or the fact that he had been appointed his manager . We concluded that while he may have felt harassed at this time, that he felt his working environment was hostile, this was because he had failed the course. Ms Fenwick remained supportive of the claimant, and her conduct was in no way related to the claimant's disability. We concluded that she assisted the claimant in his attempts to gain another role before his effective date of dismissal on 27 December 2019.

Unfair dismissal

157. We accepted that the claimant's dismissal was for a potentially fair reason, that of capability to undertake the role for which he was employed, Signaller. He had at the date of his dismissal failed the signalling training on 3 occasions. His offer of employment states that dismissal would be a likely option if he failed to pass the course. The learning agreement refenced retraining, redeployment or dismissal. We accept that it was reasonable for the 1st respondent to determine that there was little prospect of him passing the course on a 4th attempt.

158. We concluded that the respondent acted within the range of reasonable responses in determining to give the claimant notice of dismissal after his 3rd attempt, having given him an opportunity to secure redeployment. We accepted that it was reasonable to require him to go through a competitive process of application and interview prior to redeployment, as he had no railway expertise and he needed to demonstrate his ability to undertake roles he applied for. He did apply for roles during this period but was unsuccessful. We noted that the claimant was not given notice of dismissal for some weeks after his failure at signalling school, and his employment was extended to allow him to attend an interview on 23 December 2019.

159. We concluded that there were no failures of process during this period, that the 1st respondent acted reasonably, within the range of reasonable responses.

throughout the period from the 3rd signalling school failure to his date of termination.

Unlawful deductions from wages.

160. The claimant's contract of employment states that his salary was £26,665. His offer letter states that while in signalling school, he would receive "the rate of *pay from the grade below, which is £24,165 per annum."*

161. We noted that the presumption is that the contractual terms apply. However, we concluded that the contract and the offer letter must be read together. The offer letter was explicit in saying that while in training he would receive the lower grade salary. We accepted that this offer letter was incorporated as a contractual document, it contained significant relevant terms of his employment, not just his salary. He queried this point during his employment, and the contractual terms of his salary were pointed out to him at this time. We concluded that the claimant was paid in accordance to all the contractual documentation, which included the offer letter, that the claimant was aware having read or scanned the offer letter that this was his correct salary. We accordingly decided that the claimant did not suffer an unlawful deduction from his wages.

EMPLOYMENT JUDGE EMERY

Dated: 25 June 2021

Judgment sent to the parties
On: 29/06/2021

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For the staff of the Tribunal office

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