EMPLOYMENT TRIBUNALS

Claimant: Mr R Urmston

Respondent: Network Rail Infrastructure Limited

HELD AT: Manchester **ON:** 19, 20, 21 &22nd October 2021

BEFORE: Employment Judge Howard
Ms A Jackson
Mr C Cunningham

REPRESENTATION:

Claimant: Mr P Wilson, Counsel
Respondent: Ms R Levene, Counsel

JUDGMENT

The judgment of the Tribunal is that:

The claimant's claim of disability discrimination, being failure to make reasonable adjustments, pursuant to sections 20 and 21 of the Equality Act 2010, succeeds.

The matter shall proceed to remedy as follows:

A case management hearing shall by telephone at 10.00am on **20th January 2022** to identify the issues to be determined and give directions for the hearing.

A hearing to determine remedy in the Manchester Employment Tribunal on **4th to 5th July 2022**.

REASONS

The Issues

1 We heard evidence from Mr Urmston and in support of the respondent, we heard evidence from Catriona O'Brien, Regional Workforce Health, Safety and Environmental Adviser and Becky Beyes, Employee Relations Adviser. We were provided with an agreed bundle of documents to which the respondent added several documents with the consent of Mr Urmston.

2 At a Preliminary Hearing before EJ McDonald on 27th November 2020, the parties were directed to agree a revised list of issues and send it to the Tribunal by 11th October 2021. The respondent sent a revised list to Mr Urmston in December 2020 who made no amendments and it was sent to the Tribunal as directed.

3 On 11th October 2021, Ms Urmston wrote to the respondent and asked for a further issue to be added to the list in respect of the second PCP; adding a further adjustment which she contended would have been reasonable; 'reducing the claimant's workload'.

4 At the outset of this hearing, Ms Levene objected to the addition of this proposed issue, on the basis that EJ McDonald had told Ms Urmston that she should check the list of issues when it was sent to her and inform the respondent if anything was missing and she had not done so.

5 Mr Wilson explained that he had been instructed on a direct access basis by Mr Urmston. Up to that point, Ms Urmston had been representing her husband, who has a serious mental health condition. It was an oversight on Ms Urmston's part which she rectified as soon as she appreciated its absence.

6 We decided to add that proposed adjustment to the list of issues. *'Reducing the claimant's workload and/or providing more support and supervision'* was expressly pleaded in the particulars of claim. It is not clear why the respondent's solicitor did not include that adjustment in the list of issues in the first place, but we accepted Ms Urmston's explanation that it was a simple oversight that she did not spot the omission. In any event, there is considerable evidential overlap between that adjustment contended for and the adjustment contained within the list of issues of *'reducing the claimant's hours'*. The respondent has been aware of the proposed addition for a week and can plainly deal with the matter in evidence through additional questions as required. Applying the overriding objective of ensuring that the parties are on an equal footing and taking into account that Mr Urmston has been a litigant in person assisted by his wife until very recently, it is fair and proportionate to add that proposed adjustment to the list of issues to be determined.

7 Having added that issue; the respondent's solicitor helpfully updated the list for us which is as follows:

7.1 **Disability**

7.1.1 The Respondent conceded that the Claimant was at the relevant time (October to November 2018) a disabled person due to his bi-polar and depression for the purpose of section 6 Equality Act 2010.

7.1.2 The Respondent conceded that it knew and/or ought reasonably be expected to know that the Claimant was a disabled person from June 2018.

7.2 **Failure to make reasonable adjustments (sections 20, 21 and 39 Equality Act 2010)**

7.2.1 Did the Respondent apply a provision, criterion or practice of expecting employees to return to work in a safety-critical role after a long period of absence (PCP 1)?

7.2.2 Did the Respondent apply a provision, criterion or practice of requiring Workforce Health, Safety and Environment Advisors to carry out their full role (PCP 2)?

7.2.3 If so, in relation to both PCP 1 and PCP 2:
Did the PCPs put the Claimant at a disadvantage in comparison with persons who are not disabled?

7.2.4 If so, was the disadvantage to the Claimant more than minor or trivial?
The respondent conceded that if either or both PCPs had been applied to the claimant, the disadvantage; being the impact upon the claimant's mental health; would have been substantial.

7.2.5 If so, would it have been reasonable for the Respondent to make all or some of the following adjustments, suggested by the Claimant, to avoid such disadvantage(s):

In relation to PCP 1:

1. Conducting a return-to-work interview with the Claimant prior to his return in October/November 2018; and
2. Arranging for a phased return to work for the Claimant in October/November 2018, starting with reduced hours.

In relation to PCP 2:

3. Reducing the Claimant's hours in October/November 2018; and
4. Providing the Claimant with additional supervision in October/November 2018; and
5. Reducing the Claimant's workload in October/November 2018.

7.2.6 If so, did the Respondent fail to make such reasonable adjustments?

8 We discussed what adjustments Mr Urmston required to enable him to fully participate in the proceedings; he requested breaks as needed which we provided.

9 This was a hybrid hearing; with the members participating by CVP. Ms O'Brien's personal circumstances made it difficult for her to participate in person and so she gave her evidence via CVP.

The Findings of Fact relevant to the Issues

10 Mr Urmston was employed by the respondent from June 1998 until his dismissal on 20th June 2020. He was a Workforce Health, Safety and Environmental Adviser, based at the respondent's depot in Stockport.

11 Mr Urmston has bi-polar disorder and depression. The respondent accepts that it was aware of his condition from June 2018 and throughout the period of the events at issue which took place between October and November 2018.

Was Mr Urmston's role 'Safety Critical'?

12 We were shown a job description which laid out Mr Urmston's role; '*to provide advice and support to the Infrastructure Maintenance Delivery team on all workforce health, safety and environmental issues*'. The JD states under '*safety details*' that it wasn't a '*safety critical work post'*. However, it also states that the holder of the post was required to hold a relevant track safety competence. Mr Urmston met this requirement as he held a Personal track safety ('PTS') competency. As he explained to us in evidence and which we accepted, this reflected the fact that a significant part of his role required him to go 'trackside' (i.e. inside the rail track boundary). This was consistent with Ms O'Brien's evidence when she stated that Mr Urmston was not expected to carry out safety critical tasks, except for trackside visits for inspection or other advisory reasons.

13 As part of his role, Mr Urmston would be asked to check locations for proposed engineering works and maintenance to track, to plan, observe and ensure safe systems of work were implemented. This would require him to walk alongside live track to reach the location where the work was to take place. Trackside visits within 1.25 meters of a live line had to be recorded in the Safe Work Packs, but as Ms O'Brien confirmed, if Mr Urmston was trackside but outside of 1.25 meters away from the track (but still within the track boundary), his visit would not necessary be logged. If he was required to go within 1.25m of the track, it would be. Whatever his distance from the track, when he was trackside, he was quite obviously in a safety critical environment and this was reflected in the need for him to hold a track safety competence.

14 On that basis we found that a substantial part of his role was carried out in a safety critical environment, involved advising on safety critical matters and could reasonably be described as 'safety critical'.

Events before Ms O'Brien became Mr Urmston's manager

15 Under the terms of Mr Urmston's contract, he was required to work an average of 35 hours per week. As Ms O'Brien confirmed, Mr Urmston had a degree of autonomy and flexibility in how he met his key accountabilities, in terms of prioritising, organising and managing his hours. The expectation was that he would work every weekday but that his daily hours would be responsive to the requirements of the tasks, visits or operating circumstances.

16 In April 2018, Mr Urmston returned to work following knee surgery. Adjustments were put in place for a phased return. During this period of sickness absence, his manager, Mr Weatherstone kept regular contact and recorded this in the record of contact form. This informed Mr Urmston's expectations of how sickness absence was managed. Mr Weatherstone was in the position on a temporary basis. He applied unsuccessfully for the permanent role and Ms O'Brien was appointed to it, commencing late July 2018.

17 In June 2018, Mr Urmston experienced a decline in his mental health, becoming increasingly anxious, stressed and losing confidence. He met with Chris Pye (Infrastructure Maintenance Delivery Manager) and Paul Savage (Infrastructure Maintenance Engineer) to tell them how he was feeling, and they gave him reassurances of support and that there would be a follow-up. However no further action was taken by either of them. There was no communication between Mr Pye and Mr Weatherstone about these issues. We accepted Mr Urmston's evidence that by this stage Mr Weatherstone, disappointed not to have been appointed to the role permanently, was not around much and maintained little or no contact with Mr Urmston as he had done previously and there was no communication between them about his health.

Events from 30th July 2018

18 On 30th July, Ms O'Brien took over as Mr Urmston's manager. She had 4 direct reports, including Mr Urmston and worked across the different depots in her region. She was not informed by Mr Pye, Mr Savage or Mr Weatherstone of any concerns or mental health issues with Mr Urmston.

19 Ms O'Brien and Mr Urmston had an introductory meeting on 2nd August. Both confirmed that they did not discuss his mental health. Mr Urmston explained that he didn't feel the need as he felt that his health had stabilised at that point.

20 Ms O'Brien was on leave between 20th – 31st August 2018. Whilst she was away, Mr Urmston's mental health deteriorated. He had a breakdown at work on 21 August 2018 and had to be driven home by a colleague. Mr Urmston emailed Ms O'Brien, copying Mr Pye, on 26th August informing her that he had had a breakdown, had slipped into bad depression and acute anxiety and was going into hospital to be treated and stating, *'I am really sorry to let the team down it's been coming on for weeks I tried to push throughout but I was scared at the team brief on Tuesday I had to tell Chris and be taken home…. I am currently very frightened about how I feel, my job, the team and don't want to let anyone down'*. This was the first time that Ms O'Brien was aware that Mr Urmston had any mental health difficulties. On 31st August he was admitted to the Priory for 3 weeks for inpatient treatment. He was diagnosed with having had a psychotic breakdown and put under 24-hour surveillance. Ms O'Brien replied by email of 28th August, offering her support. There was no further contact between them after that until late October 2018.

21 Mr Pye visited Mr Urmston in hospital and as Mr Urmston explained, it would have been entirely clear how serious his condition was.

22 In the amended grounds of response, it states that Mr Urmston's absence was for 'a personal undisclosed reason'. Ms O'Brien clarified that this term was used in the absence reporting system as a 'catch all' when there is not a precise category to apply and did not imply that the respondent was unaware of the reason for Mr Urmston's absence.

The respondent's policies

23 The respondent's Monitoring and Managing Absence Policy differentiates between different types of sickness absence and states that in respect of long term absence (over 20 days), an OH referral is made and *'each case needs to be examined, to understand all the issues and we need to work with the individual employee and our OH providers to understand each case'*. The policy stresses; *'It is vitally important that when you manage an absence case that you keep notes, copies of any letters. Medical reports etc and involve HR from the outset.'* In respect of employees for whom an underlying medical reason for absence has been identified, the policy reminds managers that they need to be aware of possible disability and the need to monitor and work with individuals to help them manage their illness, *'involving HR at the earliest opportunity'*. It states that the line manager and HR should sit down with the employee and stresses the importance of monitoring by OH and the line manager.

24 The respondent's Return to Work Meeting Guide appends the Return to Work form for line managers to complete where structured support is required. It recommends preparation before the meeting of reviewing attendance records

and noting any actions from previous discussions and booking a private meeting room and inviting the employee to attend on the first day back at work. The Guide provides a framework for the meeting, including discussing any adjustments that may be required, how long for and agreeing a review period. After the meeting, the Guide recommends HR is updated, a Return to Work form is completed with agreed actions and timeframes recorded; that action points are undertaken and the employee informed and that the manager be available to talk and meet with the employee if they have any issues thereafter.

25 The respondent's Reasonable Adjustments Policy states that line managers are responsible for discussing possible adjustments with the employee, maintaining regular communication and discussing ongoing requirements.

The first Occupational Health Referral

26 On 5th October 2018 Ms O'Brien generated a referral to occupational health. This had been automatically triggered by Mr Urmston's record (which turned out to be incorrect) of 3 absences over previous 6 months. This referral was not specific to his mental health condition.

27 Mr Urmston had a telephone consultation with an Occupational Health Physician on 10th October 2018 and a report was placed on the OH portal for Mr Urmston and Ms O'Brien to access. The Occupational Health Physician reported that Mr Urmston's psychological health was at moderate to severe levels and advised that he was unfit for work in any capacity and should be reviewed in 4 weeks and recommended that *'supportive contact'* be maintained during this absence.

28 Ms O'Brien acknowledged that she did not access this report and was unaware of its contents; initially because of a glitch in the system, subsequently due to oversight.

29 On 3rd October 2018, Mr Urmston saw his GP. His medical notes recorded*; 'His line manager is very supportive but no immediate plans have been worked out of his return to work'* [sic].

30 On 12th October 2018, Mr Urmston returned to his GP who recorded that he had had a major depressive episode, was due to return on 20th November and, *'has seen occupational health and a plan is in place for a phased return to work'.* That statement is not reflected in the occupational report itself; quite the opposite; the report clearly stated that Mr Urmston was not fit to work in any capacity. Having heard Mr Urmston's evidence on this, we were satisfied that the GP record simply reflected Mr Urmston's expectation that a phased return to work would be implemented. This conclusion is supported by Ms O'Brien's evidence that a discussion about Mr Urmston's return to work didn't happen until late October at the earliest.

31 Mr Urmston saw his specialist on 22nd October 2018, following which he had a telephone conversation with Ms O'Brien which they both recall taking place. Mr Urmston told Ms O'Brien that he was ready to return to work and they arranged to meet at the ROC (Manchester Regional Operating Centre) to discuss matters further.

When did the meeting take place?

32 In his witness statement and in evidence to us, Mr Urmston was adamant that this meeting took place on 12th November 2018 which was his first day back in work. However, we conclude that he is mistaken about that. We were presented with overwhelming evidence confirming that Ms O'Brien fell down

stairs at home on the morning of 12th November 2018 and was taken to hospital where she was admitted for 3 days with a broken ankle and could not possibly have attended a meeting at ROC with Mr Urmston. Ms O'Brien has no clear recollection of the date that the meeting took place, but, by piecing together her diary entries and location at that time, she thought 29th October 2018 to be the most likely date and we accepted that.

33 However, Mr Urmston's misremembering of that date does not undermine the reliability of his evidence more generally. Equally Ms O'Brien has misremembered key dates (including the date of her accident and the date that Mr Urmston returned to work) and those incidents of misremembering do not undermine the reliability of her evidence generally either.

34 Given both individuals have experienced significant traumatic life and health events in the intervening years and that these events took place 3 years ago, it is to be expected that recall of precise dates and details of what was said will be impacted.

The meeting on 29th October 2018

35 In her witness statement, Ms O'Brien described the meeting as a 'return to work meeting'. However, it was not arranged, conducted or recorded in accordance with the respondent's guidance and policies. Ms O'Brien did no preparation in advance of the meeting; no meeting was diarised or room booked (in breach of the respondent's return to work guidance), she did not access Mr Urmston's recent OH report and she did not download a copy of the return to work form to complete and sign. She didn't consult the reasonable adjustments policy or managing absence policy and she did not inform, or seek any guidance or support from, HR. No note of the meeting was retained. Although Ms O'Brien recalls making brief handwritten notes during the meeting, these have not been located and were not typed up and formalised.

36 It's clear that Ms O'Brien did not approach this meeting as a formal return to work meeting. In any event, that would be premature as, although by that stage, Mr Urmston had been told by his psychiatrist that he could return to work, it wasn't until 9th November that his doctor provided a fit note with a return to work date of 12th November and stating that he would benefit from a phased return. We find it most likely that Ms O'Brien had intended to commence the return to work process on the day that Mr Urmston returned. This was supported by Ms O'Brien's evidence that normally a 'return to work' meeting would be held on the first day of return and this is confirmed in the respondent's guidance.

37 Mr Urmston and Ms O'Brien gave their accounts of the meeting. Both recalled it happening at ROC. There were minor differences in recollection as to whether they were standing or sitting. It was most likely that they were seated in the 'cubby' which was a seating area between the filing cabinets where they had a quick chat and catch up with Ms O'Brien jotting down some notes.

38 On balance we accepted that there was a brief discussion about how Mr Urmston would manage his work on his return but it was not credible that a systematic discussion took place and specific adjustments and details of a phased return were agreed and recorded as suggested in Ms O'Brien's witness statement. At the very most, it was broadly agreed that Mr Urmston would manage his time and work to his meet his capabilities. Responsibility was left with him, essentially, to decide what he could and would do upon his return. There was no return to work form or other documentary record of the agreed

components of a phased return and no monitoring or review arrangements put in place as per the guidance.

39 In reaching this conclusion we have considered the contents of the OH report dated 22nd November 2018 which recorded; '*from my assessment today I get the impression that there has been an improvement in his condition. Not sure whether it has been stabilised as yet. The specialist doctor can advise better upon this. He has returned to work including to his safety critical environment. Based on the assessment today he feels confident to return to his full hours…*'. Ms Levene relied on the phrase '*to return to his full hours..*' in support of the respondent's contention that a phased return on reduced hours/duties had been agreed and implemented and that, by 22nd November, Mr Urmston was indicating that he felt ready to increase to full hours. For reasons that we expand on later, we viewed this phrase as ambiguous and did not accept that it undermined our finding.

Events after Mr Urmston's return to work

40 Mr Urmston obtained a fit note on 9th November which recommended a phased return starting back on 12th November 2018. He handed it to Chris Pye's assistant on his first day back. No one read it, however. Ms O'Brien did not see it because on that morning she sustained the injury and did not return to work until February 2019. During her absence from work she had no contact with Mr Urmston. Ms O'Brien told us that she was contacted by her manager to discuss her absence and welfare but there was no discussion about her direct reports, including Mr Urmston, or about any management, supervisory or operational issues. No one was appointed to cover Ms O'Brien's role. It was suggested that Brad Irving was eventually asked to cover for Ms O'Brien, possibly in late December or early January 2019. Precisely when, or even if, that happened was unclear but, in any event, Mr Urmston was unaware and certainly Mr Irving made no contact with him.

41 Indeed, Mr Urmston was not informed of whether anyone was covering for Ms O'Brien during her absence as his line manager, if so, who that was or who would be his point of contact for any welfare issues.

42 In her evidence to us, Ms Bayes confirmed that in Ms O'Brien's absence, no-one checked her emails, and no-one read Mr Urmston's OH reports or monitored his progress.

43 In fact, after that initial discussion between Ms O'Brien and Mr Urmston on 29th October, upon his return to work until his further breakdown in December 2018, no one in management or from human resources was aware of the recommendation in the fit note of a phased return or the contents of the OH reports and no-one contacted Mr Urmston and/or discussed, reviewed or monitored how he was coping.

44 On 5th December 2018 a 'medication review' was sought in respect of Mr Urmston. Mr Urmston did not recall doing so, however as Ms O'Brien was still on leave and the review could only be requested by the individual or their line manager, it was reasonable to conclude that it was Mr Urmston who had sought it. A report was generated and sent to Ms O'Brien as his line manager. Mr Urmston had submitted the medications that he was taking, and the consequent review summary stated that he '*must be accompanied at all times when performing safety critical duties'*. This report was not seen by anyone. Mr Urmston had provided Ms O'Brien's contact details as his manager, further

supporting our conclusion that he had not been provided with any alternative point of contact or support in her absence.

45 Ms O'Brien told us that during his sickness absence between July and November 2018, various aspects of Mr Urmston's duties had been covered between herself and others, although specific projects e.g. updating the National Hazard Directory and recording Sites of Special Scientific Interests were held in abeyance for him to undertake on his return. But no-one had access to Mr Urmston's emails, and we accepted his evidence that he returned to a significant backlog of work.

46 We accepted Mr Urmston's evidence that from the outset of his return to work he carried out his full range of duties; including going trackside. He would enter trackside through various access points and walk alongside the track, inside the track boundaries to visit and assess specific locations as requested.

47 There was no reliable evidence to counter this. Neither Ms Beyes or Ms O'Brien observed, supervised him or had any knowledge of his activities during November and December 2018. Ms Levene submitted that the absence of any record of his visits in the work packs was probative of him not having carried out these tasks. However, this assertion was undermined by Ms O'Brien's evidence on the point (as referred to earlier in this judgment) and discounted by us.

48 Mr Urmston was adamant that he threw himself back into all aspects of his role; often starting at 6am and working until 7pm. We accepted his evidence that he threw himself back into his work in this manner. In the absence of any structured phased return, oversight and supervision and given his clear sense of responsibility, his work ethic and his anxiety about letting people down and appearing to be a 'weak link', it was entirely credible that he would have done so and quickly lost sight of the need to pace himself.

49 Having heard Mr Urmston's evidence, we found that the effect of working full hours and duties without the support or supervision of appropriate line management upon him was that his mental health deteriorated significantly to the extent that he had a full breakdown in December 2018.

50 As indicated earlier in this judgment, we found that the reference in the OH report of 22 November 2018 to *'returning to full hours'* was ambiguous. We did not interpret it as a clear statement on Mr Urmston's part that he had been working reduced hours, rather as an over optimistic assurance to the Occupational Health Physician of his ability to carry out all aspects of his role. That view was consistent with his confirming to the OH physician that he had already *'returned to work including to his safety critical environment'*; i.e. his trackside duties.

51 In her evidence to us, Ms Beyes confirmed that it would be the default position for someone who had been absent through ill health to return to their pre-existing role, subject to that person being fit to return and any reasonable adjustments that might be required. That default position included someone who had been carrying out a safety critical role. She accepted that this was the default position in respect of Mr Urmston, that he would have been expected to carry out all aspects of his role, unless adjustments had been agreed.

The Law

52 In the Annex to her closing submissions, Ms Levene laid out the relevant legal principles; with which Mr Wilson agreed and we applied in determining this claim. They are laid below:

53 **Burden of Proof:** The burden of proof provisions in the EqA 2010 are set out in section 136(2) and (3) and state:
(2) If there are facts from which the court [or tribunal] 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.

53 In *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332*, the EAT set out guidance to tribunals on the burden of proof rules then contained in the SDA 1975. This was approved, with minor revisions, by the Court of Appeal in *Igen Ltd and others v Wong and other cases [2005] IRLR 258*, and by the Supreme Court in *Hewage v Grampian Health Board [2012] IRLR 870*. The Supreme Court commented, however, that the court's guidance is not a substitute for the statutory language, and so the starting point should always be the statute.

54 The note to section 136 states: *This section provides that, in any claim where a person alleges discrimination, harassment or victimisation under the Act, the burden of proving his or her case starts with the claimant. Once the claimant has established sufficient facts, which in the absence of any other explanation point to a breach having occurred, the burden shifts to the respondent to show that he or she did not breach the provisions of the Act. The exception to this rule is if the proceedings relate to a criminal offence under this Act*.

55 In summary, a two-stage approach to the burden of proof applies:
Stage 1: can the claimant show a prima facie case? If no, the claim fails. If yes, the burden shifts to the respondent. Having established those facts, the court or tribunal must decide whether they would be sufficient to justify an inference that discrimination has taken place.

56 A prima facie case requires that "a reasonable tribunal could properly conclude from all the evidence" that there has been discrimination (*Madarassy).*
The tribunal is entitled to take the context into account, which may mean that there is no prima facie case.

57 Stage 2: is the respondent's explanation sufficient to show that it did not discriminate?

58 The respondent is required to show a non-discriminatory explanation for the primary facts on which the prima facie case is based (*Glasgow City Council v Zafar [1998] IRLR 36 (HL)*). The respondent's reasons for acting as it did do not have to be "reasonable" or "sensible" (*Laing v Manchester City Council [2006] IRLR 748 (EAT)).*

59 The Court of Appeal has explicitly confirmed the continued application of the two-stage approach under the EqA 2010 (*Ayodele v Citylink Ltd [2017] EWCA Civ 1913*). The Court of Appeal has emphasised that the burden of proof provisions "need not be applied in an overly mechanistic or schematic way" (*Khan and another v Home Office [2008] EWCA Civ 578*). A tribunal is not compelled to take a two-stage approach. For example, if the court or tribunal is satisfied that the respondent has offered a genuine reason for the treatment which is not consciously or unconsciously discriminatory, then the claim will fail and it is irrelevant whether or not the burden formally shifted to the respondent.

60 The *EHRC Employment Statutory Code of Practice* and *EHRC Services, Public functions and Associations, Statutory Code of Practice* also confirm that where the basic facts are not in dispute, a court or tribunal may simply consider whether the respondent is able to prove, on the balance of probabilities, that they

did not commit the unlawful act (paragraph 15.35 EHRC Employment Code and paragraph 14.35 EHRC Services Code).

61 Reasonable Adjustments: Section 20 EqA provides as follows:
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.

62 As to knowledge, under paragraph 20 of Schedule 8 to the EqA, an employer is not under a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know, that the individual concerned has a disability and is likely to be at a substantial disadvantage compared with persons who are not disabled.

63 In *Secretary of State for the Department for Work and Pensions v Alam UKEAT/0242/09*, the EAT posed the required questions in the following terms:
Did the employer know both that the employee was disabled and that his disability was liable to disadvantage him substantially?
Ought the employer to have known both that the employee was disabled and that his disability was liable to disadvantage him substantially?

64 The PCP, properly construed, has been described as the "base position":
[The PCP] "represents the base position before adjustments are made to accommodate disabilities. It includes all practices and procedures which apply to everyone, but excludes the adjustments. The adjustments are the steps which a service provider or public authority takes in discharge of its statutory duty to change the [PCP]. By definition, therefore, the [PCP] does not include the adjustments" (Finnigan v Chief Constable of Northumbria Police [2014] 1 WLR 445, §29).

65 A substantial disadvantage is one which must exist in comparison with persons who were not disabled: *"… an employment tribunal—in order to uphold a claim that there has been a breach of the duty to make reasonable adjustments and, thus, discrimination—must be satisfied that there is a provision, criterion or practice which has placed the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled"* (*RBS v Ashton [2011] ICR 642, §14).*

66 On the subject of comparators, Mr Wilson added that Section 20(3) EqA 2010 requires a comparison with persons who are not disabled. See *Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216* Court of Appeal in which Elias LJ stated:
"The nature of the comparison exercise in the former case is clear: one must simply ask whether the PCP puts the disabled person at a substantial disadvantage compared with a non-disabled person" see paragraph 58.

67 There must also be a causal connection between the PCP and the substantial disadvantage so identified:
It is not sufficient merely to identify that an employee has been disadvantaged, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered; that would be to leave out of account the requirement to identify a PCP. Section 4A(1) of the Disability Discrimination Act 1995 provides that there must be a causative link between the PCP and the disadvantage. The substantial disadvantage must arise out of the PCP (Nottingham City Transport Ltd v Harvey UKEAT/0032/12, §17).

68 It will be a reasonable adjustment if there is "a prospect" that doing so would prevent the claimant from being at the relevant substantial disadvantage: *Leeds Teaching Hospitals NHS Trust v Foster [2010] UKEAT/0552/10, §14*. The efficacy of an adjustment is a factor for the tribunal to take into account when considering its reasonableness.

69 The two-stage burden of proof contained in s.136 EqA applies equally to reasonable adjustments claims. If the burden shifts at the first stage, a failure by the employer to discharge the burden at the second stage must result in the claim being upheld. Its particular application to reasonable adjustments was discussed by the EAT in *Project Management Institute v Latif [2007] IRLR 579* where it held:

…the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not (paragraphs 54-55).

Our Conclusions

70 Did the Respondent apply a provision, criterion or practice of expecting employees to return to work in a safety-critical role after a long period of absence (PCP1) and/or requiring Workforce Health, Safety and Environment Advisors to carry out their full role (PCP 2)?

71 Quite plainly, yes. As Ms Beyes confirmed, it was the respondent's policy and default position that employees, including WHSEAs returned to their full role once they were fit do to so after an absence. In any event, it is unsurprising that an employer's expectation would be for an employee to resume the full range of their duties upon a return to work after a long period of absence. The fact that the respondent may make reasonable adjustments to accommodate returning employees does not detract from or remove the expectation and practice of requiring those working in a safety critical role and specifically WHSEAs of returning to carry out their full role. The purpose of a managing absence policy is to achieve that aim.

72 Mr Urmston carried out a safety critical role and he was a WHSEA. Both PCPs were applied to Mr Urmston and this placed him at a disadvantage compared with persons who were not disabled. In the absence of reasonable adjustments being put in place for his return, the default position applied. Because of his mental health condition, he was disadvantaged by this compared to someone without that condition in that he was unable to cope with the demands of the role and his mental health seriously deteriorated.

73 If so, was the disadvantage to the Claimant more than minor or trivial? This disadvantage was substantial; it culminated in Mr Urmston's mental health deteriorating to the extent that he had a full breakdown on 19th December 2018 and further hospitalisation.

The respondent conceded that if either or both PCPs had been applied to the claimant, the disadvantage; being the impact upon the claimant's mental health; would have been substantial.

74 If so, would it have been reasonable for the Respondent to make all or some of the adjustments, suggested by the Claimant, to avoid that disadvantage?

75 Yes; it would have been reasonable for the respondent to make all the adjustments suggested by the claimant to avoid that disadvantage. Network Rail is a large employer with clear policies and procedures in place for line managers to follow when dealing with long term absence, a subsequent return to work, consideration and implementation of reasonable adjustments and ongoing monitoring. It has a referral process to Occupational Health and a profession HR team available to offer guidance and support. Ms O'Brien was aware of those policies and procedures and, had she not sustained her injury and been absent she may well have applied them to Mr Urmston. However, in her absence, no one took responsibility for or oversight of Mr Urmston. There was no transfer of information or communication about his needs and none of the policies or procedures were followed. In his words, he simply fell through the gap and out of sight.

76 Did the respondent fail to make those adjustments?
Yes: A return to work interview was not held contrary to the respondent's own procedures at which the effects of his mental health impairment could have been considered and agreement reached as to how that could be accommodated in his work duties and hours. No phased return was agreed, drawn up or implemented to accommodate the effects of his disability; when he returned to work on 12th November he was left entirely to his own devices. Mr Urmston's hours were not reduced; in fact, his hours increased so he could catch up on outstanding work. He was not provided with additional supervision; in fact, he was left with no supervision at all. His workload was not reduced; in fact, he returned to a backlog.

77 Applying the burden of proof; from the facts that we found, the duty to make adjustments for Mr Urmston had arisen and from these facts we could reasonably infer, absent an explanation, that the respondent did not comply with that duty by taking reasonable steps to avoid the disadvantage. Taking account of all the evidence before us and for the reasons given, the respondent did not satisfy us that it had complied with the duty to make adjustments.

78 Accordingly Mr Urmston's claim of failure to make reasonable adjustments pursuant to S20 & 21 Equality Act 2010 was well founded and succeeded.

Employment Judge Howard
Date 9th December 2021

JUDGMENT SENT TO THE PARTIES ON
13 December 2021

FOR THE TRIBUNAL OFFICE