



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms M Muir

Govia Thameslink Railway Limited

Heard at: London Central

On: 15 – 17, 20 – 23 February 2023
In Chambers: 9 – 10 March 2023

Before: Employment Judge Lewis
Mr A Adolphus
Mr G Bishop

Representation

For the Claimant: Represented herself

For the Respondent: Ms S Robertson, Counsel

RESERVED JUDGMENT ON LIABILITY

The unanimous decision of the tribunal is that:

1. The respondent's failure to redeploy Ms Muir in a role not involving direct contact with the public, eg an administrative role was a failure to make reasonable adjustments.
2. In addition, the respondent's failure to redeploy Ms Muir to any of the following posts was a failure to make reasonable adjustments:
 - a. Trainee Train Planner: 23 September 2020
 - b. HR Administrator: May 2021
 - c. Health, Clinical and Administrative Support: October 2021
 - d. Admin Support, Fleet: February 2022.
3. Requiring Ms Muir to attend an initial capability meeting on 13 July 2020 was not discrimination arising from her disability.
4. However, inviting Ms Muir to a further capability meeting on 29 July 2020 was discrimination arising from her disability.

5. The above claims were in time. Alternatively, the tribunal exercised its just and equitable discretion to allow them in time.
6. The claim for holiday pay is dismissed on withdrawal.
7. The respondent admitted it had made an incorrect deduction due to computer error in respect of the four weeks ending 19 February 2022. By consent, the respondent is ordered to pay the claimant half pay (paid net) for that period.
8. Apart from this, the respondent did not make unlawful pay deductions from Ms Muir.
9. The respondent's treatment of Ms Muir in relation to the assaults was not direct race discrimination and it was not racial harassment.
10. The respondent did not subject Ms Muir to detriments for whistleblowing.
11. The respondent did not victimise Ms Muir.

Remedy and compensation

12. Unless Ms Muir and the respondent can reach agreement on compensation, there will need to be a remedy hearing on another day.
13. First of all, there will be a preliminary hearing to discuss preparation for the remedy hearing. The tribunal will send the parties notification of the date and time of a preliminary hearing for this purpose.

REASONS

Claims and issues

1. Ms Muir presented two claims, the first on 27 May 2021 for direct race discrimination and harassment, s15 disability discrimination, failure to make reasonable adjustments, and pay arrears; the second on 12 April 2022 for continuing failure to make reasonable adjustments, holiday pay, pay arrears and victimisation.
2. The respondent accepted that Ms Muir was disabled with PTSD at the relevant time and that it knew she was disabled at the relevant time.
3. The issues were agreed as follows:

Jurisdiction

- 3.1. Were any of Ms Muir's complaints presented outside the primary limitation period (taking the early conciliation dates of 12 – 28 April 2021

into account)? Dealing with this issue may involve consideration of the following subsidiary issues:

- 3.1.1. Has Ms Muir shown that the complaint was part of conduct extending over a period which ended within the primary period?
- 3.1.2. If not, has Ms Muir presented her claim in such other period as the tribunal thinks just and equitable?

Discrimination arising from disability

- 3.2. Did the respondent treat Ms Muir unfavourably by requiring her to attend an initial capability meeting on 13 July 2020 and a further capability meeting on 29 July 2020 which was scheduled to consider her ongoing employment which she was told could result in her dismissal?

Failure to make reasonable adjustments

- 3.3. The duties of a Revenue Control Officer were a provision, criterion or practice ('PCP') which required Ms Muir to be in direct contact with passengers.
- 3.4. Did that PCP put Ms Muir at a substantial disadvantage compared with people who were not disabled at any relevant time in that it was likely to exacerbate her health?
- 3.5. Did the respondent know, or could it reasonably have been expected to know, that she was likely to be placed at any such disadvantage?
- 3.6. If so, were there steps that were not taken which could have been taken by the respondent to avoid any such disadvantage? If so, would it have been reasonable for the respondent to have taken any of those steps at the reasonable time? Ms Muir relies on, from August 2020, redeployment to a role which did not involve direct contact with the public, eg an administrative role.

Direct race discrimination

- 3.7. Did the respondent subject Ms Muir to the following treatment:
 - 3.7.1. In relation to the assault by a white male passenger on 30 September 2019, Kevin Hughes station Manager reprimanding Ms Muir for taking a photograph of the alleged perpetrator, and neither Mr Hughes nor the respondent following up the incident or investigating it.

3.7.2. In relation to the incident of racist abuse towards Ms Muir by a white male passenger on 20 December 2019, neither Mr Hughes nor the respondent following up the incident or investigating it.

3.7.3. In relation to the assault by a white male passenger on 3 January 2020, which Ms Muir says was witnessed via monitor by Mr Hughes and Sandy, the station supervisor, neither raising the alarm or notifying security or the police, and neither Mr Hughes nor the respondent following up the incident or investigating it. The respondent says Ms Muir was told to report the incident to the British Transport Police ('BTP').

3.8. Was that less favourable treatment by the respondent because of race?

Harassment related to race

3.9. In relation to the respondent's actions and inactions described in paragraph 5.7 above, did this conduct relate to Ms Muir's race?

3.10. Did that conduct have the purpose of violating Ms Muir's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

3.11. If not, did it have that effect, taking into account Ms Muir's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect.

Whistleblowing

3.12. Did Ms Muir make a protected disclosure, ie on 14 October 2020 writing to Julie Sadler and Andy Bindon to report that she had been issued with the necessary paperwork and card to act as an 'authorised collector' of penalty fares and MG11s and had issued and collected penalty fares and notices without the relevant training as required by law? The respondent accepted this was a protected disclosure.

3.13. Did the respondent subject her to detriments on the ground that Ms Muir made her protected disclosure, the detriments being her job applications made on or after 14 October 2020 being unsuccessful?

Victimisation

3.14. It was agreed that Ms Muir did two protected acts: (1) her tribunal claim 2203512/2021 and (2) on 18 January 2022 reporting sexual harassment.

3.15. Did the respondent do the following things:

- 3.15.1. Take an unduly long time to reach a decision on her sick pay
 - 3.15.2. Take an unduly long time to investigate her complaint of sexual harassment
 - 3.15.3. Fail to uphold her complaint of sexual harassment
 - 3.15.4. Fail to offer help with internal job applications
 - 3.15.5. Read her OH reports without her permission?
- 3.16. By doing so, did it subject Ms Muir to a detriment?
- 3.17. If so, was that because Ms Muir had done a protected act?

Pay deductions

- 3.18. Ms Muir clarified during the hearing that her pay deduction claim concerned the failure to pay her full pay from 6 May 2021 until the date of her second claim form. She argued that as she was not sick, but simply unable to carry out her RCO duties, and since the respondent had failed to find her alternative duties which she could carry out, she should have been on her normal pay. The issue was therefore whether she was entitled to be paid normal pay in such circumstances.

Procedure

4. There was an agreed Trial Bundle of 743 pages and an Additional Bundle of 24 pages containing the respondent's Chronology, Cast List and Opening Note. The respondent also disclosed seven further documents, which we numbered R1 – R7. The respondent later provided written closing submissions with a bundle of Authorities and a schedule of posts.
5. There was also a bundle of witness statements which contained from Ms Muir, a witness statement and two Affidavits with attachments; a witness statement from Ms Johnson which Ms Muir asked us not to read; witness statements from Kevin Hughes, Nadia Sylvester-Paul, Emma Newman, Angela Palmer, Barry Welbourne, and two from Mark Robey. We heard from all the witnesses except Ms Sylvester-Paul and Ms Johnson.
6. Mr Welbourne indicated he was feeling unwell shortly before he was due to give evidence. The tribunal allowed time for the respondent to find out the position. This was potentially very problematic as he was the last witness. In the event, Mr Welbourne very helpfully said he felt sufficiently able to give evidence and he did so. He was offered breaks, even at 15 minute intervals, but having taken paracetamol he preferred to continue.
7. Ms Muir arrived at the tribunal building at the start of day 1, having initially been told the hearing would be in the building. The tribunal only said it would be on CVP earlier in the week (which notification Ms Muir said she did not receive) and Ms Muir said she only found out about CVP the previous

afternoon. She did not have any difficulty using the technology. The problem was more that she has noisy children at home. The tribunal enabled Ms Muir to sit in a tribunal room with a video screen for day 1. However the tribunal did not have an available facility for day 2. We said that we would find a way to work around any noise from the children. In practice, this worked satisfactorily and Ms Muir did not raise any difficulties with location for the rest of the hearing.

8. Ms Muir told the tribunal at the outset that she no longer wished to call Ms Johnson as a witness and she did not wish us to read Ms Johnson's witness statement as she considered the evidence to be irrelevant.
9. Ms Robertson told the tribunal that Ms Sylvester-Paul could not attend the tribunal, having recently given birth. The respondent wanted the tribunal to read her witness statement, most of which was simply a narrative link for documents in the trial bundle. The tribunal said we would therefore read the witness statement, but when giving weight to the evidence, we would take into account that Ms Sylvester-Paul was not present to be questioned or challenged.
10. At the respondent's request, the tribunal made a witness order in respect of Mr Hughes to enable him to get time off work with his current employer.
11. The tribunal asked Ms Muir whether she would like any adjustments in view of her mental health and suggested a short break every half an hour, and occasionally a longer break. Ms Muir said that would be very helpful. She also asked the tribunal to be patient with her. These adjustments were put in place throughout the hearing.
12. The tribunal also permitted Ms Muir's mother to sit next to her including when she gave evidence (although she was told they must not discuss the case while she was giving evidence).
13. Ms Muir wanted to read her witness statement and affidavits out loud to the tribunal. The Employment Judge explained that is not usually done and the tribunal reads the witness statements to itself. The problem with a witness reading out their statement is that it takes much longer. We did not want to risk not finishing Ms Muir's case as a result, and further delays which she would probably find distressing. Ms Muir nevertheless insisted on wanting to read out her statements, as otherwise she would not feel she had spoken her truth. This was obviously important to her, so the tribunal agreed she could read out the text of her statements (ie pages 4 - 23 and 54 - 56), but not the attachments. In the event, Ms Muir did not want to read her witness statement aloud but only wanted to read out her affidavits. This was allowed and we read her witness statement to ourselves. Then prior to cross-examination, the Employment Judge spent 2 hours talking Ms Muir through the key points of her evidence.
14. Ms Robertson then questioned Ms Muir. Ms Muir answered the questions. This went well.

15. Mr Hughes was the respondent's first witness. Ms Muir commenced her questioning. She read out entire paragraphs of her Affidavit. Mr Hughes looked bewildered. He said he did not understand. Ms Muir stated 'I acknowledge your silence as an agreement'. The Employment Judge asked Ms Muir to put her questions in plain English. She said that she also was having difficulty in understanding the questions, and she was willing to help Ms Muir formulate the question. Ms Muir insisted that she wanted to 'speak her truth'.
16. The tribunal panel called a 15 minute adjournment to discuss the matter. On returning, the Employment Judge explained the panel's view. The problem was that the witness did not understand the questions. He therefore would not answer them, which did not help Ms Muir or him or the tribunal. Formalities are not required in the tribunal. The Judge explained that the tribunal understood the difficulty for someone representing themselves in asking questions in a court setting, and moreover, in asking questions of a witness who had caused them distress at work. We also understood that Ms Muir had prepared her questions. The Employment Judge was very willing to help formulate the questions and address Ms Muir's concerns. The Judge gave an example of how to rephrase her first question into plain English. We then suggested that we stop early (3.30 pm) and that Ms Muir speak to friends and family over the weekend. There were important issues in her case which we wanted to look into and hear Mr Hughes' comments. But this approach was preventing us doing so. We would start again on Monday but we would not allow questioning in this way. The tribunal could itself step in and ask questions instead arising from issues which Ms Muir had so far raised, but the difficulty was that the tribunal could only do so from a neutral position.
17. The weekend was useful. On Monday, Ms Muir explained that as a litigant in person she found procedures difficult. She had thought she was being struck out. The Employment Judge explained this had never been the case. Ms Muir had now prepared questions in plain English and she apologised to the witness. For the remainder of the hearing, Ms Muir asked her questions in plain English, which she did most helpfully and professionally. In addition, to help her, she was allowed with each witness to ask further questions after the tribunal panel's questions and after re-examination. Ms Robertson was also permitted to ask any further questions after that if needed. This worked well.

Fact findings

18. Ms Muir was employed as a full-time Revenue Control Officer ('RCO') on 15 April 2019 at London Blackfriars station. Her original line manager was Kevin Hughes. He was a Station Manager reporting to Nadia Sylvester-Paul.
19. The role of a RCO is to manage the automatic ticket barriers and assist customers, manual ticket checking, conducting revenue protection duties including ticket sales, and issuing penalty fares or completing MG11 evidence reports.

20. Ms Muir's problems with the job and the subject of this claim were sparked by four incidents when she was subjected to verbal or physical assaults by customers.
21. We did not receive a clear description of what procedure should be followed and by whom when staff were subjected to such incidents. When we eventually had to ask for written documents, these turned out to be difficult to find and we were shown documents which were not completely in line with the verbal evidence and rather confused in themselves. We have put together the procedure which, as far as we can tell, Ms Sylvester-Paul thought should have been followed.
22. The staff member had to report the incident to their line manager, if he or she was on duty, or otherwise to the team leader if on duty, or to the station supervisor. Another reporting channel which was encouraged was to Eye Witness, which collects central intelligence.
23. The manager was supposed to complete an investigation report and investigate. The report was logged on to Q-Pulse. The investigation form was headed 'Incident Investigation Details', where there is a checklist of actions and the manager must enter what they have done. An alert was then sent to the Area Manager to carry out a review of the report. At the time of these assaults, there was no requirement to report directly back to the individual who was subject to the assault, though there may be some recommendations which were to be discussed. The person should also have received a 'chain of care' from their manager. 'Chain of care' meant welfare and support and if appropriate referring to Care First.
24. The British Transport Police might carry out their own investigation and consider charges. For this, the BTP would talk directly to the individual staff member.
25. The Incident Investigation Details form described 'Gathering Evidence and Analysis' as 'Record the evidence that has been collected. Describe the events leading up to, during and after the safety event. Assess the evidence, demonstrate what each piece is telling you....' There was then a table which effectively provided a checklist for actions: 'Reviewed Report Forms? Reviewed CCTV? Reviewed/Taken Photographs? Reviewed witness statements? Reviewed Employees Records? Reviewed relevant open recommendations (eg from prior incidents, risk assessments, PGIs)? Aware of any technical faults (eg body worn cameras, CCTV)? Any other evidence collected? Has then relevant health and safety representative been advised? Discussed the incident with the staff member?' There was then space for a note of what was done under each item. There was then a section for 'Conclusions and Actions'. Finally was a section for the Reviewing Manager Approval – the reviewing manager had to sign off.

The first incident: 31July 2019

26. The first incident took place on Wednesday 31 July 2019. Ms Muir was unsure what to do. On her colleagues' advice, she told her team leader Stuart Turner, who in turn told Mr Hughes. Mr Hughes told Ms Muir to make an Eye Witness report.
27. Ms Muir submitted her Eye Witness report on 2 August 2019 describing the incident. The customer had grabbed and argued with certain members of the public and also grabbed Ms Muir's arm. Ms Muir said she had discovered this customer had assaulted another female staff member previously. Ms Muir described the customer including that he was a black man. She added that she did not feel safe alone there any more as it might happen again. She said that if the REOs had more presence in the area, it may deter him from assaulting staff in the future. An REO is a Rail Enforcement Officer – effectively security people who circulate the station.
28. On 2 August 2019, Craig Hayes-Smith (an Eye Witness Crime & Security Analyst) emailed Mr Turner and Mr Hughes with a copy to Ms Muir and Victoria O'Reilly (Team Leader, Thameslink Enforcement Team) asking them to ensure Ms Muir was OK and to submit a report to Q-Pulse regarding the incident.
29. Mr Hughes completed a Q-Pulse investigation report. He said it was identified in his conversation with Ms Muir that she did not feel safe working on the south end of the station, especially on her own, as it was reported that this individual had done something similar recently to another member of staff. 'It was discussed that where possible we would place Michelle on the north concourse to avoid further conflict with this customer Rail Enforcement Officers were informed of the incident and the times that the customer uses the station.' Ms Sylvester-Paul signed off the report.
30. Mr Hughes told the tribunal that it was the team which managed the Eye Witness inbox who had informed the REOs of the incident. We have no reason not to believe this.
31. For the next five weeks, Ms Muir was put onto the north end of the station where there would be up to three staff members on one gate line, as opposed to the south end where an RCO would sometimes be on their own while their colleague was on a break.
32. After her initial report to Mr Hughes, no one came to talk to Ms Muir about the incident. She was not shown the investigation report.
33. Ms Muir does not say the handling of this first incident was race discrimination. She says that the respondent did more on this incident because the customer was black.

The second incident: 30 September 2019

34. A white male passenger accused Ms Muir of making him miss his train because she had given him the wrong information about the correct platform and he said she did not know how to do her job. He argued with her and grabbed her right shoulder.
35. Ms Muir emailed her report that evening to Eye Witness, with a copy to Mr Turner and Mr Hughes. She attached a photo of the customer who was a white male. Ms Muir had taken the photo while the customer was sitting on the train with the doors closed and she was on the platform. Ms Muir then went to Mr Hughes' office to report the matter.
36. Ms Muir says that instead of being concerned about whether she was OK, Mr Hughes reprimanded her for taking the photo, saying 'He can take this to Twitter and the Company could be seen in a bad light'. Mr Hughes cannot remember saying that. He does remember that he told her it was not a good idea to take photos of members of the public because it could put her at risk. We find that Mr Hughes gave both reasons to Ms Muir. We accept Ms Muir's memory of the Twitter comment and that it stuck in her mind as an unacceptable reason. Mr Hughes did not out-and-out deny that he had said it. He just said he could not recall. But he did remember the comment about her not taking the risk, which he wrote in his handwritten notes (see next paragraph). We find it plausible that a manager would mention both comments, expressing concern about the risk to the individual and the risk to the company.
37. Mr Hughes made handwritten notes on a print out of Ms Muir's email to Eye Witness. His note is undated. In summary, the note says 'chain of care was provided ... discussed if she was okay and if she required any further assistance .. I offered support ... I did also mention that, although her intentions were good, taking photos of public was not advisable. Following/pursuing individuals may put you at further risk to personal safety issues, if the situation escalated'.
38. Neither Mr Turner nor Mr Hughes opened a Q-Pulse report and Mr Hughes did not file an Investigation report. Mr Hughes was unable to explain why not. He accepted it was his duty to complete the form and investigate. He says the matter was just overlooked. Ms Muir heard nothing further on the matter.
39. Unknown to Ms Muir and before she had joined the company, Tony Holland (Head of Security and Emergency Resilience) had circulated staff saying that over the past few months, there had been several assaults on rail staff after the member of staff had taken out their mobile phone to take a photo of the individual because of fare evasion etc. He asked staff not to do this and to remember that most trains had CCTV. He also encouraged moving to a place of safety and reporting the matter. We were not told that Mr Hughes was specifically aware of this communication.
40. Ms Muir explained her complaint about the handling of this incident in her grievance meeting in August 2020. She said that Mr Hughes' focus was not

on her safety or her health, but on the fact that she had taken a photo on Twitter which could show the company in a bad light. Nothing was followed up. Nothing was reported to the police or the head of security. No charges were made. The REOs did not come and make their presence known. She had expected to hear from HR about the incident but did not.

41. Ms Muir said in the grievance hearing that the CCTV was not looked at. Mr Hughes told the tribunal that he looked at the CCTV the following day but could not find any incident in the relevant timeframe or location. There is however no mention of this in his handwritten note. We therefore find that he did not look at the CCTV.

The third incident: 20 December 2019

42. Ms Muir reported an incident on 20 December 2019 to Claire Turner, the Area Supervisor, who was on duty at the time. Ms Turner emailed the account to Eye Witness with a copy to Mr Hughes, Stuart Turner and Emma Newman (Station Manager).
43. A white man had asked Ms Muir to accept a photo of his ticket which he said he had left at work. She said he could not do so and he could buy a fresh ticket from her. After some complaint, the customer said, 'You don't have the right face for the company anyway'. Ms Muir was shocked and asked what he had said. He repeated it. She asked what he meant. He stuttered for a while and then said she was not being friendly and compliant.
44. Ms Muir then reported the matter to Mr Hughes. She was upset and in tears. She felt she kept being assaulted and nothing was done. Mr Hughes offered her a cup of tea. Ms Muir said she could not continue her shift and Mr Hughes allowed her to go home.
45. Ms Muir believed the customer's remark was racial abuse. She told Mr Hughes she felt it was racist. She says he hugged her and had tears in his eyes. She says he said he could not believe people were still like that.
46. Mr Hughes completed a Q-Pulse report noting his actions and recommendations on 30 December 2019. He noted that he had spoken to a witness, Ms Muir's colleague Naim, who confirmed the incident, and that he had looked at the CCTV. He said Ms Muir had 'portrayed the incident to be racially motivated', although that had not been written in the Eye Witness report. He said 'There is no evidence to suggest that this was racially motivated other than how Michelle perceived the comments from the member of the public.' Mr Hughes noted that no faults were identified as regards technical equipment, but Ms Muir had unusually not taken out a body worn camera that day.
47. Mr Hughes recommendations were that a discussion take place with Ms Muir 'to establish what can be done to reduce the risk of these incidents from happening in the future (planned for 16/01/2020)'. Points of discussion would

be 'body worn camera use (not worn at the time of the incident); arranging a conflict management course; further welfare to follow up after incidents; request stronger REO presence during peaks'.

48. We add here that the reason Ms Muir had not worn a body cam was because they were all broken that day.
49. The Q-Pulse report was signed off by the reviewing manager, Nadia Paul, on 30 January 2020.
50. Again, Ms Muir had not been told this investigation had happened or been shown a copy of the report. The 16 January 2020 meeting never happened because of Ms Muir's sickness absence. Ms Muir said the meeting was still not arranged when her sick note expired on 24 April 2021.
51. By the time of the next incident, which was only a few working days after the completion of the report, Ms Muir had not yet been told of the proposed meeting on 16 January 2020.

The fourth incident: 3 January 2020

52. Ms Muir emailed an Eye Witness report on 4 January 2020 regarding an incident the previous day. She copied in Mr Turner, Mr Hughes, the Area Manager Ms Sylvester-Paul and others.
53. Ms Muir's email said she had been assaulted by a white male who she had not allowed to use a photo of his season ticket which he said he had left at home. When Ms Muir opened the gate for another passenger, 'the man rushed past her and directly came and barged me with full power menacing force to get me out the way. I was stunned and winded but managed to pull him out the way and pin him whilst I called for help and told him he physically assaulted me. In this time I managed to turn on my body cam. He pushed again and hobbled to the train'. Ms Muir said she was unable to press the emergency help point as it had not been working since November. She went on 'This is now my 4th assault in 8 months. 3 physical and 1 verbal racial all by men. I am absolutely emotionally tired and stressed out of being targeted by this. I have reported all incidents and my 2nd attack I took a photo of the white male that pushed me and sent it to Eye Witness and the correct members of management and still nothing absolutely nothing has been done or said.' She said she had not seen any REOs or the British Transport Police come to the gate line to make their presence known and reassure on safety. That should be implemented after every attack and it was not.
54. Ms Muir had immediately reported the incident to Mr Hughes and the station supervisor, Sandy Boyle, in the control room. They had not seen the incident. The control room has glass windows and CCTV which revolves around different areas, so those in the room may not pick up on everything which happens. Mr Hughes left the room to look at the CCTV. He returned and said 'I've seen the tape, I'm disgusted, it's disgusting'. Ms Muir stayed in

the control room for about half an hour to try to calm down. She was extremely upset. Mr Hughes suggested they talk about it on her shift the next day. Ms Muir was astonished that he felt she would be able to come in the next day. Ms Muir felt Mr Hughes did nothing - there should have been a 999 call and police should have been asked to stop the train or pick up the passenger at the next station. It was her who reported it to the police the next day.

55. Ms Sylvester-Paul emailed Ms Muir on 4 January 2020 to say she was sorry to read about the incident. Mr Hughes would investigate it thoroughly and be in touch to discuss with her how she was feeling. Ms Sylvester-Paul urged Ms Muir to report the matter to the British Transport Police ('BTP') if she had not yet done so, so that the individual could be caught.
56. Ms Muir replied that her chest area was very red and painful when she got home. It was particularly painful because she had been to the breast clinic recently. She had also been a survivor of domestic abuse in the past for over 2 years, so to be repeatedly assaulted by men at work left her in a delicate place. She said if there was another role in the company which she could be considered for, she would really appreciate it.
57. Mr Hughes completed a Q-Pulse Incident report. He noted that he had reviewed CCTV and requested body worn camera footage, although the latter had not yet been released by BTP due to ongoing investigations. He noted that the Help Point was not working at the time. He noted that Lynda Jeffrey, the relevant health and safety rep had been advised. He said follow up welfare meetings would continue with Ms Muir until she returned to work and the head of security, Mr Holland, would hold a meeting with her to discuss the incident further. REO James Edwards would discuss issues with her when she returned to work. He said it had also been discussed with her to attend a managing difficult situations course in the future.
58. Ms Muir was not complaining about these steps. Indeed, when Ms Robertson put to her that Mr Hughes in fact carried out more investigation on the fourth incident than on the first, she said he had investigated properly this time because he was aware what he had lacked in the past. Her main complaint about the investigation is that if Mr Hughes and Ms Boyle had been actively reviewing the gate lines when they were in the control room, they could have raised the alarm, called the police and halted the train.
59. Mr Hughes told the tribunal that managers would not normally stop a train unless there was imminent danger or the safety of the line was compromised, eg because there was a person on the track. We accept this is likely to have been the company's position. We can imagine that the company is reluctant to hold trains up. Mr Hughes adds that by the time he was aware of the matter, the train had departed anyway. We accept this as it is broadly consistent with the time-line in the Q-Pulse Investigation report.

Sickness absence / impact on Ms Muir

60. On 6 January 2020, Ms Muir's GP signed her off sick as not fit for work with 'work stress following assault at work carrying out revenue duties'. She had started experiencing lack of sleep, anxiety and panic attacks. She was prescribed anti-depressants.
61. On receipt of her fit note, Mr Hughes made a welfare call to Ms Muir. She said she could not face the role of RCO any more. Mr Hughes said she could apply for other roles, but it would be subject to application and interview. After this, Mr Hughes held a regular set of welfare calls with Ms Muir. When he later left, Emma Newman, another station manager, took over.
62. Mr Hughes then made a referral for Ms Muir to a counsellor with the agency Care First. Also, Ms Muir was referred to Occupational Health ('OH') who wrote a report on 29 January 2020. The report was written by Dr Julia Chapman. Dr Chapman said Ms Muir had symptoms consistent with PTSD and that Ms Muir also told her that the assault had precipitated symptoms associated with previous traumatic episodes in her life. Ms Muir felt unable to return to a confrontational customer facing role where she was at increased risk of assault.
63. Dr Chapman said she understood Ms Muir had been referred to Care First and she would check whether they could provide specific trauma treatment, which Dr Chapman felt was required. An early return to work would be beneficial but it would have to be in a non-customer facing role at another location. It should be a phased return.
64. In the longer term, even if Ms Muir made a complete recovery, her past history of trauma meant she was likely to be more susceptible to trauma if she experienced further assault. Ms Muir had said she would feel more comfortable in a role where customer contact was behind glass, eg selling tickets. Dr Chapman suggested they revisit that as Ms Muir got better and was able to make definitive decisions. Dr Chaman certified Ms Muir as 'F2 temporary OH Managed' (temporarily unfit for work) and said she would meet her again in a month's time.
65. On 11 February 2020, in a welfare call with Ms Muir, Mr Hughes said with reference to OH's suggestion of a non-customer facing role words to the effect, 'You do realise this (Blackfriars) is your station? You do realise you will be returning to your role and station, and must not get too comfortable wherever you go?' Mr Hughes told the tribunal he was simply pointing out the reality of the situation to Ms Muir. An alternative location would be considered as part of her return to work, but that was only temporary. Ultimately she would be required to return to Blackfriars as it was where she was employed.
66. Ms Muir emailed Mr Hughes on 12 February 2020 to say that the conversation the previous day had left her more traumatised and she had been unable to sleep. She said, 'I think your comment was unsympathetic, inconsiderate and cold. You basically said that no matter what OH said to me and wrote to you on the report, don't get comfortable as it's only temporary I

will be at another station carrying out another role. Plus the medication and counselling I'm receiving is pointless.' She continued:

'I am petrified and so very very stressed as it is of the prospect of returning to Blackfriars Especially not knowing if the man or his family are going to retaliate once he is apprehended. How would you protect if this does so happen? What about my children?'

67. Mr Hughes replied on 14 February 2020, saying, 'I apologise if our welfare call has made you feel this way, this was not the intention I can assure you of that. I would like to reassure you that your welfare whilst you are off sick is important and I have a duty to check any progress you might have made.' He added that Ms Muir was also required to keep him updated, and that there would be an OH review on 4 March 2020.
68. The respondent then arranged via OH for Ms Muir to have 6 sessions of trauma therapy following the 6 generalised counselling sessions she had had with Care First. While these were helpful, Ms Muir's symptoms did not resolve because of her fear of returning to an RCO role or role with direct contact with the public.
69. In March 2020, Ms Muir applied for a Customer Ambassador role at Three Bridges. She was unsuccessful. The respondent provided no further details of the post or the reason why Ms Muir was unsuccessful to the tribunal. There was a back reference to this in a welfare meeting in February 2022, when Ms Newman asked in respect of a more recent post whether Three Bridges would be too difficult to travel to. Ms Muir said that it would.
70. In a welfare call on 22 May 2020, Mr Hughes discussed that she was approaching 6 months off sick, which was not sustainable as her substantive role remained unfilled. He reiterated OH advice for a temporary relocation but said eventually she would have to return to her substantive role unless she applied for a different role within the business. Ms Muir said she had asked HR for feedback about her application for Area Supervisor but she had not received any.
71. In an OH report dated 17 June 2020, Dr Chapman classified Ms Muir as 'F2 permanent'. She said that Ms Muir felt unable to return to her RCO position or to a position within the company where she would have direct face-to-face contact with the public and be at increased risk of assault. She felt able to return to alternative work where there would be a physical barrier, so she would not be at increased risk of physical assault, such as working from within the ticket office or an administrative position as she felt she had transferrable skills.

Invitation to capability meetings on 13 and 29 July 2020

72. Mr Hughes left the company on 30 June 2020 and Ms Newman took over care of Ms Muir welfare and de facto manager while she was off. Ms Newman

had already attended a couple of welfare meetings with Mr Hughes and Ms Muir.

73. On 6 July 2020, Ms Newman wrote to Ms Muir to invite her to attend a medical capability meeting regarding her fitness to carry out her role as RCO. Ms Muir's GP had now signed her off work until 25 October 2020. The letter said 'the business is being put under considerable strain by your continued absence and restrictions and this is becoming unsustainable'. Ms Newman invited Ms Muir to attend a meeting on 13 July 2020 'to discuss your ongoing employment with Govia Thameslink Railway, in terms of your fitness to carry out your role now and in the foreseeable future'. Ms Muir was told that she had the right to be represented.
74. The meeting took place on 13 July 2020. Siroja Balaskandan was there from HR. Ms Muir said she wanted to come back but nothing had been put in place. She had unsuccessfully applied for roles but as continually told that no feedback was available. Ms Balaskandan said she had spoken to the recruitment team about providing feedback. They had said other candidates had more relevant experience in the Area Supervisor and other roles where Ms Muir had not been shortlisted.
75. At the end of the meeting, Ms Newman said she would arrange another meeting in a couple of weeks time to consider the way forward and whether Ms Muir's continued employment was viable. She said 'It would appear we have done everything we can to support you so far, so it might be based on a medical outcome as there is little more that can be done for you in terms of Occupational Health and the counselling'.
76. On 14 July 2020, Ms Newman wrote to Ms Muir to invite her to a further meeting on 29 July 2020 to discuss her ongoing employment with the respondent, as the absence from full duties did not seem to be improving, with the potential outcome of termination due to medical capability. The invitation letter was very similar to that of 6 July 2020, except that it said the outcome of the meeting might be that Ms Muir's contract was terminated due to medical capability.
77. This further meeting was later postponed by Ms Sylvester-Paul because Ms Muir submitted a grievance.

Grievance

78. On 20 July 2020, Ms Muir submitted a grievance raising concerns about what she felt was a lack of support and failure to investigate the incidents properly; breach of duty of care at work; failure to follow OH recommendations; bullying by her line manager; disability and race discrimination.
79. Ms Muir described the impact on her health:

'I suffer from PTSD, anxiety, nightmares, difficulty sleeping and stress, for which I am taking Propranolol and also was taking Sertraline. I also received 6 sessions of counselling and 6 sessions of Trauma therapy in order to combat my symptoms and in addition I have seen the Cardiac department and had a 24hr Tape attached due to palpitations, pain in my chest and shortness of breath. I do have regularly flashbacks at night of some things I have suffered in the workplace. I currently have a long-term disability brought on whilst carrying out my Revenue Control Officer duties for the company.'

80. Ms Muir described the four assaults. She said her manager had seen the footage of the fourth incident and said it was disgusting. She went on, 'I said it's unfair and they are trying to kill me next as this kept on happening to me in the 8 months I was there and no REOs or prominent police manning the station. I said I was fed up, I'm fearful for my life and am not protected'. Mr Muir continued:

'Since then, I am traumatised, petrified and damaged. I am suffering with reoccurring nightmares, trouble sleeping, palpitations, anxiety and panic attacks, My biggest fear is what happened to our colleague 'Betty', who was working at Victoria station. She said she feared for her life and still was forced back into the lion's den. I feel I will be put back into a situation and this time my life will be compromised. I haven't been back as I fear for my life. Not only have I been affected, but my children have. They are afraid of me going back to do a job and not being protected, they feel I will be murdered at work, and they will be left alone. I am now extremely nervous of my surroundings. The company has failed me profoundly'.

81. A grievance meeting was held on 12 August and 30 September 2020 by the Area Manager, Nadia Sylvester-Paul. Ms Muir attended with her trade union representative. Ms Muir said she was looking for redeployment. She said she would be interested in admin or ticket office roles. By this time, she had unsuccessfully applied for five roles. Ms Sylvester-Paul said she was aware that Emma Newman had mentioned the Tooting ticket office role, but ticket office roles do have their own issues too. A ticket office is not a place that removes you from the aggressiveness. But if Ms Muir was willing to be considered for it, Ms Sylvester-Paul would look at that going forward.
82. Ms Sylvester-Paul asked whether Ms Muir had applied for the Roster Administration role which she had previously drawn to Ms Muir's attention. Ms Muir said she had not because the hours were long (09.00 – 17.00) and the pay was £20,000 which would not help her. In her RCO role, Ms Muir worked 39 hours/week and was paid £27,860
83. Ms Sylvester-Paul then mentioned a part-time role at the Tooting ticket office which was about to come up (Monday – Friday 15.00 – 19.00). She also mentioned a Sales Assistant role at Bowes Park, 06.30 – 10.30 Monday to Friday. Ms Sylvester-Paul said she would support Ms Muir fully with the application process and if she needed any help with the interview process, Ms Sylvester-Paul was happy to help.

84. Ms Sylvester-Paul set out her grievance findings in a letter dated 5 October 2020. We will not repeat all the findings, but they included the following:
- 84.1. Not upheld: request for more presence of BTP and REOs at Blackfriars, Ms Sylvester-Paul said that data showed good presence of REOs at Blackfriars, although Ms Muir may not have felt that because they patrol the entire station.
 - 84.2. Upheld: Having had an incident at Southbank where RCOs are more isolated, it could have been explored that Ms Muir remain at one of the other two gate lines for an extended period b5 returning there.
 - 84.3. Not upheld: unreliable equipment in the workplace. Ms Sylvester-Paul said all radios were now in working order. On the day, Ms Muir could have sourced a replacement radio when she discovered hers was not working. All the Body Worn Cameras were now functioning correctly and the charging dock had been replaced.
 - 84.4. Not upheld: no calls made to 999 or the BTP. Ms Sylvester-Paul said they only called 999 if there was immediate danger. They were unable to detain someone at the station. It is the victim who reports the incident to BTP and Ms Muir was encouraged to do so to provide a first-hand account.
 - 84.5. Not upheld: Ms Sylvester-Paul said Mr Hughes had not belittled or harassed Ms Muir. He was just trying to manage expectations while trying to establish what would be a suitable alternative role. The respondent did not have non-customer facing roles without role required training eg ticket office courses. Managers are also supposed to maintain regular contact with staff members when they are on sickness absence, and welfare calls are made on staff's personal devices as the respondent did not expect staff to be contactable on work devices while off sick.
 - 84.6. Not upheld: Mr Hughes had been trying to explain the risk of taking photos of members of the public in these situations. If the customer had retaliated, it could have put Ms Muir in more harm.
 - 84.7. Upheld: Ms Sylvester-Paul said all reported incidents are investigated on the respondent's internal system, Q-Pulse, and a chain of care is provided by the manager to an employee. She was confident Mr Hughes attempted to undertake regular welfare with Ms Muir after the 3 January incident but appreciated that Ms Muir was given no outcome from the respondent's internal investigations on previous incidents. She was going to recommend that each investigating manager routinely explains their findings and recommendations to the employee.
 - 84.8. Ms Sylvester-Paul said she intended to take the following actions:
 - 84.8.1. Provide assistance with applying for upcoming suitable roles. Ms Muir had been made aware of the part-time Sales Assistant positions

at Tooting and Bowes Park, and also about the Roster Clerk Admin Support role, although the salary did not suit Ms Muir's circumstances.

84.8.2. The Medical Capability procedure would be suspended while Ms Muir applied for the roles which were currently available.

84.8.3. Arrange additional trauma support counselling and OH to decide what was best.

84.8.4. Going forward, all managers had been instructed to ensure that they completed assault investigations with the staff member involved and shared feedback from the investigation including recommendations, to ensure individuals were aware of the outcome.

Overview: respondent's approach to finding an alternative post

85. With limited exceptions which we will mention as we go along, the respondent's general approach to relocating Ms Muir was that she must apply for roles along with everyone else, and be subject to the decisions of the recruitment team for that particular role. This included being subject to any competition from other applicants. Ms Muir was provided with hands-on help, particularly from Ms Newman and Ms Sylvester-Paul, in identifying roles which might be suitable, and occasionally providing her details of where to make the application and the deadline. At a later point, she was offered some guidance on completing a good application.

86. Ms Muir said she only applied for roles which she felt she could do.

87. Ms Newman told the tribunal that she was looking out for what Ms Muir could do. Having interviewed her, she knew Ms Muir had a good skill set, and she knew Ms Muir was articulate and confident. They would look through the vacancy lists together and largely Ms Newman was looking at admin roles.

88. Ms Newman said the structure of the company was such that any non-customer facing role would generally be considered a promotion. This was something which Mr Robey also said. The tribunal asked Ms Newman why the company could not just give the claimant a promotional role if she was able to do it. Ms Newman said that was something which she could not answer.

89. Over time, Ms Muir put in a large number of unsuccessful applications. Generally she was rejected at the shortlisting stage. On a number of occasions, she was rejected by computer two days after completing an on-line test with no explanation. She received virtually no feedback. She became very demoralised.

90. Mark Robey, an Employee Relations Manager, explained the recruitment process and online tests as follows. Vacancies are posted to a central page on the company's intranet. An applicant needs to apply through the online process which is managed by the recruitment team. Usually this involves completing an application form and submitting a CV and covering letter. If no

initial online testing is required, these are reviewed by a member of the recruitment team. If the key competencies and relevant experience are evidenced, the application is sent to the recruiting manager for the next stage. If they are not evidenced, the application is rejected and no feedback is given. If online testing is required, there is a pre-set pass mark and a candidate automatically fails if they do not achieve that, and they are sent an autogenerated response. If the candidate passes the online testing, their application is then sent to the relevant recruitment manager.

91. Most roles are advertised to both internal and external candidates, but it is possible for them to be advertised internally only. No additional weight is given to internal candidates if advertised to both. If the recruitment team is helping an internal candidate with their application, they may be aware of the employee's circumstances eg that they have been on long-term sick, but they would not know whether they had submitted any whistleblowing complaint.
92. We were provided with a document (R5) setting out the respondent's online tests. These included 'Administration Situational Judgment', testing proactivity and problem solving within an office environment, used for junior admin roles; 'Customer Service Situational Judgment', testing customer mindset and problem solving skills for customer-facing roles; 'Numerical Reasoning', using mathematical calculations to answer questions based on data presented in charts, for roles where numerical skills are important; 'Verbal Reasoning', interpreting a passage of text and answering questions to identify true or false statements, for roles where written communication skills are important and/or volume sifting; 'Train Driver Situational Judgment', testing balance between maintaining the timetable and dealing with customer and/or H&S issues, for Train Drivers. There were also 'Mechanical Comprehension' and 'Fault-Finding' tests for engineering and technical roles.
93. In terms of tribunal evidence, the respondent was unable to identify every job which Ms Muir had applied for because for data protection reasons, the respondent's systems anonymise job applications after 12 months. In respect of those positions which were identified, the respondent provided variable details. Sometimes the advert / job description was provided and sometimes not. Rarely was any detailed reason given as to why Ms Muir was unsuccessful. None of the relevant recruitment managers gave evidence. Mr Robey took on the task of commenting on each post for the tribunal but it was clear he had little first-hand knowledge.
94. The respondent described several of the posts for which Ms Muir applied as 'promotional'. However, this was rather a loose term. The respondent regarded virtually any admin post and indeed any ticket office role as promotional. This did not necessarily mean higher pay or status. It was more a case of how progression routes tended to work. People would typically come in as RCOs or platform grades and move on to other areas.
95. Ms Muir only applied for jobs which she felt she could do. She had a good CV. It says that she has 7 GCSEs and an A-Level in Dance. She also had CPD Diplomas as a Cognitive Behaviour Therapist and in Psychology, and

HND level Business and Finance. From 2004 – 2006 she worked as H&S Office Manager (duties included ensuring employees were adequately trained; managing and booking training and medicals for all staff; introducing and briefing on emergency procedures; general office management, collating invoices, compiling reports on Excel; updating in-house management system; notifying HSE of accidents and injuries); from 2006 – 2012 as Clinical Manager for Wandsworth Primary care Trust (duties included managing database; diary management; answering queries about planning and building control; organising functions; working with senior staff and personnel managers to create and develop training sessions; actioning queries and complaints from staff and colleagues); 2015 – 2017 Drug and Alcohol Collection Officer (duties included stock maintenance; timesheet admin; managing, training and auditing new Sample Collection Officers; conducting confidential specimen collection following strict procedures); from 2017, Psychologist and CBT Therapist (duties included providing individual and group sessions, and maintaining client records utilising relevant IT software).

Trainee Train Planner post

96. On about 23 September 2020, a Trainee Train Planner role had been advertised. Ms Sylvester-Paul asked Ms Muir if she was interested, which she was. Ms Sylvester-Paul obtained details of the application and deadline. Ms Muir applied.
97. The respondent provided the tribunal with the advert / job description for this post. It required little in terms of prior knowledge and experience, and said the successful candidate would be fully trained and supported in order to become a functioning and productive member of a team of over 50 planners. It required strong IT skills; ability to self-organise; analytic skills; ability to communicate effectively; a methodical and responsible approach to work; a good standard of education, ie A level standard, and a keen interest in UK rail structure.
98. On making enquiries of the relevant Talent Acquisition Adviser in the recruiting department, Madeleine Phillips, Ms Sylvester-Paul was informed that the Ms Muir had not passed the online testing: the pass mark was 80% and Ms Muir scored 50%. Ms Sylvester-Paul accepted the position. She did not make any further enquiries to explore whether the Ms Muir could be suitable for the post. We were not shown the test questions or told which ones Ms Muir had failed.
99. The respondent did not provide the tribunal with any explanation as to why Ms Muir was not suitable for this post other than she had failed the online test.

Other posts

100. Ms Sylvester-Paul mentioned a roster clerk role. This was the position of Roster Clerk Admin Support at Kings Cross. It was an entry level role. Ms Sylvester-Paul asked Ms Muir at the second grievance meeting if she had applied. Ms Muir did not apply for the role because it was full time but paid only £20,000/year.
101. The respondent argues that taking this role would have been a stepping stone to better paid roles.
102. On 30 September 2020, Ms Sylvester-Paul contacted Ms Muir to confirm a part-time position had been advertised at the Tooting ticket office. She also mentioned a ticket office role at Bowes Road. Ms Muir did not apply for either of these. She felt Bowes Road was too far away and she could not arrange childcare for the part-time Tooting role.
103. An OH report was provided by Dr Morello on 13 October 2020. He classified, Ms Muir as U1 ('temporarily unfit'). He said Ms Muir was significantly anxious and not fit for work in any capacity. It was very unlikely she would be able to return to her contractual duties, certainly in the short term. In the meantime, once Ms Muir felt better, the company may wish to consider alternative duties.
104. Ms Muir applied for the role as Employee Campaigns Executive. She was rejected at the shortlisting stage. The respondent did not provide any evidence as to why this was. Mr Robey said he did not know why Ms Muir had not been shortlisted. We were not shown any written job description or person spec or advertisement for the role.
105. On 23 October 2020, a post was advertised for External Social Media Adviser – Customer Care, based at Three Bridges. The job description said that the primary role was 'to provide excellent communication via social media channels as well as working with a small group of advisers covering both Customer Care and Information to ensure excellent customer information and communication'. Under 'Knowledge' it required good GCSEs; knowledge of social media platforms; knowledge or experience of the UK rail industry would be highly beneficial. Under 'Experience' it required experience of working in a customer focussed industry; of working in a complex and often pressurised environment; of managing customer relationships; of successfully working to deadlines and performance outcomes. 'Skills' included excellent customer service skills; excellent planning and organisational skills; good communicator with an ability to provide excellent customer response in a busy environment; ability to solve problems and resolve issues and work to tight deadlines in a fast paced environment.
106. Ms Muir had not previously carried out this kind of job but she believed she could have carried it out with the level of training that is given for any new job. The job was located about one and a half hours travel distance from Ms Muir's home, but she wanted to apply because at that time she was desperate to find alternative employment.

107. In a welfare call with Ms Newman on 3 November 2020, Ms Muir explained that she had started to apply for this role, but did not manage to complete it after hearing the results of an MRI on her liver which was worrying her. Ms Newman asked how soon she would be able to complete the application if she could get special dispensation for her. Ms Muir said by Thursday (5 November 2020). Ms Sylvester-Paul made the enquiry. She says in her witness statement that no extension was granted because candidates were already at interview stage.
108. For completeness, we mention that Ms Muir had applied and not been shortlisted for a Social Media Adviser prior to the fourth assault in July 2020.
109. In December 2020, Ms Muir unsuccessfully applied for the position of Trainee train driver at three different locations, Southern, Thameslink and Great Northern. She felt encouraged to apply as a black woman because the advert said:
- ‘Do you want a rewarding role that offers solid career prospects@ Have you got excellent communication skills and a passion for people? If the answer is yes – how about becoming a train driver?
We’re passionate about having a diverse workforce. We want enthusiastic individuals with great interpersonal skills from all backgrounds to apply for this position and particularly would like to hear from women and those from Black, Asian and Minority Ethnic communities ...
We strongly believe in personal growth and career development. We’ll nurture you to become an expert ... within 12 – 15 months whilst you undertake structured classroom-based learning, state of the art simulator training and one-on-one driving lessons...’
110. The required experience in the job description was dealing with customers effectively, ability to successfully follow complex instructions and dealing with complex situations. The required skills included ability to remain calm and self-controlled under pressure; ability to communicate with others; ability to maintain effective driving techniques. The requires knowledge was ‘successful completion of Company recruitment and driver training processes’
111. In a welfare meeting on 15 February 2022, Ms Muir told Ms Newman that she had applied unsuccessfully for the three trainee driver roles. She said she had not even been considered, which we take to mean she was rejected on an online test. Ms Newman said, ‘I know competition for that role is very fierce Having spoken to someone recently, I know the trainee train driver role can receive as many as 5000 applications. I appreciate they were looking for black females to do the role, but even in the niche you’re describing, there would still be lots of applicants and you might not be successful’.
112. Ms Newman told the tribunal she did not know why Ms Muir had been unsuccessful but she understands that competition for train driver roles can be fierce and also that the candidate must live within 1 hour of the depot. The latter is not a point she made to Ms Muir at the time. Ms Muir told the tribunal she could drive and get there within an hour.

113. Mr Robey told the tribunal that there is a statutory requirement to pass a Group Bourdon test (also known as a dots test). This involves a pattern of dots or letters and tests speed and accuracy. It is only permitted to take this test twice. If a candidate passes that test, there are a number of other computerised tests. Then there are interviews. There are also medical and psychological exams. We were not told which test Ms Muir took and failed and Ms Muir was not cross-examined about this, which only emerged later in the hearing on supplementary questions of Mr Robey.
114. On 10 February 2021, Ms Muir applied for the position of Area Operations Manager at Victoria. She was rejected at the shortlisting stage. This was Grade MG2, which was a very senior position, the managerial Grades running upwards from MG4 to MG1. Usually only people who have already been Area Managers are appointed to MG2.
115. On 10 February 2021, Ms Muir also applied for a position as Rosters Development Assistant Manager at Kings Cross. In the welfare conversation log on 10 February 2022, Ms Newman notes that she told the claimant about a Roster / Workforce Planning Specialist post and that 'MM was not aware of this vacancy but agreed with me in that she had the relevant CS [customer service] experience that would potentially make her a suitable candidate'. She says it had a closing date of 11 February 2021. An automated print out of the claimant's applications shows the claimant submitted an application for Rosters Development Assistant Manager (0737) at 16.10 on 10 February 2022. That must be the post which Ms Newman was referring to.
116. Ms Muir was rejected at the shortlisting stage.
117. We had a job description for this post. Its purpose was to assist with the production of all train crew rosters, develop base roster efficiency strategies and support long-term planning of linking strategy. The individual had to be able to deputise for the Rosters Development Manager. The team size was 1 with no direct report. The position required in-depth knowledge of train crew terms and conditions, base rostering creation principles, and rules impacting on employee utilisation. Required experience was working to tight deadlines in a pressurised environment, and consultation and negotiation with Trade Union staff representatives.
118. The claimant did not have the core knowledge. However, she felt she could have been trained. The job description did not say experience was required, though it did require knowledge.
119. Ms Muir did not submit any further fit notes after the one expiring on 24 April 2021 because her GP considered that she was at that point fit to work. However, she did not feel she was fit to return to her substantive role as RCO.

120. On 1 April 2021, Ms Newman informed Ms Muir that a full-time role in the Tooting ticket office was about to be advertised. Ms Muir said she would apply. She did so on 2 April 2021.
121. Dr Morello wrote an OH report on 28 April 2021. He said Ms Muir was still receiving counselling. She was benefitting from treatment but her symptoms had not completely settled. He advised that she was fit for a ticket office role, starting with 4 hours/day and then seeing how much she could increase to. She needed to complete her psychological treatment. He classified her as 'U2 temporary OH Managed'.
122. Meanwhile, only Ms Muir was considered for the Tooting ticket office role and initially she confirmed that she wanted to take the position. A return to work plan was devised which would include the necessary training. Ms Sylvester-Paul also arranged for Ms Muir to meet the Tooting station manager, Mr Duncan.
123. Ms Muir returned to work on 6 May 2021 at Farringdon and a return to work discussion was held with Ms Sylvester-Paul and Ms Newman. The next day, she went to speak to Mr Duncan. He told her there had been assaults there and suggested speaking to staff. After doing so, Ms Muir wrote to Ms Sylvester-Paul on 9 May 2021, expressing her concerns. She said she had been told that Aziz had had 4 assaults including physical and spitting; the staff had been threatened on multiple occasions when they had been told passengers would be waiting outside for them; Jonathan had walked a customer home after she was verbally assaulted by a passenger who waited outside for her; and the ticket vending machine outside the station was a CCTV blind spot, so if she was emptying it with a colleague and something happened, it would not be seen. All this caused her concern. After discussing the matter with Ms Sylvester-Paul on the phone on 10 May 2021, Ms Muir said she was therefore no longer interested in this position.
124. There was then a discussion between Ms Muir and Ms Sylvester-Paul about a ticket office role at Haydons Road. Initially Ms Muir was interested, but after receiving details, she rejected it on 12 May 2021 because it would involve lone working at an unmanned station and, especially because it only had partial level access, providing physical customer service assistance without support. She felt this was an unsafe environment.
125. As a result, Ms Sylvester-Paul said she would organise an OH medical to assess Ms Muir's fitness to carry out a ticket office role given their previous advice that she was fit to do that role. Until they received OH guidance, Ms Muir would remain on basic pay. Ms Muir was told that if OH assessed her as unfit for a ticket office role, she would revert to being recorded as sick for the purposes of pay.
126. Dr Morello provided an OH report on 18 May 2021. Ms Muir had explained to him about the Haydons Road and Tooting positions, and why she felt unable to do them. Ms Muir told Dr Morello that she was happy to work in a role where there was contact with customers, but the chance of challenge

was low. She had identified this as an admin type role. Dr Morello said the respondent may wish to consider her for any such available roles. However, he considered her not fit for a role where she could be challenged by the public or would need to work alone. He suggested an Individual Stress Risk Assessment before considering her for another role. He classified her U1.

127. Ms Sylvester-Paul discussed the report with Ms Muir on 25 May 2020. She confirmed that as OH had assessed her as unable to progress with the ticket office roles, she would be put onto sick pay. Although she had not been signed off sick by her GP, Ms Muir had admitted she was unfit to return to her substantive role. It was later agreed that Ms Muir could use her accrued annual leave of 42 days so that she would be paid up to 21 July 2021.
128. On 17 May 2021, Ms Muir applied for a role as payroll administrator. The job description said the post included input of payroll data, dealing with pay queries, ensuring payments for sick pay and SMP etc were processed correctly, administering HMRC and court documents, using the Oracle payroll system. Required knowledge was detailed knowledge of current HMRC legislation. Knowledge of Oracle E-business suite was desirable. Skills included methodical, attention to detail, process driven especially to deadlines, problem solving ability, excellent communication skills. Required experience was having worked in a payroll department; experience of dealing with complex payroll queries; experience of company maternity plans, share incentive schemes, childcare vouchers and other employee benefits.
129. Ms Muir was rejected at the shortlisting stage. She accepted in the tribunal that she did not have any of the specialist experience and knowledge set out in the job description.
130. On 19 May 2021, Ms Muir unsuccessfully applied for roles as HR Administrator and Business & Compensation Manager.
131. The respondent provided the tribunal with a job description for the HR Administrator post. The HR Administrator role was essentially to provide first line help desk and admin support to the HR system. The only experience required was good general admin experience. Skills were computer literacy, good organisation skills, good communicator. Required knowledge was a good knowledge of the HR system, of the scanning retrieval system, of the Data Protection Act, and of terms and conditions of employment.
132. Ms Muir was again rejected on the on-line test (Administration Situational Judgment). The respondent was unable to give any further details about exactly why she failed. Mr Robey was put forward as the witness to provide an explanation on this (and other) posts. When it was put to him that this sounded like a post which Ms Muir could do, his response was that it probably was not that well paid. When he was asked if this was one where there could have been a discussion about a more personalised assessment of whether she could have done the post, he said potentially but she did pass the test later. We were not sure as to the relevance of that. When he was then asked why couldn't someone just have sat down and worked out if Ms Muir could

have done the post, he had no answer.

133. The Business & Compensation Manager role Ms Muir was rejected following the on-line test (Numerical Reasoning). Mr Robey knew nothing about this role. He speculated that it concerned bidding for space from Network Rail.
134. At 4.05 pm on 3 August 2021, Ms Newman contacted Ms Muir and offered her a 4 week cover position as Lost Property Assistant at City Thameslink. Ms Newman thought it was a nice position. Ms Muir would be behind a window and counter. It would only be necessary to open the door to a customer to hand over something large, but there were normally two people on duty. As far as she was aware, it was not a hostile environment as customers were pleased if they were reunited with their items. Ms Muir said she was unable to find childcare at such short notice while her children were on summer holiday.
135. In October 2021, Ms Muir unsuccessfully applied for the position of Health, Clinical and Administrative Support (1000). She was rejected following an on-line test (Administration Situational Judgment). Ms Muir told Ms Newman that she had been turned down for the post immediately. Ms Newman noted 'I expressed my surprise as the Closing date had not yet passed but she said that she had done an on-line assessment and did not pass. This was even though she had done a similar job previously.' The discussion with Ms Newman then moved on to different posts. Ms Newman told the tribunal, 'certainly the Health Admin role was a good fit for her'.
136. The respondent provided the tribunal with the job description for this role. The job purpose was to provide all aspects of administrative support within OH, to act as a first point of contact to colleagues and stakeholders, and to help monitor and produce regular reports on KPIs. Duties included reception duties, booking appointments and maintaining records, and participating in health promotions. Required knowledge was education to GCSE standard, accurate typing and proficiency in MS Office, understanding the role of OH, knowledge of record keeping standards and good understanding of medical confidentiality and GDPR. Required experience was previous administrative role within healthcare. Required skills were excellent customer focus, communication, strong attention to detail, excellent organisation, ability to work autonomously and as part of a team.
137. From Ms Muir's application in May 2022, when the post was advertised again, we can see what kind of experience she had and could have elaborated on had a different approach been taken with her. She had worked as a Clinical Administrator for the NHS. This included covering a busy reception desk on a daily basis, managing confidential files and travelling between different health centres. She had to manage her workload with little assistance. She set up baby clinics for health visitors. She kept records of vaccines for distribution to children under 5.
138. The respondent provided no further detail as to why Ms Muir was not given this post beyond that she had failed the on-line test. The tribunal asked

Mr Robey whether, given Ms Muir's NHS experience, this was a role which someone could have sat down and discussed with Ms Muir. Mr Robey did not have an answer. He just commented that it was paid about £1000 less than her own substantive post. This was irrelevant as there was no evidence that it had operated on anyone's mind.

139. Dr Morello provided a further OH report on 31 December 2021. He noted that Ms Muir had continued to receive counselling through her GP which was completed in June 2021, but she was still taking medication for her anxiety. She had improved and the GP provided OH with a note saying that Ms Muir could be fit for an office based admin role but not for a customer facing role. Dr Morello advised that Ms Muir remained unfit for her contractual duties and for the ticket office duties offered. She could be fit for an office based role where she had no direct contact with the public. He did not have a timeframe for when Ms Muir might be able to return to her RCO role and he classified her as U1. Dr Morello said he understood Ms Muir had applied 20 times for office based roles without success and she had told him she had asked for feedback which was not given on all occasions. He felt it would be beneficial for her health if she was given feedback as this had caused her further stress.
140. On 14 January 2022, there was a Team Administrator vacancy on a 1 year fixed-term contract. Ms Muir did not apply because it was only for one year.
141. In February 2022, Ms Muir unsuccessfully applied for the post of Admin Support, Stewarts Lane, Battersea (also referred to as Fleet Admin Support). The respondent provided a job description for this post. The experience required was a good understanding of admin functions within an office. Required skills were good communication skills, excellent IT and organisational skills, and self-motivated. Knowledge required was educated to GCSE or above; experience developing and maintaining robust office systems; applying systematic and rational judgment on relevant information; proactively seeking to support the teams to meet all objectives and targets.
142. The tribunal asked Mr Robey why Ms Muir had not been shortlisted. He said he understood that she had failed the same situational test as before (Administration Situational Judgment). The tribunal asked him whether this was another post where people could have sat down and worked out if Ms Muir could have done the post. He said, 'It's possible'.
143. Also in February 2022, Ms Muir unsuccessfully applied for Trainee train driver (shunter driver to mainline driver progression programme). Ms Muir was not in fact eligible to apply for this as she had not been a shunter driver and so could not be part of the progression programme.
144. A formal welfare meeting was held with Ms Muir on 15 February 2022. Ms Newman and Crystal Banton, an HR Adviser, attended for the respondent. Ms Muir attended with her union representative. Ms Muir discussed her continuing job hunting. She said 'Every application I put through, it's like I'm set up to fail. It goes through to confirm; an assessment comes through; I do

the assessment before the closing date; and I'm unsuccessful without feedback. I did one last week.... I was told last week I'm unsuccessful. Without having to put any statements in to strengthen my chance of being selected. The system has discriminated against me'. Ms Newman asked about the Battersea admin role. Ms Muir said, 'It only took my CV. It didn't ask for a supporting statement. It confirmed it had been received. As soon as it was confirmed, they emailed an assessment through. I thought that was strange. They didn't even look over my CV. The next day it said I was unsuccessful. How am I supposed to feel after that?' Ms Newman replied, 'I appreciate it's dispiriting. Searching for a job can be very competitive.'

145. Ms Newman said she understood Ms Sylvester-Paul had sent Ms Muir's CV to the recruitment team in August 2021. Had any job roles been suggested from that? Ms Muir said yes but she had been turned down again. She had been turned down for over 25 positions. She never had any feedback. Ms Banton (the HR Adviser) said that due to the number of applications, feedback may not always be available if Ms Muir did not reach out. Ms Muir said she had reached out: her union rep had asked for feedback, but none was received. No one came back with advice as to how she could do better. Ms Newman said it was a puzzle that Ms Muir had not been selected for any role. She would be keen to do anything she could to help. Ms Muir asked what they could do. Ms Banton said that if Ms Muir sent them her CV, they could get in touch with the recruitment team and ask for feedback or any roles she was best suited for. Ms Muir said that was what Ms Sylvester-Paul had done in August.

146. Ms Muir's union representative asked whether any of the 25 vacancies had been given to people outside the company. Ms Banton did not know. Ms Newman said some jobs were advertised internally only and some were advertised externally too. Ms Muir's union rep said that Ms Muir should be given preference against external candidates and against people seeking to transfer. Ms Newman said that was something they could take away and consider.

147. On 23 February 2022, Ms Banton emailed Maxine Janali, a Talent Acquisition Adviser, to request a redeployment review. On 29 March 2022, Ms Janali met Ms Muir. Ms Janali provided advice on how Ms Muir could improve her applications going forward, providing more evidence to answer the competency question. It was agreed that when Ms Muir found a role of interest, she would inform Ms Janali so 'we can provide some support with the job application'.

Second tribunal claim and second application for Health Clinical & Admin Support

148. On 12 April 2022, Ms Muir submitted her second tribunal claim.

149. In May 2022, Ms Muir applied for another vacancy as Health Clinical & Admin Support. The Job Description was the same as mentioned above.

150. Ms Newman arranged a meeting with Lisa Williams, the Talent Acquisition Adviser for the role, who helped her compose her application.
151. On this occasion, she passed the on-line test. The respondent said that it was the same test which she had taken and failed for the Battersea/Fleet role. The pass mark was the same and the outcome is automated, so she probably passed the second time because she had sat it before and felt more confident with it.
152. The respondent says Ms Muir was not successful for the role as she said at the end of her interview that she wished to do it part-time whereas it was advertised full-time.
153. By this time, Ms Muir wanted to work part-time because, having not been at work for so long, all responsibility for childcare had come to fall on her.

Pay

154. On 9 November 2021, Ms Muir emailed Louise Hicks, the payroll manager. She was confused regarding a letter she had received about reducing her pay to half pay from 10 November 2021 because she was on sick leave. Ms Muir said 'I am confused as I am not on sick and haven't been on sick since my sick note expired April 24th 2021. GTR just does not have any available positions for me since then.'
155. On 11 November 2021, Ms Hicks replied that she was looking into the matter and would get back when she had more information.
156. On 15 February 2022, Ms Muir sent a chaser email. Ms Hicks replied the same day to say Mark Robey, ER Manager, advised Ms Muir's pay was to reduce to half pay from 10 November 2021 because she was on sick leave.
157. Ms Muir immediately emailed Mr Robey saying that her last sick note had expired 24 April 2021 and she had 'been more than willing and able to work. I have also taken steps to seek other positions within the company'. She received an 'out of office' message saying Mr Robey was away until 21 February 2022. On 22 February 2022, Ms Muir emailed Mr Robey again, asking for a reply as soon as possible.
158. Ms Muir told Ms Newman on 1 March 2022 that she was awaiting a response. Ms Newman immediately emailed Mr Robey. Mr Robey asked what Ms Muir's current medical grade was. Ms Newman told him that the last OH report was issued on 31 December 2021 and had given Ms Muir U1 status. According to OH, Ms Muir was unable to return to her substantive role as RCO or any other customer facing role, though she would be suitable for an admin role. Ms Muir said she had submitted no further sick notes since the one that expired on 24 April 2021, because she was not sick.

159. Mr Robey emailed Ms Muir on 2 March 2022. When he came back from leave, he had had an accumulation of emails to deal with. He apologised to Ms Muir for taking a little longer than he expected to reply to her. He said the last OH report had classified her as U1, which meant she was temporarily unfit for work, and she had exhausted her contractual sick pay entitlement. He said he understood that she had been applying for different positions. If she was unsuccessful, she should please ask her manager to get feedback for her, and they could also help with the applications.
160. From 24 May 2021 – 21 July 2021, Ms Muir took her 42 days annual leave. On 22 July 2021, Ms Muir's entitlement under the respondent's Sickness Absence Policy therefore restarted. She was then entitled to 16 weeks full sick pay up to 10 November 2021 and 16 weeks half pay up to 2 March 2022. From 3 March 2022, Ms Muir was on nil pay, having exhausted her company sick pay and SSP entitlement.
161. The respondent paid these sums apart from the four weeks up to 19 February 2022, when Ms Muir was only paid SSP. The respondent says this was a computer error and it should have paid Ms Muir half pay for those four weeks. It undertakes to repay on a net basis the underpayment of half occupational sick pay in respect of those weeks.

Protected disclosure

162. On 14 October 2020, Ms Muir emailed Ms Sadler and Mr Bindon, stating she would like to report 'wrongdoing and dangers' in relation to the respondent's activities. Her complaint was that she had been allowed and encouraged to issue penalty notices and MG11s to passengers when she had not completed the relevant training which she believed was legally required. She said Mr Hughes, Mr Turner and HR were all aware of this. She had not realised what she had been doing was illegal until her trade union pointed it out to her. She had raised it with Ms Sylvester-Paul at her grievance but Ms Sylvester-Paul had been dismissive and said nothing could now be done about it as fines had been paid and convictions issued. She said she had discussed the matter with ACAS and Citizens Advice, who had suggested she use the respondent's whistleblowing policy.
163. Ms Sadler replied on 26 October 2020, copying in the current People Director (Mr Bindon had left). Having looked into the details, she confirmed that Ms Muir had been issued with an Authorised Collectors Licence in May 2019 but had missed the relevant training for personal reasons. She had subsequently issued 63 penalty notices. Ms Sadler said that she and the Fare Evasion Manager believed Ms Muir's case was exceptional, but as a result of her letter, they would put in place a process to prevent Admin issuing licences until the Training Department had formally confirmed the relevant training was completed. The Fare Evasion Manager would also brief all Revenue Protection supervisors and managers to ensure this did not happen again. The Training Department had confirmed that Ms Muir could complete the training on the next available course in early November.

164. Ms Muir responded by asking whether she had been lawfully authorised to collect the penalty notices and what would happen to the 63+ people to whom she had issued them. Ms Sadler replied on 4 November 2020 that the Penalty Fares Guidelines said she must be authorised to charge the fares and, as she had her badge, she was authorised. However the normal company process was that people complete the relevant classroom training before the badge was issued. Nothing would happen to the 63+ people.

Sexual harassment complaint

165. On 18 January 2022, Ms Muir emailed Ms Newman to report sexual harassment by a Mr Osuwo. She said that he had made sexual advances in the past. She had not reported it, but she had told him she did not like it and he had largely stopped. However, he had now approached her on Whats App in the evening and she felt she needed to report the matter because she felt harassed. She attached a print out of the WhatsApp chain.

166. The chain showed Mr Osuwo texting Ms Muir at 7.51 pm asking how she was. It continued:

M – Great thanks. Yourself?

O – Apart from u avoiding me, I'm good

M – Okay

O – Would you like to see me?

M – I see your photos on fb [Facebook]

O – How?

M – Your photos

O – Never knew we are friends on fb

M – We are

M – Raymond? [time: 20.32]

O [23.17] – Mich

M - Raymond

O – Wa gwan?

M – Nothing much. You?

O – Just here chillaxing.

O - Where do u live now?

M – Okay

M – Same place

M – What's up?

O – Which is? You've been to mine, I've never been to urs

M – I've never been to your home. Don't even know the area you live in

O – Hmmmmm

M – Are you ok?

M – You drinking or smoking?

O – Yh I'm good thanks

O – I don't do none of d above. I don't DSS

M – Okay

O – So where do you live then?

M - ???

M – Why do you need this information?

O – Just asking, coz I would love to see u

M – See me for?

O – Chillax and chat

M – We chatting now

O – In person

M – Besides, I would never invite you to my home, so don't ask. And you do realise I still work for Thameslink ... I can report this conversation if I feel you're over stepping your mark ... and you're nearly there!!!

O – I love pulling ur leg

M – [a raised eyebrow emoji]

O – I can't believe u fell 4 my jokes

M – [a laughter emoji] [23.43]

167. The complaint was investigated by Barry Welbourne, the On Board Service Manager. The respondent does not appear to have had a specific procedure for sexual harassment grievances. Mr Welbourne had not been trained on how to handle sexual harassment grievances, and he had never investigated one before nor any grievance about sex discrimination. He had the assistance of a local employment relations adviser.

168. The ordinary grievance procedure which we were shown and which Mr Welbourne believes he was working too, although his memory was vague, contained no timescales.

169. Mr Welbourne did not know anything about Ms Muir prior to his investigation.

170. Mr Welbourne met Ms Muir on 4 February 2022. He met the two potential witnesses whom she names, Mr Ridsen and Mr Roberts, on 11 and 21 February 2022 respectively. He spoke to a third potential witness, Mr Williams, by telephone on 2 March 2022. On 12 April 2022, Mr Welbourne met Mr Osuwo. He was unable to meet him earlier as a result of Mr Osuwo being on extended leave from 15 February – 9 March 2022 and then postponing two dates in March (16th, and 28th when he had no representative).

171. Mr Welbourne then had a period of annual leave.

172. The three witnesses said they were unaware of any inappropriate comments. Mr Osuwo said he had a friendly working relationship with Ms Muir and that she had not challenged his behaviour. He denied he had ever told Ms Muir that she had been to his place. When asked why he wanted to know where she lived, he said he knew she lived in Wallington and he was messing with her. He ended the interview by saying he liked to have a joke with everyone he worked with and it was all innocent banter.

173. He admitted he had also sent Ms Muir an article about a man in the Caribbean beheading his wife after he found out that his 6 children were not his.
174. Ms Muir had told Mr Welbourne that once she confronted Mr Osuwo, he had moved on to another colleague. Mr Welbourne had been unable to explore that because of the absence of this other colleague on long-term sickness.
175. On 3 May 2022, Mr Welbourne completed his Investigation Report. He gave it to his ER adviser. He does not know if she showed it to anyone.
176. In the 'Conclusions' section, Mr Welbourne said that 'based on the investigation conducted and evidence gathered as part of it, it cannot be concluded that Mr Osuwo sexually harassed Ms Muir'. In the 'Recommendations' section, he put 'No recommendations'.
177. When discussing the matter with Mr Welbourne in the tribunal, he did not appear to have done any close analysis of the WhatsApp messages or picked up on discrepancies between what Mr Osuwo told him during the grievance interview and what he had said in the WhatsApp. Nor had Mr Welbourne considered whether there was any significance in the lateness of the hour, the repeat contact, or Ms Muir's emojis. It had not struck him that sending Ms Muir articles about a man beheading his wife was inappropriate when Ms Muir was off with PTSD. He had not thought to make recommendations that Mr Osuwo do not in future approach Ms Muir uninvited on her personal phone or that he avoid certain types of banter in the workplace with female colleagues in case it be misconstrued.
178. On 14 June 2022, Mr Welbourne wrote to Ms Muir to inform her of the findings, He said that he was unable to corroborate that Mr Osuwo did or said anything which would be classed as sexual harassment or which could be construed as sexual harassment. He was therefore unable to uphold her complaint.
179. There is in the trial bundle an earlier copy of the letter which is dated 26 May 2022. The reason was probably that Mr Welbourne had initially sent it to his ER adviser for checking and had only subsequently sent it to Ms Muir after receiving the go-ahead. Mr Welbourne was also on annual leave for 10 days starting approximately 27 May 2022. Mr Welbourne told the tribunal that he did not know whether Ms Banton was in turn getting the letter checked by anyone else. He had no comment to make on the fact that it caused a further delay.
180. It was normal for Mr Welbourne under the grievance procedure not to send the employee bringing the grievance the full Investigation report.
181. Mr Welbourne said he was unaware that Ms Muir had an employment tribunal claim until 3 November 2022. We have no evidence to the contrary.

182. We do not know whether Ms Banton knew about Ms Muir's second tribunal claim.

Law

183. Ms Robertson set out the law in detail in her opening and closing notes and expanded on some aspects when she made her closing comments. We cannot set out everything here, but we took it all into account.

Direct race discrimination

184. Under s13(1) of the Equality Act 2010 read with s9, direct discrimination takes place where a person treats the claimant less favourably because of race than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

185. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as she was. (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285)

Harassment

186. Under s26, EqA 2010, a person harasses the claimant if he engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

187. By virtue of s212, conduct which amounts to harassment cannot also be direct discrimination under s13.

Victimisation

188. Under s27 of the Equality Act 2010, the respondent would have victimised the claimant if it subjected her to a detriment because she had done a protected act or because it believed that she had done or may do a protected act. Each of the following is a protected act—

- (a) bringing proceedings under the Equality Act
- (b) giving evidence or information in connection with proceedings under the Equality Act
- (c) doing any other thing for the purposes of or in connection with the Equality Act
- (d) making an allegation (whether or not express) that someone has contravened the Equality Act.

189. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

Section 15 disability discrimination

190. Section 15 of the Equality Act 2010 prohibits discrimination arising from disability. This occurs if the respondents treated the claimant unfavourably because of something arising in consequence of the claimant's disability. The respondent has a defence if it can show such treatment was a proportionate means of achieving a legitimate aim. The burden of proof is on the respondent to establish justification.

191. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the employer. It is for the employment tribunal to weigh up the employer's reasonable needs against the discriminatory effect and make its own assessment of whether the former outweigh the latter. (Hardys & Hansons plc v Lax [2005] IRLR 726, CA.)

192. The respondent will not be liable under section 15 if it shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability.

Duty to make reasonable adjustments

193. The duty to make reasonable adjustments is set out in sections 20 – 21 of the Equality Act 2010 and in Schedule 8. Where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer is required to take such steps as it is reasonable to have to take to avoid the disadvantage.

194. 'Substantial' means more than minor or trivial (EqA s212(1)).

195. The House of Lords in Archibald v Fife Council [2004] IRLR 652 said this about the duty to make reasonable adjustments:

'The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is

attributable to the disability. This necessarily entails a measure of positive discrimination.'

196. At para 6.28, the EHRC Employment Code says the following factors may be relevant to whether an adjustment would have been reasonable: whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step; the financial and other costs of making the adjustment and the extent of any disruption caused; the extent of the employer's financial and other resources; the availability to the employer of financial or other assistance to make adjustments eg advice through Access to Work; and the type and size of the employer.
197. Under Schedule 8, paragraph 20(1), the employer is not subject to a duty to make reasonable adjustments if the employer does not know, and could not reasonably be expected to know that the disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.
198. The EHRC Employment Code says at para 6.19 that employers must do all they can reasonably be expected to do to find out if someone has a disability and is likely to need adjustments.

Burden of proof under Equality Act 2010

199. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision..
200. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can take into account the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)
201. The Court of Appeal in Madarassy, a case brought under the then Sex Discrimination Act 1975, states:
- 'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.
202. In cases for failure to make reasonable adjustments for the claimant's disability, by the time the case is heard before a tribunal, there must be some

indication as to what adjustments it is alleged should have been made. The claimant must establish that the duty has arisen and there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. It is not enough to show there was a provision, criterion or practice which caused substantial disadvantage. There must be evidence of some apparently reasonable adjustment which could be made. That is not to say that in every case the claimant would have to provide the detailed adjustment that would need to be made before the burden would shift. It would, however, 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. (Project Management Institute v Latif [2007] IRLR 579, EAT.)

Time-limits under the Equality Act 2010

203. The relevant time-limit is at section 123(1) Equality Act 2010. Under section 123(1)(a), the tribunal has jurisdiction if the claim is presented within three months of the act of which complaint is made. By subsection (3), conduct extending over a period is to be treated as done at the end of the period. A series of different acts, especially where done by different people, does not (without some assertion of link or connection), constitute conduct extending over a period. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96, the CA held that 'an act extending over a period' can comprise a 'continuing state of affairs' as opposed to a succession of isolated or unconnected acts.
204. Under s123(1)(b), if the claim is presented outside the primary limitation period, ie the relevant three months, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable.

Whistleblowing

205. Under s47B a worker has a right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. Under s43B(1), a 'qualifying disclosure' means any disclosure of information which, in the claimant's reasonable belief was made in the public interest and tended to show, inter alia, that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject
206. Once it is established that the claimant made a protected disclosure and that she was subjected to a detriment, it is for the employer to show the ground on which any act or deliberate failure to act was done. (ERA 1996 s48(2) .) With regard to the causal link between making a protected disclosure and suffering detriment, s.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial

influence) the employer's treatment of the whistleblower. (Fecitt v NHS Manchester [2012] IRLR 64, CA)

Conclusions

Discrimination arising from disability (Issue 3.2)

207. Inviting Ms Muir to attend the capability meetings on 13 and 29 July 2020 was unfavourable treatment because of something arising in consequence of her disability, ie her continued inability to work in her substantive post because of her PTSD.
208. This would be unlawful discrimination under section 15 of the Equality Act 2010 unless the respondent could prove that the invitations were a proportionate means of achieving a legitimate aim.
209. Ms Muir had been off sick since 4 January 2020. She was signed off until 25 October 2020. The respondent's aim for the meeting of 13 July 2020 was to review the medical position as Ms Newman had just taken over, and to see what could be done to assist Ms Muir to return to work. The aim of the 29 July 2020 meeting was to consider whether Ms Muir's ongoing employment was sustainable given the medical position.
210. The aim of managing an employee's long-term sickness and assessing what can be done, whether they are likely to be able to return and how long they can continue to be employed in the light of the impact on the employer, is in principle a legitimate aim.
211. The key question was whether the invitations were 'proportionate'.
212. We find that requiring Ms Muir to attend an initial capability meeting on 13 July 2020 was proportionate. In terms of the impact on Ms Muir, it was only a meeting, albeit a formal one. Although it referred to the business being under strain and said it was to discuss Ms Muir's fitness to carry out her role in the foreseeable future, it did not say anything about a risk of dismissal or other sanctions.
213. In terms of the respondent's needs, we think it reasonable to have a meeting to discuss formally what progress is being made, to consider whether sufficient support is being offered, and to indicate to Ms Muir that the situation could not remain unresolved indefinitely. It was also reasonable as Ms Newman had only just taken over and needed to familiarise herself with what was happening.
214. Therefore we find that inviting Ms Muir to the initial capability meeting on 13 July 2020 was not unlawful discrimination.
215. However, the invitation to the further meeting on 29 July 2020 was different. It was issued the day after the first meeting. It took things one step

further. It explicitly flagged up potential termination. The timing and overall content of the second invitation suggests to us that its purpose was specifically to consider whether to dismiss Ms Muir on capability grounds.

216. In relation to proportionality, the discriminatory effect of the letter on Ms Muir was severe. She was already very distressed about her continual rejection on her efforts to find an alternative post. She was hurt and stunned at the threat to terminate her contract because she felt she had done everything she could to get back to work including attending counselling, taking anti-depressants and applying for vacancies.
217. In terms of the respondent's needs, Ms Newman wrote on the letter that the business was being put 'under considerable strain by Ms Muir's absence and restrictions and that this is becoming unsustainable'. The respondent provided that tribunal with no evidence supporting the contention that Ms Muir's absence was causing 'considerable strain' or 'becoming unsustainable'. This is not something which we consider obvious without evidence. Govia is a very large company. It employs many RCOs. Ms Muir had been absent for only 7 months. We are not saying this was a short time, but this was an employer which pays 16 weeks full pay and 16 weeks half pay to employees who are off sick. We were not told what the strain was. We were not told anything about arrangements made to cover Ms Muir's absence in her substantive post. If the problem was supporting Ms Muir through OH and welfare calls, we were not told. For these reasons alone, we would say that the respondent did not prove the second invitation was proportionate.
218. In addition, letter was premature. We note that in her outcome decision on Ms Muir's grievance, Ms Sylvester-Paul suspended the Medical Capability Procedure while Ms Muir applied for roles which were available at that time. Further, the respondent were not taking the correct approach to finding Ms Muir an alternative post, as we have set out below.
219. We therefore find that inviting Ms Muir to a further capability meeting on 29 July 2020 was discrimination arising from disability.

Failure to make reasonable adjustments (Issues 3.3 – 3.6)

220. The respondent applied to Ms Muir a provision, criterion or practice that while working as an RCO, she had to be in direct contact with passengers. Her duties involved standing on the gate line and dealing with passengers who did not have correct tickets, whose tickets who were not working, who asked questions about the correct platform etc.
221. This put Ms Muir at a substantial disadvantage compared with people who were not disabled. The nature of the RCO job is that from time-to-time, passengers will become agitated if challenged about whether they have the correct ticket or if they feel they might miss their train because they were misinformed as to the correct platform and so on. Passenger assaults of the kind experienced by Ms Muir are unfortunately something which does happen

from time-to-time to RCOs. The four assaults experienced by Ms Muir triggered her disability (PTSD). Her PTSD meant that she was unable to cope with such assaults or even with the fear of further assaults. She experienced lack of sleep, nightmares, palpitations, anxiety, flashbacks and panic attacks. She was prescribed anti-depressants and trauma counselling. She was 'petrified' at the thought of going back to her role.

222. OH recognised that even if she made a complete recovery, which she did not do throughout the relevant time, she was likely to be more susceptible to trauma if she experienced further assault.
223. The respondent knew Ms Muir was placed at such a disadvantage. It received the OH reports and read her emails. Ms Muir made this clear from a very early stage. In her email to Ms Sylvester-Paul on 4 January 2020, Ms Muir referred to the fact that she was a survivor of domestic abuse and that repeated assaults by men at work left her in a delicate place, saying she would appreciate it if she could be considered for another role in the company. The OH report of 29 January 2020 confirmed this and said Ms Muir felt unable to return to a confrontational customer facing role where she was at increased risk of assault. Ms Muir emailed Mr Hughes on 12 February 2020, after he told her not to get too comfortable with any temporary relocation as she would be returning to her role and station, saying 'I am petrified and so very very stressed ... especially not knowing if the man or his family are going to retaliate once he is apprehended. How would you protect if this does so happen? What about my children?' This was obviously an extreme reaction to the circumstances and it demonstrated Ms Muir's mental state.
224. A non-disabled RCO without PTSD would not have reacted in this extreme way and become unable to function in the role.
225. The real issue in this case is whether there were steps which it would have been reasonable for the respondent to take to avoid such disadvantage. Ms Muir says the reasonable steps would have been to redeploy her to a non-customer-facing role. Alternatively, to redeploy her into one of the specific roles which she applied for and which were identified in these proceedings.
226. The OH report of 29 January 2020 indicated an early return to work would have to be in a non-customer facing role, and expressed reservations about the impact of any further assault even if she completely recovered from the current position. On 11 February 2020, Mr Hughes reminded Ms Muir not to get 'too comfortable' wherever she was relocated because any alternative location would only be temporary and ultimately she would have to go back to Blackfriars. Mr Hughes repeated this in a welfare call on 22 May 2020, saying she would have to return to her substantive role unless she applied for a different role. On 17 June 2020, OH classified Ms Muir as permanently unfit for her RCO role and said she could not return to a position where she had direct face-to-face contact with the public. At that point she felt able to return to a place where there was a physical barrier eg a ticket office or to an admin position.

227. One of the respondent's arguments is that it effectively offered Ms Muir the ticket office roles at Haydons Road and at Tooting in April and May 2021, but Ms Muir rejected them. Our first observation is that, even if making these offers was a reasonable adjustment, it does not mean that it would not have been reasonable also to offer other suitable posts to Ms Muir. The fact that Ms Muir rejected two ticket office roles, having initially thought a ticket role might be suitable, may be a good reason for the respondent not to have continued to look for ticket office roles. But other reasonable adjustments still need to be considered on their merits, while considering the overall circumstances.
228. The reality is that ticket office roles were not suitable for Ms Muir. As Ms Sylvester-Paul recognised, a ticket office is not a place that removes you from the aggressiveness. Ms Muir initially thought a ticket office role would be suitable, but it became clear that it would not.
229. Regarding the particular posts, Ms Muir turned down Haydons Road because she would have been working on her own and moreover, would occasionally be required to leave the protection of the ticket office to help people up and down the steps to the road. We can fully understand why Ms Muir would have turned down such a post. Just being alone, even behind a barrier, could have been stressful. Not being alone was something Ms Muir had raised repeatedly as an RCO. And in addition, she would have had to leave the ticket office on occasions and engaged in close contact with passengers.
230. Regarding the Tooting ticket office, this was the most obviously attractive. It was close to where Ms Muir lived. She would have been behind glass. She would not have been alone. She would only have had to leave the ticket office a couple of times a week to empty the vending machines, and that would always be with another person.
231. Ms Muir's concern was that the vending machines were in a CCTV blindspot, so if something happened, no other staff member would be watching. She also became extremely worried when she went down to speak to station staff and was told of a number of events, including spitting, staff being told passengers would be waiting outside for them, and a staff member walking a customer for their safety. We appreciate that the respondent meant well by making this offer and moreover, that OH had indicated in its report on 28 April 2021 that Ms Muir was fit for a ticket office role. But we can also see that, given Ms Muir's state of mind because of her PTSD, the above matters fed into her fear and anxiety. Tooting did not sound like a conducive environment. Even if she was behind glass most of the time, passengers were apparently waiting outside for staff members – or had threatened to. The OH report on 18 May 2021 said Ms Muir was not after all fit for a role where she could be challenged by the public or where she would need to work alone, and she would be unable to progress with those ticket office roles.

232. Our concern overall is that the respondent took a passive rather than a proactive approach towards finding Ms Muir another post. It is a large employer. The support provided was with making applications, not with securing redeployment. These are two different things. Ms Muir was helped to identify posts and then essentially left to her own devices. She was left to compete with other applicants, whether internal or external. No one took ownership of trying to find her an admin post. The respondent treated the redeployment process as it would a situation where an employee needs to be found a new position because of redundancy or poor performance. It did not appear to appreciate the particular obligations to make reasonable adjustments where an employee cannot do their substantive post because of disability.
233. It would have been a reasonable adjustment for someone in the respondent to take a proactive role; identify suitable posts; speak to the relevant manager; ask them to look at Ms Muir's CV and sit down and talk the duties through with her, exploring whether she appeared able to do them. By all means then do any essential testing, but explore the importance and significance of any shortfall in test results.
234. We believe that had this approach been taken, there was a real prospect that Ms Muir would have been found a suitable position in the period covered by the claim.
235. Further, we consider it would have been reasonable to have slotted Ms Muir into any of the following posts and there was a real prospect that any of these would have been successful:
- 235.1. Trainee Train Planner: 23 September 2020
 - 235.2. HR Administrator: 19 May 2021
 - 235.3. Health, Clinical and Admin Support: October 2021
 - 235.4. Admin Support, Fleet: February 2022.
236. The Trainee Train Planner post was part of a large team. It required very little prior knowledge and experience. The job spec said the successful candidate would be fully trained and supported. Ms Muir's CV suggested she had the necessary skills. Although her A-level was Dance rather than an academic subject, she also had CPD Diplomas as a Cognitive Behaviour Therapist and in Psychology, HND level Business and Finance and 7 GCSEs.
237. The only experience required for HR Administrator was good general admin experience. Skills were computer literacy, good organisation skills, good communicator. Ms Muir's CV shows she had all of this. Even if Ms Muir did not have all the required knowledge, we would expect her to be easily trainable on those given the job description and what skills and experience she did have. It seems it was not a highly paid post. Mr Robey had no answer to why someone could not have sat down and assessed whether Ms Muir actually could do the post.
238. Ms Muir's CV shows she was particularly suited to the Health, Clinical and Administrative Support post in October 2021. Her targeted application for the

post again in May 2022 shows very applicable knowledge, skills and experience. The fact that she appears to have been ruled out only because she did not by then want to work full-time reinforces our view that she should have been given the position in October 2021. It also shows what would have happened had there been a personalised discussion of the type we suggested rather than leaving her to computerised on-line testing.

239. Ms Muir's CV shows she was also extremely suitable for the Admin Support post in Fleet. She was educated to GSCE level and indeed above. She had IT, admin and organisational skills and experience. This was another example where she failed a computerised on-line test but someone could have sat down and explored with Ms Muir whether she could in fact do the job. Mr Robey admitted it was possible that could have been done.
240. We think the following roles were also a possibility, but we cannot be confident there was a 'real prospect' of successful redeployment into these posts:
- 240.1. Employee Campaigns Executive: October 2020. We were not given any detail of this role, but the title indicates it was not managerial.
- 240.2. External Social Media Adviser: 23 October 2020 This looks suitable except that it was located at Three Bridges. This was a one and a half hour journey from Ms Muir's home. Although she applied for it through desperation for a job, we think it doubtful she would have accepted or sustained it because in February 2022, in respect of a different post, she said that location would be too far to travel to.
241. We think it very unlikely that Ms Muir was suitable for the following roles:
- 241.1. Trainee train drivers: December 2020. Ms Muir did not pass an online test which may have been a statutory test. We do not have sufficient information to say this was a real prospect.
- 241.2. Area Operations Manager, Victoria: February 2021. This was a senior manager post.
- 241.3. Rosters Development Assistant Manager: February 2021. This required specialist knowledge which Ms Muir did not have to any extent, in a context where she would also have to deputise for the manager.
- 241.4. Payroll Administrator: May 2021. We feel there was just too much specialist information which Ms Muir would have to learn and we were particularly concerned about the requirement of experience of dealing with complex payroll queries.
- 241.5. Business & Compensation Manager: May 2021. We know nothing about this and so cannot say it was a real possibility. The title of the post sounds like it involves a specialism Ms Muir does not have and it is also at a manager level.
- 241.6. Trainee Train Driver (Shunter driver progression programme): February 2022. She was not eligible for this.
242. The claim for failure to make reasonable adjustments is therefore successful. It would have been a reasonable adjustment:

242.1. To redeploy Ms Muir into a role not involving direct contact with the public, eg an administrative role

242.2. To redeploy Ms Muir specifically to any of the following post:

242.2.1. Trainee Train Planner: 23 September 2020

242.2.2. HR Administrator: May 2021

242.2.3. Health, Clinical and Administrative Support: October 2021

242.2.4. Admin Support, Fleet: February 2022.

Direct race discrimination (Issues 3.7 – 3.8)

243. A difficulty with the race discrimination claim was that we were not shown any clear company policy on what steps managers were supposed to take when a staff member reported an assault or abuse or racist abuse. Nor was it clear what guidance or training Mr Hughes or Mr Turner or Ms Boyle had had on this, or what policy they thought they were following. Nor did we have any clear evidence as regards what they had done on other occasions, when the staff member reporting an incident was white. The only comparison of any kind we had was Ms Muir's first assault, when the perpetrator was black, as opposed to the subsequent three assaults when the perpetrator was white.

244. We have considered the respondent's response to the 3 assaults individually as well as collectively. We have also compared them with its response to the first incident which involved a black customer as opposed to the others, which involved white customers.

Issue 3.7.1 + 3.8 (incident 2)

245. In relation to the assault by a white male passenger on 30 September 2019, there are two parts to this issue, which we looked at separately and together: the photo comment and the failure to investigate.

246. Mr Hughes did tell Ms Muir that she should not have taken the photo. He gave her two reasons, partly because it could put her at further risk and partly because it would not look good for the company if it ended up on Twitter.

247. We believe it was tactless for Mr Hughes to tell Ms Muir that she should not have taken the photo because the customer might mention it on Twitter. However, there is no basis at all for inferring that Mr Hughes would not have been equally concerned to protect the company's reputation if Ms Muir had been white. As for saying that Ms Muir was risking her personal safety, this was a legitimate and sensible concern. We can see that a customer might react badly, and possibly violently, to having their photo taken without permission. Indeed that was the view of the head of security, Tony Holland, who had written a communication to staff about not taking photos. Even if Mr Hughes had not seen that communication, it shows that Mr Hughes was expressing an unsurprising view. Ms Sylvester-Paul also agreed with his approach.

248. Neither Mr Hughes nor anyone else in the respondent investigated this incident. Mr Hughes did not look at the CCTV or otherwise investigate. He did not complete an incident report form for Q-Pulse. He simply made some handwritten notes at some point. He could not explain to the tribunal why he had not completed an investigation report.

249. If we apply the two stage burden of proof, there is not enough evidence from which we could decide, in the absence of any other explanation, that the reason for this failure was because Ms Muir is black. It is true that Mr Hughes did complete an investigation report in relation to the first assault reported by Ms Muir which concerned a black customer as opposed to this second assault involving a white customer. But then Mr Hughes also completed incident reports for the third and fourth assaults, which both involved a white customer.

Issue 3.7.2 + 3.8 (incident 3)

250. The alleged act of direct race discrimination is that, in relation to the incident of racist abuse towards Ms Muir by a white male passenger on 20 December 2019, neither Mr Hughes nor the respondent followed up the incident or investigated it. However, Mr Hughes did investigate the incident. He completed a Q-Pulse investigation report. He spoke to the witness, Naim. He looked at the CCTV. Regarding follow-up, he planned a discussion with Ms Muir on 16 January 2020 to establish what could be done to reduce the risk of these incidents happening in the future. Points of discussion would include arranging a conflict management course, wearing body cam camera, further welfare, and requesting stronger REO presence during peaks.

251. Unfortunately the fourth incident happened before Mr Hughes got back to Ms Muir to tell her about the proposed meeting on 16 January 2020, but his intention was noted in the investigation report. We understand from Ms Muir's point of view that she felt nothing was happening because she was not being given prompt feedback after the investigation. But, as we shall discuss again below, that was the system which applied to all staff at that time.

252. The only obvious failing in the investigation was the failure to note that the body cams had not been working that day. However, the topic of body cams was to be discussed again on 16 January 2020.

253. We therefore find that Mr Hughes and the respondent did investigate Ms Muir's complaint on this incident. Even though the customer's complaint was potentially racist, there is no evidence at all of any difference in the handling of the matter because of Ms Muir's race. The follow-up did not take place because shortly after there was a fourth assault and Ms Muir went onto sick leave for a long period.

Issue 3.7.3 + 3.8 (incident 4)

254. In relation to the assault by a white male passenger on 3 January 2020, it is true that Mr Hughes and Ms Boyle did not raise the alarm. They did not stop the train or call 999 or notify the BTP.
255. There is no evidence from which we could decide, in the absence of any other explanation, that the failure to raise the alarm, ring 999, call the British Transport Police or stop the train was because Ms Muir is black. There is no evidence at all that Mr Hughes or Ms Boyle would have done anything differently if Ms Muir had been white. The fact that Ms Boyle was later dismissed for racist behaviour in a quite different context, is not enough to suggest that she would have acted differently if Ms Muir was white in relation to this incident.
256. Even if we thought the burden of proof had shifted, which we do not, the respondent satisfied us that their inaction was nothing whatsoever to do with race. Mr Hughes and Ms Boyle did not see the incident as it happened. They have to multi-task in the control room and keep an eye on circulating CCTV. Ms Muir brought the matter to their attention. Mr Hughes immediately went to look at the tape and expressed support saying it was disgusting. However, we accept the evidence of both Mr Hughes and Ms Sylvester-Paul at the grievance hearing that the respondent only makes calls to 999 where there is immediate danger. That makes sense to us. The respondent does not have power to detain someone at the station. We do not find it surprising and therefore suspicious that the respondent did not stop the train or get the police to pick up the passenger at the next station. We do not wish to belittle matters. The customer behaved very badly and aggressively. But there was no immediate ongoing danger. This was not a passenger with a knife or a bomb for example. Ms Sylvester-Paul subsequently urged Ms Muir to report the matter to the BTP. This followed the respondent's usual system, ie that it is the subject of the assault who reports the incident to BTP and Ms Muir was encouraged to do so to provide a first-hand account.
257. We were a little surprised that it is left to the victims of an assault to contact the BTP rather than the respondent doing it for them in the first instance. But this was the respondent's system. The question for us is not whether it was a good or fair or even supportive system. The question was whether Ms Muir was treated differently because of race.
258. Mr Hughes did in fact carry out a thorough investigation, completed the Q-Pulse report, and planned meetings with Mr Holland, head of security, and with Mr Edwards, an REO, when Ms Muir returned to work. If anything, these were more thorough steps than in the first incident, when the customer was black, which Ms Muir accepted in the tribunal.
259. Looking at the incidents overall, we also cannot see any evidence which would suggest the failings identified by Ms Muir were because she is black. Indeed, when looking at matters taken together, we can see that on three of the four occasions, investigation reports were completed. We can see that from Ms Muir's point of view, it felt like very little was done after she reported

these assaults. Generally this was because no report was made back to her of what had been done. She was not shown any investigation reports. We can understand why she felt under-supported. She did not know how much had been done or planned. But this was the result of a company process which applied to everyone. Ms Sylvester-Paul recognised as a result of Ms Muir's later grievance that this was a failing in the procedure and she gave managers a new instruction going forward

Harassment related to race (Issues 3.9 – 3.11)

260. As we have already explained in relation to direct race discrimination, none of the respondent's actions or inactions which Ms Muir itemised, in so far as they took place, were conduct related to race. Specifically:

260.1. Telling Ms Muir she should not have taken a photo was not related to race. Any staff member would have been told the same thing.

260.2. The failure to investigate or complete a Q-Pulse investigation form on the 30 September 2019 incident (incident 2) was not related to race. There was no evidence at all to suggest that could be a factor. Mr Hughes investigated and completed the Q-Pulse forms in respect of the three other assaults reported by Ms Muir.

260.3. There was no failure to investigate the incident of racist abuse on 20 December 2019 (incident 3). Follow up was planned by way of a discussion on 16 January 2020 with the possibility of further actions, but this did not take place because it was superseded by the final assault after which Ms Muir was absent through sickness. This was not a reason related to race.

260.4. The failure to raise the alarm, notify security, call 999 or notify the police in relation to the incident on 3 January 2020 (incident 4) was not related to race. It was in line with the respondent's general approach for incidents of that nature.

260.5. Any other failure to investigate or follow-up the incident on 3 January 2020 was not related to race. In particular, the intended meetings with Mr Holland and Mr Edwards did not go ahead because of Ms Muir's lengthy sickness absence.

260.6. The general failure to report back to Ms Muir on the investigations and show her the investigation reports was not related to race. It was the general policy of the respondent at that time, although the procedure was changed as a result of Ms Muir's grievance.

Whistleblowing (Issues 3.12 – 3.13)

261. The respondent accepted and we agree that Ms Muir's email to Ms Sadler and Mr Bindon was a protected disclosure. She disclosed information which in her reasonable belief was made in the public interest and tended to show the company had failed to comply with a legal obligation. The disclosure was that Ms Muir had been issued with the necessary paperwork and card to act as an 'authorised collector' of penalty fares and MG11s and had issued and collected penalty fares and notices without the relevant training as required by law.
262. The next question was whether Ms Muir's job applications made on and after 14 October 2020 were unsuccessful because she had made this protected disclosure.
263. There is nothing in Ms Sadler's responses that suggests she or anyone else in the company was in any way upset that Ms Muir had raised the whistleblowing issue. They took her point, made changes and offered her the opportunity to complete the training. The tone of Ms Sadler's correspondence was friendly.
264. Ms Muir was unsuccessful in her job applications from 14 October 2020 onwards either because she failed an on-line test or because she failed at shortlisting stage. The on-line tests were computerised. There is no evidence that the computer would have been fed any information telling it that candidates had made protected disclosures. As regards applications where human beings made decisions about shortlisting, these were people on the relevant recruitment teams. They would not have known that Ms Muir had made her protected disclosure.
265. We also cannot see any difference in the respondent's approach before and after 14 October 2020. Both before and after that date, Ms Muir was told by Ms Newman and/or Ms Sylvester-Paul about suitable vacancies (eg Roster Clerk admin role; part-time Tooting ticket office; Bowes Road ticket office before and full-time Tooting ticket office and Haydons Road after). Ms Newman continued to discuss possibilities at regular intervals before and after the disclosures in the welfare calls. Ms Muir failed on-line tests both before (eg the Trainee Train Planner) and after (eg Trainee Train Driver).
266. The whistleblowing claim therefore does not succeed.

Victimisation (Issue s 3.14 – 3.17)

267. The respondent accepted that Ms Muir did two protected acts: (1) her tribunal claim 2203512/2021 dated 27 May 2021 and (2) on 18 January 2022 making an internal complaint of sexual harassment. The List of Issues refers to her reporting an incident in October 2021 and June 2022 to the respondent, but during the hearing it was agreed that she was referring to the complaint which was investigated by Mr Welbourne in January – June 2022.

Issue 3.15.1 + 3.16 + 3.17: taking an unduly long time to reach a decision on sick pay

268. Ms Muir first raised the issue about her sick pay on 9 November 2021. Ms Hicks did not get back to Ms Muir until she chased more than 3 months later on 15 February 2022. After Ms Muir's chaser, the respondent dealt with matters fairly quickly, taking into account Mr Robey's holiday. The only unduly long time was the initial 3 months. But we note that Ms Muir also forgot to chase up the matter.

269. We do not feel that, in the absence of an explanation by the respondent, we have sufficient evidence to infer victimisation. There is just nothing which points in that direction. We do not know whether Ms Hicks knew about the tribunal claim or about the sexual harassment complaint two months later. Even if Ms Hicks knew about the protected acts, which is unlikely given her role, why would she as payroll manager react by sitting on an enquiry about pay. It just does not seem likely.

Issue 3.15.2 + 3.16 + 3.17: taking an unduly long time to investigate sexual harassment complaint

270. The respondent took from 18 January 2022 until 3 May 2022 to investigate Ms Muir's sexual harassment complaint, and the outcome letter was not provided to Ms Muir until 14 June 2022. Mr Welbourne did not even know that Ms Muir had put in her tribunal claim. However, he did of course know she had complained of sexual harassment.

271. Breaking down the time taken to investigate the sexual harassment complaint: Ms Muir emailed her complaint on 18 January 2022. Mr Welbourne met Ms Muir on 4 February 2022. Roughly 2 weeks is a reasonable time-scale for holding the first meeting. He interviewed three witnesses on 11 and 21 February 2022 and 2 March 2022. Again, that is a fairly prompt timescale. His interview of Mr Osuwo was delayed until 12 April 2022 because the latter was on extended leave and then postponed two earlier dates. This slowed matters down, but we would not call it an undue delay, and it was not something which Mr Welbourne could control. The investigation report was completed by Mr Welbourne and handed to his ER Adviser on 3 May 2022 after he had had a period of leave himself. Again, this is a reasonable and understandable timescale.

272. The most obvious delay was between 3 May 2022 and when Ms Muir was notified of the outcome on 14 June 2022. This included a three week delay between Mr Welbourne originally drafting the letter to Ms Muir on 26 May 2022 and his sending it out on 14 June 2022, having received the go-ahead from Ms Banton. However, Mr Welbourne was away on annual leave for 10 days in this period, starting approximately 27 May 2022.

273. There is insufficient evidence from which the tribunal could conclude, in the absence of an explanation, that the delay between 3 May 2022 and 14

June 2022 was victimisation. The delay was not so long that it raises suspicions. In our experience, there is sometimes a 6-week gap in notifying employees of an outcome to their grievance, even on serious matters. We took into account that the complaint was not upheld, but as we explain below, we do not think that was indicative of victimisation either. Mr Welbourne did not know about the tribunal claim. There was no evidence that the fact of a sexual harassment complaint being made had upset him in any way.

274. If we consider the explanation and that 10 days involved annual leave, the delay is even less notable.

275. The claim for victimisation is therefore not upheld.

Issue 3.15.3 + 3.16 + 3.17: failing to uphold the sexual harassment claim

276. It is true that the respondent failed to uphold Ms Muir's complaint of sexual harassment.

277. We do not think that Mr Welbourne made a very sophisticated analysis of the sexual harassment complaint. He did not closely analyse the WhatsApp messages, which on their face – as well as in combination with contradictory evidence from Mr Osuwo in the interview – raise significant questions. He did not make even basic recommendations afterwards to Mr Osuwo about his future conduct.

278. However, Mr Welbourne had no experience or training in handling sexual harassment complaints. The respondent did not provide him with a specific policy on such matters. We believe his approach was a reflection of his inexperience in the area rather than suggestive of victimisation. He did attempt to speak to all the relevant witnesses including tracking down Mr Williams. The witnesses said they were unaware of any inappropriate comments. It is possible to see how Mr Welbourne got to his conclusion, even if his approach was simplistic.

279. The present claim is not for sexual harassment, but that the failure to uphold the complaint of harassment was victimisation, We cannot see any evidence supporting the suggestion that victimisation was a factor. Nor was there any evidence that Mr Welbourne disapproved of Ms Muir for making the allegation.

280. Not upholding the sexual harassment complaint was therefore not victimisation.

Issue 3.15.4 + 3.16 + 3.17: failing to help with internal job applications

281. Ms Muir did not point out to us any specific failure to help with job applications after she presented her tribunal claim on 27 May 2021 or after she made her sexual harassment complaint on 18 January 2022. The

respondent's approach remained the same, before and after these events. In fact, slightly more hands on support with applications was offered in February / March 2022 by Ms Janali. This claim is therefore not upheld.

Issue 3.15.5 + 3.16 + 3.17: reading OH reports without permission

282. Our fact findings and conclusions are all set out here on this particular issue because it does not fit into the factual narrative above. The allegation was that Mr Robey read OH reports without Ms Muir's permission. He did not. He only saw her records as part of the disclosure process in the tribunal proceedings. Ms Sylvester-Paul did send Mr Robey on 2 July 2021 what appears to be an OH referral which contained a brief sickness history and a request to book a telephone assessment. It had some elements of copy and paste from previous reports for the purposes of the referral. There was also the exchange of emails with Ms Muir in March 2022 about her pay when Mr Robey was explaining that Ms Muir was on sick pay because OH had classed her as U1. Ms Muir asked for the date of the report as she did not have it. Mr Robey replied 'I don't have a copy of the report, but I will speak to your manager and see if she has a copy.' He suggested this because he thought that Ms Muir was asking for a copy of the report.

283. We cannot see how any of Mr Robey's actions in this would be victimisation. They were perfectly normal handling of the workplace situation. This claim is therefore not upheld.

Jurisdiction (Issue 3.1 – time-limits)

284. The first tribunal claim was presented on 27 May 2021, ACAS having been notified under the early conciliation procedure on 12 April 2021 and the certificate issued by email on 28 April 2021. Any discriminatory action before 13 January 2021 would therefore be outside the 3 month time-limit (unless part of an act of discrimination extending over a period).

285. The second tribunal claim was presented on 12 April 2022. ACAS was notified under the early conciliation procedure on 1 March 2022 and issued its certificate by email on 11 April 2022. Any discriminatory action before 2 December 2021 would be outside the 3 month time-limit (again, unless part of an act of discrimination extending over a period).

286. We find that the discriminatory invitation to a capability meeting on 29 July 2020 together with the failure to make reasonable adjustments by giving Ms Muir an alternative post (and/or the failure to give specific posts which we have identified) were discriminatory conduct extending over a period of time, continuing on to (and indeed past) the date of both claim forms. They were not isolated self-contained incidents.

287. The respondent's failure to make the reasonable adjustment of finding Ms Muir a new post started at the latest on 17 June 2020, when OH classified her

as permanently unfit to return to work as RCO. The discriminatory failure to give Ms Muir the Trainee Train Planner post was on or about 23 September 2020. The discriminatory failure to give Ms Muir the HR Administrator post was on or about 19 May 2021. The discriminatory failure to give Ms Muir the Health Clinical and Admin Support post was in October 2021 and the discriminatory failure to give her the post of Admin Support at Fleet was in February 2022. The Fleet post standing alone was within the primary time-limit (ACAS was notified 1 March 2022).

288. We say it is a continuing discriminatory state of affairs because the respondent's approach remained the same throughout that period, and the pattern of application and rejection remained essentially the same. Between the posts we identified as having a real prospect of being a successful adjustment were many more posts and applications following a similar pattern, including two in October 2020 which were possibilities, but in respect of which we did not have enough information to say 'real prospect'.
289. The second capability invitation, ie the one on 29 July 2020, was very much part of this discriminatory state of affairs, raising the possibility of Ms Muir being dismissed for capability because another post had not been found, in a context where it was a failure to make reasonable adjustments that that situation existed.
290. If we are wrong about this, we would in any event say it is just and equitable to allow the late claims. The general state of affairs had not become history by the time the claims were put in. At the time of presentation of both claims to the tribunal, the issue of finding alternative employment was a live issue on the minds of both Ms Muir and the respondent. We have taken into account the level of lateness involved (some more than others). We also took into account that Ms Muir had a union representative, had spoken to ACAS and seen a Citizens Advice solicitor. However, ultimately she was representing herself. She was told by her union and by ACAS that she needed to bring a grievance first (although that does not account for all of the delay). Most significantly, she was suffering from prolonged mental health difficulties and significant anxiety. She was receiving counselling and taking medication. She was focused on getting a job and was becoming increasingly demoralised and despondent.
291. A claimant's reason for making a late claim is not the only factor when considering whether it is just and equitable to extend time. We did not find any significant prejudice to the respondent caused by the lateness of the claims. If anyone has been harmed by the loss of some applications and anonymisation after 12 months, it is Ms Muir. In fact, the pack prepared for the capability hearing on 29 July 2020 noted previous applications, and the subject was also discussed with Ms Sylvester-Paul at the grievance. Ms Newman continued to keep a log of her discussions with Ms Muir about job applications for some time thereafter. It remained a live topic at the time of tribunal claims.

Pay deductions (Issue 3.18)

292. Ms Muir argued that she should have been paid full pay from 6 May 2021 onwards because she was not off sick; she was simply unable to work in the RCO role and the respondent had not found her an alternative role which she could undertake. The period when she was not paid full pay was after she reduced to 50% occupational sick pay on 10 November 2021 and then to nil pay on 3 March 2022.

293. Ms Muir was not willing or able to work in her contractual post of RCO throughout this period. Indeed, on 28 April 2021, OH said Ms Muir was fit for a ticket office role only on a phased return, and on 18 May 2021, OH said Ms Muir was not fit for a ticket office role and classified her as U1 (temporarily unfit for work). Either way, she did not show us any right under her contract to continue to be paid full pay when she was not doing her contracted job and when any entitlement to full contractual sick pay had run out.

294. Ms Muir might have other legal claims for the failure to find her an alternative job and therefore the loss of pay. She has made several such claims including that the failure to relocate her was a failure to make reasonable adjustments, and we have dealt with them above.

295. Subject to the following point, the claim for unauthorised deductions is therefore not upheld.

296. The respondent did admit it had made an incorrect deduction due to computer error in respect of the four weeks ending 19 February 2022. For this period, Ms Muir was not paid her half pay. The respondent identified during the hearing that this was a computer error and undertook to repay it on a net basis.

Employment Judge Lewis
13/03/2023

Judgment and Reasons sent to the parties on:
14/03/2023

For the Tribunal Office