

**Case Numbers:** 3313739/2020, 3313740/2020, 3310211/2021 and  
3310212/2021



# EMPLOYMENT TRIBUNALS

## Claimants

(1) Miss N Eltahawy  
(2) Mrs E Rawinska

v

## Respondents

(1) London Underground Limited  
(2) Transport for London

**Heard at:** Watford, in person and by Cloud  
Video Platform

**On:** 9 and 12-16, December 2022  
and (in private) 1-2 March 2023

**Before:** Employment Judge Hyams

**Members:** Ms A Brosnan  
Mrs J Hancock

## Representation:

**For the claimants:** Mr Nick Toms, of counsel

**For the respondent:** Ms Rebecca Thomas, of counsel

## RESERVED UNANIMOUS JUDGMENT

The claimants' claims of (1) direct discrimination within the meaning of section 13 of the Equality Act 2010 because of sex, (2) indirect discrimination because of sex within the meaning of section 19 of that Act, (3) harassment within the meaning of section 26 of that Act, and (3) victimisation within the meaning of section 27 of that Act, are not well-founded and are accordingly dismissed.

## REASONS

### Introduction; the claims

1 The claimants' claims were made in two stages and were made in the name of both claimants. The first claim was made in an ET1 claim which was allocated case numbers 3313739/2020 and 3313740/2020. That claim form was presented on 17 November 2020. Early conciliation in respect of a claim against the first respondent only was commenced by the first claimant on 17 September 2020 and that period of early conciliation was ended on 17 October

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2020. The second claimant commenced a period of early conciliation in respect of the first respondent only on 23 September 2020 and the early conciliation certificate was issued on 23 October 2020. The first claim was accordingly in time only in respect of conduct (including conduct extending over a period) of the first respondent which ended on or after 17 June 2020.

- 2 The second claim form was presented on 2 June 2021. It was preceded by a period of early conciliation commenced by both claimants in respect of the acts of both respondents which started on 25 March 2021 and ended on 6 May 2021. Accordingly, that claim was in time in respect of any conduct which occurred on or after 25 December 2020.
- 3 The respondents say that the claimants were employed only by the first respondent, which is a wholly-owned subsidiary of the second respondent, so that the claims were properly made only against the first respondent. No formal order had, however, by the start of the hearing before us on 9 December 2022, been made dismissing the claims against the second respondent. In the event, because the claims failed on the facts, we did not need to dismiss the claims against the second respondent specifically.
- 4 On 11 August 2021, Employment Judge (“EJ”) George held a preliminary hearing by telephone. She consolidated the claims and listed them to be heard on 19-26 September 2022. Unfortunately, the claims could not then be heard, because of a lack of judicial resources at the time, and they had to be relisted to be heard on 9-16 December 2022.
- 5 The claims are of sex discrimination, harassment and victimisation. The claimants are women. The claims arise from the claimants’ applications to be employed by the first respondent in the post of Train Maintainer. Both claimants were first employed by the first respondent in 2008 and have remained so employed since then: the first claimant from 25 March 2008 onwards and the second claimant from 7 July 2008 onwards. Both claimants are parents. They were both employed as members of the first respondent’s administration staff until they applied to become train maintainers. Neither of them had before they so applied received any formal training in engineering or mechanical maintenance, or worked in an engineering or mechanical maintenance role.

### **The issues**

- 6 After a discussion on the first day of the hearing, the parties very helpfully recast the list of issues which had before then been produced after discussions between the parties, and agreed the following list of issues (which we have produced with minor textual corrections, which we have not shown), helpfully treating the first respondent as the only respondent, which, from now on, we do too.

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‘Jurisdiction

1. The Claimants commenced ACAS early conciliation in respect of the first set of claims on the 17<sup>th</sup> September 2020 (C1) and the 23<sup>rd</sup> September 2020. The ACAS certificates were issued on the 17<sup>th</sup> October 2020 and 23<sup>rd</sup> October 2020. The Claim Form was issued on the 17<sup>th</sup> November 2020.
2. Consequently, the issue of jurisdiction only arises in relation to the allegation from March 2020. The other allegations are all in time.
3. In relation to this allegation the Tribunal need to consider,
  - (a) whether it forms part of a course of conduct with the later allegations which are in time;
  - (b) if it is not part of a course of conduct, whether, nevertheless, it would be just and equitable to extend time.
4. The Claimants commenced early conciliation in relation to the second set of claims relating to the grievance outcome on the 14<sup>th</sup> January 2021 on the 25<sup>th</sup> March 2021 with the ACAS certificate being provided on the 6<sup>th</sup> May 2021. The Claim Form was presented on the 2<sup>nd</sup> June 2021. Consequently, this claim is in time.

Direct sex discrimination (Section 13 EqA)

5. The Respondent accepts that the following acts relied on by the Claimants as detriments took place;
  - (a) Mr McFall’s request to review the Claimants’ scores and full candidate packs from the assessment process on or around the 18<sup>th</sup> March 2020
  - (b) the Respondent’s decision to require the Claimants to undergo a further interview and assessment in August 2020 for the TM role in Transplant;
  - (c) the Respondent’s decision to withdraw the job offer made to the Claimants notified to them on the 17<sup>th</sup> August 2020 and/or the 25<sup>th</sup> September 2020;
  - (d) the Respondent’s decision upon the Claimants’ grievance dated the 14<sup>th</sup> January 2021 and, in particular,

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- (i) the finding that Mr McFall's decisions in relation to their placement with Transplant had been based on their 'lack of relevant experience' and that he was entitled to withdraw the job offer;
  - (ii) the recommended replacement of their entitlement to be placed in the role of Train Maintainer with a 3-6 month secondment;
  - (iii) the recommendation from their grievance that the Respondent review the Train Maintainer JD and recruitment campaign to address 'concerns this review has found';
  - (iv) the recommendation from their grievance that other candidates on the waiting list are reviewed to confirm they have appropriate experience and that the selection process also be reviewed.
6. Have the Claimants proved facts from which the Tribunal could decide, in the absence of any other explanation, that the detriments above were act(s) of unlawful discrimination because their sex?
7. The Claimants rely on a hypothetical comparator.
8. If so, can the Respondent show that the treatment was in no sense whatsoever because of sex since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive?

Indirect sex discrimination (Section 19 EqA)

9. The Respondent accepts it applied the provision, criterion or practice ("PCP") of requiring Train Maintainers employed in their Transplant Department to have the experience detailed in the job description.
10. Did the Respondent apply a PCP that Train Maintainers employed in the Fleet department were required to have the experience referred to in the grievance/investigation and/or outcome document?
11. Did or would the Respondent apply either or both of the PCPs to men? The Respondent accepts that it applied the first PCP to men.
12. Do either or both of the PCPs put women at a particular disadvantage when compared with men? The Claimants' position is that the particular disadvantage is that female applicants are less likely to have that experience.

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13. Did either or both of the PCPs put the Claimants at that disadvantage?
14. Can the Respondent show that the PCPs (if it was applied in relation to the second PCP) were a proportionate means of achieving a legitimate aim? The Respondent relies on the following legitimate aims:
  - a. Ensuring the role is carried out competently and effectively, without excessive training being required;
  - b. Ensuring the safety and wellbeing of the Respondent's employees;
  - c. Minimising any damage to Transplant rolling stock; and
  - d. Ensuring the Respondent's operations are run cost effectively

Harassment (Section 26 EqA)

15. The Respondent accepts that it subjected the Claimants to the unwanted conduct set out as detriments under the Direct Discrimination claim which is also relied on, in the alternative, for the purposes of the harassment claim.
16. Have the Claimants proved facts from which the Tribunal could decide, in the absence of any other explanation, that the unwanted conduct,
  - (a) was related to sex,
  - (b) had the purpose or effect of violating the Claimants' dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimants.
17. If so, can the Respondent show that the conduct was in no sense whatsoever because of sex and/or that it did not have that purpose or effect.

Victimisation (Section 27 EqA)

18. The Respondent accepts the Claimants undertook the following protected acts,
  - (a) bringing grievances on or around the 7<sup>th</sup> September 2020 in which they complained of sex discrimination;

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(b) bringing their first claim under the Equality Act 2010 on the 17<sup>th</sup> November 2020.

19. Did the outcome of the grievance on the 14<sup>th</sup> January 2021 in relation to the matters relied on above in para 5(d) constitute a detriment to the Claimants?

20. If so, have the Claimants proved facts from which the Tribunal could decide, in the absence of any other explanation, that the detriment(s) were due to the protected act(s)?

21. If so, can the Respondent show that the detriment was in no sense whatsoever because of the protected act(s)?

### Remedy

22. If all or any of the Claimants' claims are well founded, what is the appropriate remedy? Should the Tribunal,

(a) make a declaration;

(b) make a recommendation and, if so, what should it be;

(c) award compensation including for financial losses and injury to feelings?

23. Have the Claimants mitigated any financial loss caused by any unlawful discrimination found by the Tribunal?

24. What is the appropriate calculation of interest of any compensation awarded by the Tribunal?

7 On 9 December 2022, EJ Hyams pointed out that

7.1 as a result of section 212(1) of the EqA 2010, a claim of harassment made under section 40 of that Act is an alternative to a claim of detrimental treatment within the meaning of section 39 of that Act, that is to say, if one of those claims succeeds then the other cannot do so, and

7.2 the analysis of Underhill LJ in paragraphs 83-110 of his judgment in *Unite the Union v Nailard* [2019] ICR 28 shows that in order to succeed in claiming harassment within the meaning of section 26(1) of the EqA 2010, i.e. of "unwanted conduct related to a relevant protected characteristic", the claimant needs to satisfy the tribunal that there was a mental element of the same sort as that which is required for the success of a claim of direct discrimination within the meaning of section 13 of that Act.

- 8 In addition, as EJ Hyams pointed out then, a claim about the outcome of a grievance is not obviously sustainable as a claim of victimisation: it is so sustainable only if the outcome would have been different if the outcome of a grievance stated by someone who had not asserted a breach of the EqA 2010 would have been different because that person had not claimed that there had been a breach of that Act.

### **The parties' submissions and the manner in which they were made**

- 9 By the time of closing submissions, the claimants were no longer advancing the argument that what is referred to in paragraph 5(d)(iv) of the list of issues set out above was unlawful. Those submissions were made in writing only in the following circumstances. The respondent's oral evidence was concluded only at lunchtime on 16 December 2022. It was then clear that we would be reserving our judgment (that day being the last of the six days originally allocated for the hearing of the claims). We could see that we would need at least two days to hear (or, if they were made in writing, read) the parties' submissions, deliberate, and form our conclusions on the claims. We had a discussion with the parties and agreed with both counsel that closing submissions would be made in writing only, with both parties having the opportunity to respond in full in writing to the other's written submissions. We then adjourned the hearing to 1 and 2 March 2023, at which time we were going to resume the hearing without the parties present. When we resumed the hearing on 1 March 2023, both parties' written closing submissions and submissions in reply were put before us.

### **The evidence which we heard**

- 10 We heard oral evidence from the claimants on and, on their behalf, from
- 10.1 Mr Kyle Dempsey, who was at the time of giving evidence employed by the respondent as an Advanced Train Maintainer, and
  - 10.2 Mr Peter Ashley, who had at that time been employed by the respondent since 2004 as a Train Systems Technician and began working for the respondent as an Advanced Train Maintainer in 2001.
- 11 We heard oral evidence from the following witnesses on behalf of the respondent, in the following order:
- 11.1 Mr Andy Folan, who was at the time of giving evidence to us employed by the respondent as the Depot Manager of its Ruislip Central Line Fleet depot;

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- 11.2 Mr Stacey McFall, who had at the time of giving evidence to us been employed since 2011 as the respondent's Maintenance Performance Manager in its TransPlant team; and
- 11.3 Mr Edward Rowley, who (1) started working for Metronet in 2006 as an Engineering and Management Graduate Trainee, (2) transferred to the respondent's employment in 2008 under the Transfer of Undertakings (Protection of Employment) Regulations 2006 and (3) had by the time of giving evidence to us been employed by the respondent as an Overhaul Delivery Manager for over three years.
- 12 We had before us a bundle of documents consisting of 1800 substantive pages, excluding its index. Any reference below to a page is to a page of that bundle.
- 13 Having (1) heard that oral evidence, (2) read the documents in the bundle to which we were referred, and (3) heard the parties' submissions, we made the following material findings of fact (the matters to which we refer in paragraph 5 above being agreed).

## **Our findings of fact**

### **Background**

- 14 The respondent is responsible for the provision and maintenance of the public passenger rail network known as London Underground. During 2019 the claimants were working in the team of administrative staff at the respondent's Ruislip depot for its Central Line fleet.
- 15 Before 2019, all advertisements and job descriptions for the post of Train Maintainer ("TM") with the respondent contained a requirement that the applicant or post-holder had experience of (for example, as stated in the job description from 2016 at page 142) "carrying out basic mechanical and electrical tasks including correct use of tools and safety standards".
- 16 The respondent's train maintenance workforce (i.e. those who carried out, or managed the carrying out of, train maintenance) was at that time, and remained at the time of the hearing before us, predominantly male. As a result, during 2019, the respondent determined to seek to increase the number of women members of that workforce. It determined (as evidenced by the email exchange of 4 June 2019 at pages 377-378 between Ms Sophia Perry, the respondent's "Manager, Diversity, Inclusion & Operational Culture" and Mr Steve Lammin, the respondent's "Head of Fleet, Asset Operations") to "Remove any unnecessary requirements" and to use "Targeted external adverts – women, young offenders", by for example using "Flat pack furniture analogy".



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- 17 The job of TM is done in two areas of the respondent's operations: (1) fleets, that is to say fleets of trains used on the various underground lines, with the trains on each line differing in material respects from those on other such lines, and (2) the respondent's track and infrastructure maintenance division, which it called "TransPlant". The managers of the TransPlant division were not consulted about the proposed removal of the requirement for experience of "carrying out basic mechanical and electrical tasks including correct use of tools and safety standards".

**The recruitment process which led to the claimants being offered the role of TM**

- 18 In (it appeared) October 2019, the respondent commenced a recruitment campaign for the role of TM. At page 386 there was a copy of the advertisement for the role (which it appeared was still "live" in December 2019, as the webpage on which it was situated bore the date "13/12/2019"). Some of its text was not visible on the left hand side of the page, but we could see that it contained this text (into which we have added, in square brackets, what appears to have been what was cut off on the left hand side of the page):

"We have launched our internal and external recruitment campaign for London Underground train maintainers. These are fantastic hands-on roles for those who are mechanically minded, who like problem solving and fixing things.

If you know someone who's interested, it can also be a good way to start a career with London Underground, as we provide training.

Applicants need to be 18 or over, and while previous experience in a mechanical or electrical environment would be beneficial, we are also interested in hearing from people who have an interest in taking things apart and putting them back together.

The recruitment website has everything applicants need to know on how to apply, and gives a good insight to what's involved in the role.

[All] candidates will be invited to take an online test, which needs to be completed within five days. Those who are [successful] will then be asked to attend an assessment centre."

- 19 The advertisement also contained this text:

"**Location:** Anywhere across the whole London Underground network – you will have the option to select your preference at the online application stage. However, due to business requirements we cannot guarantee that you will be placed at your preferred location.

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We encourage you to apply early. Due to the expected high response to these vacancies we reserve the right to close this campaign once we have a suitable pool of applicants, which could be prior to the published application closing date ... After this, no further applications will be considered.

### **The Role**

You will receive high quality on the job training from our fleet dedicated trainers, and you will work alongside skilled train maintainers and engineers, learning how our varied train systems operate. London Undergrounds rolling stock has long since ceased to be 'clunk click' and is now a highly sophisticated piece of equipment requiring a raised level of technical competence to maintain it. Under supervision, and working as part of a team, you will learn and become proficient in both mechanical and electrical skills enabling you to help contribute to the maintenance and fault repair of our varied rolling stock, ensuring a fast turn around and playing your part in keeping London moving. Whilst having previous experience in the role is advantageous, you will be given thorough training, guidance and development to ensure you become a confident expert in your field.

You'll be based in a maintenance depot which operates 24 hours a day, 7 days a week. These are full time positions, and you must be able to work nights, weekends and public holidays in order to be eligible for this role."

- 20 The claimants applied for the role of TM pursuant to that advertisement. They were successful. They were two of the three successful candidates who were women. There were 107 successful candidates. The claimants were notified of their success in emails dated 26 February 2020 of which there were copies at pages 495 and 497. The emails stated that and continued:

"We are unable to offer you an immediate start date but will contact you again when vacancies become available. In order that we can progress quickly when we are in a position to do so, we would like you to complete the vetting process."

- 21 The emails were sent by "Pat Holt On behalf of Rose Horton". Ms Horton's role was stated to be "Recruitment Consultant, Operational High Volume Recruitment, HR Services".
- 22 Mr McFall was not consulted by the respondent's Human Resources ("HR") team about the advertisement to which we refer in paragraphs 18 and 19 above. His team had vacancies including for the role of TM, about which he wrote to Ms Esther Bateman of HR on 20 January 2020 in the email in the middle of page 468. On 10 and 17 February 2020, he asked in the emails from

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him on page 471 to see the job descriptions for the roles which needed to be filled. On 20 February 2020, he sent the email at pages 485-486 to Ms Natasha Beacher, copying it to Ms Anna-Maria Messina. It appears to have enclosed, but in any event we found as a fact that it referred to, the job descriptions at pages 487-494, which included one for the post of TM at pages 491-494. Mr McFall made “comments for each role below” in the email at pages 485-486, but he did not comment in any way (whether positively or negatively) on the box at the top of page 493, under the word “Experience”, in which box there was this text:

“Basic fault finding and problem solving experience  
Time served Apprenticeship or previous experience in a mechanical or electrical discipline including formal qualifications.  
Potential for obtaining certification for job skills and safety procedures etc.  
As may be required (desirable)”.

### **What happened in March 2020**

23 On 10 March 2020, Ms Anne Emorhokpor emailed Mr McFall a copy of the proposed text for the advertisement for the post of TM in TransPlant. The email was at page 1571 and the text of the proposed advertisement was at pages 1572-1575. It contained these three bullet points under the heading “Experience”:

- Basic fault finding and problem solving experience
- Time served Apprenticeship or previous experience in a mechanical or electrical discipline including formal qualifications.
- Potential for obtaining certification for job skills and safety procedures etc as may be required (desirable)”.

24 The text of the email enclosing that draft text for the job advertisement was this:

“Hello Stacey,

I have booked a call with my Colleague for 8.30am tomorrow. After that, I will have a clearer picture of what Interviewing for the role entails. Then I will send a complete campaign planning email.

In the meantime, I have attached the job advert for you to take a look at. If you’re happy with it, we can advertise tomorrow.”

25 On the next day, 11 March 2020, Ms Emorhokpor sent the email on page 502 (repeated at the bottom of page 507) to Mr McFall, which was in these terms.

“Hello Stacey,

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Further to our conversation, my Colleague Rose will be handling your TM role for you.  
She will be in contact regarding Candidates for the role.

I have attached your JD.”

26 The job description which was apparently intended to be the one which was enclosed with that email was at pages 503-506, but the software which had been used to compile the bundle had stripped out the essential text of that document. The parties agreed that the actual text was at pages 660-661, which contained the same words as those which we have set out in paragraph 23 above under the same heading of “Experience”.

27 Mr Stacey said this in paragraph 49 of his witness statement:

“On or around 11 March 2020, I spoke to Anne Emorhokpor, about the recruitment of the TransPlant Train Maintainer. During my conversation with Anne Emorhokpor, she explained that there was already a pool of candidates who had applied to LUL for Train Maintainer vacancies as part of a separate LUL high volume recruitment exercise for Fleet Train Maintainers that could be called upon as and when vacancies arose across the Fleet network. At this point, I did not know anything about the previous recruitment process which had been undertaken. It was suggested to me that this was a sensible place to start in terms of an existing pool of candidates, rather than starting a new recruitment advertisement and process which I had previously assumed would be the route we would follow. This seemed sensible to me. I therefore agreed that we could interview the candidates in the pool for the Transplant Train Maintainer roles.”

28 At 10:31 on 11 March 2020, Ms Horton (Ms Emorhokpor’s “Colleague Rose”) wrote to Mr McFall in an email, asking him for information about the role of TM in the TransPlant team based at the respondent’s Ruislip depot. He responded at 16:21 on that day with the information which she had sought. Those emails were on pages 530 and 531.

29 On the following day, 12 March 2020, Ms Victoria Bayley, whose job title was “Resource & Capability Development Manager (Business Partner)”, sent an email to Mr Graham Daly, whose title was “Head of Operations” for the “Compliance, Policing & On-Street Services” of the respondent. The email was in the following terms (the email was at page 508):

“I know you did some great work on making the Operational Officer adverts more appealing to women and people who needed flexible working arrangements.

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My R&E Director (Tim Morrison) wants to do the same for our roles at Transplant which are Train Maintainers etc – do you have any guidance on how to make the adverts more diverse?”

30 In the evening of that day, Mr Daly sent the email in the middle of page 508. It was in these terms:

“Hi Victoria

Attached is a lessons learned document we prepared regarding the recruitment of the TPHC officers.

Getting adverts right is very important, because there is a simple formula of the percentage of women who are recruited typically correlates with the same % who apply.

Increase interest and application is a very important step in increasing the recruited numbers.

Some things we did:

- Stated clearly in the adverts that we wanted to reflect the diversity of London and that we are under-represented by women so we would welcome applications
- Showcase women in the adverts
- Accompany the advert with something like a day in the life profile of a train maintainer who is a woman.
- There are some tools (HR will advise if still in use) to help write gender neutral jobs adverts and some useful online decoders. See:  
<http://www.womeninrecruitment.org/article/writing-gender-neutral-job-ads-23.aspx>”

31 The “Lessons learned” document was at pages 509-519. It contained no indication that the respondent had in the recruitment process for “TPHC officers” waived any essential requirement for the post which it had previously applied.

32 At 10:21 on 13 March 2020, Ms Rawinska was sent the email at pages 526-527 from [onboarding@tfjobs.co.uk](mailto:onboarding@tfjobs.co.uk). The email was, however, sent by (it said) “Pat Holt On behalf of Rose Horton”. That email started: “Dear Elzbieta, Further to my telephone call I am pleased to say I now have details of the first posts available. Details are as follows.” The details were for the post of TM at Ruislip, on grade TM45, with a shift pattern of “Permanent days (Monday-Friday)”. Ms Eltahawy was sent an email in the same terms at 10:26 on the same day, 13 March 2020. It was at pages 520 and 521.

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- 33 On 13 March 2020, at 11:39, Ms Bayley forwarded to Mr McFall “FYI” the email and its attachment to which we refer in paragraphs 30 and 31 above.
- 34 At 16:24 on that day, Mr Stacey sent Ms Bayley the email at the top of page 507, which was in these terms:

“Hi Victoria,

As discussed please see below reference the TM position, I am not fully familiar of the LUL recruitment process, however if there is a pool of candidates that have passed a previous recruitment process then I would see the logic in them being automatically selected for interview prior to advert to ensure suitability for the role.

I understand that the candidates in the pool may have interviewed for a TM role on another line and although similar in description, TransPlant is different in that we have such a varied stock and are somewhat more engineered focus we need to ensure the candidate is suitable for the specific role.

Happy to discuss on Monday for clarification on next steps.”

- 35 There was nothing in the documents on pages 508-519, including the emails to which we refer in paragraphs 29 and 30 above, which could have put Mr McFall on notice that the respondent had in the recruitment process which led to the claimants being offered the role of TM waived the previous requirement of experience of the sort set out in paragraph 23 above. In fact, at that time, we concluded from both his oral evidence (both that which was given in cross-examination and what was in paragraphs 49-54 of his witness statement) and the documents to which we refer in paragraphs 22-31 and 33 above, Mr McFall did not know that there had been such a process. For the avoidance of doubt, after careful and cautious consideration, we accepted in its entirety the passage in his witness statement at paragraphs 49-54.
- 36 Mr McFall was pressed firmly by Mr Toms in cross-examination on Mr McFall’s evidence in paragraph 57 of his witness statement that he only on 16 March 2020 “became aware that candidates may have been offered jobs in TransPlant without [him] first being consulted”. Mr Folan was at that time the Interim Depot Manager at Ruislip Central Line Fleet. Mr McFall said that he first spoke to Mr Folan about the offer of the post of TM to what Mr Folan referred to as members of his team on 16 March 2020. Mr McFall said that he sent the email at page 507 when he was working at home, sitting in his summerhouse. He remembered working at home on that day because it was unusual for him to do so and it was the start of the Covid-19 lockdown period: before the imposed lockdown, when the situation was (as he put it in cross-examination) “just

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starting to ramp up”. He said that he first spoke to Mr Folan about the situation when he (Mr McFall) was in the Ruislip depot, on Monday 16 March 2020.

- 37 There was at page 530 a copy of an email from Ms Horton to Mr McFall sent at 15:15 on 16 March 2020. Its text was this:

Hi Stacey,

Just tried to give you a call, Victoria mentioned you have some questions / concerns. Let me know if you're free today before 4.30pm, or I'll be back online tomorrow from 8.30am.

Many thanks,

Rose”

- 38 It was put to Mr McFall by Mr Toms that those “concerns” were about the fact that female administrative staff at the Ruislip depot had been appointed to the role. Mr McFall said this in response (as noted by EJ Hyams):

“My concerns were that Rose had offered jobs to people that I did not know or have any information about and without my authority; it was not who they were but about their CVs.”

- 39 Mr McFall said this in his witness statement about that conversation.

“57. On 16 March 2020, I first became aware that candidates may have been offered jobs in TransPlant without me first being consulted. I found this out from Andy Folan, Ruislip Depot Manager. At the time, the COVID pandemic was escalating quickly and on 16 March 2020, the Prime Minister [sic] released a statement that it was time for everyone to stop non-essential contact with others and to stop all unnecessary travel. Therefore everyone's focus was on putting in place appropriate measures to address the situation. I was speaking to Andy Folan on 16 March 2020 over the telephone about such measures when he mentioned to me that he had been approached by two members of his team who had stated that they had been offered roles as day shift Train Maintainers at the Ruislip Depot, assuming the positions were within Fleet. Andy Folan said that he did not have any day shifts which were out for recruitment and asked if I did. I confirmed I did but had not authorised any offers to be made and I would look into this further.

58. I emphasise that Andy Folan did not refer to the candidates by name. Neither did he refer to them being female or provide any other details of their current roles other than they were part of his team.

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Our conversation on this issue was very brief given our focus was on the COVID pandemic.”

40 Mr Folan’s witness statement contained this passage.

- ‘24. When I started working at the Depot, Nadine Eltahawy and Elzbieta Rawinska (together “the Claimants”) were both working as Administrators within the Depot. In 2019, the Claimants informed me that they were applying for the roles of Train Maintainers and asked if I could provide any guidance on competence based interviews. I agreed to do so and I held ‘1-2-1’ sessions with them on how to approach and conduct competence-based interviews. I assisted with the construction and structure of their example competencies, how to answer questions and what to look out for.
25. On or around 13 March 2020, I overheard the Claimants speaking to a few other members of staff within the Depot. I understood from the conversation that the Claimants were excited about the fact that they had secured roles as TMs. I also gathered from the conversation that they believed that they would be working as TMs on day shifts within the Fleet team in the Depot. However, I did not have any vacancies for such roles within the Depot. I therefore spoke to the Claimants about this and said I would investigate the matter further if I could.
26. During March 2020, the COVID pandemic was rapidly developing, and steps were being taken across LUL and TfL to put in place appropriate measures to address the situation. I am the Landlord for the entire territory within Ruislip Depot environs and I have numerous tenants and large operations within this remit. I had set up a regular group of senior representatives of tenants and Fleet core management, to review covid crisis measures on a regular basis.
27. On 16 March 2020, I was speaking to Stacey McFall, Maintenance Performance Manager, who works within the Transplant team within the Depot, about the COVID measures he was putting in place – as per my request for all my tenants. During our call, I took the opportunity and explained that I had two people here in my part of the business, who believed that they had been offered roles as TMs within Fleet at the Depot working day shifts. I explained that I did not have any vacancies for such shifts so was trying to understand what had happened. I asked if he therefore had any vacancies for TMs working day shifts. Stacey McFall confirmed that he did, but that no offers would have been made to any TMs. Stacey McFall explained that the recruitment process had only just started, and he had not interviewed any applicants. He asked if I had any information about the recruitment campaign which had led to the job offers and I said



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no, but maybe a mistake had been made. Stacey McFall said that he would have to investigate the matter.

28. At no point during my conversation with Stacey McFall did I provide him with any information about the Claimants. He did not ask for it, he was only interested in how anyone can be recruited without Transplant business input. I only referred to two people that worked in my part of the business who said they had been offered jobs at Ruislip Depot. Stacey McFall did not ask any questions about them, and it was clear his only concern was the fact that individuals were being offered roles without his knowledge or input.'
- 41 Both Mr McFall and Mr Folan were adamant when pressed in cross-examination that when they spoke on 16 March 2020 Mr Folan did not mention the claimants by name or by description, such as that they were members of the administration team at the Ruislip depot.
- 42 There was reason to doubt the reliability of the evidence of Mr Folan. That is because of the factors and evidence to which we refer in paragraph 67 below. However, having taken those factors and that evidence into account, and having considered with great care the reliability of the evidence of both Mr Folan and Mr McFall (including by taking into account the many assertions made on behalf of the claimants about the reliability of that evidence; for the sake of relative brevity we do not refer to them all in these reasons), we concluded that Mr Folan did not say who the two members of his team who had been offered the role of TM in TransPlant were, and Mr McFall did not ask who they were. We accepted Mr Folan's evidence, which was borne out by what Mr McFall said. While we bore in mind the fact that the manner in which a witness gives evidence is often not a reliable indicator of the truth of what they are saying, in this instance we did find it helpful to have seen and heard both Mr McFall and Mr Folan give evidence. We could see that Mr Folan was genuinely unhappy about the fact that the respondent had in the advertisement for the role of passenger fleet TM waived the requirement for experience of the sort which is set out in paragraph 23 above. That unhappiness was the result of the fact that he had formed the clear view (which for the reasons that we give in paragraph 97 below we accepted was objectively justified) that it was contrary to at least the short-term financial interests of the respondent to do so. Mr McFall was at the same time unaware that the respondent had waived the requirement for the experience described in the extract set out in paragraph 23 above, and had genuinely expected to interview anyone who was put forward as a candidate for the role of TransPlant TM. Thus, he was assuming that whoever had been appointed had the necessary experience, but he nevertheless thought that he should have been given an opportunity to say "no" to their appointment if he was not satisfied after interviewing them that their appointment was appropriate.

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- 43 Mr McFall described what happened after he spoke to Mr Folan on 16 March 2020 in paragraphs 59-64 of his witness statement. Those were also highly material. Paragraph 59 was in these terms.

“As an immediate reaction to what Andy Folan had told me, I spoke to Victoria Bayley to raise my concerns and she said she would contact Rose Horton. Rose Horton subsequently contacted me by leaving me a voicemail message and then sending me an email on 16 March 2020 (page 530). [We have set that email out in paragraph 37 above.] In my email of 17 March 2020, I explain to Rose Horton that I was concerned people were being offered jobs without first coming through me as the employing manager. I pointed out to her that I have a duty of care to ensure that the candidates have the necessary skill sets to carry out the job safely (page 529).”

- 44 That email of 17 March 2020 was sent by Mr McFall at 08:50. In it, he said this:

“Hi Rose,

Yes if you could call me when you get the chance, I am receiving info suggesting that people are being offered jobs without first going through me as the employing manager.

Hopefully the above is not accurate as I would not be in a position to agree given the safety element of working within TransPlant, I have a duty of care to ensure that any candidate has the necessary skill set to carry out the job safely.”

- 45 Mr McFall’s witness statement continued:

“60. I then had a telephone conversation with Rose Horton on 18 March 2020 (as Rose references in her email on page 528). I was shocked to find out that individuals had been offered roles as Train Maintainers in TransPlant without any involvement on my part. I reiterated that as the employing manager, I needed to review the candidates to see if they were potentially suitable for the roles. Rose Horton said that this was fine and agreed to dig out the candidate packs (which would have included their CV and applications, assessment paperwork and scores). The whole situation was extremely frustrating, given the efforts I had previously gone to in agreeing a detailed job description and the communication with Victoria Bayley about the differences between the two roles.

61. Rose Horton did not tell me who the candidates were, nor whether they were male or female, nor anything about them at all. My initial thought upon understanding that roles had already been offered was

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that I needed to determine their level of skill and experience, following which interviews would hopefully take place. Given the pandemic, it was not clear whether interviews could take place in the near future. I also asked Rose Horton to confirm to the candidates that they had not actually been offered the roles.

62. Following our telephone call, Rose Horton sent me the anonymised scores of each of the candidates who had been offered the roles (page 528-529). Again, I was not told any details about the names, gender or background of the candidates at this stage. Again, Rose Horton did not tell me anything about who the candidates were. I now see that she confirms that she did not tell me anything about who the candidates were in emails to the two Claimants on page 548.
  63. Rose Horton also explained that due to remote working, she was unable to send me the assessment packs. Given that I had no involvement in the volume recruitment campaign for Fleet Train Maintainers, the scores which Rose Horton sent meant very little to me.
  64. I subsequently responded to Rose Horton's email on 24 March 2020 to thank her for the information, to confirm that we should discuss next steps once we were back to normality and to ask that, as we had discussed, she ensure that the candidates were informed that they had not actually been offered the roles (page 539-540). By this point, in light of the pandemic, all recruitment had been put on hold. It was envisaged at that time that we would hopefully go back to normality fairly soon."
- 46 We saw that at page 548 there was an email from Ms Eltahnawy to Ms Horton (copied to Ms Rawinska) sent at 11:03 on 24 March 2020 in which Ms Eltahnawy asked whether Mr McFall was aware "that it would be us taking the TM roles in the future? (I have been told that he pops across to the Depot from time to time so in that case I would introduce myself)."
- 47 On the same page there was a copy of Ms Horton's reply, which she sent very shortly afterwards, at 11:07 on 24 March 2020, in which she said:
- "I've not told Stacey that it would be you two in the positions. If you'd like to approach him and have a chat, I'm more than happy for you to do so."
- 48 The claimants did not do that. Instead, at 12:09 on that day, in the text at pages 545 (which was not shown to have been read) and 546 (which was shown to have been read, but when it was read was not shown), sent to Mr Paul Davis,

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who was the head of the part of the respondent's operations in which Mr McFall was employed, Ms Eltahrawy said this:

"Hi Paul, how are you? Hope all is going well during these crazy times. Hope Kirsten is keeping well health wise. Just to let you know that I was successful with The TM role. Guess my location?! Transplant at Ruislip! My colleague was successful too. They can't give us a start date due to the current situation but hopefully In the near future"

- 49 At 12:50 on that day (still on 24 March 2020), Mr McFall sent the email at pages 539-540, in which he said this.

Hi Rose,  
I hope you are well given the current crisis we are experiencing. Thank you for the below information, once we are back to normality I would suggest that a sit down meeting to discuss and agree next steps would be prudent. Also I know that you said that the candidates would be informed that they have not actually been offered the role as per our discussion. Can we please ensure that they receive this information as I would not like to think people are presuming they have role when it is not thee [sic] case. All the very best and stay safe."

- 50 At 13:05, Ms Horton responded in the email at page 539, in which, so far as relevant, she said this:

"I've told the candidates that the role is on hold for now, and we may will be [sic] reviewing things once business has picked up. Once we're back in business, I'll bring their CV's, scores and interview packs with me to our meeting. To confirm – they are interested in the offer and would like it, but they have not been sent any contracts or offer letters."

- 51 We pause to say that that was misleading given what we say in paragraph 32 above. It was technically correct if one regarded a letter as being different from an email, but it was not correct that the claimants had not by then been offered the role of TM at Ruislip on grade TM45, working permanent day shifts.

- 52 We add, however, that Ms Eltahrawy's evidence was that Mr Davis had previously responded to any communication which she had sent him but that he did not respond to the text at pages 545 and 546 which we have set out in paragraph 48 above. We accepted that evidence. We also accepted the evidence of Mr McFall, however, in paragraph 68 of his witness statement, that he "had no knowledge of this text message" and that he "did not receive any call or communication from [Mr] Davis about the text message." In cross-

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examination, Mr McFall said that Mr Davis “never discussed recruitment” with him, “at all”. We also accepted that evidence of Mr McFall. We concluded that he was telling the truth when he said, at the end of paragraph 68 of his witness statement, “that [he] did not know who the candidates were at this point”.

**The period after March 2020 until the claimants sent written grievances to the respondent**

53 The first compulsory period of lockdown because of the Covid-19 pandemic had the result that it was only in July 2020 that the possibility of recruiting to the post of TM in TransPlant at Ruislip was again raised. It was so raised by Mr McFall, as he said in paragraph 70 of his witness statement. Mr McFall said in that paragraph that he received approval to progress the recruitment campaign for four TMs, and we accepted that evidence. In paragraphs 71 and 72 of his witness statement, which we also accepted, Mr McFall said this:

“71. During August 2020, I was in conversation with Rose Horton by telephone and e-mail, picking up where we had left off and discussing how to progress with the recruitment (pages 578-586). I was clear with Rose that I had to be satisfied that any candidates from the existing pool satisfied our suitability criteria and had the necessary skills and experience. We discussed that I would want to assess that suitability through an assessment/interview (which would include technical questions). We agreed that Rose Horton would contact the candidates who had previously been selected for the roles, and others who were in the pool, to explain the difference in the two roles and that an assessment process would need to be followed. Rose Horton would then ask whether they wanted to be considered for the TransPlant roles. I now see that emails did go out to the Claimants on 17 August 2020 (page 564-565). All this kind of correspondence is handled by Recruitment and I did not see those emails.

72. I was expecting to receive from Rose Horton the CVs, assessment criteria and outcome from the Fleet recruitment exercise (including the two Claimants who had been offered roles in error) ahead of the assessment process. She did send me those details for two external candidates in the pool, but said that she could not send me the CVs of the two internal candidates (the Claimants). She was unable to explain why that was (page 578).”

54 The emails at pages 564 and 565 were the subject of the claims of direct discrimination because of sex and harassment within the meaning of section 26 of the EqA 2010. They were sent by Mr John Milewski, whose job title was “Senior Candidate Care Specialist”, and were in these terms:

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“I write further to your successful application for Train Maintainer - 031680.

A few months ago, you were contacted by Rose at TfL and Pat at Capita about a Train Maintainer position arising in the Ruislip depot. After further consulting with the hiring manager and HR, there are some key differences between the roles, and as such an interview and assessment will be required.

The key differences between the Trans Plant Train Maintainer role and Asset Ops Train Maintainer position are the vast stock variations. Trans Plant vehicles are varied and have a range of electrical, pneumatic, diesel and hydraulic systems to maintain. Therefore, TfL expect a successful candidate to have the relevant knowledge and experience, which needs to be demonstrated in your CV and subsequent interview.

The interview will, along with competence questions, include technical questions relating to electrical and mechanical principles as per the requirements in the attached Job Description.

Please let us know by email to support@tfljobs.co.uk if you would like to be considered for this alternative role. If you would prefer to remain on the waitlist for the role you originally applied for, again, please let us know your preference by email.”

- 55 On 21 August 2020, Ms Eltahawy sent the email at pages 566-567 to Mr Milewski, expressing concern at the content of his email which we have set out in the preceding paragraph above, and including this passage:

“Why would Transplant be any different to any other section of LU as the new recruits would be LU and not JNP, BCV, SSL or Transplant – just LU. I don’t believe any other section of LU would require these extra assessments or the need to look over past experience for successful TM applicants as I’ve never heard of or experienced it before.

This leads me to the part where you must forgive my cynicism and I do apologise for it, but I am interested in knowing, would it be because the two of [sic] us are both women? It just seems strange that two successful applicants are being treated differently to how previous TM applicants have been treated and seems to go against LU’s policy on inclusion.”

- 56 The email from Ms Horton to Mr McFall at page 578 was sent also to Ms Bayley. It was dated 27 August 2020, and it started in this way:

“Morning Victoria,

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Right now I cannot disclose the CV's to yourselves, and I cannot give you rationale as to why."

- 57 On 7 September 2020, the claimants sent the grievance emails at pages 593-595 and 596-598. They were in the same terms. The both stated that their desired outcome was to be "permitted to take up the train maintainer position that I was offered at Ruislip".
- 58 Mr McFall's witness statement described what happened subsequently as far as he was concerned in the following passage.

"73. In or around 18 September 2020 I received a telephone call from Samantha Curniffe (Senior HR Business Partner) who explained to me that the two Claimants were raising grievances about the fact they had been offered Train Maintainer roles in TransPlant and were now being required to go through a new assessment process. Samantha Curniffe did not provide the Claimants' names but did say they were alleging that they believed they were being discriminated against because they were women. I responded to ask how the situation could amount to sex discrimination when I had not previously known they were women. To confirm, I only found out that the Claimants were women during this telephone conversation with Samantha Curniffe.

74. I also explained to Samantha Curniffe that I had been expecting to receive the candidate packs for these individuals previously and that if she were able to send them to me, together with the assessment materials used in the Fleet process, I could review and assess whether the individuals were suitable, notwithstanding that they should never have been offered the roles in the first place.

75. At Samantha Curniffe's request, Rose Horton did subsequently provide the information later that day (page 636-638). She provided the assessment materials on pages 336-376 and the CVs and covering letters of the two Claimants (439-440 and 446-447). The body of Rose Horton's email also contained their scores.

76. It was immediately apparent that the Claimants did not have any prior experience in a similar position or in a mechanical or electrical discipline. They had not undertaken apprenticeships and neither did they have any formal qualifications in relevant disciplines. Both Claimants were working in administrative roles at Ruislip depot and had a background in administration and customer service. They did not meet the suitability criteria for the role. I subsequently spoke to Rose Horton to confirm this and she asked me to justify the requirement for experience in the Train Maintainer roles at

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TransPlant. I explained by phone that safety was paramount, and that one needed prior experience in a similar position to perform the role safely. I explained that the Claimant's did not have the relevant experience as set out above. I also explained that the training in TransPlant does not cover the core skills required to carry out the role. Rose Horton then followed up by e-mail (page 646) asking the same questions again and to respond to the alleged discrimination.

77. At this point I must say that I felt more than a little frustrated that I was being asked to justify the essential requirements of the role when the issue arose in the first place because an error had clearly been made by the Recruitment team in offering the role to candidates who didn't meet the essential criteria set out in a job description that had been discussed and finalised in conjunction with colleagues in Recruitment. The suggestion that the job offers had been withdrawn due to the candidates being female was nonsense and that should have been immediately apparent to Rose Horton, not least if she had looked back at the job description which had been agreed with me. Rose was well aware that she had kept the personal details of the candidates confidential (i.e. not shared with me at all) throughout all our discussions. I did not know they were female (via Rose or anyone else) and this had no relevance whatsoever. I am fully supportive of the aim of attracting more women into Train Maintainer roles and other roles in TransPlant. I would have been delighted to consider the Claimants for the roles if they had the relevant skills and experience.
78. I spoke to Samantha Curniffe again and expressed my frustrations. Samantha Curniffe's subsequent emails with others are on pages 644-646. I then provided responses to Rose Horton's email on 24 September 2020 (pages 648-649).
79. I can see that Rose Horton responds to the Claimants explaining the position, in response to their complaints, on 25 September 2020 on pages 655-656. Again, I did not see that correspondence until preparing this witness statement. I can see that she has attached to those emails, a copy of the job advertisement for the TransPlant Train Maintainer (page 660-662), in line with the job description that I had previously approved on 2 March 2020. I see that the Claimants draw attention to the fact that this role had a different job vacancy number – 033825 to the Fleet Train Maintainer job vacancies (as part of the volume recruitment campaign). That was appropriate because it was a different job with different job description.
80. I was later interviewed by Edward Rowley, as part of a grievance process. The notes of the interview are on page 719.



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81. We have since recruited three new Train Maintainers from the TransPlant recruitment campaign, all of whom are male. The first Train Maintainer was appointed to the role internally on 19 November 2021 following medical redeployment. Following the recruitment campaign for the role, we selected three individuals to attend an interview. A copy of the interview schedule is at pages 776-777. Two were male (Applicants A and D) and one was female (Applicant C). They had all completed apprenticeships in an engineering discipline and had all achieved a NVQ Level 3 in an engineering discipline (pages 1559-1561, 1564-1566).
82. Only Applicant D passed the interview process. Applicants A and C had not carried out apprentices [sic] in Train Maintenance and did not demonstrate in the interview the appropriate skills or knowledge to carry out the role. Applicant D commenced his role on 8 February 2021. Another apprentice, Applicant B, who had carried out his apprenticeship within Train Maintenance was offered the role without an interview as per the apprentice roll off procedure and we were already aware that he could carry out the role competently. A copy of his CV is at pages 1562-1563. He commenced his role on 22 February 2021.”
- 59 We accepted that passage in its entirety. It was in fact not challenged except that it was put to Mr McFall that he did in fact know long before 18 September 2020 that the candidates who had been offered the role of TM in TransPlant were women and that they were the claimants. However, given our conclusion stated in paragraph 52 above, and having heard and seen Mr McFall give evidence, and bearing in mind the email at page 578 which we have set out in paragraph 56 above, we concluded that he was genuinely unaware that the candidates who had been offered the role of TM in TransPlant were (a) women and (b) the claimants until 18 September 2020.
- 60 We also concluded that Mr McFall would have taken precisely the same stance as he did in fact take towards the claimants if they had been men in a comparable position, i.e. members of the respondent’s administrative staff who did not satisfy the experience requirement set out in paragraph 23 above.

**The manner in which the claimants’ grievances were dealt with on behalf of the respondent and the evidence relating to the justification for requiring relevant experience of mechanical or electrical engineering**

The grievance investigation

- 61 Mr Rowley was given the task of investigating the claimants’ grievances. He had not before then carried out a grievance investigation. He interviewed the

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claimants in a joint meeting with them on 3 November 2020. He did not have a note-taker present, and his notes of the meeting were brief. As a result, the claimants supplemented those notes with extensive additions, to which he was happy to agree. The supplemented notes were at pages 690-706. We took all of those notes into account. We saw that Ms Rawinksa had said (as recorded on page 702) this:

“Now it seems it has been ‘a funny campaign’ as I have heard that description used by people in the depot, so we are coming from the funny campaign where people have no experience as full training will be provided to them.”

62 Mr Rowley interviewed Mr McFall on 13 November 2020. The notes of the meeting were also brief, but they were informative. They were on page 719. In Mr Rowley’s witness statement he summarised what Mr McFall had said, but we focused on the notes at page 719, on the basis that they were likely to be the most accurate record of what Mr McFall said at the time. So far as material, we noted the following passages of those notes.

62.1 “Asked for explanation of differences between Fleet TMs and Transplant TMs. Stacey [i.e. Mr McFall] explained that he felt there were significant differences between the two positions, the type of equipment worked on and how this was carried out. He also noted that typically new TMs get 3 weeks training before being expected to contribute as a capable part of the team with the experience and skills as per the JD [i.e. the job description] already obtained from previous work experience.”

62.2 “Asked whether Stacey would consider the candidates working in the positions on a secondment basis. Stacey said he wouldn’t feel comfortable with people without experience (as required by the JD) in that position.”

62.3 “Made it clear that allegations of sexual discrimination had been made. Stacey said this was not the case, he was an advocate of women joining his team, he had had women apprentices through the team and had tried to secure this apprentice in the team. Upon reviewing the two CV’s in question it was very apparent that the skills and knowledge did not meet the JD criteria and therefore they were not in a position to be interviewed. Stacey indicated that he had a duty of care for all staff within his area and that the skills/knowledge and skill sets were key when employing staff.”

63 Mr Rowley interviewed Mr Folan, but, he said in paragraph 11 of his witness statement, because his conversation with him was brief, he did not make a note of it. He continued in that paragraph:

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“Andy Folan explained that he had become aware that the Claimants had been offered Train Maintainer roles and took steps to find out where they had been placed. He said that the Claimants were excited about the roles and were having a jovial conversation with some of the Train Maintainers about this in the Depot. Andy Folan did say that he heard one Train Maintainer ask what they would do with their nails.”

64 Much of the rest of Mr Rowley’s witness statement contained a description of the content of the report which he made of his investigation of the claimants’ grievances, which included his recommendations arising from that report. The report itself was, however, sufficiently self-explanatory for us to refer only to the material part of the content of the report, which we do in paragraphs 79 and 80 below. Before doing that, we record that Mr Rowley’s witness statement contained the following additional material paragraphs.

“13. I also spoke to Michael Cuthbert, Senior Business Partner, Skills Development, who oversees the training provided to Train Maintainers. Michael Cuthbert confirmed that Fleet Train Maintainers normally needed experience before being selected for interview but that the bar had been lowered for one recruitment campaign. It was Michael Cuthbert’s view that all Train Maintainers, whether for Fleet or TransPlant needed experience in engineering to be able to carry out the role without requiring a significant amount of training.

14. I also asked Glen McCormick if he thought there was any significant difference in the role of Fleet Train Maintainer and TransPlant Train Maintainer and he said no, not a significant difference. I also spoke to Glenn McCormick and Paul Downham, Head of Fleet, about the lack of experience and qualifications to carry out the role of Fleet Train Maintainer and they both also had similar concerns to Michael Cuthbert.”

Mr Folan’s evidence in relation to the justification for imposing a requirement that new TMs have relevant engineering experience

65 The final paragraphs of Mr Folan’s witness statement in its final form were these:

“32. The Claimants subsequently joined the Fleet team at the Depot as new-starter TMs in November 2021. I was not privy to the decision to offer the Claimants TM roles and was only informed verbally over the phone. Upon joining my teams, they were assigned to work within the lift shop team.

33. The lift shop team is a subdivision of the planned maintenance team. Therefore this team only carries out planned maintenance and does

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not need to carry out casualty repairs which involves identifying and fixing a fault within the train. The tasks which the lift shop team are responsible for are set out in the document at page 1540 of the bundle. The tasks include the removal and refit of traction motors, the removal and refit of wheelset, the removal and replacement of half-tubes (traction current shoe gear), greasing axles and the remove and recoupling of bogies.

34. While drafting my witness statement, I have become aware that the job description for the role the Claimants applied for stated that Fleet TMs have 12 weeks to pass the training course otherwise the job offers would be withdrawn (page 814). I was not made aware of this and was not involved with the recruitment campaign in any way whatsoever. My understanding was that the two Claimants were given internal transfer status and therefore had no probation period in respect of their roles as TMs.
35. The Claimants have been provided with both classroom training and on the job training. A copy of their training records as at the beginning of August 2022 is at pages 1540-1541. The Claimants have not yet completed all the training they are required to undertake to be fully competent TMs, despite having been in the role for around nine months. I had previously understood, as set out in an earlier version of my witness statement which was disclosed ahead the hearing listed from 19 September 2022, that the Claimants' progress as TMs was illustrative of the difficulties in employing TMs without any previous experience or qualifications. However, I now understand that their progress as TMs is at least in part due to disruptions in the training programme. It is therefore not possible to determine to what extent their progress may have been impacted by their lack of experience.
36. I am aware of a further employee (Employee A), who was recruited as a TM within Fleet as part of the 2019 high volume recruitment campaign whose employment was terminated for not passing competency assessments, despite having experience as an engineer. A copy of Employee's job application is at pages 1547-1556, a copy of his CV is at pages 1595-1603, and a copy of his training record is at pages 1557-1558. As can be seen from the training record, Employee A undertook training as a TM from 30 November 2021 until 26 April 2022, which is a total of almost five months.
37. I understand that LUL has now reverted back to requiring TMs who join Fleet to have either undertaken an engineering apprenticeship, or have previous experience within an engineering job role. This can

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be seen from the job description at pages 928- 933 which was prepared for a recruitment campaign in January 2022 under the “Experience” section as well as the job description at page 938 which was prepared for a recruitment campaign in August 2022.

38. After discussions with training colleagues, I believe it would be very difficult for TMs without experience in an engineering discipline to work as TMs within Transplant and be able to learn all the different tasks which they would need to carry out on engineering vehicles within a reasonable amount of time. It is likely that it would have taken many months, if not longer, before they could contribute meaningfully to the team.”

66 The document at page 814 to which Mr Folan referred in paragraph 34 of his witness statement had in it this section:

#### **“Training**

Appointment to the post is subject to successful completion of a full-time training course which will [word missing; presumably “last”] up to 12 weeks (dependant on experience) to complete depending on licences currently held, including classroom based training and live station training. Candidates who do not pass the training will have their offer of employment withdrawn.”

67 Mr Folan had originally depicted Employee A to whom he referred in paragraph 36 of his witness statement as someone who had not had any engineering experience. Mr Toms said that the claimants had then asked for the disclosure of the training records relating to Employee A and it became clear that Mr Folan had misstated the position. Much was made of that misstatement on behalf of the claimants, and we ourselves were unimpressed by it, if only because it showed a lack of attention to detail. Mr Folan explained it by saying that he had not wanted to look too closely at the evidence as he was hoping that the claimants’ cases would be settled and that Employee A was managed by someone else, as he worked in a different business area. He said, too, that he “maybe hastily assumed that he did not have a train background.” In fact, however, the erroneous evidence was not more helpful to the respondent than the reality. That is to say, the truth was more helpful to the respondent’s case than the erroneous evidence. That was because if a recruit with relevant engineering experience might fail to be kept on despite having had five months’ training, then that supported the respondent’s position that it was a proportionate means of achieving a legitimate aim for a new recruit to the TM team to have relevant engineering or electrical experience.

68 When giving oral evidence, we concluded that Mr Folan was (as we say in paragraph 42 above) genuinely unhappy about the waiver by the respondent of the requirement for engineering or electrical experience in a candidate for the

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role of TM. When he was being cross-examined on the claimants' apparently very satisfactory training records, and on the email of 16 December 2021 from Mr Steve Stratton at pages 1633-1635, which was copied to Mr Folan, he said that the training which the claimants had been given had been put in place to give them what he called the "foundational knowledge" that anyone who had the previously-required (and subsequently-required) engineering or electrical experience would already have. The email started with this text:

"I am writing to ascertain the current position of the x2 new starters skillset to date. The idea was that the below training would be completed and then a 'circuit breaker' of training to be put in place so that the new starters could come on shift through the month of January to apply their training to the job. Training would then reconvene in February on other tasks to further continue development. I need to be sure that they are comfortable in an environment outside of training and behave in a manner that allows them to apply their gained skillsets to an acceptable competence level without putting themselves or others at risk."

- 69 The claimants said that the respondent had employed four male TMs at Hainault who had not had previous engineering or electrical experience, and Mr Toms said that the claimants' solicitors had sought the disclosure of documents relating to the previous experience of those four TMs but the respondent had said that those documents could not easily be identified and that it was disproportionate to look for them, given that they were (according to the respondent) not material. We were not shown that correspondence. However, while Mr Ashley said that there were four new TMs appointed to work at Hainault, he did not say who they were. It would have been possible for the claimants to identify those new starters to the respondent and the respondent could then with relative ease have disclosed any records showing the experience, the subsequent training and the progress of those new starters. In the absence of that evidence, we could not assess whether or not they were comparable to any material extent.
- 70 When EJ Hyams asked Mr Folan what he knew of those four new starter TMs at Hainault, Mr Folan said that he was not responsible for them, and that he would be surprised if they did not have a technical background. He said that he would say that it would be a strain to take on more than a handful of new starter TMs without relevant engineering experience.
- 71 When he was pressed on the documents in the bundle which recorded the claimants' very successful performance in training, he said this (as noted by EJ Hyams, tidied up for present purposes and agreed by us all; all references to EJ Hyams' notes are to be read in the same way, i.e. as reference to his notes made during the hearing tidied up for present purposes and agreed by us all).

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“I can give you the background. The claimants are very intelligent and able to do the assessments as we go along. They [the assessments] are done in a training environment and only once. There cannot be a time and motion study on this. This is the beginning of something. They get that assessment in a training environment. It is a different thing between then and 3 years to the next one. We have to rely on buddying and mentoring and coaching about delivery in real time in real life.

I am sure that their managers are very proactive. I check regularly with LUSD [the respondent’s training division] for the fleet as a whole and I am glad that they are tipping along and passing every assessment but this is just the beginning. We do not let them on the shop floor just because they have passed their training.”

72 It was then put to Mr Folan that the claimants were put on shifts in January 2021 and he said this (as noted by EJ Hyams):

72.1 “As part of their training programme. They are on shift and buddied and mentored and never once have they been on their own so far. There are only some things they do and they are getting better; but the training event is just the beginning of their learning journey.”

72.2 “Their manager assures me that they are still buddied and mentored all the way through. We cannot give them a task without a buddy even with the things they have been signed off to do. There is a big difference between being signed off and being on shifts; there is a mix of coaching and training on the job; it is how we operate. It is quite old fashioned and I have strong views on that. It is still effective but works in the claimants’ favour. It is slow and ponderous and there is no need to pass. In other parts of the business you have competence based training.”

73 When it was put to him that the records were of such competence-based training, he said firmly that it was not competence-based training. It was, he said, task-based training.

74 It was then put to him that the claimants had on occasion worked on their own, without a buddy, and the example of 29 November 2022 was given. Mr Folan’s response was this (as noted by EJ Hyams):

“Their manager is a direct report to me. They are now always asking for overtime. He needs to see if they could do it. He gave them 2 tasks to do – couple and uncouple – in one shift not mentored. He said that if you can do that then we will give you overtime opportunities. The same thing happened on Thursday. The claimants did not like it. Steve Stratton has said he has to know that others are not buddied up to the claimants, as

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service is paramount. It is reasonable for him to test them; they are not where they need to be yet at 54 weeks.”

- 75 It was not then put to Mr Folan that the claimants had at any other time not been “buddied”. When it was put to him that if the claimants had been appointed to the role of TransPlant TM then they would have been as far advanced as they were now, in their role of Central Line fleet TM, he said this (as noted by EJ Hyams):

“They are a country mile away from their peers. We are no longer accepting people without experience. At an organisational level the trade unions have already been consulted on it and have agreed; they want the bar reinstated for want of a better term until we have a comprehensive package for new starters, a comprehensive competence-based package to sign off. I could take 2 and we are getting by; we are on track and on [target as far as progress is concerned]. At TransPlant without that help, it would have been different. They are among friends at Ruislip and they had a much better chance at the start of their new careers [i.e. than if they had started at TransPlant.]”

- 76 When it was put to him that the trade unions had not sought to change the criteria, he said this:

“We are learning lessons from our misguided and well-meaning attempt to diversify. All stakeholders are going to agree where the shortlisting is going to go; so we are going to temper diversity with background. ... The trade union representatives on Fleet are in agreement that we need to improve how we take on new recruits. ... we have honestly learnt our lessons from the recruitment campaign and it is continuous improvement; we are all going to have direct involvement; there will be no blanket [policy] that anyone can apply.”

- 77 The tribunal asked Mr Folan about the text of the email of 16 December 2021 at pages 1633-1635 which we have set out in paragraph 68 above, and in particular the use of the word “behave”, as that seemed to be an odd word to use in the context. Mr Folan said that he had been as light-touch as possible and that he had merely wanted to ensure that he was kept informed about how the claimants were doing. In regard to the use of the word “behave”, he said that Mr Stratton used it because of his “personality”, and that he reads a lot harsher than what he is; he is very considerate; he needs no stone unturned.” Mr Folan then said this:

“It is a very dirty and dangerous game the lifting road; it is a place that is fraught with danger; having inexperienced people in is a risk. Mr Stratton is sterile, harsh, and super-efficient. He would be worried; there would be hell to pay if anything when wrong.”



78 We accepted all of the evidence of Mr Folan to which we refer in paragraphs 65-77 above.

Mr Rowley's determination of the claimants' grievances

79 Mr Rowley's grievance investigation report and outcome letter were sent under cover of the email of 14 January 2021 at page 785. The letter was at pages 786-787 and the investigation report was at pages 788-791. The email from Mr McFall to Mr Rowley of 7 January 2021 at page 778, enclosing a document in what appeared to be the same terms as that which was at pages 788-791, showed that Mr Rowley consulted Mr McFall on the contents of the report before finalising it and that Mr McFall suggested several amendments to it.

80 The most important parts of the report were the following passages, which were on the pages shown after each quoted passage. The bold text is in the original.

**80.1 "On issue of is transplant TM role sufficiently different to warrant separate JD**

Whilst the roles are extremely similar in nature they do have different JDs as is common in other areas of the business. For example two different project manager positions with the same job title, this does not preclude them from having different requirements. The Transplant positions appear to have consistently had additional experience requirements and therefore these two colleagues are not eligible for these positions despite recruitment's error in thinking they were suitable to be put forward.

**On issue of change to the recruitment process by Transplant hiring manager and issue of Sex discrimination:**

Whilst the hiring manager has acted on hearing that two colleagues who currently have Admin positions at Ruislip have been offered positions, there is no evidence that this was based on their sex but rather their likely lack of relevant experience, which was identified as a requirement in the JD from the beginning of the campaign. The hiring manager initially looked to assess the candidates experience, via another interview, and later confirmed their experience was in-sufficient for the role when their CV's with personal details redacted were provided.

The hiring manager noted he had nothing against hiring women and had attempted to recruit female apprentices to his team.

Whilst not the focus of this grievance, allegations of low level sexist remarks regarding the applicants suitability for the role probably have

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taken place around the applicants current workplace. This may have contributed to a perception that this played a part in the recruitment process - for which I can find no evidence.

**R1: Therefore I do not recommend that your offer of a position is upheld - you do not meet the Job description requirements and should not have been offered the position.” (Pages 788-789).**

80.2 “Having spoken with managers in fleet and training management their normal expectation for new starters (TMs) is that they would train recruits in applying their skills to our assets rather than in the fundamentals or introduction to/use of tools.

Therefore, it seems unhelpful to place the two candidates into permanent roles where there is a chance of them not being successful – better to offer them a secondment position with permanency subject to being competent at the end of the secondment. This is good for the individuals and the organisation.

**R2: I recommend that the two candidates are offered 3-6m secondments with permanency as Fleet Train Maintainers as opportunities become available.” (Page 790.)**

80.3 **“C3: I recommend a review of the Fleet train maintainer JD and recruitment campaign to address a number of concerns this review has found”.**

80.4 The removal of the requirement of engineering experience “appears inconsistent with expectations of training department who expect new starters to have core competence in using tools and general experience in area but will be taught what needs to be done to our assets.” (Page 790.)

80.5 **“R3a: I recommend that recruitment review the standard JD for fleet TMs with training and fleet organisation to re-confirm knowledge, skills and experience required to succeed in the role. This may be informed by the outcome of the trial placement of these two colleagues in positions within Fleet.”**

80.6 **“R3b: I recommend that candidates on the waiting list are reviewed to confirm they do have appropriate experience and I recommend the selection process for future campaigns is also reviewed.”**

81 The claimants were, understandably, unhappy with that outcome. Not only was the promise (which may have been contractual) made to them that they be appointed to the role of TM recommended to be reneged on, but it was recommended that they be merely seconded to the new post. On one level the

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secondment would have been helpful to them. That was because they would (if the secondment had been implemented; and Mr Rowley did not check with the claimants' line managers to see whether it was feasible, so it might not have been possible to implement it in any event) have a job to go back to if they did not make the grade in the intended timescale for becoming fully-fledged TMs. However, the secondment would mean that the respondent might not treat them as serious contenders for a permanent position of TM, and in any event the proposed secondment was just for 3-6 months, which was (unhelpfully to the claimants' cases, in fact, given our findings in paragraphs 68-78 above) not likely to be sufficient for them to be capable of doing the job of TM without a buddy being present. In addition, the fact that the claimants would have had the right to claim unfair dismissal if they had been dismissed from the role of TM meant that the proposal to second them to that role rather than appointing them permanently to it was of less value than it would have been if they had been external appointees.

### **The claimants' appeal against the grievance outcome**

82 The claimants appealed Mr Rowley's determination of their grievances. They did so on 20 January 2021. The appeal was heard on 1 April 2021 by Mr Greg Roach. He was, it appears, unable to determine the grievances for practical reasons: he was referred to in the letters to the claimants dated 21 June 2021 at pages 876 and 880 as being "unavailable". As a result, Mr Marc Perry, the Respondent's Piccadilly Fleet Manager, determined them. Although nominally he dismissed the appeals, he did not act on the recommendation for a secondment. In that regard he said this (on pages 878 and 882):

"In relation to the offer of a secondment as part of the recommendations from your initial grievance, I have sought clarification and the intention was to provide support for your progression into the train maintainer role. The intention behind this offer was to not deter or treat you differently from other successful candidates, however we recognise you are one of few internal applicants that was successful. The intention was to give you first-hand experience prior to your position becoming permanent. However, I understand how this may be negatively interpreted so this will not be taken forward and you should be offered a permanent position as soon as it arises at your preferred location."

83 Mr Perry also said (on pages 879 and 883) that "The recommendations from the initial grievance relating to the Job description and the review of candidates on the waitlist will not be taken forward."

### **Relevant legal principles**

84 Mr Toms' closing submissions included (in paragraph 53a) that "unlike direct discrimination, there is no need for any form of comparator" in a claim of

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harassment. That was in our view mistaken. There is no statutory need for a comparator in either case. However, there is (as we record in paragraph 7.2 above) binding authority for the proposition that in the case of a claim of harassment within the meaning of section 26(1) of the EqA 2010 there is a need for a mental element of the same sort as that which is required for the success of a claim of direct discrimination within the meaning of section 13 of the EqA 2010. That means that in a claim of harassment within the meaning of section 26(1), for conduct to be “related to” the relevant protected characteristic, there must be a connection in the mind of the claimed harasser between the claimed harassing conduct and the protected characteristic on which the claimant relies. Thus, if a comparator were a requirement for one of the two types of claim, then it would also be a requirement for the other type. In practice, it is helpful to have a hypothetical comparator for claims of direct discrimination. Given that a claim of harassment within the meaning of section 26(1) of the EqA 2010 also requires a mental element of the same sort (albeit that one must in considering whether there was such an element apply the words of section 26(1) rather than those of section 13(1)), we concluded that a hypothetical comparator was helpful when applying section 26(1).

85 Section 136 of the EqA 2010 provides:

- “(1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

86 There is much case law concerning the application of that provision, and we refer to some of it immediately below. However, we bore it in mind that (as the House of Lords said in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337) in some cases the best way to approach the question whether or not there has been for example direct discrimination within the meaning of section 13 of the EqA 2010 is by asking what was the reason why the conduct or omission in question occurred.

87 In paragraph (L[807]) in *Harvey on Industrial Relations and Employment Law*, this is helpfully said (the italics being original):

“[T]he complainant must prove facts from which the tribunal *could* conclude, in the absence of any other explanation, that the respondent had committed an unlawful act of discrimination against the complainant. According, to the Court of Appeal in *Madarassy v Nomura International*

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*p/c* [2007] IRLR 246, [2007] ICR 867, CA, ‘could conclude’ must mean ‘a reasonable tribunal could properly conclude’ from all the evidence before it (also restated in *St Christopher’s Fellowship v Walter-Ennis* [2010] EWCA Civ 921, [2010] EqLR 82). That means that the claimant has to ‘set up a prima facie case’. In *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] IRLR 811, [2021] ICR 1263 the Supreme Court said that so far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. The issue in that case was whether adverse inferences should be drawn from the fact that the employer had not adduced evidence to show why the claimant had not been appointed to posts he had applied for, and the court said that whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are, the court said, inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules.”

- 88 Victimization within the meaning of section 27 of the EqA 2010 is similar to direct discrimination within the meaning of section 13 of that Act, and the same analysis needs to be applied when considering a claim of victimisation, with, however, one or more protected acts taking the place of the protected characteristic for that purpose.

#### Proportionate means of achieving a legitimate aim

- 89 Section 19 of the EqA 2010 provides:

“(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B’s if—

- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,

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(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.”

90 In its judgment in *Hardy & Hansons plc v Lax*, as reported at [2005] ICR 1565, the Court of Appeal said this.

‘32 Section 1(2)(b)(ii) [of the Sex Discrimination Act 1975 as it stood at that time; that provision was replaced by section 19(2)(d) of the EqA 2010] requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (*Barry v Midland Bank plc* [1999] ICR 859) and I accept that the word “necessary” used in *Bilka-Kaufhaus* [sic] is to be qualified by the word “reasonably”. That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word ‘reasonably’ reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants’ submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer’s views are within the range of views reasonable in the particular circumstances.

33 The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer’s freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in *Allonby* [2001] ICR 1189 and in *Cadman* [2005] ICR 1546, a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal. In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind, as did this court in *Allonby* and *in*

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*Cadman*, the respect due to the conclusions of the fact finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation. Equally, the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification.

**34** The power and duty of the employment tribunal to pass judgment on the employer's attempt at justification must be accompanied by a power and duty in the appellate courts to scrutinise carefully the manner in which its decision has been reached. The risk of superficiality is revealed in the cases cited and, in this field, a broader understanding of the needs of business will be required than in most other situations in which tribunals are called upon to make decisions.'

- 91 At the end of paragraph L[352.03] of *Harvey* (concerning justification of what would otherwise be indirectly discriminatory conduct within the meaning of section 19 of the EqA 2010), this was said.

"[T]ribunals are helped by the warning given by the EAT in *Birtenshaw v Oldfield* [2019] IRLR 946 that in assessing proportionality they should give a substantial degree of respect to the judgment of the employer as to what is reasonably necessary to achieve the legitimate aim."

- 92 We also found it helpful to take into account the passage immediately following that one in *Harvey*:

"[352.04] Where the PCP [i.e. the provision, criterion or practice] is a general policy which has been adopted in order to achieve a legitimate aim, it is the proportionality of the policy in terms of the balance between the importance of the aim and the impact on the class who will be put at a disadvantage by it which must be considered rather than the impact on the individual. In *Seldon v Clarkson Wright and Jakes* the EAT said: 'Typically, legitimate aims can only be achieved by the application of general rules or policies. The adoption of a general rule, as opposed to a series of responses to particular individual circumstances, is itself an important element in the justification. It is what gives predictability and consistency, itself an important virtue.' This was approved by the Court of Appeal and by the Supreme Court ([2012] UKSC 16, [2012] IRLR 590), where Lady Hale commented on the passage just quoted: 'Thus the EAT would not rule out the possibility that there may be cases where the particular application of the rule has to be justified, but they suspected that these would be extremely rare. I would accept that where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it.'

## **Our conclusions**

### **Direct discrimination because of sex**

- 93 Having found (as stated in paragraph 59 above) that Mr McFall did not know until 18 September 2020 that (1) the persons who had been offered the role of TM in TransPlant were women, and (2) the successful candidates were the claimants, the claims of direct discrimination in paragraphs 5(a)-(c) of the list of issues set out in paragraph 6 above were in part (i.e. paragraphs (a), (b) and the first part of paragraph (c)) bound to fail.
- 94 As for the claim that the communication by Ms Horton on 25 September 2020 (in the emails at pages 655 and 656) of the dismissal of the claimants' initial complaint about not being given the role of TransPlant TM was direct discrimination because of sex, it was clarified by Mr Toms in paragraph 69 of his closing submissions on behalf of the claimants that it was dependent on the proposition that it was based on, or was, a discriminatory decision of Mr McFall. Given our finding stated in paragraph 60 above, we were completely satisfied on the evidence before us that Mr McFall's decision that the role should not be offered to the claimants had nothing whatsoever to do with their sex and was made purely because he genuinely believed that they needed to have the experience that we have set out in paragraph 23 above. Thus, the second part of the claim stated in paragraph 5(c) of the list of issues also had to fail.
- 95 As for the outcome of the grievance investigation of Mr Rowley, however one described the claims of detrimental treatment, the first and in our view here the key question was whether or not what he concluded was to any extent less favourable treatment of the claimants than they would have received from him via that grievance outcome if they had been men. We found the determination of that question rather more difficult. However, in the end we came to the clear view that what Mr Rowley decided and recommended was not in any sense discriminatory because of the claimants' sex: rather, his conclusion was gender-neutral, given that he recommended (see paragraphs 80.3, 80.5 and 80.6 above) that all of the candidates on the waiting list were treated in the same way, and most of them were men. In addition and in any event, his conclusion that the claimants would be helped by being given a secondment as recorded in paragraph 80.2 above was based on the same proposition as that which led to the recommendations in paragraphs 80.3, 80.5 and 80.6 above, which was that which we have set out in paragraph 80.4 above. That was that the removal of the requirement of engineering experience was "inconsistent with expectations of training department who expect new starters to have core competence in using tools and general experience in area but will be taught what needs to be done to our assets". We were fortified in that regard by our conclusion on the issue of the justification (or otherwise) for that expectation, to which we now turn.



**Indirect discrimination**

96 It was submitted to us by Ms Thomas on behalf of the respondent in paragraph 68 of her closing submissions that “Even with the removal [of] the PCP [i.e. the requirement for the experience stated in paragraph 23 above] for the Fleet role only 3 of the 107 successful candidates were women which does not support a contention that the PCP put women at a particular disadvantage” within the meaning of section 19(2)(d) of the EqA 2010. Logically, that submission had some merit. There was certainly no practical impediment on women becoming apprentices, and that was an obvious route by means of which the claimants could have acquired the experience to which we refer in paragraph 23 above.

97 However, we did not need to decide whether or not the claimants, as women, were in fact put at a particular disadvantage within the meaning of section 19(2)(d). That was because we concluded that the requirement for the experience stated in paragraph 23 above was justified in that it was a proportionate means of achieving a legitimate aim. We came to that conclusion on the basis of our findings of fact stated in paragraphs 68-78 above in relation to the requirement as applied to fleet TMs. Those factual conclusions showed in our judgment that training someone who had not had received training in, and then practical experience of, an engineering or electrical discipline, whether through an apprenticeship or otherwise, will in almost all cases cause the respondent to incur the cost of employing that member of staff as a supernumary for much longer than the 12 weeks which the respondent would normally expect (as shown by the part of the document at page 814 which we have set out in paragraph 66 above) to be required. That was borne out by the evidence of Mr Folan which we set out in paragraphs 74 and 75 above and which, as we say in paragraph 78 above, we accepted. There was nothing wrong intrinsically with giving the claimants the opportunity of training to become TMs: far from it. It was done for the best of reasons and with the best of intentions. However, it was relatively costly (that is to say, it was rather more expensive than employing someone who already had relevant experience in an engineering or electrical discipline), because

97.1 the claimants needed to be “buddied up” for a long period of time before they could safely be allocated tasks to be done by them without a buddy present,

97.2 while working so buddied, the claimants were learning and likely to be taking longer to carry out the task in question than if they were familiar with it, and

97.3 the requirement for a buddy would take the buddy away from being able to carry out a task (at the usually-expected speed) him or (rarely) herself.

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- 98 For those reasons, we accepted that the respondent had the legitimate aims set out in paragraph 14 of the list of issues which we have set out in paragraph 6 above, and that it was a proportionate means of achieving those (legitimate) aims to require of candidates for the role of fleet TM the experience stated in paragraph 23 above.
- 99 The fact that the respondent had, in the recruitment campaign for fleet TMs which was followed by the claimants being offered the role of TransPlant TM on 13 March 2020 in the emails described in paragraph 32 above, waived the requirement for such experience was proof only of the fact that the respondent had the best of intentions. It in no way negated the justification for the requirement. If it was justified for the role of fleet TM, then the requirement was also justified for the role of TransPlant TM. In fact, as we say in paragraph 59 above, we accepted the evidence of Mr McFall in paragraph 76 of his witness statement, which we have set out in paragraph 58 above, that “the training in TransPlant does not cover the core skills required to carry out the role”. We did so despite the things that he said in cross-examination which showed that there would be training for a new TM in TransPlant on the tasks which would have to be carried out by the TM. That training was not on the “core skills required to carry out the role”. That was a further reason for concluding that the imposition of a provision, criterion or practice within the meaning of section 19 of the EqA 2010 in the form of requirement for the kind of experience stated in paragraph 23 above was a proportionate means of achieving a legitimate aim.

## Harassment

100 Given

- 100.1 our finding stated in paragraph 59 above that Mr McFall did not before 18 September 2020 know the identity or the sex of the candidates who had been offered the role of TransPlant TM on 13 March 2020,
- 100.2 our finding stated in paragraph 60 above that Mr McFall would have taken precisely the same stance as he did in fact take towards the claimants if they had been men in a comparable position, i.e. members of the respondent’s administrative staff who did not satisfy the experience requirement set out in paragraph 23 above,
- 100.3 our conclusion that Mr Rowley’s conclusions and recommendations set out in paragraph 80 above were in no way tainted by direct discrimination because of sex, and
- 100.4 the passage in the judgment of Underhill LJ in *Unite the Union v Nailard* [2019] ICR 28 to which we refer in paragraph 7.2 above,

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we concluded that the conduct referred to in paragraph 5(d) of the list of issues which we have set out in paragraph 6 above about which complaint continued to be made by the time of closing submissions was in no way related to the sex of the claimants. Therefore, their claims of harassment within the meaning of section 26(1) of the EqA 2010 had to, and did, fail.

- 101 In addition, in our view the conduct of which complaint was made as stated in paragraphs 5(d)(i) and (iii) did not, applying section 26(4) of the EqA 2010, have the effect of violating the dignity of either claimant or of creating for them, or either of them, an intimidating, hostile, degrading, humiliating or offensive environment. That was because we found (as stated in paragraphs 97-99 above) that there was objective justification for that conduct. As a result of that justification, the conduct described in paragraph 5(d)(ii) of that list of issues was capable of being regarded in the same way, although it was also possible that it could reasonably have been regarded as having the effect of violating the dignity of the claimants or of creating for them an intimidating, hostile, degrading, humiliating or offensive environment. However, given that we found that that conduct was in no way related to the claimants' sex, we did not need to determine that question.

### **Victimisation**

- 102 We saw nothing on the facts before us from which we could have concluded in the absence of any other explanation that Mr Rowley had come to the conclusions and made the recommendations set out in paragraph 80 above to any extent because the claimants had complained of sex discrimination. In any event, we were completely satisfied on the balance of probabilities that Mr Rowley had not been motivated (using that term as it is described by Underhill LJ in, for example, paragraph 72 of his judgment in *Nailard*) to any extent in coming to those conclusions or making those recommendations by the fact that the claimants had complained of sex discrimination.

### **In conclusion**

- 103 In conclusion, none of the claimant's claims succeeded. They were accordingly all dismissed.
- 104 We add, however, that the claimants' sense of grievance was entirely justifiable in that they had been promised by the respondent the role of TransPlant TM on 13 March 2020 and that promise had been reneged on. That promise may (as we say in paragraph 81 above) have been contractual, but whether or not it was so contractual was not an issue before us, and (given the terms of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, SI 1994/1623) it could not have been because the claimants had not been dismissed.

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105 We also add, for the avoidance of doubt, that while we took into account fully the sexist comments which Mr Rowley referred to briefly in the part of his investigation report that we have set out in paragraph 80.1 above, those comments were on our conclusions on the facts not material.

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Employment Judge Hyams

Date: 9 March 2023

SENT TO THE PARTIES ON

27/3/2023

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FOR THE TRIBUNAL OFFICE