EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102344/2022

Held in person and (in part) hybrid in Glasgow on 14 to 18 and 21 November 2022

Employment Judge R Bradley
Tribunal Member: P O'Hagan
Tribunal Member: Ms M McAllister

Mr A Greasley-Adams	**Claimant** **Represented by:** **Dr C Greasley-Adams –** **Claimant's spouse**
Royal Mail Group Ltd	**First Respondent** **Represented by:** **Dr A Gibson –** **Solicitor Advocate**
Communication Workers Union	**Second Respondent** **Represented by:** **Ms M Hughes –** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:-

1. The claim of less favourable treatment of part-time employee is dismissed under Rule 52 having been withdrawn on 26 July 2022.

2. The claim under sections 20/21 of the Equality Act 2010 (reasonable adjustments) is dismissed under Rule 52 having been withdrawn on 26 July 2022.

3. At the material time (between about 1 September 2021 and 24 February 2022) the claimant was disabled within the meaning of section 6 of the Equality Act 2010.

4. The claims which were to be determined were presented in time.

5. The claim of indirect discrimination (age) does not succeed and is dismissed.

6. The claim of indirect discrimination (disability, seniority) does not succeed and is dismissed.

7. The claim of indirect discrimination (disability, shift patterns) does not succeed and is dismissed.

REASONS

Introduction

1. In an ET1 presented on 28 April 2022 the claimant made claims of discrimination on the grounds of age, disability and of less favourable treatment of part time employees. In both ET3s, the claims were resisted.

2. The claims were managed at two preliminary hearings (28 June and 22 September 2022). We have recorded below relevant matters arising from them. This final hearing was allocated six days. The claimant was represented by his wife, as he had been at both PHs. The respondents were represented at those earlier hearings as they are noted above. The first PH noted (page 60) that Dr Greasley-Adams had prior experience of the Tribunal process. Indeed, she represented her husband in an earlier seven-day hearing in a case against the first respondent (4100591/2020). This was a case referred to by the claimant in his written submission in this case. The second PH noted that she is "*an intelligent and articulate individual,* [who had] *chosen to place herself before the Tribunal as the claimant's representative in this case and must therefore accept the responsibilities which such a role brings with it*." (pages 104 to 105)

3. At the PH on 28 June (page 60) the claims were summarised as being; indirect age discrimination; indirect disability discrimination; failure to make reasonable adjustments; and part time workers discrimination. At paragraph 26 of its Note the tribunal said, "*On 7 June 2022 the Claimant intimated further written details of his complaints extending to 19 pages of close-type narrative*

text. Not all of those details appeared relevant to his complaints." That document became pages 38 to 56. It maintained the claim of failure to make reasonable adjustments. It set out a number of adjustments which the claimant had suggested to the first respondent which may have allowed him to work in a particular post, which had been vacant at the time of the suggestion.

4. At paragraph 75 of a document headed further and better particulars – 26 July 2022 (page 91) the claimant withdrew the claims of part-time less favourable treatment and of "*reasonable adjustment*." We have dismissed them. That document clarified three heads of claim (on pages 85 to 91). The first two were each of indirect discrimination relying on the protected characteristic of disability. The third was of indirect discrimination relying on age.

5. It is trite that a claim of indirect discrimination requires there to be a discriminatory "*provision criteria or practice*" (PCP). Prior to the second PH the claimant had set out various iterations of the alleged PCPs. Examples can be seen at page 50a and pages 85 and 86. The June PH noted that "*The Claimant relies upon the provision criterion or practice ('PCP') that only these with the longest service ('greatest seniority') were permitted to apply or be considered for the post of full time MGV reserve position or full time MGV night shift position. Following discussion it is understood that the Claimant asserts that the PCP put younger staff (those age 51 and under) to a substantial disadvantage when compared with older staff (those over the age of 51). The Claimant was unable to apply for the MGV night shift position because of his disability*."

6. By the second PH on 22 September, the Tribunal accepted the need for the PCPs to be clearly defined. That was said in the context of a dispute among the parties as to the state of a joint list of issues. We say more about the issues below. Suffice to say that a reasonable inference to draw is that by 22 September the PCPs had not been clearly defined.

7. The asserted disability is Asperger's (page 61). The first respondent accepts that the Claimant was disabled by reason of that impairment at the relevant

time. The Second Respondent denied that the Claimant was disabled by reason of it (see page 61 at paragraphs 20 to 22).

8. At the PH on 22 September the tribunal ordered the use of witness statements (page 106). We heard evidence from 10 witnesses including their statements. For the claimant we heard from (i) John Forrester, autism consultant (ii) Paul Bullen, employee of the first respondent and (iii) the claimant. The second respondent's witnesses were (iv) Christopher Carrick (v) Kenneth McKenzie and (vi) Iain Malloch (all its employees). From the third respondent we heard from (vii) Gary Clark, (viii) John Knox (ix) Brian Philbin and (x) Ross McEwan, also all employees of the first respondent. By agreement (and as per Order 5 from the PH on 22 September) (page 106) the first day of this hearing (14 November) was a hybrid hearing as John Forrester gave his evidence by CVP. The June PH had anticipated steps being taken to agree a witness timetable and that if statements were used only four days would suffice. As it turned out, no reading time was anticipated; we began hearing evidence at about 3.15pm on the first day and all six days were occupied with evidence only. By agreement; submissions were made in writing; the respondents' submissions were lodged and copied to the claimant 7 days before his were due; parties were given the option of an oral hearing; no-one sought one; on 6 December the claimant's submission was received; we saw the second respondent's comments on an aspect of it on 8 December. We took time to consider the evidence and submissions in the context of the issues.

9. By agreement Mr Forrester gave evidence first and by CVP.

The issues and PCPs

10. At the first PH the Tribunal ordered the claimant to provide a substantive response to a draft list of issues which had been agreed between the respondents prior to it. The parties were then ordered to use reasonable endeavours to agree the list which was to be sent to the tribunal at least three days before this hearing (paragraph 8 of the Note, pages 58 and 59).

11. The Note from the second PH records the state of affairs on the issues by 22 September (see paragraphs 13 to 26 on pages 103 to 105). Our summary of

those paragraphs is; the claimant's response (ordered on 28 June) was lengthy; Ms Hughes (for the second respondent) was of the view that the PCPs proposed by the claimant were confusing and unclear and were set out in three different documents; the list of issues required to be revisited; and Dr Greasley-Adams had taken legal advice including on the PCPs since the first PH. The resulting Order from 22 September was "*By no later than 3 October 2022, the second respondent shall send to the first respondent and to the claimant a draft List of Issues and a short summary of the claimant's PCPs for agreement by the parties. The agreed List of Issues shall be submitted to the Tribunal no later than 3 working days prior to the commencement of the Hearing on the Merits*."

12. On the morning of the first day of this hearing we were presented with a document which bore to be a draft list of issues. In answer to a question from us, we were told it was an agreed list. It included one list of PCPs said to be relevant to two of the heads of claim and one other PCP relative to the third head. We have set out the agreed issues in full here. For clarity, we have used sequential numbering. There was an element of duplication in the list which we have not repeated.

    1. Was the claimant disabled at the material time within the meaning set out in section 6 of the Equality Act 2010? The claimant relies on the condition of Autism Spectrum Disorder.

    2. Are any of the acts and/or omissions relied upon time barred as having taken place prior to 24 November 2021 and on the basis that they do not form part of any continuing act under section 123(1) of the 2010 Act?

    3. Are the following provisions, criteria or practices ("PCPs") within the meaning of section 19 of that Act?

        a. Not showing all staff members the advert for full-time MGV drivers (including the new MGV reserve position?

b. Not giving all staff members the opportunity to apply for or be considered for the post and instead asking the most senior staff members first?

c. Subsequently, the practice of selecting the most senior person for those duties without consideration of the objective selection criteria as recorded in the Professional Drivers Agreement?

4. If so, did the first and/or second respondent apply any of these PCPs?

5. If so, did the first and/or second respondent apply, or would it apply, any of these PCPs to persons who did not share the claimant's age applying section 19(2)(a) of that Act?

6. If so, did any of these PCPs put, or would put, persons aged 51 and under at a particular disadvantage when compared with persons aged 52 and over on the basis that they are less likely to have 27 years' service?

7. Did any of these PCPs put, or would any of them put the claimant at the disadvantage in question applying section 19(2)(c) of the Act?

8. Has the first and/or second respondent shown that the application of that provision, criterion or practice was a proportionate means of achieving a legitimate aim applying section 19(2)(d) of that Act?

9. If the first and/or second respondent applied any of the PCPs at issue 3, did they apply, or would it apply any of them to persons who did not share the claimant's disability relied upon, applying section 19(2)(a) of that Act?

10. If so, did any of these PCPs put, or would put, persons sharing the claimant's characteristic, namely autistic people, at a particular disadvantage when compared with persons who do not share that protected characteristic on the basis that autistic people are less likely to be able to gain longer service?

11. Did any of these PCPs put, or would any of them put the claimant at the disadvantage in question applying section 19(2)(c) of the Act?

12. Has the first and/or second respondent shown that the application of that provision, criterion or practice was a proportionate means of achieving a legitimate aim applying section 19(2)(d) of that Act?

13. Is the following a provision, criteria or practice ("PCP") within the meaning of section 19 of the Act?

    a. A requirement that to apply to do reserve jobs (including the MGV reserve job) that the staff member must be able to undertake all shifts within the delivery office, including for the MGV reserve nightshift and delivery work That requirement being expressed to any interested party, alongside comment that no adjustment would be made and if any person is made up to full-time and subsequently found not to be able to do all shifts that they would be reverted back to part-time hours

14. If so, did the first and/or second respondent apply this PCP?

15. If so, did the first and/or second respondent apply, or would it apply, this PCP to persons who did not share the claimant's disability relied upon, applying section 19(2)(a) of the Act?

16. If so, did any of these PCPs put, or would put, persons sharing the claimant's characteristic, namely autistic people, at a particular disadvantage when compared with persons who do not share that protected characteristic on the basis autistic people may be more likely not to be able to complete all shift patterns?

17. Did this PCP put, or would it put, the claimant at the disadvantage in question applying section 19(2)(c) of the Act?

18. Has the first and/or second respondent shown that the application of that provision, criterion or practice was a proportionate means of achieving a legitimate aim applying section 19(2)(d) of that Act?

19. If the claimant succeeds in any of his claims what, if anything, is he entitled to by way of remedy?

13. It is for a claimant to identify the requirement or condition which they seek to impugn (*Allonby v Accrington & Rossendale College* [2001] IRLR364 CA at paragraph 12). It was thus for the claimant to identify the PCPs which he says are discriminatory. The claimant was aware of the need to identify PCPs from at latest 7 June when he intimated the further and better particulars now at pages 38 to 56. Given that a number of issues were contingent on the claimant's success on the issues to do with the PCPs, it was all the more important that he be clear on those being relied on.

14. If a list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list (*Parekh v The London Borough of Brent* [2012] EWCA Civ 1630 citing *Land Rover v. Short* UKEAT/0496/10/RN. A main purpose of such a list is to establish the parameters of the legal and factual questions to be addressed at the hearing. That in turn influences the evidence that is relevant to determine them. We proceeded to hear evidence on the basis that the list provided was indeed agreed. Regrettably, that was not an end of the debate on the PCPs within the list of issues. The claimant sought to revisit the question in his written submission. This in turn prompted the second respondent's email of 8 December. We have considered what was said in them. In summary, the claimant suggested that the list which had been presented as agreed was not a complete, comprehensive and accurate version taking account of earlier discussions. The second respondent disputed that suggestion. We heard evidence by applying the general rule which we have noted. We decided the claims based on the agreed issues.

Findings in fact

15. From the evidence which we heard and the documents spoken to from within the bundle we found the following facts admitted or proved.

16. The claimant is Adam Greasley-Adams. His date of birth is 11 February 1971. In March 2017 he was diagnosed by a consultant psychiatrist as meeting the criteria for Adult Autistic Spectrum Disorder (pages 72 and 284). The claimant

prefers to call the condition Aspergers (page 75). He has been advised that he has had the condition for all of his life.

17. At times his work is all he is able to cope with. In the 12 months before February 2022, at worst he would not leave his room except to go to work. He would not speak to anybody (including his wife) outside of work. He would not eat if his wife had not brought food to him. In certain situations he can become agitated and vocal and say things which he later regrets. He finds interacting with others difficult. He often applies literal interpretations to situations. He does not cope well with change. He does not cope well with alterations to routine.

18. The first respondent is Royal Mail Group Limited. It employs about 143,000 people in Great Britain. It provides mail collection and delivery services throughout the UK.

19. The second respondent is the Communication Workers Union. It has about 200,000 members in the UK. It represents its members in postal companies including the first respondent.

20. The claimant is employed by the first respondent. He is employed as an MGV driver. He is a member of the second respondent. He works 30 hours per week. His employment began on 20 October 2008. With a letter dated 20 August 2015 the first respondent issued to the claimant a written statement of his terms and conditions of employment (pages 117 to 133). It recorded that; his job title was MGV driver; his initial place of work was the Stirling Delivery Office; his employment was part time; and his hours of work were 28.5 per week. It set out that there were collective agreements relating to his employment. In particular, they included "*the National Agreement for the Implementation of the Road Transport Directive and the Introduction of the Professional Driver*." That Agreement with its appendices (pages 192 to 215) was indexed as dated 2007. Its stated scope is all grades represented by the second respondent in the first respondent's Network & Area Distribution who drive vehicles fitted with a tachograph. It is said to supersede National/Local Agreements in respect of the specifics contained within it. Its stated objectives

include (i) ensuring full compliance with legal requirements on hours derived from the Road Transport Directive and (ii) introducing "*the Professional Driver*" with improved terms and conditions. Its stated resourcing process/criteria for the specialist role of Professional Driver are that; "*the initial selection will be from a list of suitable internal candidates holding the relevant licence; no current record on an individual's licence of dangerous driving or drink driving (includes accident/speeding/tacho offence history; less than 6 points on driving licence; good conduct and attendance record; individuals who hold a driving licence who are suitable in line with the selection criteria who wish to be trained; experience at previous driving level (normally a minimum of 2 years); and preference may also be given for experience with other relevant vehicles such as PSV*."

21. The claimant's March 2017 diagnosis contained advice that he would particularly benefit from having a regular shift pattern which allowed him to work in the afternoons and evenings. This was because his condition made it very difficult for him to change his set patterns.

22. In March 2018 the claimant presented a claim to the employment tribunal. It was case number 4103456/2018. On 2 August 2018 and related to that claim the claimant signed a COT3 form (pages 136 to 142). It recorded the terms of settlement reached in relation to the claim. Paragraph 4 of the form recorded that; the claimant would be assigned the MGV driving duty number 8; that particular duty was to be undertaken between 14.30 and 20.30 Monday to Friday; and it was based at the Stirling Delivery Office. Paragraph 5 of the form recorded an increase in the claimant's hours from 28.5 to 30 per week.

The Stirling Delivery Office

23. A number of functions are carried out by the first respondent at its Stirling Delivery Office. They include "*delivery*", "*distribution*" "*collection*" and "*indoor work*." The claimant's work is regarded as "*distribution*" work. At the time relating to this claim, the first respondent employed about 115 members of staff at the Stirling Office. Staff at Stirling included those called Operational

Postal Grade (OPG). Others, including the claimant, were called MGV (medium goods vehicle) Drivers.

Revision at the Stirling Delivery Office; 2021

24. The respondents are party to a national "*Pathway to Change Agreement*". It was described as an all-encompassing agreement which was created during the privatisation of the first respondent. A copy was not produced.

25. In or about April 2021 the first respondent decided to carry out a structural revision at the Stirling Delivery Office. It was one of 400 units selected to undergo such a revision in that year.

26. In a structural revision a planning team comes to the relevant delivery office. The team members use certain tools and software to determine any changes which may be required to various duties. There are usually a number of changes during such revisions. The revision team uses software to analyse the routes covered in the area. They compare them to the office's volume of mail and the number of staff within it. They use that information to determine the most efficient way to implement the work. Revisions can change; start times; routes for mail delivery; the time required for a duty to be completed; and various other aspects of the delivery office function.

27. In August 2021, the first respondent informed the second respondent that it was undertaking a revision of the delivery part of the Stirling office. There was an initial meeting in August 2021. The starting point for the revision was to source "*base data*". That involved plotting delivery points using software, either Geo-route or Pegasus. The data are used to prepare maps of how a delivery "*walk*" would be and roughly how long it would take.

28. The respondents agreed the staff who were "*in post*" at the start of the revision process. There were various meetings regarding the "*delivery span*". In August 2021 all delivery staff were invited to ballot on whether there was going to be a revision. They voted in favour. There was then a further ballot in September 2021 on what should be the size of the delivery span. The factors

to be taken into account included; the length in time to be taken and the number of employees (full and part time) required. The latter number was influenced by the former. The ballot was displayed in the staff canteen. In September 2021 John Knox and Brian Philbin for the second respondent met with the OPG staff. They discussed with them a number of things to do with the revision. Those things included the make-up of particular duties. Notes from those meetings were taken (pages 455 to 463). The meetings took place prior to the planners' mapping exercise. The information obtained from those meetings was to be taken into account during a "*re-sign*" process.

29. "*Re-signing*" is a process defined within an agreement between the respondents. That agreement is known as the "*Way Forward Agreement*" dated 21 January 2000 (pages 143 to 191). A re-sign involves employees being permitted to "*sign up*" to work based on seniority to the shifts and their preferences. The key principles of a re-sign as per the Way Forward Agreement include that; it must be planned into the revision process; and should not take more than four weeks to complete (page 171 paragraph 16.4).

30. In about October 2021 and by reason of volume of work related to Christmas, Mr Knox suggested that the re-sign should be deferred until January 2022. At or around that time, the claimant was asked if he wanted to "*go full-time*". He was told that if he did then only OPG roles were available on that basis. The claimant regarded that as a demotion. He declined.

31. In or around September or October 2021 a nightshift MGV driver, Neil Martin, opted to return to delivery duties. As a result, his role became vacant. It was advertised. The claimant did not apply for the role.

32. By 2 November 2021 a final draft of Stirling's Revision Proposal had been produced (pages 296 to 300). It says, "*A copy of the office structure is attached to this proposal*." It appears that page 300 is the structure referred to. Page 300 is headed "*Stirling Delivery Office Duty Breakdown*." The whole document is indexed as "*Stirling Office Structure*." The Breakdown shows 12 full time reserves. One is identified as "*MGV*". The Proposal says, "*It is important to note that any new contract increases must ensure compliance to*

the overall office structure. i.e. If someone is made full time to become a full time reserve the expectation is that they can cover every shift available. If this is not the case, then they will be reverted to part time and we will begin the process of asking part time staff members again." The Proposal contains a paragraph headed "*Reserves*". It says "*For clarity the local office reserve structure will be 11 FT, 1FT MGV, 9PT*". The Proposal records that the target deployment date was 17 January 2022.

33. The respondents regarded the revision as "*delivery only*". That view was based on only delivery duties being changed as a result of the revision.

34. Page 435 is headed Cross Function Reserve Advert. It says that; it is a new duty; it is being introduced in the Stirling 2022 Revision; it is being advertised because the role requires "*the OPG who applies*" to be eligible to drive HGV up to 7.5 tonnes; the role will be expected to cover every available duty withing the office, including nightshift, MGV runs, collections, indoor and delivery work.

35. The advert was displayed at the "*signing on*" desk in the Stirling office. It is likely that it was also displayed in the canteen on the union notice board and on the staffing board at the Stirling office. It is likely that it was displayed before the end of January 2022.

36. On or about 10 November 2021 the claimant spoke with Mr Carrick, who at the time was the first respondent's Delivery Office Manager at Stirling. The claimant asked him for a copy of the final proposal for the office structure. Mr Carrick said that he would need to speak to Mr Knox. The claimant did so. Mr Knox told him he was not entitled to see it because it was a "*delivery revision*" and, as the claimant was in distribution, he was not entitled to it. The next day the claimant emailed Mr Carrick (page 301). In it he; referred to their conversation the previous day and to his request; noted that he had been refused as not being entitled; referred to the previous proposal containing MGV changes which in his view made the refusal odd; and complained that as a union member was not entitled to vote.

37. At the time of the Revision, the most senior member of staff (by length of service) at the Stirling unit had about 43 years' service (page 468). At the time of the Revision, the most senior member of staff (by length of service) at the Stirling unit who held the position of MGV driver had about 31 years' service (page 468). Neither of them was appointed to the MGV reserve role.

The history of the claimant's grievance; November 2021 to April 2022

38. On 14 November 2021 the claimant emailed to Mr Carrick a completed stage 1 grievance form (pages 302 to 305). He sought a response within 14 days. On 2 December Mr Carrick replied to the claimant about his grievance (pages 307 and 308). Also, on 2 December the claimant asked Mr Carrick to escalate it to stage 2 (pages 309 and 310).

39. On 10 January 2022 the claimant met with Ian Malloch, Delivery Office Manager, Falkirk. A note of the meeting was taken (page 348). It notes that it was a second line grievance meeting. On 14 January Mr Malloch sent a copy of it to the claimant (called a summary) (page 347). The letter said that if he had not received comments within three days he would conclude that the claimant had accepted the summary. Also that day, 14 January, the claimant emailed Mr Malloch (page 314). He said that there were a couple of omissions from the notes. He then set out further comments including a suggestion as to how his grievance could be resolved. On 21 January Mr Malloch wrote to the claimant (pages 349 to 351). It set out his decision on the grievance.

40. On 25 January the claimant emailed Mr Malloch (pages 322 and 323). He requested that his grievance be raised to stage 3. He set out various arguments arising from the stage 2 outcome.

41. On 24 February 2022 the claimant began early conciliation with ACAS (page 13). He named the first respondent. Also on 24 February the claimant began early conciliation with ACAS naming the second respondent.

42. On 17 March Kenneth McKenzie a Lead Distribution Manager employed by the first respondent wrote to the claimant (pages 355 and 356). At that time, Mr McKenzie was employed in Edinburgh. The letter invited the claimant to a

meeting with him on 25 March. On 25 March the claimant met Mr McKenzie. The claimant was, at his request, accompanied by his wife.

43. On 28 April Mr McKenzie wrote to the claimant with his decision on the grievance appeal. He enclosed his report (pages 362 to 365). He did not uphold the appeal. He recorded his view that the local advertising of the position of the "*new reserve duty*" was very poor. He therefore recommended that the office (meaning the Stirling District Office) must advertise and display all vacancies on the resourcing noticeboard for all staff members to see and for a minimum of three weeks, that requirement to apply to vacant duties occurring throughout the year or arising by virtue of a local revision.

44. In the period between 6 January and 25 February the claimant and Mr Carrick exchanged a number of emails to do with matters connected with his grievance (pages 315 to 321 and 324 to 326).

45. Early conciliation began on 24 February 2022. A certificate was issued on 31 March. The ET1 was presented on 28 April.

The issues raised or noted by the claimant during the grievance process

46. In his stage 1 grievance on 14 November (pages 302 to 305) the claimant said that; being told by Mr Carrick and Mr Knox that the revision was "*delivery only*" was a blatant lie; that lie was an attempt to refuse him full-time work; he was "*entitled*" to be made up to full-time; the office proposal showed the addition of at least 1 MGV shift and the creation of "*new FT MGV posts*"; that shift was also referred to in "*the written detail*"; the proposal should have included shift details which had never been passed to him; he found that fact to be "*cloak and dagger*"; and the proposed framework/structure omitted part-time MGV shifts which omission he hoped was a simple error and not an attempt to ensure they disappeared. He proposed practical steps to resolve his grievance. He suggested that "*all MGV shifts either existing and which are proposed are included in the office framework so it is a true reflection of the specialist posts that actually exist within the office and which will exist after the revision. I propose that I am entitled under the proposal plans to be made up to full-time that that is done and I should become FT MGV grade. This can*

be achieved in the following ways within the proposed office structure." There then followed a numbered proposal that "*The Callander parcels are added to the start of my PT MGV shift. This would mean my shift would become FT and the upgrading of my PT contract would be done in line with seniority in the proposal*." This addition at the start of the run would mean the "*Callander parcels*" work would be done before 2.30pm. His grievance then set out the implications of his proposals for a colleague, and for the number of MGV hours compared to "*the current plan*". He made no reference to the Cross Function Reserve Advert (page 435). It is likely that by 14 November, the claimant had seen the Stirling Revision Proposal final draft (pages 296 to 300) or a similar version. By 14 November he had not seen the Advert.

47. In the email of 2 December in which he sought escalation to stage 2 (pages 309 and 310) the claimant said; he had been initially refused sight of the plan; the MGV reserve post was at MGV grade; it was showing as an additional MGV shift which shifts must be resourced on suitability first with seniority operating only as a "*tie break*" "*as per national agreements*"; if the respondent was "*looking at*" MGV work then that should be done when "*looking at*" distribution and not delivery (emphasising the point that the Stirling Revision was not delivery only); by creating an MGV FT post and by asking MGV drivers (like him) if they wanted to keep their post meant that the whole office was subject to the Revision; there was an opportunity for the first respondent to make adjustments during the process to allow him to take up an FT post "*as per the seniority options*"; that case law suggested that movement of staff is a reasonable adjustment and there was plenty of opportunity for the first respondent to do so when it was assigning duties to tasks; he should be made FT and then reasonable adjustments made to make sure that that (FT) post suited his needs, which could be done in different ways; and under reference to what was said by some staff of the first respondent "*in the court*" his duty is a hybrid and therefore should be dealt with in this Revision.

48. In his email of 25 January requesting a stage 3 investigation the claimant said; the stage 2 findings were contradictory in that delivery revisions were said to not affect MGV duties yet the respondents had agreed to include an MGV

reserve post; (again) that he was lied to in being told that the Revision was delivery only; he should have been considered for the FT vacant MGV post albeit with reasonable adjustments; and where (as in this Revision) duties were covered by a number of Statements and Policies relating to professional driving, they should have been adhered to in the process of appointment to the MGV role in Stirling.

49. In his emails to Mr Carrick between 6 January and 25 February 2022 the claimant asked; for an update on his bullying and harassment against Mr Knox; asked for details (where and when) of the role being advertised and for the opportunity to apply with reasonable adjustments (noting the suggestion from the stage 2 grievance outcome that he was entitled to apply for the MGV FT reserve post); asked about the pay rate for the MGV role, "*MGV rate*" or "*OPG rate with substitution*" (the latter meaning pay at MGV rate only for that element of the work see page 206 at paragraph 1.8); repeated his request for a copy of the Advert as he was uncomfortable asking Mr Knox because of an ongoing bullying and harassment case; said that any duty which included tachograph work is classed as a professional driving duty and a specialist role; reiterated his argument that recruitment for the role should not be on seniority; set out four options of reasonable adjustments that could be put in place to allow him to do the role; said that Paul Bullen (MGV nightshift driver) had been denied the chance to apply for the post vacated by Neil Martin; reiterated that all MGV posts have strict resourcing criteria including suitability first; under reference to lodging a claim with ACAS said that "*the whole resourcing of somebody creating a post to take the post stinks of corruption*"; and repeated his arguments that appointment (as per the relevant policies) should be on suitability.

50. In a reply to the claimant dated 23 January, Mr Carrick said that the FT All Duty Office Reserve position was being advertised to every member of staff whilst the re-sign was being undertaken. It is likely therefore that by that date the Advert (page 435) had been publicised.

51. In his email to Mr Carrick of 24 January (page 317) the claimant said, "*In terms of reasonable adjustment I attach a document with four separate options for*

reasonable adjustment that might be put in place if I chose to apply and was allocated it (having taken into consideration the resourcing criteria above)." The post was the MGV reserve of cross-function reserve role. The criteria referred to were taken from the Way Forward Agreement.

52. The claimant's "*reasonable adjustment*" options were; (1) movement of staff to different duties. Its bases were (i) MGV driver contracts are not "*post specific*"; (ii) he was due to have his hours increased to full time; therefore (he suggested) he be made up to full time and duties are reassigned. The desired result was a stable day shift with another member of staff allocated to the reserve shift. (2) increasing his hours by adding "*Callander packet*" onto his duty. (3) he should be offered the full time MGV reserve role but be given only daytime MGV reserve work and distribution reserve work. This option recognised the "issue" of nightshift reserve work. The claimant suggested that this could be done by another employee. (4) undertaking daytime only work.

53. John Knox was appointed to the role of MGV, or cross-function reserve. At the time of the Revision, he was 33rd most senior employee at Stirling (pages 346 and 468).

54. Some time prior to 24 October 2022 the claimant met (virtually) with John Forrester, autism consultant. The meeting lasted about one hour.

Callander Parcels

55. The town of Callander has a small delivery office. The office has limited storage space. Its personnel did not want packets being delivered to it in the morning because of its limited storage space. Parcels for Callander came into Stirling at about 11am. They were sorted there then set aside. They were transported to Callander during the nightshift. They were then taken out by the Callander staff for delivery in the morning. This avoided the parcels being stored in Callander delivery office. This was a request Callander had made. The Stirling office was happy to accommodate it. Occasionally, at peak times it may not have been possible to take the Callander packets during the nightshift. On those few occasions, dayshift delivery drivers would be asked to do it.

Comment on the evidence

56. The Stirling Revision (which was the catalyst for the claims) was described as a "*major change*." Reference is made to that expression in the Way Forward Agreement (see page 171). It was therefore surprising that the bundle contained very little documentation to do with the Stirling Revision. For example, pages 296 to 300 was called a final draft (2 November 2021) of the Revision Proposal. The obvious inference is that there were earlier versions. A number of witnesses gave evidence in chief and in cross examination about it. The claimant's evidence was that there had been a draft of an office structure put to the workforce in October but it was not produced. It is not clear how relevant that draft was, or whether there were others.

57. Page 435 was indexed as Cross Function Office Reserve Advert-Stirling Delivery Office. At the start of the hearing Ms Hughes clarified its date stamp of 28 September 2022 is the date of receipt by her office. The document is in fact undated. That in itself is surprising. Equally surprising (and unhelpful) was that none of the witnesses were able to say with any real confidence when it was first publicised to the workforce. There was a conflict in the evidence as to whether and if so how it was publicised. The job title of the role to which Mr Knox was ultimately appointed was not consistent in the evidence. For example, it was called an MGV reserve role (see pages 299 and 300). It was also called Cross Function Office Reserve (page 435). This lack of consistency did not assist when we were invited to consider conflicting evidence about the method by which the respondents were deciding how a candidate should be appointed. The claimant's evidence (in cross examination) was that there was no advert, he had not seen it. But it was not suggested to any of the witnesses for either respondent that there had been no such advert or that it was not displayed in the Stirling office. On balance, we accepted that; page 435 was an advert for the role about which the claimant complains; and it was displayed in the Stirling Office some time before the end of January 2022.

58. At stage 1 of the claimant's grievance he proposed a way for him to be made up to full time. This involved the addition of "*the Callander parcels run*" to the

start of his shift. In contrast, none of the issues in this case concern the first respondent's decision not to accede to that proposal. Several witnesses gave evidence about "*the Callander parcels run*". In our view it was not relevant to the issues which we had to decide.

Submissions

59. The parties lodged written submissions. We are grateful for the work that went into each and for their content. We have not repeated or summarised them here. To the extent relevant and necessary we refer to what was said in them below.

The relevant law

60. Section 6(1) of the Equality Act 2010 provides "*A person … has a disability if (a) [they have] a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on [their] ability to carry out normal day-to-day activities*."

61. *"It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial*." (*Aderemi v London and South Eastern Railway Ltd* [2013] ICR591)

62. Section 19(1) and (2) of the 2010 Act 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, (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."

63. "*The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic*." Chief Constable of West Yorkshire Police and another v Homer [2012] I.C.R. 704 at paragraph 17.

Discussion and decision

64. The claimant's focus in all three heads of claim of indirect discrimination is on the method by which selection was made for "*MGV driving duties*". His complaint referred to two posts; a reserve position; and a nightshift post. His evidence was that because MGV roles were specialist and at the relevant time he was already in an MGV role, the exercise which was undertaken to appoint staff to both roles was flawed because (principally by virtue of the CWU National Agreement RTD/Professional Driver (pages 192 to 215)) the only relevant applicants for them should have been MGV drivers. Had the respondents followed the correct process (so argued the claimant) the individual appointed to the reserve role (John Knox) should not have been considered never mind appointed (as noted at the first PH, page 63). His repeated evidence was that if the correct process had been followed, MGV drivers like him should not have been on the same list as Mr Knox. Instead they should have been on their own separate list from which a candidate should have been selected for the reserve role. His evidence was that if the PDA had been used, he would have been appointed to that role. It is relevant to note that the claimant's case was not that he was disadvantaged relative to the nightshift role. The claimant's written submission (page 12 lines 8 to 13) confirmed that position. In cross examination by the first respondent he

accepted that he could not do the nightshift role. The agreed issues make no reference to it. The clarification at our behest at the end of the hearing confirmed this. For completeness, the "*advert*" referred to in PCP 3(a) could only mean the advert for the MGV reserve position (page 435). In the context of the evidence it could not mean anything else. Similarly, reference to "*the post*" in PCP 3(b) can only mean the same job. And again the words "*for those duties*" can only mean the duties of that post.

65. The claimant did not take issue with what was said by the second respondent in its written submission under the heading of "*Indirect Discrimination – the Law*" at paragraphs 37 to 53.

66. Some of the claimant's evidence contained complaints about other matters which were not relevant to the issues. For example, he complained that Mr Knox was appointed through cronyism. His evidence was that the second respondent "*controls the office*" which included control of job adverts and who was allocated overtime work. Also, he complained that there was a desire to remove him from his grade, his driving duties or indeed from his employment. In his witness he said that his trade union, "*don't think I had the seniority to be given a MGV contract and so they would I think quite happily influence the resign and revision processes to make it that I'm demoted to OPG or got rid of all together*." It was also obvious that the relationship between the claimant and Mr Knox was very poor. That was evidenced by (at least) the claimant's contemporaneous reference within the bundle to allegations of bullying and harassment. Further, part of the claimant's case appeared to be about the unsuitability of Mr Knox for the reserve role. For example, Mr Bullen's witness statement recorded his opinion that there would be times when Mr Knox would not be able to do the reserve role because of his union work. And Mr Knox was cross-examined about his alleged failures to comply with driving law which may have disqualified him. Separately, the claimant's proposed way of resolving his grievance was to appoint him to a full time MGV role by adding Callander Parcels to his responsibilities. None of those tranches of evidence were to the point of any of the issues which we had to decide. But they were obviously factors which influenced the claimant in his approach to this case.

It was also clear from his own evidence that the claimant could not, without some adjustment to it, carry out the MGV reserve role.

Was the claimant disabled at the material time? (Issue 1)

67. It is agreed between the claimant and the second respondent that the material time began on or about 1 September 2021 and continued to about 24 February 2022. The first respondent did not dispute that the claimant was disabled at that time. But the second respondent did. The second respondent did not dispute the diagnosis of adult autistic spectrum disorder in March 2017. Therefore, it accepts, the claimant has a mental impairment. The inference is that it is not disputed that he had that impairment at the material time. In our view, Mr Forrester's evidence added very little of value on whether that impairment has a substantial and long-term adverse effect on the ability to carry out normal day-to-day activities. The only question and answer with Mr Forrester which was in our view of some albeit limited relevance are; "***In your opinion would Adam's condition be considered to have a longstanding and substantial effect on everyday life?*** *Yes, based on the fact he has a diagnosis and how he presented to me and what he described to me. Admittedly, it was only a brief meeting but yes is the answer to that*." The claimant relies on that evidence. It is (quite obviously) extremely limited. Mr Forrester's opinion relies on the fact of the diagnosis (in itself nothing particular to the claimant's particular circumstances); what the claimant described (without explaining that description or opining why it supported his opinion); and "*how he presented to me*". There is no further detail about that presentation, or how it informed his opinion.

68. In his submission the claimant referred to what was said by the EAT in the unreported case of *City Facilities Management (UK) Ltd v Ling* UKEAT/0396/13/MC at paragraph 39. "*Following the guidance in* J v DLA Piper*, the approach the Employment Judge might have been expected to adopt would have been to hear from the Claimant as to the impact of the impairment from which she said she suffered on her normal day-to-day activities. That is not a matter that should normally require expert evidence, albeit that an expert may comment on such issues in her report and that may*

be of assistance to the ET. In most cases, however, this will generally be something that the Claimant is best qualified to attest to. Of course, there can be issues of credibility and Employment Tribunals might not simply accept that evidence of the Claimant. As a starting point, however, the evidence of impact on normal day-to-day activities is likely to be evidence of fact."

69. In his witness statement and in answer to the question, "***Can you tell me about how having Asperger's affects you now?***" the claimant said, "*You know I don't like talking about it. We already put together that statement where I set things out. I don't want to talk about it again now. (pages 75-76)*" Taking those matters into account, in very large measure the evidence about the impact of the impairment on his ability to carry out normal day-to-day activities is within the impact statement from June 2022.

70. We are required to focus on what the claimant maintains he cannot do as a result of his impairment. His submission focussed on three activities, social communication, social interaction, and managing change. He accepts that the first two "*may overlap*". In our view they do. Some of the "*social interaction*" examples in his submission refer to the reactions of others to his engagement with them; in other words, how he had communicated with them.

71. We found that; at times work was about the only thing he could "*cope with*"; in the 12 months before February 2022 and at worst he would not leave his room except to go to work; he would not speak to anybody (including his wife) outside of work; he would not eat if his wife had not brought food to him; in certain situations he can become agitated and vocal and would say things which he later regrets. We also found that he; finds interacting with others difficult; often applies literal interpretations to situations; and does not cope well with change or with alterations to routine. We agree with the second respondent that the claimant's impact statement is not supported by recent medical evidence. But the primary focus is on what the claimant cannot do. In its conclusion on the point, the second respondent argues that the claimant's impact statement "*in and of itself does not do enough to evidence that there are long-term and substantial adverse effects on the Claimant's ability to carry out normal day-to-day activities. Much of what he describes are avoidance*

strategies and coping mechanisms." Certainly he describes ways to avoid and cope. But in our view those mechanisms are indications of the day-to-day activities which are substantially affected by his impairment. In our view that effect has been long term. Its effect continued in the 12 months before February 2022. Based on his evidence, the claimant's impairment has an adverse impact of those activities which is more than trivial. The claimant was, in our view, disabled at the material time.

Time bar (Issue 2)

72. The focus of this issue was that the acts complained of did not form part of any continuing act under section 123(1) of the 2010 Act. The point was not maintained by either respondent. In our view, the conduct complained of extended over a period which ended on or about 24 February 2022. Early conciliation began that day. The ET1 was presented on 28 April 2022. The claim was presented in time.

Indirect age discrimination (seniority) (Issues 3 and 4)

73. In *Ishola v Transport for London* [2020] IRLR368 at paragraph 28, the Court of Appeal noted, "*The Equality Act 2010 Statutory Code of Practice issued by the Equality and Human Rights Commission (which must be taken into account by courts or tribunals in any case in which it appears to the court or tribunal to be relevant: see s 15(4)(b) Equality Act 2006) provides as follows:' 6.10 The phrase [PCP] is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, or qualifications including one-off decisions and actions ..*'" At paragraph 36 in that case the Court said, "*The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The PCP serves a similar function in the context of indirect discrimination, where particular disadvantage is suffered by some and not others because of an employer's PCP. In both cases, the act of discrimination that must be justified is not the disadvantage which a claimant suffers (or adopting [the appellant's]*

approach, the effect or impact) but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course (as [the appellant] submits) that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply." And at paragraph 38 the Court said, "*In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises*."

74. In our view the most relevant way to consider these issues is to conflate them. For any of the alleged PCPs to be relevant it is obvious that they require to have been "*applied*" by a respondent. As was said by the Supreme Court in *Essop and others v Home Office (UK Border Agency)*; *Naeem v Secretary of State for Justice* [2017] IRLR558 at paragraph 25 "*Indirect discrimination… requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual*." To understand the operation of the alleged PCPs in this case one is required to consider whether they caused the particular disadvantage relied on by the claimant.

75. In our view, each of the PCPs here is limited to the appointment to the MGV reserve post. 3(a) refers to "*the advert*". There is an obvious ambiguity in the whole phrase, "*the advert for full-time MGV driving duties (including the new MGV reserve position)*". But the point of us clarifying at the end of the evidence (as we did) that it referred solely to what the claimant called "*the*

MGV reserve job" was to remove that ambiguity. And in the context of the disadvantage asserted by the claimant, "*the advert*" could only mean "*the MGV reserve job*". That is obvious from his witness statement (page 2 at lines 13 and 14). We did not accept the second respondent's primary position that "*there was no MGV reserve position*" (see its submission at paragraph 55). If that were its position from the start of the hearing, the second respondent should not have agreed the issue in its terms. For complete clarity "*the advert*" referred to was the document on page 435. The role was the one ultimately taken up by John Knox. Either in the context of 3(a) or indeed "*stand alone*" 3(b) refers to the same MGV reserve role. The phrase "*the post*" in context can only mean that role. And equally, 3(c)'s reference to selecting for "*those duties*" can only mean the duties of that role. That all being so, our view is that the conduct complained of in 3(a) to 3(c) is not a provision, criterion or practice within the meaning of section 19. They are by definition limited to the activities associated with selecting a candidate for this one role. There therefore cannot be any indication that the conduct would be repeated. We must say something in answer to the claimant's written submission that the PCPs were "*altered*" or "*narrowed*" by us in the discussions at the end of the evidence. They were neither. We simply clarified what appeared to us to be the obvious ambiguity noted above. The claimant suggests in his submission (page 12 at lines 13 and 14) that the PCPs could be repeated for "*other positions*" or "*in previous or future revisions*". That in our view is not possible because they are, in terms, limited to one role. Put shortly, if the claimant had wished his PCPs to extend to recruitment more generally he should have said so. The claimant asserts (submission page 12 last line) that there was "*substantial evidence that what was conducted was not a one-off event*." He then lists five examples. The first is that "*arguably*" the PCPs were applied to all positions in the revision process. There was simply no evidence to support that contention. The second is to assert that notwithstanding that one witness for the respondent (Kenneth McKenzie) felt the way the role had been advertised was incorrect and wrong there was no apology. The claimant then says, "*In that context, it would be entirely plausible to suggest that on the balance of probabilities the same would occur in the future*." That in our view is not evidence. It is

speculation. The third is a reference to "*history*" and to pages 286 to 288. It is indexed as a stage 3 Grievance investigation document from 24 August 2017. The claimant says that episode is one where PCP 3(b) and (c) had been followed. We do not agree. Page 287 records (second paragraph) "*…it is clear that [the claimant] applied for 2 duties & was unsuccessful in both applications*." Neither these pages nor the references to them in witness evidence supports a finding that either of the PCPs occurred in 2017. Fourth, the claimant refers to the evidence of three witnesses who, he says, claim that the Stirling District Office is "*an anomaly*" which allows it to avoid following resourcing criteria contained in national agreements. Even if that were so, it is not evidence which supports a finding that the alleged PCPs were being or would be repeated. The claimant follows his list by saying, "*The Tribunal are asked to find that on the balance of probabilities, what was conducted having been applied to other posts within the revision, and indeed having been applied to similar posts in the past, would where there is no acknowledgement of fault or wrongdoing be more than likely to continue and be followed in the future. The MGV reserve position was resourced following an established way of doing things within the Stirling Delivery Office, a way that pays no regards for National Agreements between the first and second respondents. It is entirely possible that the same process (seniority overall) would apply to other MGV positions going forward, as it has applied in the past).*" But it is important to distinguish between (i) what the claimant says had been or would be "*conducted*" in appointing to roles generally and (ii) the PCPs relied on. To rely on his examples is in our view to impermissibly stray beyond his PCPs.

76. In any event, in our view the three PCPs relied on were not "*applied*". We found that the advert (page 435) was displayed at the "*signing on*" desk in the Stirling office; and that it was likely that it was also displayed in the canteen on the union notice board and on the staffing board at the Stirling office. It may be that the claimant did not see it. But that is not the same as it "*not being shown*" to all. On 1(b) the first respondent's position was this; "*The First Respondent did not apply a PCP of not giving all staff members the opportunity to apply or be considered for the post and instead, asking the most senior staff members first. The seniority process was applied to all posts, not*

*"*the post*". All staff members potentially had the opportunity to select any post that had not already been filled and they had the necessary qualifications and training to do by the time they were asked to choose. The first respondent did not apply a PCP of not doing something. They applied the PCP of giving all staff members the opportunity to choose an available and suitable duty in accordance with their position on the seniority list*." (page 4 penultimate paragraph) We agree that the PCP identified by the first respondent is not the one relied on by the claimant. Separately, 1(c) is contradicted by the evidence. Irrespective of the relevance of the Professional Driver Agreement, the respondent did not select the most senior person for the post.

Issues numbered 5 to 8 above

77. These numbered issues depended on issues 3 and 4 being answered "*yes*". Given our negative answers to them, we have not answered issues 5 to 8.

Indirect disability discrimination (seniority) Issues numbered 9 to 12 above

78. For the reasons set out above, we decided that the PCPs relied on were not applied by either respondent.

79. These numbered issues depended on issues 3 and 4 being answered "*yes*". Given our negative answers to them, we have not answered issues 9 to 12. That said, and while not strictly necessary we would simply add this on the question of "*disadvantage*." In his submission the claimant referred to the decision of the Supreme Court in *Chief Constable of West Yorkshire Police and another v Homer* [2012] ICR704. He did so in support of the proposition that "*There is no requirement to lead statistical evidence*." What the Court said in that case (at paragraph 14) was that "*the current formulation of the concept of indirect discrimination … was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question*." In this case he invited us to agree

that "*autistic people are less likely to be able to gain longer length of service*" when compared with persons who are not autistic. But we had no evidence (statistical or otherwise) to support that conclusion.

Indirect disability discrimination (shift patterns) (Issues 13 and 14)

80. The PCP relied on is this; "*A requirement that to apply to do reserve jobs (including the MGV reserve job) that the staff member must be able to undertake all shifts within the delivery office, including for the MGV reserve job nightshift and delivery work. That the requirement being expressed to any interested party, alongside comment that no adjustment would be made and if any person is made up to full-time and subsequently found not to be able to do all shifts that they would be reverted back to part-time hours*." The claimant asks in his written submission that we accept that this is a PCP. In support of that request he says, "*It is written into the office proposal…*" The first respondent accepts that the first sentence is a PCP but disputes that the second sentence is. We agree. The Stirling Office Structure document (pages 296 to 300) says (on page 298) "*…if someone is made full time to become a full time reserve the expectation is that they can cover every shift available*." But there is no evidence which supports a finding that either respondent made the comment to the workforce that "*no adjustment would be made*." In his submission the claimant refers to emails from Mr Carrick in which he makes comments about adjustments. It is clear that they relate to the claimant. They do not indicate a PCP which could be said to operate which disadvantages any wider group. In our view therefore the respondents did not apply the PCP contended for.

Issues 15 to 18

81. Separately and while not strictly necessary given our view on the PCP or its application, there was no evidence to support the claimant's assertion that autistic people may be more likely than not to be able to complete all shift patterns. In his submission the claimant relied on the evidence from John Forrester at page 3, lines 31 to 40. The questions and answers recorded there are; "***In your experience, would autistic employees be more likely***

or less likely to be able to demonstrate flexibility in working patterns than non-autistic employees? *As a generalisation less likely, at least less likely to manage that quickly without notice.* ***Why might that be?*** *It's probably in terms of autism and preference, of course everyone is different but for some the means of making sense and controlling and maintaining their emotion is to maintain sameness and it can be extremely difficult for people to adjust their patterns that are so embedded to keep them on an emotional keel and keep influencing their emotions so that they are at a lower level*." The focus of that evidence is on flexibility in working patterns. That question differs from the issue which is concerned with the ability to complete shift patterns. Separately, Mr Forrester's answer to the second question is not evidence about what is or is not more likely; it is an explanation of why that might be. It is not additional evidence in answer to the first question.

Remedy (Issue 19)

82. While not strictly necessary, we say something about a remedy sought in the claimant's amended statement which was added to the bundle at page 464. He suggests four recommendations there. Section 124(2)(c) of the Equality Act 2010 provides that an Employment Tribunal "*may…make an appropriate recommendation*". An appropriate recommendation is "*a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate*" — S.124(3). At least three of his suggestions go beyond the claimant and would require both respondents to do things with far wider implications. They go beyond the extent of section 124.

Employment Judge: **R Bradley**
Date of Judgment: **21 February 2023**
Entered in register: **22 February 2023**
and copied to parties