Case Number: 2202719/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Liaqat Ali	**v**	**First Greater Western Limited**

Heard at: **Central London Employment Tribunal**
On: **9-11 May 2023**
12 May 2023 (In Chambers)
9 June 2023 (In Chambers)
7 July 2023 (In Chambers)

Before: **Employment Judge Woodhead**

Members: **Ms Shaah**
Ms Ali

Appearances:

For the Claimant: Mr Nicholas Toms (Counsel)

For the Respondent: Ms Naomi Ling (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. **The Claimant's claim of discrimination arising from disability is well founded.**

2. **The Claimant's claim of a failure to make reasonable adjustments by not providing him with a stool is well founded.**

3. **The Claimant is awarded £16,737.04 comprising:**

    a. **Loss of earnings of £2,598.35**

    b. **Interest of £166.29 on his loss of earnings**

    c. **An injury to feelings award of £13,000**

    d. **Interest on the injury to feelings award of £972.40**

4. **The Parties may, within 28 days (rather than 14 days) of the date on which the written record of this decision is sent to the parties, ask for**

reconsideration of the monetary sums awarded to the Claimant. The normal time limit for requesting reconsideration of any other aspect of this judgment shall remain 14 days.

REASONS

Preliminary matters

1. Mr Toms and Ms Ling both confirmed that they were content with the list of issues which are in **Appendix 1** to this judgment. We made clear that this would form the basis on which we would be deciding the claim.

Summary

2. As recorded in the Case Management Orders of the preliminary hearing held on 29 July 2022, the Claimant is employed by the Respondent, First Greater Western Railways. By a claim form presented on 11 May 2022, the Claimant brought complaints of discrimination arising for disability discrimination under s.15 Equality Act 2010 (EqA) and failure to make reasonable adjustments contrary to sections 20 and 21 of the EqA.

3. The claim centres on a deterioration in the state of the Claimant's right knee in January 2021, the Respondent requiring him to go on sick leave from 23 April 2021, the Claimant having an operation on his knee on 22 October 2021 which required a period of recovery, the Claimant's entitlement to 6 month's full pay expiring on 3 December 2021 resulting in his pay then dropping to 50% from that date.

4. It was agreed that the Claimant is employed as a Gateline Assistant at Paddington Railway station, that Network Rail owns and has to approve any changes to the infrastructure of the railway station and that in his role the Claimant is responsible for ensuring the safe and efficient operation of the automatic ticket gates there. It was also agreed that in January 2021 the Claimant began suffering with increased pain in his right knee. We heard undisputed evidence in reexamination of Ms Williams that the role of Gateline Assistant involves shift work with 4 shifts on and between 2 and 3 shifts off. The shifts are 10 hours long and the early shift starts at 4am and runs to 2pm and the late shift starts at 2:30pm and runs to 00:40am at night.

The hearing and findings of fact

5. We were provided with six sets of documents (including a main bundle which alone included 1225 pages).

6. The Claimant gave evidence for his case and was supported by evidence from **Mr Malcolm Lewis** (RMT Health and Safety Representative).

7. The Respondent adduced the evidence of **Mr Adam Field** – Assistant Flagship Station manager, **Mr Dean Haynes** – Flagship Station Manager and **Ms Gladys Williams** (Duty Station Manager at Paddington and the Claimant's direct line manager).

8. The way in which the parties had prepared the case (and in particular the main and various supplemental bundles) meant that, notwithstanding the helpful chronologies prepared by counsel for each party, we had to spend a good deal of time piecing together the sequence of events and the correspondence between the parties. This

has been the principal reason for the delay in both us reaching a decision and being able to prepare this judgment for the parties. As a result, our findings of fact are lengthy, quote substantially the correspondence and are therefore set out in **Appendix 2** to this judgment.

THE LAW

Disability

9. Disability is defined in S.6 Equality Act 2010 (**EqA**)

> (1) A person (P) has a disability if—
>
> (a) P has a **physical or mental impairment**, and
>
> (b) the impairment has a **substantial** and **long-term** adverse effect on P's ability to carry out **normal day-to-day activities**…
>
> (2) A reference to a disabled person is a reference to a person who has a disability.
>
> (3) In relation to the protected characteristic of disability –
>
> a. A reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
> b. A reference to persons who share a protected characteristic is a reference to persons who have the same disability
>
> (4) This Act …applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly …
>
> *a.* a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability…
>
> b. a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability
>
> (5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

10. Section 212 EqA defines “substantial” as being more than minor or trivial.

11. Schedule 1, part 1, para. 2 of the EqA 2010 defines “long-term” as follows:

> (1) The effect of an impairment is long-term if –
>
> (a) it has lasted for at least 12 months,
>
> (b) it is likely to last for at least 12 months, or
>
> (c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

12. It will be an error of law if a Tribunal does not have regard to all three scenarios envisaged in paragraph 2 of schedule 1. 'Likely' has been held to mean it is a "real possibility" and '**could well happen'** rather than something that is probable or more likely than not. **(SCA Packaging Ltd v Boyle [2009] ICR 1056).**

13. Paragraph 5 of Schedule 1 to the EqA provides:

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:

(a) measures are being taken to correct it, and
(b) but for that, it would be likely to have that effect.

(2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.

14. Para. 12 of Schedule 1 of the EqA provides that when determining whether a person is disabled, the Tribunal "must take account of such guidance as it thinks is relevant*."* **The "Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability"** (May 2011) (the "Guidance") was issued by the Secretary of State pursuant to s. 6(5) of the EqA 2010.

15. In **Goodwin v Patent Office [1999] I.C.R. 302**, Morison J (President), provided some guidance on the proper approach for the Tribunal to adopt when applying the provisions of the Disability Discrimination Act 1995. Morison J set out four questions to be answered by the Tribunal in order. This four-stage approach was approved more recently by the Court of Appeal in **Sullivan v Bury Street Capital Limited** [2021] EWCA Civ 1694, where Singh LJ listed the questions as:

a. Was there an impairment? (the 'impairment condition');
b. What were its adverse effects [on normal day-to-day activities]? (the 'adverse effect condition');
c. Were they more than minor or trivial? (the 'substantial condition');
d. Was there a real possibility that they would continue for more than 12 months? (the 'long-term condition').

16. Singh LJ emphasised that these are questions for the Tribunal; although it may be assisted by medical evidence, it is not bound by any opinion expressed.

17. Underhill J (President) in **J v DLA Piper UK LLP 2010 WL 2131720** suggested (para [40]) that although it was still good practice for the Tribunal to state a

conclusion separately on the question of impairment, as recommended in Goodwin, there will generally be no need to actually consider the 'impairment condition' in detail:

> "In many or most cases it will be easier (and is entirely legitimate) for the tribunal to ask first whether the Claimant's ability to carry out normal day-to-day activities has been adversely affected on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from an impairment which has produced that adverse effect. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve the difficult medical issues."

18. The relevant time to consider whether a person is disabled is at the time of the alleged discrimination: McDougall v Richmond Adult Community College [2008] ICR 431.

19. In **Goodwin** Morison J warned of the risk of "disaggregating" the 4 questions – i.e. whilst they can be addressed separately, it is important not to forget the purpose of the legislation, and to look at the overall picture. This warning was emphasised by HHJ Tayler more recently in **Mr A Elliot v Dorset County Council, UKEAT/0197/20/LA.**

20. It is irrelevant that a Claimant is no longer disabled at the time of the hearing. When considering if an impairment is "long term", that consideration must be considered **as at the time of the discriminatory act**, and not at the date of the hearing. This was again repeated by the EAT in **Alao v Oxleas NHS Foundation Trust** [2022] EAT 135, where Eady P held that when assessing the question of disability the Tribunal was "**bound to have regard**" to the position as at the date of the acts of discrimination in issue.

21. Pursuant to s. 6(4) of the EqA, someone who is no longer disabled, but who met the requirements of the definition in the past, will still be covered, if the discrimination is due to the past disability. However, if a past disability is relied on, then it must still meet all strands of the statutory definition. The Guidance says:

> "The Act provides that a person who has had a disability within the definition is protected from some forms of discrimination even if he or she has since recovered or the effects have become less than substantial. In deciding whether a past condition was a disability, its effects count as long-term if they lasted 12 months of more after the first occurrence, or if a recurrence happened or continued until more than 12 months after the first occurrence" [C12].

22. In a claim under sections 20 and 21, however, no duty to make reasonable adjustments will arise unless there is an impairment putting the person at a disadvantage.

EqA, Part 5 Chapter 1, Employment, Etc Employees

23. **Section 39 EqA** provides:

> […]

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

[…]

(d) by subjecting B to any other detriment.

[…]

(5) A duty to make reasonable adjustments applies to an employer.

24. **EqA, s136** sets out the burden of proof in claims under the EqA. It provides:

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

(2) If there are facts from which the court [which includes employment tribunals] 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"

25. It is a shifting burden. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in ***Igen v Wong*** **[2005] ICR 931** at para 76 and Annex to the judgment.

26. In ***Madarassy v Nomura International plc.*** **Court of Appeal, 2007 EWCA Civ 33, [2007] ICR 867**, Mummery LJ approved the approach of Elias J in ***Network Rail Infrastructure Ltd v Griffiths-Henry*** **[2006] IRLR 865** and confirmed that the burden of proof does <u>not</u> simply shift where M proves a difference in sex/disability and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient, para 56 – 58 Mummery LJ.

Discrimination Arising from Disability

27. Subsection 15(1) of the Equality Act 2010 provides that:

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

a. A treats B unfavourably because of something arising in consequence of B's disability, and

b. (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim

28. Limb (a) involves a two stage test:

a. Did the Claimant's disability cause, have the consequence of, or result in, "something"?

b. Did the employer treat the Claimant unfavourably because of that "something"?

29. It does not matter which way round these questions are approached.

30. Simler P in ***Pnaiser v NHS England*** **[2016] IRLR 170***, **EAT***, at [31], gave the following guidance as to the correct approach to a claim under *EqA s15*:

'(a) 'A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises..

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely, to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) There is a difference between the two stages – the "because of" stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the "something arising in consequence" stage involving consideration of whether (as a matter of fact rather than belief) the "something" was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the Claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the Claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a Claimant that leads to "something" that caused the unfavourable treatment."

31. According to subsection 15(2), subsection 15(1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability. It is not necessary, however, for A to be aware that the "something" arises in consequence of B's disability (**City of York Council v Grosset [2018] EWCA Civ 1105**).

32. The concept of unfavourable treatment is unique to section 15. In the case of **Williams v Trustees of Swansea University Pension and Assurance Scheme and another [2018] UKSC 65**, the Supreme Court said it was a similar to a detriment. In particular, there is a requirement that the disabled person "must have been put at a disadvantage." No comparator or comparison is required.

33. Known as the test of objective justification, the leading case on limb (b) is **Bilka-Kaufhaus GmbH v Weber von Hartz [1987] ICR 110, ECJ**. The Court held that, to justify an objective which has a discriminatory effect, an employer must show that the means chosen for achieving that objective:

    a. correspond to a real need on the part of the undertaking

    b. are appropriate with a view to achieving the objective in question, and

    c. are necessary to that end.

34. A balancing act is therefore required. The discriminatory effect of the treatment has to be balanced against the employer's reasons for it. To be proportionate, the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so (**Homer v Chief Constable of West Yorkshire [2012] UKSC 15**)

35. When determining whether or not a measure is proportionate it is relevant for the tribunal to consider whether or not a lesser measure could have achieved the employer's legitimate aim (**Naeem v Secretary of State for Justice [2017] UKSC 27**). The tribunal should consider whether the measure taken was proportionate at the time the unfavourable treatment was applied (**The Trustees of Swansea University Pension & Assurance Scheme and another v Williams UKEAT/0415/14**).

36. The tribunal is required to make an objective assessment which does not depend on the subjective thought processes of the employer. This question is not to be decided by reference to an analysis of the employer's thoughts and actions. The question is whether the treatment, objectively assessed, at the time it occurred, a proportionate means to achieve a legitimate aim irrespective of the process adopted by the employer.

37. We must also consider the guidance contained in the EHRC Statutory Code of Practice that is relevant to this question. This is contained, in particular at paragraph 5.12 which states that:

> "It is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on mere generalisations."

38. The guidance in paragraphs 4.28 – 4.32 is also relevant.

Reasonable Adjustments

39. Section 39(5) of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer.

40. Section 20(3) provides that where a provision, criterion or practice (a PCP) applied by or on behalf of an employer, places a disabled person at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable to have to take in order to avoid the disadvantage.

41. Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated than in recognition of their special needs.

42. The duty to make reasonable adjustments only arises where the employer has knowledge (actual or constructive) that its employee is disabled and likely to be placed at a substantial disadvantage as (Paragraph 20 (1)(b) Schedule 8 of the Equality Act 2010).

43. In **Environment Agency v Rowan 2008 ICR 218 and General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4** the EAT gave general guidance on the approach to be taken in reasonable adjustment claims.

44. A tribunal must first identify:

    a. the PCP applied by or on behalf of the employer

    b. the identity of non-disabled comparators; and

c. the nature and extent of the substantial disadvantage suffered by the Claimant in comparison with the comparators

45. Once these matters have been identified then the tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified. The issue is whether the employer had made reasonable adjustments as matter of fact, not whether it failed to consider them.

46. The phrase PCP is interpreted broadly. The EHRC Code says (paragraph 6.10):

"[It] 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."

47. In **Lamb v The Business Academy Bexley EAT 0226/15** the EAT commented that the term "PCP" is to be construed broadly "having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability".

48. It is also generally unhelpful to distinguish between "provisions", "criteria" and "practices": **Harrod v Chief Constable of West Midlands Police [2017] ICR 869**.

49. There is no formal requirement that the PCP actually be applied to the disabled Claimant. The EAT said in **Roberts v North West Ambulance Service [2012] ICR D14** that a PCP (in this case, hot desking) applied to others might still put the Claimant at a substantial disadvantage.

50. There are some limits to what can constitute a PCP. In particular there has to be an element of repetition, actual or potential. A genuine one-off decision which was not the application of policy is unlikely to be a "practice": **Nottingham City Transport Ltd v Harvey [2013] All ER(D) 267 (Feb), EAT**. In that case the one-off application of a flawed disciplinary process to the Claimant was not a PCP. There was no evidence to show that the employer routinely conducted its disciplinary procedures in that way.

51. In **Ishola v Transport for London [2020] ICR 1204** the Court of Appeal said that all three words "provision", "criterion" and "practice" "..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."

52. The test of reasonableness imports an objective standard. The tribunal must examine the issue not just from the perspective of the Claimant, but also take into account wider implications including the operational objectives of the employer

53. It is not necessary to prove that the potential adjustment will remove the disadvantage; if there is a "real prospect" that it will, the adjustment may be reasonable. In **Romec v Rudham [2007] All ER (D) 206 (Jul), EAT**: HHJ Peter Clark said that it was unnecessary to be able to give a definitive answer to the question of the extent to which the adjustment would remove the disadvantage. If there was a 'real prospect' of removing the disadvantage it 'may be reasonable'. In ***Cumbria Probation Board v Collingwood*** **[2008] All ER (D) 04 (Sep), EAT**: HHJ McMullen said that 'it is not a requirement in a reasonable adjustment case that the Claimant prove that the suggestion made will remove the substantial

disadvantage'. In ***Leeds Teaching Hospital NHS Trust v Foster*** **UKEAT/0552/10, [2011] EqLR 1075**, the EAT said that, when considering whether an adjustment is reasonable, it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage.

54. The Statutory Code of Practice on Employment 2011, published by the Equalities and Human Rights Commission, contains guidance in Chapter 6 on the duty to make reasonable adjustments. Paragraph 6.28 sets out some of the factors which might be taken into account in determining whether it is reasonable for an employer to have to take a particular step in order to comply with the duty to make reasonable adjustments. These include whether taking the step would be effective in preventing the substantial disadvantage, the practicability of the step, the cost to the employer and the extent of the employer's financial and other resources.

55. We took account of the EHRC Code of Practice on Employment (2011) ("the Code") and in particular paragraph 6.24 (there is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask), paragraph 6.37 and paragraph 6.28.

56. Schedule 8 EqA 2010 (Work: Reasonable Adjustments) - Part 3 limitations on the duty provided at S. 20. Lack of knowledge of disability, etc provides:

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

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

Under Part 2 and an interested disabled person includes in relation to Employment by A, an employee of A's.

57. If relied upon, the burden is on the Respondent to prove it did not have the necessary knowledge. The Respondent must show that it did not have actual knowledge of both the disability and the substantial disadvantage and also that it could not be reasonably have been expected to know of both the disability and the substantial disadvantage.

Jurisdiction

58. The relevant time-limit is at section 123 Equality Act 2010. According to section 123(1)(a) the tribunal has jurisdiction where a claim is presented within three months of the act to which the complaint relates.

59. The normal three-month time limit needs to be adjusted to take into account the early conciliation process and any extensions provided for in section 140B Equality Act.

60. By subsection 123(3)(b), a failure to do something is treated as occurring when the person in question decided on it. In the absence of evidence to the contrary. A person is taken to decide on a failure to do something when that person does an

act which is inconsistent with doing it or, in the absence of such an inconsistent act, on the expiry of the period on which that person might reasonably have been expected to do it.

61. In claims for reasonable adjustments, this means time will start to run when an employer decides not to make the reasonable adjustment relied upon ***(Humphries v Chevler Packaging Ltd*** **[2006] EAT0224/06**). Alternatively, in a claim when an adjustment has not been actively refused time runs from the date on which an employer might reasonably have been expected to do the omitted act **(*Kingston upon Hull City Council v Matuszowicz*** **[2009] ICR 1170 CA**). This should be determined having regard to the facts as they would reasonably have appeared to the employee, including what the employee was told by his or her employer (***Abertawe Bro Morgannwg University Local Health Board v Morgan*** **[2018] ICR 1194, CA**).

62. By subsection 123(3)(a), conduct extending over a period is to be treated as done at the end of the period.

63. In ***Hendricks v Metropolitan Police Commissioner*** **[2002] EWCA Civ 1686**, the Court of Appeal stated that the test to determine whether a complaint was part of an act extending over a period was whether there was an ongoing situation or a continuing state of affairs in which the Claimant was treated less favourably. An example is found in the case of ***Hale v Brighton and Sussex University Hospitals NHS Trust*** **UKEAT/0342/17** where it was determined that the Respondent's decision to instigate disciplinary proceedings against the Claimant created a state of affairs that continued until the conclusion of the disciplinary process.

64. It is not necessary to take an all-or-nothing approach to continuing acts. The tribunal can decide that some acts should be grouped into a continuing act, while others remain unconnected (***Lyfar v Brighton and Sussex University Hospitals Trust*** **[2006] EWCA Civ 1548**; The tribunal in *Lyfar* grouped the 17 alleged individual acts of discrimination into four continuing acts, only one of which was in time.

65. A refusal of a request, where it is repeated over time, may constitute a continuing act (***Cast v Croydon College*** **[1998] IRLR 318**).

66. A distinction needs to be drawn between a continuing act and a one-off act that has continuing consequences (***Barclays Bank plc v Kapur and others*** **[1992] ICR 208**;). This distinction will depend on the facts in each case. (***Sougrin v Haringey Health Authority*** **[1992] IRLR 416*, CA**).

67. Alternatively, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable as provided for in section 123(1)(b).

68. The tribunal has a wide discretion to extend time on a just and equitable basis. As confirmed by the Court of Appeal in ***Adedeji v University Hospitals Birmingham NHS Foundation Trust*** **[2021] EWCA Civ 23**, the best approach is for the tribunal *to* assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. This will include the length of and reasons for the delay, but might, depending on the circumstances, include some or

all of the suggested list from the case of **British Coal Corporation v Keeble [1997] IRLR 36** set out below, as well as other potentially relevant factors*:*

a. The extent to which the cogency of the evidence is likely to be affected by the delay.

b. The extent to which the party sued had co-operated with any requests for information.

c. The promptness with which the Claimant acted once they knew of the possibility of taking action.

d. The steps taken by the Claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

69. It is for the Claimant to show that it would be just and equitable to extend time. The exercise of discretion should be the exception, not the rule **(**Bexley Community Centre (t/a Leisure Link) v Robertson *[2003] EWCA Civ 576*).

70. Where the reason for the delay is because a Claimant has waited for the outcome of his or her employer's internal grievance procedures before making a claim, the tribunal may take this into account (***Apelogun-Gabriels v London Borough of Lambeth and anor* 2002 ICR 713, CA**). Each case should be determined on its own facts, however, including considering the length of time the Claimant waits to present a claim after receiving the grievance outcome.

71. The potential merits of the claim may well be a factor that falls to be considered (***Kumari v Greater Manchester Mental Health Foundation Trust* [2022] EAT 132**) although care needs to be taken not to conflate the determination of a time point and the application of the just and equitable test with the tests to be applied when considering an application for a strike out or a deposit order under the tribunal rules.

72. Kapur involved a pension scheme that did not recognise the years of service completed by an Asian employee abroad in Africa. The House of Lords held that the **time limit** ran from the end of Mr Kapur's employment, not the date when the bank decided to not credit Mr Kapur's service in Africa. The court held that where an employer operates a discriminatory regime, rule, practice or principle, such a practice will amount to an act extending over a period. However, where there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing, even though that act has ramifications which extend over a period of **time**.

73. In **Sougrin v Haringey Health Authority [1992] IRLR 41**6, the Court of Appeal held that an employer's refusal to upgrade a black nurse was a once-and-for-all event, which took place (at the latest) on the dismissal of the nurse's appeal against that decision. The resulting, ongoing payment of a lower salary was not a continuing act extending over a period, but the continuing consequence of the employer's one-off decision.

74. The Sougrin case was considered by the EAT in **Pennine Acute Hospitals NHS Trust v Power and others UKEAT/0019/11**. There, the EAT remitted the matter to a tribunal to decide whether the substance of the Claimant's age discrimination claim concerned the employer's one-off decision to regrade her

(in which case, the claim was out of time) or a continuing age discriminatory failure to pay her at a higher rate. On remission, the tribunal concluded that it was the application of a policy which caused the employee to receive less pay than her comparators. Since the policy was applied each time the employee was paid, then this constituted a continuing act and not a one-off decision with ongoing consequences.

75. Sougrin was also considered by the EAT in **Hale v Brighton and Sussex University Hospitals NHS Trust UKEAT/0342/17**. The EAT held that the Trust's decision to instigate disciplinary proceedings against Mr Hale created a state of affairs that would continue until the conclusion of the disciplinary process. It was not a one-off act with continuing consequences. The EAT noted that this outcome avoided a multiplicity of claims since if an employee was not allowed to rely on an ongoing state of affairs in such circumstances, then time would begin to run as soon as each step was taken under a disciplinary procedure.

76. In **Okoro and another v Taylor Woodrow Construction Ltd and others [2012] EWCA Civ 1590**, the Court of Appeal considered whether banning two agency workers from a particular construction site was a continuing act or a one-off decision with continuing consequences. The ban was imposed on 7 April 2008; another agency sent the workers to the site on 18 April 2008 and they were turned away. They presented race discrimination claims on 6 August 2008, brought under the RRA 1976. The Court of Appeal, upholding the EAT, found that the ban was a one-off act. It was comparable to the dismissal of an employee by an employer. It terminated the relationship between the principal and the workers and time ran from the date of the ban. In the absence of a continuing relationship between the parties, there was no continuing state of affairs on which a complaint could be based. The latest date on which time could begin to run for limitation purposes was therefore 18 April 2008.

Discussion and Decision

77. The Tribunal took into account all its findings of fact and the relevant law (including that referred to by the parties in submissions) when reaching its decision. For clarity, it has stated its conclusion on individual allegations separately.

Disability

What is the material time for assessing whether the Claimant was disabled?

78. The material time for assessing disability is when the alleged acts of discrimination occurred.

Provision of a stool

79. In relation to the provision of a stool the Claimant submitted that the material time was around June 2021 which is the point by which he says the stool should have been provided, and with that duty continuing to 11 May 2022 (the date of presentation of the claim form). The Respondent says that the material time was 5 March 2021 when Network Rail confirmed the stool was not permitted (because the Respondent says it was bound by that decision). We do not agree with the Respondent's assertion. The Respondent was not entitled, having given so little explanation to Network Rail for their request or entered into any sort of dialogue with them about the request, to treat Network Rail's response of 5 March 2021 as an

indication that a stool would not be permitted. Network Rail's subsequent willingness to try to accommodate a stool/perch bench emphasises that it was not reasonable for the Respondent to put any reliance on the response of 5 March 2021.

80. We consider that whilst occupational health first suggested a stool (and it was only later that a perch bench was mentioned) it was or should have been clear as a matter of common sense to all concerned that what the Claimant needed was a place to rest his knee.

81. We accept, as did the Claimant, that the provision of a stool or perch needed to comply with a risk assessment and that there were practical questions to resolve. For the reasons we go on to explain more fully we consider that the Respondent failed to make a reasonable adjustment from the **end of July 2021** and the material time from the perspective of this adjustment was from the **end of July to the date the claim was brought on 11 May 2022**.

Claimant's sick pay

82. In respect of the Claimant's sick pay reducing, the Claimant says the material time is when the reduction took effect (i.e. from 3 December 2021) and it was ongoing after this time. The Respondent says the material time was when the decision was taken to place Claimant on sick leave on the 22 April 2021. We agree with the Claimant's submissions that the material time was when reduction took effect (i.e. from December 2021) through to 11 May 2022 which is the end of the time in respect of which the claim is about.

Did the Claimant have a disability within the meaning of Section 6 EqA in relation to degeneration in his right knee at the material time?

Was there an impairment?

83. The Respondent sensibly appears to accept that the Claimant has an impairment in his knees, particularly his right knee with a consultant making clear in March 2021 that there was "*varus deformity of both knees, right significantly worse than left*" and that whilst the right side deformity was almost completely correctable he has bone-on-bone medial compartmental arthritis and some bony collapse. Whilst full/partial knee replacement surgery was considered and would have addressed the arthritis, it was best to correct the alignment of the knee to try to get it to last longer (a knee replacement, for example, would have created "*slightly higher lifetime revision risk*").

What were its adverse effects on normal day-to-day activities (the 'adverse effect condition')?

84. The Claimant's impact statement did not describe the impacts on his day to day activities at the material time. The Claimant was cross examined on this and did not provide clear responses and we agree with the Respondent that the impact statement was drafted by reference to September 2022 (when it was prepared). The Respondent asked us to find that where the impact statement referred to what the Claimant 'used to' be able to do, then it referred to the period just before January 2021. We accept that this is the most logical interpretation of the impact statement.

85. Whilst a consultant knee specialist did describe the Claimant as very active, we accept that the misalignment of the Claimant's right knee and the resulting arthritis and bony collapse did have an adverse impact on his normal day to day activities of

standing and walking and his ability to do his work which involved standing at the gateline (we have taken into account the authorities referred to by the Claimant on adverse effects on professional life (including **Banaszczyk v Booker Ltd (2016) IRLR 273, EAT** (at [48]) and **Chacón Navas v Eurest Colectividades SA (2006) IRLR 706, ECJ**)).

Were they more than minor or trivial (the 'substantial condition')?

86. We find that the adverse effects were more than minor or trivial at the material times and have discounted the Claimant's reliance on pain killers and the knee braces he was supplied with.

Was there a real possibility that they would continue for more than 12 months (the 'long-term condition')?

87. The Respondent submitted that the long term requirement was not met because, it says, it was expected that an operation would take place in the shorter term (described by his consultant surgeon as 'the near future' on 17 March 2023 (459)) and that the operation would resolve his knee problems. The Claimant submitted that it should be considered a recurring condition, that it had fluctuated over the years with a gradual deterioration over the last 10 years and that the operation would not resolve it because of the diagnosed osteoarthritis and bony collapse (which the Claimant's operation did not and was not going address – the operation was just to correct the deformity of his leg so that some of the pressure was taken from the joint). The Claimant submitted that the condition is likely to recur.

88. We accept the Claimant's position on this and that, based on the medical evidence, it was likely that the adverse effects would last for more than 12 months even in January 2021 and that they are likely to recur into the future given the bone on bone osteoarthritis and bony collapse that was not going to be rectified by surgery.

Knowledge of disability

89. The next question is whether the Respondent knew or could reasonably have been expected to know of the Claimant's disability.

90. The Respondent submitted that we should focus on the information available to the Respondent at the time and the advice it was receiving from Occupational Health. The Respondent argued that it made attempts to clarify the position with occupational health in February 2021 (787), March 2021 (791) and April 2021 (795) and through additional questions to OH in March and April 2021 (Bundle C) but OH did not clarify questions such as whether the Claimant's condition was long term or not. The Claimant argued that the Respondent's managers had at least constructive knowledge. We accept on the facts that by March 2021, based on the two occupational health reports that they had received, that the Respondent's managers were aware or should have been aware that the Claimant had:

    a. a serious problem with his knee, with the possibility of a partial knee replacement;

    b. his conditions were long term based on the reference to previous surgery and likely to last more than 12 months; and

c. that the Claimant's condition was impacting significantly on his normal day to day activities, especially in relation to his working life.

91. It is also clear that the Respondent's managers were aware at least from 23 April 2021 that the Claimant himself considered he had a disability as we accept that he told them in the zoom meeting on that date and in his subsequent email (796-7).

92. We also find that, even if we are wrong and the Respondent's managers did not know of the Claimant's disability, they nonetheless could reasonably have been expected to know of his disability. We note that the ECHR Code, which deals with constructive knowledge in relation to Section 15 EqA claims at paras 5.15 to 5.13 at page 70, says "*Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'. An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially*."

93. The same approach is adopted in relation to the duty to make reasonable adjustments as can be seen from paras 6.19 of the EHRC Code.

94. We agree with the Claimant that, had the Respondent properly investigated the Claimant's medical situation with OH including through the OH advisor obtaining evidence from the Claimant's treating specialists, they would have found the full extent of the Claimant's condition (including, as the Claimant submitted, its nature and duration and the underlying bony collapse/arthritis which was going to remain even after the correction, by operation in October 2022, of the misalignment in the Claimant's leg).

Duty to make reasonable adjustments s.39 EqA

<u>Provision, criterion or practice (pcp)?</u>

95. We have noted the guidance of the EAT in **Carreras v United First Partners Research UKEAT/0266/15/RN** that the concept of the pcp is not to be interpreted in too restrictive a way and can include one off decisions. We also note the guidance in the Code:

> *6.10: "[It] 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."*
>
> *4.5: The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions.*
>
> *A provision, criterion or practice may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a 'one-off' or discretionary decision.*

96. In submissions the Respondent was prepared to accept both pcp's advanced by the Claimant at paragraph 4 of the list of issues. The Respondent reminded us that the pcp is established by reference to the practice of the Respondent before any adjustments are made: **Paulley v FirstGroup plc [2017] 1 WLR 423.**

97. We agree that on the evidence the following do amount to pcp's applied by the Respondent:

    a. the requirement for the Claimant to stand whilst working on the gateline and/or to stand whilst working on the gateline and dealing with customers ("**the Requirement to Stand pcp**").

    b. the provisions of the sick pay policy (based on the Claimant's length of service) that full pay would be provided for 6 months and then half pay for 6 months. ("**the Sick Pay pcp**").

Comparators – substantial disadvantage

98. The Respondent submitted that the important point is that a comparator should test whether the pcp has the effect of producing the relevant disadvantage as between those who are and are not disabled (Simler J in **Sheikholeslami v University of Edinburgh [2018] IRLR 1090**) and we accept this.

99. The Respondent submitted that the Claimant was seeking to create a 'composite comparator' out of the two pcps. The Respondent argued that it was not controversial that the requirement for the Claimant to stand whilst working on the gateline placed him at a disadvantage because he suffered pain as a consequence and was unable to perform his role (at any event, without adjustments) and we agree with the Respondent in this respect.

100. The Respondent argued however that the 'being made to go sick pending the provision of adjustments including a stool' was not a disadvantage arising from the first PCP, it was, if anything, a second PCP. The Respondent said that alternatively, it was something that sounds in a s15 claim. The Respondent said that the Claimant's framing of the comparator in this way was an attempt to get round the authorities that state that the appropriate comparator where the pcp is a sick pay policy is someone who might be off sick for a non-disability related reason, rather than a non-disabled individual who is not off sick at all and therefore to whom the sick pay policy does not apply and referred to **Royal Bank of Scotland v Ashton [2011] ICR 648**.

101. The Respondent further asserted that the drafting of the disadvantage at paragraph 6 of the list of issues did not create the difficulties it asserted with respect to the pcp's because, it said, paragraph 6 of the list of issues keeps the disadvantage created by the two pcps separate and the Respondent accepted that these disadvantages were caused. We have taken this also to indicate that the Respondent accepts that the disadvantage was substantial but have nonetheless considered it independently ourselves

102. We find that in respect of the Requirement to Stand pcp the appropriate comparator is a non-disabled employee who is required to work on the gateline. We find that it did put the Claimant at a substantial disadvantage because it caused him pain and therefore difficulty working.

103. We agree with the Respondent's submissions in respect of the Sick Pay pcp and we consider that this sounds more appropriately in the S.15 EqA claim brought by the Claimant. We have found for the Claimant in that claim and we do not therefore deal further with this element of his reasonable adjustments claim.

Requirement to Stand pcp - knowledge of substantial disadvantage

104. We have explained above why we have concluded that the Respondent had actual or, failing that, constructive knowledge of the Claimant's disability.

105. We find that the Respondent clearly knew or could reasonably have been expected to know of the substantial disadvantage suffered by the Claimant, indeed it was the Respondent that required the Claimant to go on sick leave.

Reasonable adjustments – provision of a stool

106. The Respondent accepted some criticism of some of the delays that occurred and the clarity of communication with the Claimant on the difficulties that the Respondent said it was experiencing with providing a stool. However, the Respondent submitted in summary that it was not a reasonable adjustment to provide a stool because it was not and never would have been possible to provide a stool that could be both 'suitably secured' to the satisfaction of both the Respondent and Network Rail, and removable, as required by Network Rail. The Respondent submitted:

    a. Mr Field, as soon as he saw the stool that had been obtained by 4 August 2021 knew that it could not comply with the risk assessment. This was a stool that the Respondent has asked the Claimant to choose from a catalogue.

    b. The bump rail attached to the HEX ticket office temporary prefabricated structure was too flimsy and not itself attached to the floor.

    c. A chain attached to a bolt in the floor was also by its nature not suitably secure because there was always 'looseness' in a chain.

    d. Mr Field searched the internet for other stools that might be suitable but could come up with nothing.

    e. There was nothing that a stool could be chained to, to make it 'suitably secure' and it was not appropriate to have one on the gate line.

107. With respect to a perch bench the Respondent submitted that attempts to provide the perch seat took place after the presentation of the ET1, but they are useful to demonstrate the time that it would have taken to put either a perch seat or a suitably secured stool in place and show that it was not a realistic adjustment to provide a stool in the period 23 April-22 October 2021. The Respondent in this regard asserted that/pointed to:

    a. A perch bench was first suggested on 2 November 2022 by the Claimant's Trade Union Representative and with the various hurdles that were encountered (including a model being made – which showed adjustments were needed because the Claimant found the slope of the model uncomfortable) a perch bench had still not been put in place at the date of

the hearing in May 2023 and this is longer than the period 23 April – 22 October when C was off work.

b. The costs of making a perch bench and installing it.

108. The Respondent submitted that once the Claimant had had his operation on 22 October 2022, any duty to make reasonable adjustment lapsed because the Claimant would not have been able to attend work in any event, and further there was a likelihood that the operation would resolve the Claimant's difficulty with his knee. The Respondent said that the Claimant was signed fit to return to work with adjustments from 26 May 2022, but the ET1 in this claim was presented on 11 May 2022.

109. The Claimant submitted in summary that the provision of a stool was a reasonable adjustment because:

a. The OH team had repeatedly advised it and it would have enabled him to carry out his duties at the gateline by facilitating microbreaks.

b. It would not be prohibitively expensive.

c. There was no evidence that Network Rail were ever asked about the stool that was obtained and, when asked, they approved the perch bench.

d. There is no or no sufficient evidence the stool or some other form of seating could not be accommodated to meet the risk assessment (bearing in mind the reversed burden of proof).

e. The opinion of the Claimant's managers is not conclusive as they had no engineering qualifications;

f. Network Rail clearly considered the use of a stool possible. The Claimant pointed to Network Rail's participation in the original (and only) risk assessment and that they were prepared to advise the Dept of Transport about the use of the stool (856);

g. The Respondent have only very recently involved expert contractors to advise on a solution as regards a perch bench and have prepared a model which is being revised;

h. The delay in dealing with this issue is wholly unreasonable and was not due the Claimant or his representative.

110. The Claimant countered the Respondent's arguments that the duty to provide a stool as a reasonable adjustment did not extend beyond the Claimant going off on sick leave for his operation on 22 October 2022 on the following grounds:

a. there was no medical evidence sought after April 2021 as to whether the stool might be needed on the Claimant's return to accommodate his condition and it is likely it would have been needed given the severity of his operation and the likely need for an extensive period of recuperation. Occupational Health continued to recommend the stool after the operation (1082-1083).

b. there is also no evidence that they interpreted their duty as ceasing from October 2021. The Claimant referred to the email from Ms Williams to the Claimant on the 20.10.21 when she knew his operation was imminent assuring him they would (1007). The email from Mr Field dated the 11 March 22 also shows the issue was continuing after the Claimant returned to work (1071).

c. Mr Haynes appeared to accept in cross examination that it had taken far too long. He agreed that having placed the Claimant on sick leave it was incumbent on the Respondent to deal with the issue one way or the other as quickly as possible. This clearly did not happen. The Respondent should have either confirmed the stool or concluded it was not possible (based on reasonable evidence) at the latest by June 2021.

d. More generally, the Respondent has not been supportive of the Claimant in this process,

   i. they left him on sick pay for 6 months without any or any adequate regard as to the impact this would have on his sick pay entitlement when he went into hospital for his operation;

   ii. they refused to commute his sick pay for the period when they were purportedly assessing the stool;

   iii. they did not expedite his return to work after his operation. Occupational Health were clearly getting increasingly frustrated at the refusal to get the Claimant back to work.

111. We accept the Claimant's submissions as set out above but turn to the last submission (with respect to the Respondent's more general lack of support to the Claimant) below.

112. Provision of a stool was first suggested by the OH team in February 2021. Stool is the term used but we find that it is a matter of common sense that the Respondent should not have thought of that as describing the only piece of furniture or equipment that would remove the substantial disadvantage clearly being suffered by the Claimant. The Respondent should reasonably have seen this as a recommendation to provide the Claimant with a means of resting his knee (a phrase used by the OH team) at the gateline. Pending the provision of a more permanent fixture on the gateline (i.e. the perch bench which the Respondent is now commissioning), we conclude on the balance of probabilities that a suitable temporary measure could have been put in place to allow the Claimant to rest his knee for short periods of time near the gateline that would have satisfied the various requirements of the risk assessment and Network Rail as the station owner. However, the Respondent was simply ineffectual in taking the proper steps to explore the options and make it happen. By the time it turned its mind to the question more diligently the Claimant had had his operation and the focus had moved to the more permanent solution of a perch bench.

113. We agree with Mr Toms' submissions that the bump rail was necessarily sturdy (it needed to protect the HEX ticket office from collisions) and was sturdy enough to be used to chain a stool or other rest on a temporary basis without it posing a risk of being torn off by a member of the public or posing a trip hazard. However, the Respondent, until it finally, and much more recently, took proper steps to

implement a permanent solution, simply did not take adequate steps to effectively engage with Network Rail (who we find would have been willing participants in a discussion) and health and safety representatives on the reasonable temporary options. Network Rail were never asked to make any decision by the Respondent on the stool. We do not find that this was a wilful failure on the part of the Respondent. We find that it was largely down to the fact that nobody in the Respondent's management team took personal responsibility for finding a solution. Once the Claimant was on sick leave then, day to day, he was out of sight and out of mind and consequently so was the need to find a solution for him.

114. As such, the Respondent failed to follow its OH teams recommendations, speak to the Claimant (particularly about what he thought would work given that he had been provided with knee braces), actively consider what was required and actively and effectively coordinate the necessary parties to put in place the adjustment needed. The Claimant wanted to be in work and illustrative of this the fact that on 23 March 2021 the Claimant paid for, at his personal expense, a private MRI scan on his knee due the delays in securing a scan through the NHS [A188]. We took this as a strong indication that the Claimant was being proactive in seeking to resolve his health issues.

115. The Respondent cannot rely on its own unreasonable inabilities to coordinate (i) the required action (ii) management engagement and (iii) engagement of the necessary external expertise, to assert that the provision of the required adjustment was too difficult to achieve or could not have been achieved sooner. We find that asking the Claimant to choose a stool from a catalogue in August 2021 was an attempt to appear to be doing something.

116. We are not persuaded by the Respondent's arguments in respect of cost (not least because of the size and financial resources of the Respondent, the cost to the Respondent of the Claimant being on sick leave and the fact that a perch seat is being commissioned by the Respondent).

117. We find that it was not reasonable of the Respondent to cease work, as it effectively did, on progressing provision of this adjustment when the Claimant was recovering from his operation. It was clearly foreseeable, even without OH advice, that the Claimant would need a period of rehabilitation (given the seriousness of his operation) and that he would be able to come back to work sooner if he had a place near or on the gateline where he could sit for short periods. We find this to be a matter of common sense.

118. As such we find that the Respondent failed to make a reasonable adjustment as required by the EqA in that it should have provided the Claimant with a stool, bench or other means of resting his knee from the end of July 2021 to 11 May 2022 (the end of the period to which this claim relates).

Discrimination arising from disability

<u>Was the Claimant subject to unfavourable treatment through having his sick pay reduced from the 3rd December 2021?</u>

119. The Claimant says the unfavourable treatment he suffered was a reduction in his sick pay from the 3 December 2021 to half pay and which he said Mr Haynes failed to redress through commuting the earlier period. He submitted that he did

not rely on the decision to place him on sick leave on 23 April 2021 (which he said could be contended was a separate instance of unfavourable treatment)

120. The Respondent accepted that the Claimant was subjected to a, as they put it, "disadvantage", namely a reduction in pay, and that this arose from a reason related to his disability, namely his period of sickness absence.

121. However, the Respondent further submitted that the Claimant's claim under s.15 EqA includes two issues that have been tangled up with one another. The Respondent said that the disadvantage relied on by the Claimant, which was that he went down to half pay on 3 December 2021 (and was therefore a disadvantage to which he was subjected on that date), was also for a reason related to his disability. The Respondent said that the justification for this was to pay sick pay in accordance with the policy applicable to the Claimant. The Respondent went on to submit that the Claimant was put on sick leave as a result of his manager's assessment that he was unable to work on the gateline, which was a reason related to his disability. The Respondent said that this could be said to be a disadvantage (though it is not identified as such in these proceedings) to which the Claimant was subjected on 23 April 2021. The Respondent said that the legitimate aim advanced for this would be to protect the health and safety of staff and customers and also to comply with the rules as set out by Network Rail. The Respondent made other submissions in relation to justification which we will come on to consider.

122. We find that the Claimant did suffer unfavourable treatment through the reduction in his sick pay from 3 December 2021.

<u>What was the something?</u>

123. It was the Claimant's case that the something was Mr Haynes' assessment that he was unable to work on the gateline without the provision of a stool and him being placed on sickness absence as a consequence between 22 April 2021 and the 22 October 2021, even though Occupational Health said he was fit to work with adjustments.

124. The Respondent accepted that the something was his period of sickness absence. The Respondent did not accept that the decision to put the Claimant on sick leave was a disadvantage asserted in the case. However, it submitted that the contemporaneous documentary evidence showed that the reason for the treatment was to ensure that the Claimant was not working in an unsafe manner that might injure him further, consistent with the Respondent's legal duty to provide the Claimant with a safe system of work. The Respondent pointed to OH reports which it said showed that:

a. By 19 March 2021 (787) it was said that a knee brace would be provided to help manage the problem, and that the Claimant had been able to manage the problem as he had been mostly undertaking union duties;

b. On 29 March 2021 (791) it was said that after a couple of hours the Claimant's pain became 'unmanageable' and that prolonged standing and walking aggravated the pain;

c. On 14 April 2021 (795), despite the fact that the knee brace had been provided and was apparently helping with walking, the Claimant still

experienced an ‘increase in knee pain’ when standing for a prolonged period of time. The knee brace was also stated to ‘prevent further damage to the knee’.

125. The Respondent asked us also to take into account further contentions as follows:

a. although the Respondent had not agreed it at the time, the Claimant was taking breaks from his duties at the gateline (other than his normal breaks) and was sitting on Heathrow Express trains to take them. The Respondent said that it could not therefore be said that the Respondent’s actions could not be justified because they should have permitted him to take more breaks;

b. the Respondent had also attempted to clarify the position with OH but had found that its questions were not answered clearly and sufficient guidance was not given;

c. the fact that HR later agreed that the Claimant could undertake union duties was again an ameliorating factor;

d. the documentary evidence, the Respondent contended, demonstrated that the Claimant’s sickness absence was initially intended to be a short term measure whilst the Respondent pursued the question of whether it could provide a stool on the gateline (797 and 807). The Respondent said that this was supported by the fact that in July 2021 Mr Haynes was expressing concern that the Claimant was still off sick and was asking why he was still off sick (849-847). However, as became clear, it was not possible to provide the adjustment of a stool.

e. It said that there was no evidence to support the assertion that the real reason why the Claimant was put on sick leave was because the Respondent was alarmed by the sight of his knee brace.

126. Having taken into account these submissions, we find that the something was the decision to put the Claimant on sick leave.

<u>Did the something arise in consequence of disability?</u>

127. We find that the something (i.e. the decision to put the Claimant on sick leave) was erroneous (for reasons we will explain) but that it did nonetheless arise in consequence of the Claimant’s disability. As such we find that the Claimant was subjected to the unfavourable treatment of having his pay reduced to 50% from 3 December 2021 because of a decision to put him on sick leave (even though erroneous) which arose in consequence of his disability and that, unless such unfavourable treatment could be justified, it amounted to unlawful discrimination under s.15 EqA.

128. The decision to put the Claimant on sick leave on 22 April 2021 was explained by the Respondent on health and safety grounds. Mr Haynes said he had put the Claimant on sick leave over concerns for his welfare and the reference in the OH report of 14 April 2021 to ‘further damage’ to the Claimant’s knee pending surgery was what was at the forefront of Mr Haynes’s mind. However, the decision was erroneous because:

a. The Respondent did not properly to engage in dialogue with the Claimant about the decision (the OH team had been recommending discussion with the Claimant);

b. The Respondent did not get a more specialist medical opinion from those treating the Claimant (if the Respondent felt it did need more reassurance about the risks of the Claimant continuing to work and it did not feel it was getting that from its OH team).

c. The OH report of 14 April 2021 on its natural reading suggests that the knee braces would themselves prevent further damage to the knee pending the planned operation and therefore Mr Haynes' rationale for putting the Claimant on sick leave was fundamentally flawed. To quote the OH advice fully it said:

> *"Knee braces are temporary measures to facilitate mobility and prevent further damage to the knee pending surgery"*

d. The Claimant did not want to go on sick.

e. With the Claimant wearing knee braces and having the breaks that he was himself finding the opportunity to take, the situation was, on the balance of probabilities, manageable. We find on the evidence that Mr Bladen (Safety Manager East) said a risk assessment on the braces was not needed.

129. Mr Haynes may not have at that time anticipated that the Claimant would then remain on sick leave for so long but we find that he did not do enough before requiring the Claimant to go on sick leave.

130. The fact that the decision to put the Claimant on sick leave was erroneous and at the same time driven by a concern for the Claimant's welfare does not mean that it did not also arise in consequence of his disability. We do not accept the Respondent's arguments with respect to the unfavourable treatment. We find that the reduction in the Claimant's sick pay on 3 December was unfavourable treatment which was because the Respondent put the Claimant on sick leave and that the decision to put him on sick leave was something arising in consequence of the Claimant's disability.

<u>Was the unfavourable treatment a proportionate means of achieving a legitimate aim?</u>

131. The Respondent submitted:

a. in relation to the reduction of pay to half pay that:

i. given the principles set out in **Meikle** relating to the fact that it would be contrary to policy to require adjustments to be made relating to sick pay, it follows that having a general policy permitting an employer to treat sick pay as reducing to half pay after six months and then to nil pay after a further six months is justifiable.

ii. The existence of such a policy to provide clarity, certainty and fairness between employees as to sick pay entitlements is desirable and plainly a legitimate aim; and

iii. following such a policy is justifiable for the same reasons.

b. that in terms of proportionality, flexibility in applying the policy to the Claimant was shown as follows:

i. there was an easement permitting the Claimant to undertake union duties and not to be marked as sick while undertaking them, and that this was a significant flexibility allowing the limits on the policy to be ameliorated.

ii. The Claimant was brought back from sick leave and spent six weeks between 17 July and 25 August on annual leave and rest days, meaning that the full rigour of the policy was not applied to him;

iii. The Claimant should also, strictly speaking, have been subject to a disciplinary procedure for having failed to submit fit notes as instructed and failed to obtain authorisation to attend union meetings, but this was not pursued (see p1030).

132. We have also taken into account the Respondent's other submissions as referred to above.

133. The Claimant submitted that:

a. this is an objective test and we must reach our own judgment based on a fair and detailed analysis of the working practices and business considerations involved (**Hensman v Ministry of Defence (2014) EqLR 670);**

b. what has to be justified is not the Respondent's sick pay policy but, instead, its application in the Claimant's case (**Buchanan v Commissioner of Police of the Metropolis [2016] IRLR 918**);

c. The aims relied on by the Respondent (to protect the health and safety of its staff and customers and also to comply with the rules set out by Network Rail and to pay sick pay in accordance with the TUPE transferred policies of HEX) were not legitimate because:

i. health and safety of staff and customers is not relevant to a sick pay extension. This argument is applicable to the reasonable adjustment of the stool;

ii. protecting the integrity of a sick pay scheme is usually a legitimate aim (subject to the duty to make adjustments by, for instance, extending targets to accommodate disability). However, this is not a case where the Claimant has been taking sick leave where that would be relevant. This is a case where he has been placed on sick leave against his will and the advice of Occupational Health. In this situation, the integrity of the sick pay scheme is not in question. The Respondent cannot reasonably place someone on sick leave and take a very long time to resolve the issue with the employee bearing the loss of their indecision;

d. Further and/or alternatively, the Respondent's actions were not proportionate because Mr Haynes referred when cross-examined to the cost of keeping Claimant off sick. However,

   i. as the schedule of loss demonstrates, the costs are limited in view of the size and resources of the Respondent;

   ii. it is completely unreasonable to place someone on sick leave whilst a proposed reasonable adjustment is investigated and to leave them there for 6 months eating up their sick pay. An unreasonable action is not proportionate and the Respondent should bear the loss as, if nothing else, it might speed up their decision making processes.

   iii. The Respondent's case is also that the treatment of the Claimant was proportionate as it was not permitted to allow him to use a stool so the safest course of action to place him on sick leave to prevent him having a further injury. However, there is no evidence that the Claimant was being caused further injury by working with his braces and sitting down as needed. Occupational Health had not advised this.

134. We agree that protecting the health and safety of staff and customers, complying with the rules set out by Network Rail and paying sick pay in accordance with the Respondent's policies are potentially legitimate aims. However, we do not consider that the Respondent's unfavourable treatment of the Claimant was in this case a proportionate means of achieving a legitimate aim because:

a. The decision to put the Claimant on sick leave was erroneous and not supported by evidence that it was necessary to protect the health and safety of the Claimant (or anyone else for that matter);

b. As the Claimant submitted, this was a case where he had been placed on sick leave against his will and against the advice of Occupational Health and therefore it was not a situation where the integrity of the sick pay scheme came into question.

c. As the Claimant submitted, the Respondent could not reasonably place the Claimant on sick leave and take too long time to resolve the issue with the employee bearing the loss of their indecision.

d. As to the fact that the Claimant spent six weeks between 17 July and 25 August 2021 using his annual leave entitlement (the significance of him taking rest days over this period was not explained to us), we do not consider that the Respondent can take much credit. It pleaded this as evidence of the Respondent not rigorously applying its policies but we consider that, in respect of annual leave, this represented flexibility on the part of the Claimant not the Respondent.

e. The Respondent can take no credit for not pursing the Claimant through a disciplinary procedure for having failed to submit fit notes as instructed and having failed to obtain authorisation to attend union meetings. The Claimant had made clear he considered himself able to work, it was the Respondent who had put him on sick leave and the Respondent made a poor judgement in inviting the Claimant to a disciplinary investigation hearing such that he

read the notice of invitation from his hospital bed soon after a major operation. Part of the purported reason for the investigation was that the Claimant had not obtained authorisation to carry out union duties and the Respondent sought to claim credit for the fact that its HR team had agreed that the Claimant could do such duties while on enforced sick leave. The relevant email is from Ms Beech (Employee Relations Manager) to the Claimant on 27 April 2021 (803) follows (having sought approval from Mr Haynes):

> *Good afternoon Liaqat*
>
> *I hope you are keeping safe and well.*
>
> *I wanted to give you a quick update with regards to carrying out union duties whilst you are sick.*
>
> *Where there are meetings that you have already booked in, such as staff side meetings or divisional council you will be able to pick these up for the interim. If you wish to carry out union duties, you must obtain permission from Steve Hawker first or it will not be authorised.*
>
> *If there are other reps who are available or are attending meetings then it may be that your attendance is not required and you may be told that you cannot attend.*
>
> *You will continue to be sick for the duration of this period. If you carry out union duties for half a day or a day, this will not break or restart your entitlement.*

The Claimant also made clear at the time in an email that he did not agree that this helped him.

f. It was not explained why the Claimant would have needed to obtain permission to do union duties when the Respondent was denying him the opportunity to work but we note in particular the comment in this email that "*You will continue to be sick for the duration of this period. If you carry out union duties for half a day or a day, this will not break or restart your entitlement"* so we do not agree this either assists the Respondent in minimising the unfavourable treatment of the Claimant's sick pay reducing or help in its justification arguments.

g. The documentary evidence, the Respondent contended, demonstrated that the Claimant's sickness absence was initially intended to be a short term measure whilst the Respondent pursued the question of whether it could provide a stool on the gateline (797 and 807). The Respondent said that this was supported by the fact that in July 2021 Mr Haynes was expressing concern that the Claimant was still off sick and was asking why he was still off sick (849-847). However, as became clear, it was not possible to provide the adjustment of a stool. Again we do not agree that this either assists the Respondent in minimising the unfavourable treatment of the Claimant's sick pay reducing or help in its justification arguments

135. For the avoidance of doubt our findings on the Claimant's s.15 EqA claim are not dependent on our findings on his reasonable adjustment claim relating to the

provision of a stool being right – his unfavourable treatment of having his pay reduced on 3 December 2021 because of the erroneous decision to put him on sick leave on 23 April 2021 (which arose in consequence of his disability) would have happened even if it had not been a reasonable adjustment to provide him with a means of resting his knee – he could still have worked with his leg braces and taking the other measures that he was taking until his operation in October 2021.

Jurisdiction – time limits

136. The parties agreed that because the Claimant made his application to ACAS on 28 February 2022, the EC certificate was presented on 11 April 2022 (5) and he presented his claim on 11 May 2022, any act predating 29 November 2021 is prima facie out of time.

Reasonable adjustments in general

137. The Respondent and the Claimant both referred us to **Kingston Upon Hull City Council v Matuszowitz [2009] ICR 1770**. The Claimant further referred us to the Court of Appeal decision in **Abertawe Bro Morgannwg University Local Health Board v Morgan (2018) ICR 1194** which interpreted the earlier Matuszowicz decision.

138. As referenced above, we consider that these decisions are authority for the following position:

a. time will start to run when an employer decides not to make the reasonable adjustment relied upon ***(Humphries v Chevler Packaging Ltd*** **[2006] EAT0224/06**).

b. when an adjustment has not been actively refused time runs from the date on which an employer might reasonably have been expected to do the omitted act **(*Kingston upon Hull City Council v Matuszowicz* [2009] ICR 1170 CA**). This should be determined having regard to the facts as they would reasonably have appeared to the employee, including what the employee was told by his or her employer (***Abertawe Bro Morgannwg University Local Health Board v Morgan*** **[2018] ICR 1194, CA**

Reasonable adjustments – provision of a stool

139. The Respondent submitted that the Claimant's email of 23 April 2021 (796) shows that the Claimant had been informed that day that Network Rail had decided not to accommodate the reasonable adjustment and therefore the time limit for bringing a claim ran from that date. We do not agree with that submission because, as we have explained, it was not clear to the Claimant then that Network Rail had said no and that that was an end of the matter. Once Network Rail understood the request more (around 28 April 2021) they clearly were not saying that a stool could not be accommodated.

140. The Respondent submitted that, if we did not agree with their first argument, then it was for us to make a judgment on the question of when a reasonable adjustment might reasonably have been expected to be made and the Respondent was not able to advance a positive case on that point because its position is that it was never a reasonable adjustment to provide a stool (in part because it could not have done so in the relevant time period).

141. The Claimant submitted that the Respondent's actions or inaction amounted to a continuing omission given that at no point had there been a refusal to make the adjustment (which is still under consideration) and that the time limit was continuing up to the date of the presentation of the claim and beyond as the Respondent has never told the Claimant they would not make the adjustment. As an example the Claimant pointed to Ms Williams' assurance to the Claimant of 20 October 2021 (just before the Claimant had his operation) that they were still trying to make the adjustment (1007) and pointed to the fact that the Respondent continues to consider it now. We accept this submission and do not find that this was a case where the adjustment had not been actively refused and so time should not run from an earlier date of when the employer might reasonably have been expected to do the omitted act.

Just and equitable extension – the stool

142. If we are wrong on this and time should be taken as running from the date on which the Respondent might reasonably have been expected to make the adjustment (which we find to have been the end of July 2021) we have gone on to consider whether that it would be just and equitable in the circumstances of this case to extend time such that the claim is in time. We have had regard to:

a. the Respondent's submissions that:

i. the Claimant was asked why he did not present a claim about the failure to provide him with a stool earlier and did not give a clear answer.

ii. there are conflicting decisions from the EAT as to whether this is fatal to an application to extend time, but at best, a failure to give a reason should lead to the drawing of an interference that there is no good reason: **Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0320/15**.

iii. the Claimant was represented by an RMT representative throughout and did not assert that delay was based on any incorrect advice, mistake or ignorance or any illness or disability causing the delay nor was there the pursuit of an internal appeal the reason.

iv. the length of and reasons for the delay are primary considerations in determining whether to grant an extension of time on a just and equitable basis.

v. the length of a delay (on their submissions from April to November) is significant in these circumstances.

b. the Claimant's submissions that the following factors are relevant:

i. the presence or absence of any prejudice to the Respondent;

ii. the presence or absence of any other remedy the Claimant may have if the claim is not allowed to proceed;

iii. the conduct of the Respondent subsequent to act of which complaint is made and the conduct of the Claimant over same period;

iv. the length of time claim is out of time;

v. the medical condition of the Claimant taking into account, in particular any reason why this should have prevented or inhibited the making of the claim;

vi. the extent to which professional advice was sought and content of that advice.

c. the Claimant's submissions that:

i. the Claimant and his trade union were trying to deal with his concerns through discussion with the Respondent's managers;

ii. the Claimant did seek professional advice from his trade union

iii. and they did not advise him to bring a claim until February 2022 based on the detriment of the pay reduction;

iv. the Claimant underwent major surgery on the 22.10.21 and was off work recuperating for some time after this.

v. the fact that the Respondent had not been prejudiced and had been able to defend the claim but in contrast the Claimant could not pursue the claim elsewhere.

143. We accept the Claimant's submissions and consider that the Claimant should be granted a just and equitable extension of time. We also find that he did give a reasonable explanation for why he did not bring his claim sooner which focused on the fact that his mind was not drawn into focus on the question until his pay reduced in December 2021.

Reasonable adjustments – sick pay

144. As we have explained, we consider that this claim is more appropriately brought in the Claimant's s.15 EqA (arising from disability) discrimination claim and, as we find for the Claimant on that claim, we do not address the time limit points further here.

Arising from disability

145. The Respondent accepted that in relation to the complaints about the Claimant being put on half pay, that was an act that occurred on 3 December 2021 is therefore within time. We conclude that this was the date of the act of unfavourable treatment and that the Claimant's claim of discrimination arising from disability has been brought in time.

Remedy

146. The Claimant's schedule of loss (1212) set out:

a. Gross basic pay per week: £579.32
b. Net pay per week: £419.14

c. Disability Discrimination – Injury to Feelings (Middle Band): £8,800-£26,300 (and the Claimant submitted that the injury to feelings award should be £16,000)
d. Loss of Earnings:
    i. Reduction of Pay December 2021-September 2022: £7,061.71 (NET)
    ii. Loss of Overtime (£30.88 average per week) x 73 weeks x £30.88 = £2,254.24 (NET)
e. Interest TBC
f. Total Claimed: TBC

147. Other than this we were just provided with payslips for weeks ending 6 November 2021, 4 December 2021, 1 January 2022, 29 January 2022, 26 February 2022, 26 March 2022, 23 April 2022, 21 May 2022, 18 June 2022, 16 July 2022, 13 August 22 10 September 2022 and 8 October 2022 (1213-1225).

148. The Respondent submitted that the hearing was listed to deal with remedy as well as liability but the Claimant had submitted a schedule of loss which shows no workings. It submitted that the claim for overtime had been made without the Claimant providing the evidence (documentary or witness) on which it was based. The period of financial loss runs from 3 December 2021 to the presentation of the claim form in 11 May 2022 and it is for the Claimant to prove that loss.

149. The Respondent made clear that it advanced no case in relation to any payments that might have been made to the Claimant from the railway benevolent fund (apparently accepting the Claimant's submissions that. Parry v Cleaver (1970) AC 1 was a common law tort claim whereas a claim for discrimination is a statutory tort and compensation is awarded on that basis (Section 124(6) EqA. Parry has been applied in a case of wrongful dismissal see *Hopkins v Norcros plc (1994) ICR 11)*

150. The relevant Vento bands are: lower band £990 to £9,900, middle band £9,900 to £29,600, upper band £29,600 to £49,300.

151. The Claimant's witness statement included the following:

a. Financially

i. Due to not receiving the normal/reduced wages, I have had to request my children (over the age of 18) to support me with the everyday expenses. This has not been something I would have done under normal circumstances. My children have assisted with everyday expenditure such as food shopping, car repairs/maintenance and household expenditures.
ii. I did get some charitable support from the Transport Benevolent Fund and the Railway Benefit Fund as I explained I had no money/reduced income due to a work situation.

b. Psychologically

i. This whole situation and the way the Respondent has responded to my disability has given me great anxiety and caused me distress. There are times at night I wake up, with bad nightmares. When the Respondent put me on sick pay this was a very difficult period. I had uncertainty of my finances, my life and what the next stages would be. I have never been in a situation

with this much uncertainty. Their treatment towards me was cold and upsetting.

ii. It has caused me to have reduced confidence in the Respondent and I feel uncomfortable in this workplace because they have made my disability such an issue. I do not feel I have had their support, or that they have worked collaboratively with me. During this period of the Respondent's treatment towards me, particularly when they placed me on sick pay was a period where I was unable to eat properly and I felt very stressed.

iii. The Respondent did nothing to support me apart from add to the uncertainty. During this period, I felt quite low and upset. I relied on herbal remedies to try and lift my mood (such as calming tablets etc). I have never had to rely on herbal medicine for psychological purposes, but I was aware that if I did not, I fear my emotions would be worse. I did not feel comfortable in speaking with my GP about my emotions, as I just did not want to be referred elsewhere.

152. The Claimant submitted that loss of pay whilst recuperating from a major operation and failure to provide a stool were not one off acts. They had an impact over time.

153. We do not make an award in respect of loss of overtime because on the balance of probabilities, and given the nature of the Claimant's disability, we consider that he would not have done overtime (even if the necessary adjustments had been made).

154. With respect loss of salary we have concluded that in November 2021 the Claimant's normal monthly take home pay was £1,676.56 (net) as per his payslip for that month (1213).

155. The period of loss was from 4 December 2021 to the date of the Claim (11 May 2022). This is a period of 5 months and 1 week (or 5.23 months). £1,676.56 multiplied by 5.23 is £8,768.40 and this is the total amount that we calculate the Claimant would have earnt had he not suffered the discrimination in question.

156. From this amount it is necessary to deduct the amounts the Claimant was paid. We calculate that he was paid: 1 January 2022 (1215) £1,256, 29 January 2022 (1216) £1,347.81, 26 February 2022 (1217) £1,150.91, 26 March 2022 (1218) £1,019.94 and 23 April 2022 (1219) £888.78 = £5,663.44 net. We calculate that there were 2.5 weeks between 23 April 2022 and 11 May 2022 (the date on which the claim was made) and that therefore 57% of the payment he received on 21 May 2022 i.e. £506.60 corresponded with the period of loss (£888.78 x 0.57). His total earnings over the relevant period were therefore £6,170.04. His total loss of earnings were therefore **£2,598.35** (£8,768.40-£5,663.44). These are all net figures.

157. The EAT **Prison Service v Johnson [1997] IRLR 162, para 27** held that:

Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award;

Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches;

Awards should bear some broad general similarity to the range of awards in personal injury cases – not to any particular type of personal injury but to the whole range of such awards;

Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or by reference to earnings;

Tribunals should bear in mind the need for public respect for the level of awards made.

158. The matters compensated for by an injury to feelings award encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression (see ***Vento v Chief Constable of West Yorkshire Police (No2) [2003] IRLR 102***).

159. For the avoidance of doubt we have not found cause to call into question the Claimant's credibility.

160. Taking all of this into account we consider that an award at the bottom of the middle band is warranted in this case and award the claimant **£13,000**.

161. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803 give employment tribunals the power to award interest on awards made in discrimination cases. Under Reg 2(1) a tribunal is required to consider whether to award interest even if the claimant does not specifically apply for it.

162. Interest can be awarded on the sum for injury to feelings. Tribunals are required to consider interest whether or not an application has been made by a party (see ***Komeng v Creative Support Ltd UKEAT/0275/18/JOJ***).

163. Reg 6(1)(a) of the Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 provides that the period over which interest accrues begins with the date of the discrimination and ends on the date the tribunal calculates compensation.

164. The relevant period for interest on the injury to feelings award is 31 July 2021 to the date of the claim, being 11 May 2022, a period of 9.35 months. At 8% p.a. this equates to interest of **£972.40**.

165. With respect to the Claimant's financial loss the period for calculation of interest is from the mid-point date and ending on the day of calculation (being 7 July 2023). The mid-point date here is the date half way through the period beginning on the date of the act of unlawful discrimination and ending on the date of calculation. In respect of loss of earnings it is therefore the mid-point date between 3 December 2021 and 7 July 2023. This is a period of 581 days. The period from the mid-point

to 7 July 2023 is therefore 290.5 days which is 0.8 of a year. The interest on the Claimant's financial loss is therefore **£166.29** ((£2,598.35 x 0.8) x 0.08).

166. Rule 71 of the Employment Tribunals Rules of Procedure provides:

> *Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.*

167. Rule 5 provides that:

> *The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired.*

168. **Pursuant to Rule 5 and in the interests of justice the Parties may, within 28 days (rather than 14 days) of the date on which the written record of this decision is sent to the parties, ask for reconsideration of the findings from the heading "Remedy" to this paragraph. The normal time limit for requesting reconsideration of any other aspect of this judgment shall remain 14 days.**

Employment Judge Woodhead

7 July 2023

Sent to the parties on:

31/07/2023

For the Tribunals Office

APPENDIX 1

LIST OF ISSUES

The issues to be determined

Disability

1. Did the Claimant have a disability within the meaning of Section 6 EqA in relation to degeneration in his right knee at the material time?

2. What is the material time for assessing whether the Claimant was disabled?

3. The material time for assessing disability is when the alleged acts of discrimination occurred and does not reflect when his disability first arose. In relation to:

    a. the provision of the stool, the Claimant says the material time is around June 2021. Occupational Health first recommended the provision of a stool in February 2021 and the Claimant says the stool should have been provided at the latest by June 2021 with the duty to provide it remaining ongoing to 11 May 2022 at the point of presentation of the claim form; The Respondent avers that the material time was 5 March 2021 when Network Rail confirmed the stool was not permitted. The Respondent was bound by the decision of Network Rail.

    b. the reduction in the Claimant's sick pay, the Claimant says the material time is when the reduction took effect from 3 December 2021 and was ongoing after this time. The Respondent, by contrast, contends the material time was when the decision was taken to place Claimant on sick leave on the 22nd April 2021.

Reasonable adjustments (Sections 20/21 EqA)

4. Did the Respondent apply the following PCPs:

    a. the requirement for the Claimant to stand whilst working on the gateline and/or to stand whilst working on the gateline and dealing with customers.

    b. the provisions of the sick pay policy (based on the Claimant's length of service) that full pay would be provided for 6 months and then half pay for 6 months. The Respondent accepts this was a PCP.

5. Are the appropriate comparators in relation to the PCP non-disabled employees who are required to work on the gateline and who can do so without difficulty and/or being made to go sick pending the provision of adjustments including a stool? The Respondent's position is that the comparator is incorrect. It should be a non-disabled employee who works on the gateline and is able to stand throughout their shift.

6. Did the PCPs cause the Claimant a substantial disadvantage due to his disability? The Claimant will contend they did in that,

a. he was not allowed to work on the gateline without a stool being provided due to his disability. An employee without his particular disability would not be disadvantaged in this way.

b. because he was forced to go off sick by his manager pending the provision of the stool, he used up his sick pay entitlement prior to having surgery. A non-disabled employee would not have been disadvantaged in this way either.

7. Did the Respondent breach their duty to make reasonable adjustments to accommodate the Claimant's disability? The Claimant contends that the following were reasonable adjustments,

    a. the provision of the stool. The Respondent denies this was a reasonable adjustment and also it was not responsible for the decision to not provide the stool on 5 March 2021;

    b. extending the Claimant's full sick pay entitlement beyond the 3rd December 2021 to the 22nd April 2022 to accommodate the fact that he was placed on sick leave by Mr Haynes pending the provision of the stool. It is the Claimant's case that the period of sick leave between the 22nd April 2021 and the 22nd October 2021 when he was required to be off sick by his managers should have been discounted. The Respondent denies this was a reasonable adjustment and that the decision was taken on 22 April 2021.

Discrimination arising from disability (Section 15 EqA)

8. Was the Claimant subject to unfavourable treatment through having his sick pay reduced from the 3rd December 2021?

9. If so, was the unfavourable treatment because of the some arising from the Claimant's disability? It is the Claimant's case that it arose due to his manager's assessment that he was unable to work on the gateline without the provision of a stool and him being placed on sickness absence as a consequence between the 22nd April 2021 and the 22nd October 2021 even though Occupational Health said he was fit to work with adjustments.

10. The Claimant's case is that this arose because of his knee disability which prevented him, in his manager's eyes, from working without a stool.

11. Was the unfavourable treatment a proportionate means of achieving a legitimate aim. The legitimate aim relied on by the Respondent is to protect the health and safety of its staff and customers and also to comply with the rules set out by Network Rail. It is also a legitimate aim to pay sick pay in accordance with the TUPE transferred policies of HEX.

12. It is the Respondent's case that the treatment of the Claimant was proportionate. As it was not permitted to allow the Claimant to use a stool it was the safest course of action to place the Claimant on sick leave to prevent him having a further injury. It paid him sick pay in accordance with that policy.

Jurisdiction

13. Is all or any of the Claimant's claim out of time? The Claimant made his application to ACAS on the 28th February 2022. Consequently, any allegation pre-dating the 29th November 2021 is out of time unless it forms part of a course of conduct extending over time. Thus, the Tribunal must ask itself:

    a. What were the dates of the alleged acts of discrimination?

    b. Are those acts of discrimination out of time?

    c. If they are out of time, is it just and equitable to extend time?

    d. Once those dates are confirmed, was the Claimant disabled at the material time?

    e. If the Claimant was disabled at the material time, did the Respondent have knowledge of the Claimant's disability?

APPENDIX 2

FINDINGS OF FACT

Claimant's right knee

1. It was agreed that in January 2021 the Claimant began suffering with pain in his right knee. The Claimant was referred to an orthopaedic surgeon on 10 February 2021 [A188 A444].

2. On 17 March 2021 a Consultant (Mr Alvand) wrote to the Claimant's GP as follows (206-210):

> ***Diagnosis:***
>
> *Bone-on-bone medial compartment arthritis of both knees, right significantly worse than left on a background of previous tibial osteotomy during teenage years.*
>
> ***Management plan:***
>
> 1. *Referral to orthotics for an unloader brace.*
> 2. *MRI scan of the knee right knee to look at the status of the other compartments and the ACL.*
> 3. *Patient to optimise analgesia and think about option of possible arthroplasty in the near future.*
> 4. *Discussed in the Complex Knee MDT and review afterwards.*
>
> *I reviewed this pleasant 56 year old gentleman who works as a customer Services manager in the railway. He has had a long history of knee problems and when he was 18 he had high tibial osteotomies up in St James's Hospital in Leeds due to what appeared to have been valgus deformity of his knees. He was placed in a plaster for several months after this. He has since moved to London and lived down in Slough and his knees have gradually deteriorated over the last 10 or so years. He has begun to develop varus deformity of his knees. He is a very pragmatic individual and has tried over the years to make his knees last as long as possible before he sought medical attention. He is otherwise fit and well and not on any medication.*
> *Clinical examination reveals he has an above average BMI and has significant varus deformity of both knees, right significantly worse than left. He has a 20 degrees varus deformity on the right side which is almost completely correctable. The range of movement in his knees is plus 5 degrees to 100 degrees limited by pain. His knee is stable in the coronal and sagittal plane. He has pain free range of movement in his hip joint and he has good pedal pulses. He has traverse scars across both proximal tibias from what appear to have been closing wedge high tibial osteotomies.*
> *Plain radiographs of his knee demonstrate significant varus deformity with bone-on-bone medial compartmental arthritis and some bony collapse on the right knee. The lateral compartment and the patellofemoral joint are relatively well preserved. On the radiographs, on the long leg views which was somewhat rotated, the varus deformity measures approximately 20 degrees.*

I've had a long conversation with Mr Ali and he understands that the results of knee replacement surgery in a very young and active can sometimes be a little more unpredictable and obviously can have slightly higher lifetime revision risk. He, however, feels that he has got to a point where he needs something doing. In the first instance I'm going to try an unloader brace and organise an MRI scan to see whether or not he would be suitable for a partial knee replacement. I'm not sure whether he would be a candidate for this given his previous osteotomy and the degree of deformity as well as the fact that he has a partially correctable deformity. I'm going to discuss him in our Revision Knee MTD following his MRI scan and I will then discuss the outcome with him in clinic face-to-face.

3. On 23 March 2021 the Claimant paid for, at his personal expense, a private MRI scan on his knee due the delays in securing a scan through the NHS [A188]. We took this as a strong indication that the Claimant was being proactive in seeking to resolve his health issues. On the same date his GP records document:

   "Knee pain (Review) Laterality: Right. History: under ortho on NHS, a/w MRI but waiting times too long ortho consultant advised knee replacement, wants MRI privately to speed things up.

4. On 31 March 2021 the Claimant was assessed on the NHS for a knee brace (Ossur hinged knee supports) (605) and the records state:

   "*pain worse when walking. Currently uses pull on knee braces and pain medication. Pt measured for Unloader one."*

5. On 14 April 2021 the Claimant had a GP consultation for his knee pain which recorded that he had had a private MRI and wanted the report so that he could forward it to his orthopaedic consultant which it appears was printed by the GP surgery for him and emailed to him on 21 April 2021 (188).

Occupational Health guidance at the beginning of 2021

6. The Claimant had occupational health consultations with the Respondent's provider on the following dates:

   a) 22 February 2021 (787) This was in respect of a consultation carried out the same day. It recorded that:

   Mr Ali reports sudden onset of pain on the left side of his right knee, his knee was locked, he could not straighten his knee and he started to walk with a limp, these symptoms started in January 2021 and have persisted. He contacted his GP who sent him for X ray, test result shows wear and tear in the knee. His GP has referred for specialist opinion, Mr Ali has appointment on the 17/03/2021 for assessment by orthopaedic specialist. He currently finds prolonged standing and walking increase his knee symptoms. He is taking over the counter pain relief medications that he finds helpful in managing pain and

wears knee support. I understand he has been doing more of his union duties lately for him to continue in work. Mr Ali is fit for work with adjustments.

[…] Mr Ali currently finds the prolonged standing involved in Gate line work challenging in managing his knee situation.

Is the impairment likely to be permanent or temporary?

- *I am unable to confirm if the knee problem would be temporary or not. We are likely to have a better picture following the specialist assessment when the knee condition will likely be diagnosed, and treatment decided.*

What adjustments should management consider?

- *Please provide Mr Ali with a stool when undertaking Gate line duties for him to rest his knee on occasions when required pending the time the knee situation resolves when the support can then be reviewed following risk assessment. Please liaise with procurement to progress this recommendation.*

7. Ms Williams for the Respondent accepted at paragraph 4 of her witness statement that the Claimant had told her on 4 February 2021 that, since January 2021, he had been suffering with symptoms affecting his right knee.

8. On 19 March 2021 Occupational Health prepared a second report (791). This was in respect of a consultation carried out the same day. It recorded:

I understand Mr Ali has been assessed by NHS musculo skeletal specialist. He had further X ray taken that revealed alignment problem in the right knee and also on the left, the impression is that the current situation could be related to the past surgery that he had on both knees. Partial knee replacement is planned for the right knee, we don't have idea of when this will likely take place. In the meantime, Mr Ali has been advised to continue with over the counter pain relief medications and he will be provided with a knee brace to help him further manage the knee problem for now. He is awaiting appointment for MRI scan and will thereafter be reviewed by the treating specialist. Mr Ali reports that he has been able to manage the knee condition around work as he has been mostly undertaking union representative duties.

Mr Ali is fit for work with limitations pending the time the knee problem resolves.

Feasible short-term alternatives for Liaqat.

As you know, Mr Ali reports that knee pain becomes pronounced following prolonged standing and walking. You may consider accommodating him in a role that does not involve prolonged standing and walking pending the time the knee problem resolves.

Whilst I know it's difficult to know the long-term prognosis, I need to be able to ascertain what short-term means and how best we can support him whilst at work."

Mr Ali is now under specialist care. In the short term, he has been advised to take pain relief as required and will be provided with knee brace to help him manage the misalignment/imbalance in the knee. The plan is for him to have surgery that would likely resolve the knee problem. We don't know timescales at this time and there is the possibility of this being affected by the ongoing pandemic. As an alternative, the business could explore for Mr Ali a role that does not involve prolonged standing and walking pending the time the knee problem resolves as another feasible option to the provision of a stool to assist when undertaking Gateline duties.

9. On 25 March 2021 Ms Williams contacted Mary Olatunbosun in the Respondent's occupational health department to ask whether the Claimant had a long term condition and for details of his capabilities i.e how many hours he could stand for and whether further standing would aggravate his knee pain.

10. Bundle C included a number of further emails which can be summarised as follows. Ms Olatunbosun responded on 29 March 2021 saying she thought she had answered those questions in her reports. She said he could stand for a couple of hours before the pain became unmanageable and that prolonged standing and walking further aggravated the pain. She suggested that Ms Williams should discuss Mr Ali's health situation with him and the adjustments the business could accommodate. Mr Toms, representing the Claimant, put much emphasis on this and we agree that the Respondent did not engage in adequate dialogue with the Claimant.

11. Ms Williams replied on 8 April 2021 saying "*Unfortunately we will not able to take onboard your recommendations for Liaqat, he is aware that we don't have any sitting position. Liaqat is currently using the knee brace as recommended by the specialist, and am having regular catch -up with him- 1 have sent a referral back to you, can you confirm from a well-being perspective and duty of care whether he's still fit to be at work or not.*"

12. Ms Olatunbosun replied the same day saying her recommendations of 19 March still applied. She said they should discuss and agree with Mr Ali the duties the business can accommodate as he should feel able to manage the knee condition around work duties. She said if wearing the knee brace allows him to undertake gateline work in the interim that would be OK. She advised maintaining regular catch up with the Claimant so any problems could be promptly addressed. Mr Toms for the Claimant suggested that this meant that Occupational Health's guidance was not that the Claimant was unfit for work without the adjustments and we accept that view. Ms Williams sent Ms Olatunbosun's email on to Ms Beech, Mr Haynes and Mr Shephard.

13. An occupational health report of 14 April 2021 (794) in respect of a consultation carried out the same day recorded:

I understand he has received knee braces from the treating specialist, he is able to walk better with the braces as they feel comfortable. Mr Ali has self-funded MRI scan to speed up the process for his treatment, he is awaiting result. He reports that he continues to undertake more of union representative duties, he has been able to access some support to sit down and rest his knees as the need arises during work session when on Gateline duties.

14. We have taken into account in our decision the Respondent's evidence that over this period in 2021 passenger numbers were not at pre-pandemic levels. This facilitated the Claimant taking short breaks, sitting in Heathrow Express trains that came into the platform and after the flow of passengers of the train. Mr Haynes in cross examination said that he did not think this was an appropriate place to sit (although he did not explain why) and said that there were other places on the concourse where the Claimant could have sat. The report went on:

    […]

    If the employee is unfit for work, are they fit to attend an Interview/participate in meetings

    Mr Ali remains fit for work with adjustments as previously advised, this question would not be applicable.

    What is the long-term effect of the knee brace?

    - *Knee braces are temporary measures to facilitate mobility and prevent further damage to the knee pending surgery*

    How is the knee pain?

    - *Mr Ali finds current knee braces comfortable and helps with walking. He still reports increase in knee pain when he has been standing for prolonged period of time and he is still requiring to sit down to rest his knees as the need arises when on Gateline duties.*

    OH adjustment could not be taken onboard- would this cause more short term an long term pain to Liaqat's knee & Is Liaqat fit to be at work seeing we can't accommodate the OH adjustments

    - *In response to the above questions, I refer you to the recommendations in previous occupational Health reports dated 22/02/21, 19/03/21 and the further recommendations in the emails dated 29/03/21 & 08/04/21 as the recommendations would still apply. This is now a management case, further Occupational Health intervention is not required.*

Commencement of sick leave

15. Mr Haynes said in his witness statement that he spoke to the Claimant on the telephone on the 22 April 2021 (para 11). This was denied by the Claimant and the Claimant was not questioned about this in cross-examination. Mr Toms for the Claimant invited us to find that Mr Haynes was mistaken about the conversation taking place and on the balance of the evidence we accept that he is mistaken.

16. On 23 April 2021 a zoom meeting was held between the Claimant, Mr Dean Haynes (Flagship Station Manager), Ms Gladys Williams (Duty Station Manager and the Claimant's direct line manager), Julian Shephard (Duty Station Manager, Heathrow Express / GWR), Malcolm Lewis (RMT Rep - for the workforce on matters that involve the health or safety of his colleagues) and Steve Skelly (RMT). We were not provided with any notes of that meeting but a series of emails were exchanged following and on the same day as the meeting (796-7) which read as follows.

17. Firstly from Gladys Williams (NR being Network Rail):

> […] *Key summaries from RA this afternoon:*
>
> - *from a duty of care – Liaqat will be marked off sick from today until we get more information from NR about their decisions around the safety concerns of having a stool at the gates.*
> - *With the support of Dean and Lee, I will liaise with NR and keep Liaqat informed*

18. In response from the Claimant:

> *[…] Please note my summary, I believe is an accurate account of our discussion at today's meeting-*
>
> - *My first occupation health visit was in 22/02/2021 with further two visits over a two-month period.*
> - *I believe my knee situation is covered by the Equality Act 2010 as explained.*
> - *Under the Equality Act 2010 any reasonable adjustment it's your lawful duty to accommodate.*
> - *It was mentioned by Dean Haines that it was network rail's decision not to accommodate occupational health reasonable adjustment and to confirm no risk assessment was produced by network rail in the meeting or any documentation or paper trail to this effect.*
> - *I reiterated my safety and welfare is already supported by occupational health assessment and recommendation*
> - *my objections on Dean Haynes taking the decision to place me on absence lead due to sickness for my safety and welfare, considering I have already been in the business for two months from the first occupational health report dated 22 February 2021*

- *I read the last O/H report to everyone for clarity. I also raised concerns as I believe Dean Haynes decision is challenging occupational health assessment that I am not fit to work.*
- *The proposal to now allow me to continue with union activities while Deans Hayne's to follow up with network rail was rejected*
- *other reasonable options to compromise on a local level were also rejected by Dean Haynes*
- *At a workplace health and safety representative I will need to have access to all correspondence petite between GWR and Network Rail concerning more welfare but not limited to reports and documents under safety the regulations*

[…]

19. This meeting was called for the purposes of carrying out a risk assessment of knee braces that the Claimant was by this point wearing (that was included in the subject of the subsequent emails). We were not pointed to pictures of the braces but understand that they were substantial in size and were worn over the top of the Claimant's trousers. Mr Hayden could not recall in cross examination what the result of the risk assessment of the braces was and, whilst it is not recorded in writing expressly, we find on the evidence that Mr Bladen (Safety Manager East) said a risk assessment on the braces was not in fact needed (documents in so far as they are relevant A796-797, A1074-1075).

20. As is recorded in the email correspondence referenced above, Mr Haynes, acting for the Respondent, put the Claimant on sick leave from 23 April 2021. This was recorded as being pending more information being obtained from Network Rail about using a stool at the gateline. As is referenced in the email correspondence quoted above, at this point the Claimant expressed in writing his view that his knee condition amounted to a disability under the Equality Act 2010.

21. It was put to Mr Haynes in cross examination that he had been shocked by the sight of the Claimant's knee braces. He denied that, and in response to being asked why he had not carried out a risk assessment, Mr Haynes said that he did not know what went on there and agreed that it was incumbent on the Respondent to do a risk assessment if putting the Claimant on sick leave (albeit Mr Haynes said he did not know what the prolonged outlook was). Mr Haynes said he had put the Claimant on sick leave over concerns for his welfare and it appears that the reference in the OH report of 14 April 2021 to 'further damage' to the Claimant's knee pending surgery was what was at the forefront of Mr Haynes's mind but he did not ask OH to specifically give an opinion on whether, in the absence of a stool or other adjustments which might have been possible, and with the Claimant using knee braces, it was necessary for the Claimant to be on sick leave – e.g. to prevent further damage to his knees (or to put it another way, whether he was in fact unfit for work).

22. We find that the Claimant did not want to go on sick leave and that Mr Haynes, having not had a response that satisfied him from Occupational Health as to the risks, should have sought advice, via occupational health, from the specialists treating the Claimant or talked more fully with the Claimant himself (as had been suggested by occupational health) about how, absent a stool, the situation could

be managed to keep the Claimant in work. We do not doubt that Mr Haynes was concerned about the Claimant causing further damage to his knee by continuing to work but we do not think he reached that conclusion on a reasonable basis and should have done more before placing the Claimant on sick leave. We consider that this in part also arose out of a misreading of the occupational health guidance which was that the knee braces were to prevent further damage to the Claimant's knee. We find that with the knee braces and breaks that the Claimant was himself finding the opportunity to take, the situation was, on the balance of probabilities, manageable. Mr Haynes may not have at that time anticipated that the Claimant would then remain on sick leave for so long, but we find that he did not do enough before requiring the Claimant to go on sick leave.

23. On 27 April 2021 the Claimant had been attending a remote hearing via zoom as the Trade Union companion of a colleague but it seems the Claimant was asked to leave by Mr Haynes because the Claimant was on sick leave. The Claimant challenged this in an email to Mr Haynes, saying:

> *I am reiterating that I have not reported sick in my workplace of my sick absence and I have never declared that I am unfit to carry out my Trade Union Duties as alleged. I am really disappointed with your approach as I am aware there are issues of reasonable adjustment in the workplace for me which I believe are still outstanding and awaiting your response.*
>
> *Irrespective of your views, please note that whilst I am carrying out my role as a Trade Union Representative, I am to report to my full time officer. You have exercised your managerial role in order to create a hindrance to ensure I am unable to carry out my union activities.*

24. Nicola Beech (Employee Relations Manager) replied to the Claimant on 27 April 2021 (803) in an email as follows (having sought approval from Mr Haynes):

> *[…]*
>
> *I wanted to give you a quick update with regards to carrying out union duties whilst you are sick.*
>
> *Where there are meetings that you have already booked in, such as staff side meetings or divisional council you will be able to pick these up for the interim. If you wish to carry out union duties, you must obtain permission from Steve Hawker first or it will not be authorised.*
>
> *If there are other reps who are available or are attending meetings then it may be that your attendance is not required and you may be told that you cannot attend.*
>
> *You will continue to be sick for the duration of this period. If you carry out union duties for half a day or a day, this will not break or restart your entitlement.*

25. On 28 April 2021 (807) Mr Haynes wrote an email to the Claimant as follows:

Following on from our meeting on Friday when I made you aware that I had concerns over your welfare relating to your knee. I advised you that i would be marking you as sick until such time that i can be assured that duty of care has been followed and all correct processes have been completed, ultimately i do not want to put you in a position that may further damage your knee. I also advised that union deters should not be conducted while sick from duties. I'm aware that Nicola Beech has now clarified this in a separate e-mail.
Regarding your knee brace we will still need to complete the RA as it was not completed on Friday.

At present we are seeking the relevant RA's that are needed for a stool to be placed near the gate line however, at present this recommendation cannot be accommodated. We are hoping to have an update from NR this week.

I'm hoping to get you back in the workplace as soon as possible subject to relevant RAs being in place which can be accommodated.

I am now on AL until next Tuesday at which point I'm hopeful an update is available.

26. As we make clear above, we find on the evidence that Mr Bladen (Safety Manager East) said a risk assessment on the braces was not in fact needed and that Mr Haynes was mistaken in his email of 28 April 2021.

Communications with Network Rail in relation to provision of a stool

27. Over this period discussions were being held with Network Rail with respect to the placement of a stool on the platform to help the Claimant take the pressure off his knee.

28. On 5 March 2021 Mr Shephard (Duty Station Manager, Heathrow Express, Great Western Railway) sent an email (859) to Mr Mustaq (Station Manager, London Paddington Station, Network Rail). The email was titled “use of a stool” and said:

Good afternoon Haji

I would just like to ask you for your opinion on a particular case we are encountering. A member of staff is asking to use a stool/chair to use on the gate line.
What would your stance be ?

29. Mr Mustaq replied simply: *Shep, I’m afraid my answer is no.* Mr Field in cross examination maintained that Mr Mustaq would have known why the request was being made. However, we have concluded that this was not a sufficiently informative email and it would not have been reasonable for the Respondent to take this as the final answer from Network Rail without explaining further why the request was being made. Network Rail’s subsequent willingness to engage in a discussion reflects this.

30. On 27 April 2021 Mr Field (Assistant Flagship Station Manager, GWR) picked up this email chain and in an email to Mr Joe Porter (Network Rail, Station Interface Manager, London Paddington Station) and Mr Mustaq (copying Mr Bladen (Safety Manager East, GWR) and Mr Haynes) said (858):

    In relation to the below, the colleague who works on the Hex Gateline has been informed that we are currently unable to accommodate the request for a stool on the advise from Network Rail on safety grounds.

    The colleague is asking for a copy of the risk assessment that identifies the risks and concludes that stools would be unsafe.

    Is it possible to have a copy that we can forward to the colleague please? (The colleague is pursuing this through his union).

31. The following day, 28 April 2021, Mr Porter responded by email, adding Mr Steve Hart (Network Rail) to the chain, saying (857):

    After our brief discussion this morning, We are happy to review this request for a temporary stool. To do this we would request GWR to carry out the following to support its use.

    • GWR need to agree this request for their member of staff to have a stool on the gate line temporally.
    • Provide a risk assessment for the use of a stool on the gate line. In addition, dose its use fit in with your gate line procedure.
    • Provide details of location and how the stool will be secured (preferably behind a screen).
    • Ensure its use meets with any DFT security requirements.
    • Esurance that this is only a temporary request for the employee in question.

    Once I have this, I will review the information and respond accordingly.

32. Mr Porter sent a further email (857) on 20 May 2021 to Mr Bladen and others saying:

    Spoken to Haji regarding the notifying DfT of the use of a stool. If you email him with a notification he will inform DfT.

33. On the same day, 20 May 2021, Mr Bladen carried out a risk assessment on the use of a stool on the platform (828 and 831 – 837). This risk assessment was sent to the Claimant by Ms Williams on 28 May 2021 (828) and that day the Claimant sent it on to Mr Lewis who was an RMT Health and Safety Representative (827-828). We find that the Claimant did this because, although he himself was a health and safety representative, he thought it would be better for the position to be commented on by someone independent.

34. On 9 June 2021 Ms Williams asked if there were any updates from the Claimant or Mr Lewis on the risk assessment.

35. Mr Lewis replied in an email to Mr Bladen (copying Ms Williams, the Claimant and Mr Shephard) the next day, 10 June 2021, and marked up the risk assessment with changes in blue typeface and deletions in red (816-823). He also commented:

> *The main change is to to the ban on use at the Country end of the platform; it is hard to see how the use of a secured stool within a screened area, where the screens are secured can present a significantly raised hazard; we would argue that it presents a similar risk at either end of the platform.*

36. The country end of the platform is a reference to the end of the platform on the train side of the ticket barriers i.e. the area to which passengers pass with a ticket to leave the capital after they have gone through the ticket barriers. The London end of the platform is the end of the platform to which passengers arriving into London pass to when they go through the ticked barriers having arrived on a train.

37. On 22 June 2021 Mr Lewis sent an email to Mr Bladen asking for an update on the situation with respect to provision of a stool for the Claimant (879). On 25 June 2021 Mr Bladen replied to say that he was happy with the proposed changes to the risk assessment and he confirmed that he had advised the Paddington team of that. He said that only sticking point was the London end, which he said would need Network Rail agreement (877). On 28 June 2021 Mr Lewis asked Mr Bladen for a point of contact within Network Rail and queried whether he meant the country or London end (877).

38. On 29 June 2021 Mr Bladen by email (875) corrected this to make clear that it was of course the country end of the platform which posed a problem and let Mr Lewis know that the risk assessment had been prepared with representation from the Network Rail Paddington Station Manager team with Joe Porter being on the call.

39. On 8 July Mr Lewis asked Mr Bladen for Joe Parker's (at Network Rail) email address (874). Mr Bladen provided the Mr Parker's email address the next day (872), 9 July 2021.

40. On 16 July 2021 Mr Lewis contacted Mr Porter by email saying (872):

> *I understand that you were the Network Rail point of contact for the Risk Assessment of the provision of a stool, as a Reasonable adjustment, for Liaqat Ali a colleague on the HEX gateline at Paddington.*
>
> *We have agreed with the GWR safety team that the restriction on the use of the stool at the Country end of the platform should be relaxed.*
>
> *Are you amenable to this?*
>
> *Please find the RA attached and the email chain regarding this below.*

41. On 18 July 2021 Mr Porter sent an email to Mr Bladen, Mr Haynes and Mr Field, evidencing some frustration and saying (856):

Can I ask why I've been emailed by your employees union rep stating, he's agreed with GWR safety team that the restriction on the use of the stool at the Country end of the platform should be relaxed. How was this agreed and when was you going to inform Network Rail of this. There was a number of requests sent 28/04/21 that still haven't been undertaken or actioned by GWR.

In addition, I was expecting the risk assessment once finalised to be sent to me to review from GWR not your employees union rep. and saying a number of actions by R were requested on the 28.4.21 which have not been carried out.

42. Mr Haynes asked Ms Williams to update Mr Porter which she did late on 18 July 2021 and which we refer to below and which says:

I line manage the staff in question, unfortunately I was unavailable during the RA ,but the infor passed on to me from Dean and the RA was shared with the staff in question , which was then passed on to his HS Rep for review. Am aware they had some concerns about the RA(i.e provision of a stool on the CE of the gates as well) which was escalated to our GWR East Safety manager(Lee B.)- I believe myself and Dean were copied into that email, but the response from Lee was that NR must be consulted first from a station level.

After discussion with Dean, the member of staff was informed of GWR and NR stand which was that the Stool was strictly going to be for the LE only as per the RA, he obviously wasn't happy about this decision but am not aware of the email conversation that went on after that.

Am also unaware of any pending requests sent on the 28/04/21, but I will touch-base with

Dean when am back in the business.

I did speak to the staff in question yesterday evening about the RA and his response what that his HS Rep is still liaising with our Lee B. about their concerns.

43. We agree with Mr Toms for the Claimant who invited us to find that, as a fact, there was no further response from the Respondent to the requests of Mr Porter after this email from Ms Williams' on 18 July 2021 (para 35 C submission and 853/854).

44. On 22 July 2021 (888-891) Mr Lewis sent an email to Mr Hart at Network Rail (cc'ing others) saying he understood that Mr Porter was away until the 9 August 2021, forwarding the risk assessment and email chain and asking if it is something Mr Hart could agree to. Mr Bladen asked Mr Lewis to pursue this through Mr Haynes (889). Mr Haynes replied to apologise to say that he was on annual leave and asked them to follow up through Ms Williams who managed the Claimant.

45. On 23 July 2021 Ms Williams sent an email to Mr Lewis (copying Mr Haynes, Mr Bladen, Mr Shephard and Mr Field) saying that "*unfortunately it's completely out of our hands, only NR can make the final decision on this, I will liaise with NR and keep you posted*".

46. We agree with the Claimant's submission that in fact Network Rail were never asked to make any decision by the Respondent on the stool (para 38).

47. On 29 July 2021 Ms Williams emailed Mr Lewis again (886) to say:

> *Trust you're keeping well, I just thought to keep you updated, as per my previous email whilst we're all fully aware of your communication regarding the request to allow a stool at the Country End, however in my opinion before we can have this conversation with NR, we need to do our due diligence and find an appropriate stool that complies with the RA first (i.e. a stool that must be suitably secured to the ground at all times but then also able to remove the stool when it gets exceptionally busy to allow passengers dissipate.. etc) which we're yet to find.*
>
> *We are still looking around for a stool that fits those requirements, am just wondering if you have any suggestions or can you recommend a stool that fits within this parameters.*

48. However, as we reference again below, Ms Williams must have known that a stool had already been ordered if not actually obtained because the Claimant had told her, on 16 July 2021 (in response to a request from Ms Williams), he had passed the details of a stool he had chosen <u>at her request</u> to the Respondent's administrator for that administrator to order [839].

49. On 3 August 2021 Mr Lewis replied to Ms Williams (including Mr Haynes, Mr Bladen, Mr Shephard, Mr Field and Mr Porter) to say (865-866, 885):

> *I am sorry not to have replied to this sooner as have been on leave.*
>
> *This process seems to have stalled; can we try to move it onwards to a resolution please?*
>
> *I am a bit puzzled by the objections raised...the RA says*
>
> *"Stool MUST be suitably secured at all times The stool should be removed completely from the area when not in use."*
>
> *Which seems sensible. This clearly cannot mean screwed to the floor or similar as it then could not be removed when not in use.*
>
> *My reading would be chained to pillar/screen in such a way that it could not be used as a projectile and as such any stool should be amenable to such an arrangement given a length of chain and two locks.*

I understand a stool has been obtained - is it not suitable for some such arrangement?

I can make myself available if an in situ risk assessment would help the process.

50. Mr Field replied to Ms Williams on 3 August 2021 (cc'ing others but not Mr Lewis) to say (865):

Hi Gladys - just an update, I spoke to Lee & he has agreed any stool does not need to be fixed to the floor however it must be secured to something.

I think the hold up is the fact all parties including Network Rail need to agree in what form that takes.

My concern is the shields are not a sturdy fixture to use and will a chain secure it enough and is that really practical?

It may well be worth all parties meeting on site to see if there are solutions but from my view it's not that simple.

Maybe a reply bk to Mal explaining we agree fixing to the floor is not practical but we also need all parties to agree on what method is used and that it is a sensible method that complies with all the other requirements of the RA.

I'd wait until Dean is bk and say an on-site meeting is trying to be arranged

51. On 4 August 2021 Ms Williams replied to Mr Lewis and cc'ing the others (884):

Trust this email meets you well and safe, I must have mis-interpreted the RA , you're absolutely correct, it's not feasible to have the stool screwed to the floor.

I realise it feels as though the process is stalled, but be rest assured that we're very keen to get Liaqat into the workplace with the appropriate adjustment as recommended by Occ-health and that meets the requirement of the RA.

Yes a stool has been obtained which will have to be approved by NR.

It well be a great idea to have all parties meet on site to see how we can progress this forward ,unfortunately Dean Hayes my Flagship station manager is on leave but once he's back I will advise you of the next steps.

I will be on leave from the 7th of August for 2 weeks but I will leave this in the capable hands of my colleague Shep(Julian Shephard) to liase with you and all stakeholders.

52. The Respondent accepted as a result of the cross examination of the Mr Field that Mr Field was clear that as soon as he saw the stool that had been obtained, by 4 August, he knew that it could not comply with the risk assessment for various reasons.

Progress of the Claimant's medical treatments

53. On 10 June 2021 Mr Alvand (Consultant Knee Surgeon) wrote to Mr Jamie Ferguson (Consultant Orthopaedic Surgeon) as follows and the letter was stamped as received on 25 June 2021 (213, 455-456):

> *I would be grateful if you could see this gentleman regarding his suitability for possible limb deformity correction in order to address his medial compartment arthritis. Please see my clinic letter for more details, but in summary he's a 56 year old very active gentleman who now has bilateral medial compartment arthritis (right knee is the one that is troubling him most). In terms of background he had bilateral high tibial osteotomies in Lees around 30 years ago for valgus deformities. This resulted in over correction and he is now left with a 20 degrees varus deformity of his right knee which is partially correctable. His MRI shows his ACL is intact and he has had a proximal tibial closing wedge with no metalwork in situ. We looked at his imaging and discussed his case in our Revision Knee MDT and given his degree of varus and activity level, doing a total knee replacement will be extremely challenging and may leave him unhappy due to the degree of correction required. We were wondering if you could review him to see if he is suitable for an Ilzarov correction in order to gain several more years out of his knee and if necessary in the future one would then undertake a relatively more straightforward total knee replacement.*
>
> *I have given him bilateral unloader braces to try and correct its varus deformity to see if this will give him some benefit and this would be a good indicator of seeing whether or not a deformity correction might help.*

54. In an example of the poor state of the bundle of documents presented to the Tribunal for this claim, a letter from Consultant Mr Ferguson of 5 July 2021 appears in part on 223 and in part on 262. 224 of the bundle appears to be a letter to the Claimant from a Consultant plastic surgeon reporting that he could not find a problem with the Claimant's hand (he had called the Claimant because the Claimant had not attended his outpatient appointment).

55. Mr Ferguson said in his letter to the Claimant's GP of 5 July 2021:

> ***Problem:*** ***1) Bilateral tibia vara with symptomatic right knee pain***
>
> ***[…]***
>
> ***Plan:*** ***1)*** *Listed for periarticular angular correction of right proximal tibia with Taylor spatial frame.*
>
> *It was a pleasure to meet Mr Ali today with his wife. He tells me that he is a customer services relations worker at a railway station. He has been seen by my colleague Mr Abtin Alvand, one of our knee surgeons for consideration of intervention for his painful right knee. He is marked arthritis particularly on the*

inside of his knee but this is also associated with a bony deformity of the proximal tibia. This deformity is causing overload of the medial joint line which is exacerbating his symptoms.

He tells me that as an 18 year old he had both legs broken and plasters applied to treat an underlying knock-knee deformity. There seems to be a family history of knock-knee deformity with several of his siblings also having similar problems. He believes the deformity was overcorrected resulting in his varus knees.

He is generally in good health takes no regular medication nor has any allergies. He does not smoke or drink.

On clinical examination he stands with slight varus of his legs. His left side seemed to be slightly shorter than the right by a couple of centimetres. His hips were a little stiff bilaterally and his knee range of demonstrates slight loss of full extension worse on the right and the left and flexion to only 90 degrees.

We talked about how to proceed and I agree that any joint replacement is doomed to failure unless we first addressed the malaligned leg. In doing this there is a chance that a lot of his knee pain will resolve anyway.

To realign the leg will need to crack the bone to straighten out the shin.There are several ways of undertaking this but generally it is achieved by either using a plate fixation or with an external fixator.

The plate has the advantage of not requiring any external frame but it will impede his weight bearing for a while and given the extent of the correction required there are some concerns about the ability for the body to heal. Furthermore using the plate will not necessarily deal with the leg length discrepancy.

The other option of using an external fixator is obviously not a straightforward treatment to live with but has many advantages, including the ability to make fine adjustments to the final alignment of the leg particularly in allowing optimal adjustments to offload the arthritic part of the knee. It also allows early weight bearing and there is more reproducible bone formation due to the gradual nature of the correction. The surgical scars are also smaller. It is likely frame the need to be on the leg for significant length of time probably in the region of four to five months.

I would not recommend doing both legs at once but if Mr Ali was keen for both legs be undertaken we could perform stage frame application and undertake the left side once he had regained good range of movement following correction of the right side.

I will arrange for another appointment in the preassessment clinic today to discuss things further that initially Mr Ali would prefer to go under her go undergo frame correction of the deformity.

On a separate note he mentioned that his left hand had swollen up and was sore [...]

Internal management correspondence relating to the Claimant's sickness absence

56. On 9 July 2021 Mr Haynes contacted Ms Williams to ask for an update on the Claimant's sickness absence (847). Ms Williams replied on 10 July to say (848):

I've emailed him to look through the catalog for a suitable stool that meets the Occ-health and Safety requirement and get in touch with Louise or myself to order it, he is still challenging the RA via his H&S Rep - I have informed him that is GWR and NR's stand , can I confirm with you if you're happy for him to come back to work whilst we wait for the stool ? I can then give him a return to work date.

Dean considering he's be doing Union work all along should he

57. On 12 July 2021 Mr Haynes replied to Ms Williams (HR Advisor) and Mr Shephard (and cc'ing Mr Field) saying (848):

I really cannot understand why Liaqat is still off. How many weeks is this? He has not supplied any sick notes. Regarding payroll what is Liaqat being shown as.

Regarding the risk assessment have you made Lee Bladen aware of the concerns made by Liaqat as we have already discussed the RA.

Please confirm what your next steps are to get Liaqat back in the workplace as a matter of urgency.

Sue, I will discuss this with you tomorrow.

58. Ms Williams replied the next day 13 July 2021 (847) to say:

Good morning Dean et al,

To my knowledge Lee B and NR are aware of Li's RA concern raised by his Health and Safety Rep Mal - , you were copied into the email from Lee dated the 11 of June 2021 at 10:25(Extract from the email - I have no issues with the changes suggested by Mal. Whether or not the stool is allowed at the country end would need to be agreed with NR if you wanted to go ahead with it. This shouldn't be an issue if the stool is secured at all times in some way and behind the screen)

Am more than happy to bring him back immediately ,but as requested below – I need you to confirm if you're happy for him to come back to work whilst the RA concerns are still pending with NR, as explained below, I've requested Li to order the Stool via Louise.

No fit note as been provided by Li so far – he claims he's been doing GWR union work which was authorised by HR , Sue where do we stand in regards to fit note pls.

59. Ms Wilson confirmed on 14 July 2021 (846):

His union duties wont be full time even if they were authorised by HR, so he would still require a fit note to cover his sick leave.

60. On 18 July 2021 Ms Williams replied to Mr Haynes and Ms Wilson (845):

Liaqat absence is now closed, no Fit note was provided – I have informed him again of the need to provide a fit note, this where his words "Due to having a long-term condition with my knees, I am classed as disabled. I have been away from my workplace because Paddington Manager Dean Haynes was unable to accommodate my reasonable adjustments (in the present case a stool). I understand my time off not sickness absence will be closed today. I have not agreed to be off sick or reported sickness from April 23rd 2021 but rather I have agreed to come away from the premises until a time comes where my RA has/can been dealt with amicably".

61. Mr Haynes replied to Ms Williams on 19 July 2021 (844):

I am a concerned that the below is closed and the way this has been handled. Can you please advise me of your work commitments this week as I need to discuss this with you. Nicola will also be in attendance once we have agreed a date.

62. Ms Beech replied the same day:

Can I just check that LA has been marked as sick even though we haven't got a fit note? He should not have received paid leave for this absence. Also if Steve H hasn't been notified of any union duties, he should be marked sick for the duration of the absence – as discussed at the start of this process.

63. Mr Haynes responded (19 July 2021 (843)):

Nicola, He should have been shown as sick from day 1 and supplied Fit Notes. We will have to wait for Gladys to confirm.

64. Ms Beech responded:

Agreed, but I just wanted to check in the meantime that we have informed Payroll that he is sick and not on paid leave.

65. On 20 July 2021 Ms Williams replied (842) that:

Yes, he was marked as sick not paid leave – he is fully aware, am on my MHFA course tomorrow morning -happy to have a meeting via zoom after my course between 1400-1500 if convenient ,if not am back in the business from Friday(0400-1400)till Tuesday.

Correspondence with the Claimant and period of annual leave

66. As referenced above, on 15 July 2021 Ms Williams had emailed the Claimant (838) referring to a conversation they had had, telling him the Respondent was keen to get him back to work safely and asking him to look through a Lyreco catalogue for an appropriate stool that was 'in line' with the risk assessment and occupational health. We agree with Mr Toms for the Claimant that this was a surprising request as it was for the Respondent to locate the appropriate seating that could be used at the gateline and it was not as simple as this request might suggest. The Claimant replied the same day to thank Ms Williams for her email and say he was glad that the reasonable adjustments had been confirmed. He said he would progress the stool choice and order via Louise Baldwin (administrator at the Respondent).

67. On 16 July 2021 (839) the Claimant contacted Ms Williams to say:

> *Thank you for the email and updating me on my shift and return to work meeting for the 17/07/2021.*
>
> *I have looed through the LYRECO CATALOGUE and there is a stool that fits my needs.*
>
> *I have spoken to Louise and will be forwarding the product no so that she can submit the order . Louise has also outlined her thoughts on the process that the stool will need to go through Network Rail for authorisation before the order can be placed . Once the order is put through it should be received quickly .*
>
> *To bear in mind, I can carry out my role with reasonable adjustments in place and this is still in the process and pending . I will be glad to come in to the work place and catch up with you tomorrow on the late shift schedule as requested.*

68. Despite this prompting by the Claimant nobody actually checked whether the stool would be consistent with the requirements of the risk assessment before it was ordered and Mr Haynes confirmed in his evidence that when the stool arrived around in July they could immediately see that it was not suitable.

69. In response that afternoon, 16 July 2021, Ms Williams said (839):

> *Thanks for the update, can you ensure your stool preference is sent to Louise immediately to get the ball rolling, I will confer with Dean and Louise about the stool ASAP. I will catch up with you tomorrow to close your absence and complete your RTW, can I confirm you are still wearing your Knee brace to help support your knee pain?*

70. The Claimant replied that evening, 16 July 2021, (839):

> *Yes, I can confirm stool product information has been forwarded to Louise and I can also confirm support is aways worn.*

71. On 17 July 2021 the Claimant returned to work but did not actually work, he took a period of paid annual leave to 25 August 2021. The purpose of this was to extend his entitlement to full pay under the sickness absence policy as long as possible. On 18 July 2021 Ms Williams emailed Mr Haynes, Mr Porter at Network Rail, Mr Bladen and Mr Field (cc'ing Mr Mustaq, Mr Hart and Mr Shephard) to say:

    I line manage the staff in question, unfortunately I was unavailable during the RA ,but the infor passed on to me from Dean and the RA was shared with the staff in question , which was then passed on to his HS Rep for review. Am aware they had some concerns about the RA(i.e provision of a stool on the CE of the gates as well) which was escalated to our GWR East Safety manager(Lee B.)- I believe myself and Dean were copied into that email, but the response from Lee was that NR must be consulted first from a station level.

    After discussion with Dean, the member of staff was informed of GWR and NR stand which was that the Stool was strictly going to be for the LE only as per the RA, he obviously wasn't happy about this decision but am not aware of the email conversation that went on after that.

    Am also unaware of any pending requests sent on the 28/04/21, but I will touch-base with Dean when am back in the business.

    I did speak to the staff in question yesterday evening about the RA and his response what that his HS Rep is still liaising with our Lee B. about their concerns.

72. Mr Field replied to Ms Williams and copied Ms Beech saying:

    Are you available at all on Monday 26th July 1000hrs to catch up re. Liaqat, with myself and Nichola?

73. It seems that meeting did happen because Ms Williams emailed Mr Field and Ms Beech that day to say:

    Many thanks for the catch up this morning, I've double- checked the roster and Li is back on Saturday the 7th of August 12:40 shift . Am also on leave from that weekend for 2 weeks but I will brief Shep appropriately once he's back from A/L.

74. On 16 August 2021 Mr Lewis sent an email to Mr Haynes saying he understands Mr Haynes is back from leave and asked what is needed to expedite obtaining a stool (904-905). The next day Mr Haynes replied (904) to say that, in his view, Ms Williams was dealing with the stool and that she is on leave for another week. After her return. On 25 August 2021, Ms Williams emailed the Claimant cc'ing (Mr Field, Mr Lewis, Mr Shephard, Ms Beech, Mr Bladen and Mr Haynes) (903) to say:

    Trust you're keeping well and safe, I know you are due back from your leave shortly, I just wanted to give you an update in regard to the RA and the

provision of reasonable adjustment as recommended by Occ health to help you carry out your role.

Currently as explained to Mal(your H&S Rep),whilst we're keen to get you back into the workplace with the appropriate adjustment as recommended by Occ-health and that meets the requirement of the RA, we are currently not in a position to do so yet ,this is because :

• Whilst I can confirm we have obtained a stool that was ordered by yourself, we are yet to finalise with NR the details of the RA and how we can implement the RA.

• And as earlier mentioned to you ,we don't have any sitting position that we can offer to you pending when the RA gets sorted.

What we certainly do not want to do is to bring you back into the workplace and then cause more damage to your knee because we were not able to provide the reasonable adjustment recommended.

After seeking further clarification and advice from a station level and HR, just to confirm, you will have to remain sick after your annual leave until we are sure that we can arrange for you to return to work safely. Please note you will need to provide a fit Note from your Dr. At present ,we are currently trying to get NR and all stakeholders including your H&S rep involved in a station meeting to help facilitate and progress the RA process, once I have anymore information about this I will keep you posted.

75. The same day, 25 August 2021, the Claimant came off holiday and was placed back on sick leave (924).

76. On 2 September 2021 Mr Lewis made a further attempt to move matters forward by emailing Ms Williams asking her to arrange a meeting (928-929). He mentions the utility of having a site meeting so the relevant decision makers could physically see the stool, the gate line and know how they might use it while complying with the risk assessment. This was a vital step and one that should have been taken months before. Mr Field seems to have agreed with Mr Lewis and asked Ms Williams by email (928/929) to try and arrange a meeting which she then tried to do on a number of occasions but there were difficulties in co-ordinating individual's calendars (971-975, 949-950, 955-956).

77. On the 9 October 2021 Ms Williams proposed the 21 or 22 October 2021 and Mr Lewis said he was available only on 21 October 2021 (979). The meeting did not take place and no-one informed Mr Lewis (978).

78. The same day Ms Williams emailed Ms Beech and others saying (953):

L has still not provided any fit note for his absence since the 26th of August – he is aware he is on the sickness log , he claims he has been doing GWR Union duties and we are yet to accommodate his reasonable adjustment and he will only provide a fit note when he goes for his leg lengthening operation

at the end of the month. I've advised him again he needs to provide us a fit note for his sickness absence , any advice on this issue?

79. Ms Beech replied saying:

This matter has been confirmed in writing to L twice by Steve. He has been told that he is required to obtain permission prior to carrying out union duties and he will be sick on the days when he is not working. I am assuming that he hasn't requested permission and that his current absence therefore over 8 days?

80. On 20 October 2021 Ms Williams emailed the Claimant (1007) saying:

[…] we are still in the process of trying to organise an onsite visit to see how the above RA will work, due to operational constrains and AL it's been a bit challenging to get everyone onsite but be rest assured that we are doing everything possible to organise an on- site meeting to get you back to work as safely and as quickly as possible . Am still awaiting your fit note certificate, unfortunately if I don't get a fit note from you I will have to put you down as AWOL.

81. Given that the Claimant was on sick leave at the Respondent's direction and the Respondent knew that the Claimant was due to have an operation two days later we do not understand why Ms Williams was suggesting that the Claimant would be treated as absent without leave.

82. On 21 October 2021 Mr Lewis sent an email (1006) to Ms Williams questioning why the Claimant was being classed as sick he said:

Liaqat has just forwarded this email to me and I am a bit confused it; I do not see how Liaqat can possibly be currently sick as he has been passed fit for work by occupational health.

The matter of fulfilling the Risk Assessment requirements for the reasonable adjustment has sat with management since June and Mr L Ali has always been declared fit to work. I believe and so Liaqat cannot be held responsible for the limbo in which he now finds himself.

The company has a duty under the Equality Act to facilitate this, All the elements required to discharge that duty are in place; the stool has been acquired and a Risk Assessment created. Therefore the sole reason for Liaqat's absence is due to the failure of the company to fulfil their reasonable requirements duties under the EA not due to Liaqat being unwell. As a light reminder, Liaqat classes himself as disabled and therefore he requires Reasonable Adjustments which need to be met by the company in order to fulfil his role.

We look forward to reaching an amicable solution.

83. The next day, 22 October 2021, the Claimant underwent his knee surgery which was clearly a major operation. It involved breaking his tibia and putting his leg in a frame to try and realign it (534-536). However, nonetheless the Respondent that day sent the Claimant a letter (from a Duty Station Manager), inviting him to an investigation meeting concerning him not complying with booking arrangements for trade union activities and his failure to provide fit notes to cover absence since 23 April 2021 (1032-1033). The Claimant replied from his hospital bed the next day saying he was in hospital recovering from surgery. Mr Pinder replied saying he hoped the operation went well and to let him know when he is out of hospital and well enough to attend a meeting (1045). This was poor judgement and unjustified on the part of the Respondent and showed a lack of sympathy for the Claimant and a lack understanding of his situation.

84. On 26 October 2021 the Claimant sent Ms Williams a fit note for 3 months from the day of his operation (1034). Mr Field appears to have been out of touch with the Claimant's situation because on 27 October 2021 he sent an email to a number of people, including Ms Williams saying: "*I am receiving unconfirmed reports that Liaqat Ali is currently in hospital and has been signed off for 4 months. Can any of you confirm if Liaqat has been in touch and if so what he has advised ASAP, please?" (1035).*

85. The Claimant was discharged from hospital on 29 October 2021 (228-229). On 1 November 2021 Ms Williams, in an email to Ms Beech and Mr Field (cc'ing others) put the record straight by saying:

> *Am just clearing my emails now, in response to the colleague being off from April the 23rd,that's incorrect, be was asked to go off sick by Dean on the 23rd of April 2021, he was brought back into the business by myself as requested by Dean on the 17/07/21 – I completed his RTW ,Business updates and he completed his safety and business brief during the shift.*
>
> *He was then on booked AL – I sent him an email on the 25th of August informing him he will be off sick after his AL. He was taken off the roster from the 26th of August and annotated as sick with Payroll.*

86. On 24 November 2021 Ms McGiveron in the Respondent's payroll team sent an email to the Claimant informing him his pay was being reduced to half pay from 3 December 2021. The Claimant responded to say (1043):

> *I have received a letter from payroll dept dated 17 Nov 2021 advising me I will be on half pay from 3rd Dec 2021 .*
>
> *I am writing to confirm that I have been off sick since 22nd October 2021 for which I have submitted a fit note from this date and I do not believe that my full pay entitlement will expire on 3 Dec 2021.I am entitled to full sick pay for six months in accordance with Heathrow Express Sick Pay Policy which was TUPED over in 2018.*
>
> *Would you be kind enough to provide me with full details of my sickness in last 12 months to ascertain how it has come up with this conclusion.*

Please note that I am not in good frame of mind due to a major medical surgery I recently have gone through and the pain and this disability is already a stress on me. At this moment of time, I do not need unnecessary stress which payroll letter has served.

Please note that I do not agree with the contents of the letter and I will be disputing it accordingly, If not sorted out.

Your clarification with requested information will be much appreciated.

87. The Claimant forwarded his response to his manager, Ms Williams the same day and she sent it on to Mr Field and Ms Beech saying (1042): *The email below was forwarded to me, also I've informed the colleague that his welfare check will now be passed over to Adam as per the instructions from Dean ,but he wasn't keen on it – He said it wasn't part of our Tuped HEX Policy ,I did inform him it's only a welfare check just to find out how he's doing.* We were not pointed to a response from Ms McGiveron or the Respondent to the Claimant.

88. It seems that on 24 November 2021 Ms Baldwin (Flagship Team Organiser) spoke to the Claimant and having done so she sent an email to Mr Field copying Mr Hawker, Ms Beech and a Mr Morgan (but not Ms Williams) saying:

I spoke to Liaqat Ali – (Gateline HEX) today and asked if he would like a Zoom welfare meeting with you and myself which he declined as he said that he was happy in keeping in contact with Glady's (DSM Hex) and did not feel the need to speak with us, he also did not feel the need for an Occupational Health Appointment to be arranged.

Just thought you all should know this.

89. Ms Beech sent this email on to Ms McGiveron.

90. On 3 December 2021 the Claimant did in fact drop to half pay (1051) and he challenged this in an email to a payroll team leader at the Respondent, called Ms Rickard, on 9 December 2021 (1050-1052). She told him that he had been marked as on sick leave since 24 April 2021 and that she would need his manager to confirm if this was in fact in accurate. The Claimant therefore on 10 December 2021 sent the email on to Ms Williams and asked her to review Ms Rickard's email and reply to him. On 23 December 2021 Ms Williams send an email to Ms Rickard and others saying (1056):

Trust you're keeping well and safe, I was just going through the 12months attendance report sent to L ,your information is correct- as per the 12months attendance report ,the colleague was back in the business in July(I completed his RTW then he had some pre-booked leave) till August 26th when he was told to stay off sick , my understanding of the policy is that his 26weeks of sickness absence starts from August the 26TH, – I might be wrong though but I will wait for Nicola to confirm.

91. Ms Rickard replied the same day saying (1055) "*I have attached a screenshot from the HEX sick policy below, as you can see it states that all sickness is on a rolling 12 month period and this is what we have done the deductions based on*.". Mr Field commented that it look correct that the Claimant was on half pay (1054). No reply appears to have gone to the Claimant.

92. On 6 January 2022 Vicky Pullinger (NHS Limb Reconstruction Specialist Nurse) saw the Claimant to check on his post-operative progress (475). The Claimant wanted a date for removal of the frame from his leg but the nurse felt it was too soon.

93. On 13 January 2021 The Claimant emailed Ms Arnolin at the Respondent in relation to his reduction in pay (1053). He said:

> *Could you please pursue this for me as Gladys [Ms Williams] was attempting to deal with by discussing this with you, but unfortunately she is not at work due to being unwell. As per this e-mail below, is self-explanatory that my sickness started from 22nd Oct 2021, with me providing a fit note. Yet, from Dec 3rd 2021 I have been placed on half pay. This was due to Dean Haynes instructing everyone that I was sick. But I was never sick prior to Oct 22nd 2021, I was waiting Dean and co implement reasonable adjustment in the workplace, I was told by management to wait until they are in place. Can you kindly take this issue up with Dean Haynes or whoever is in charge to undo this and get payroll to update the current information so that my sickness starts from 22nd Oct 2021, to continue forwarding my full salary payments for the moment. Regards*

94. On Friday 15 January 2022 Mr Layne (RMT) had a conversation with Dean Haynes about the situation with the Claimant's pay because he then sent Mr Haynes an email on 20 January 2022 saying (1060):

> "*Further to our conversation last Friday regarding Liaqat's current status. Have you managed to find out where the issue lies and more importantly, been able to take steps to rectify it? Payroll are just waiting on an instruction from you to adjust the sickness date (22 Oct 2021). This is obviously having a significant detrimental effect on Liaqat so we are eager to get this sorted."*

95. Mr Layne chased Mr Haynes on 25 January 2022 (1061) emphasising the financial hardship and mental distress of the Claimant and saying that otherwise they would have no option but to pursue this as an illegal deduction of wages through grievance and Employment Tribunal route. Mr Dean replied on 27 January 2022 saying he was not out of court and playing catch up. He asked if Mr Layne was available for an in person meeting at mid-day the next day to discuss it.

96. At 8 February 2022 it is clear from medical evidence (719) that the Claimant continued to experience pain and was taking morphine and codeine.

97. Mr Layne sent a further email to Mr Haynes 8 February 2022 (1063) referencing, amongst other things, the employment tribunal time limits and the financial hardship and mental distress of the Claimant. Mr Haynes responded on 9

February 2022 (1066) referencing his previous suggestion of a meeting that week he noted they had a meeting booked for Friday that week and asked if it would it be suitable to discuss this matter afterwards. Mr Layne responded (1065) acknowledging Mr Haynes' response of the previous week, saying he wasn't available and had suggested an alternative. He said they were now at a point where a chat was not going to be enough. He was happy to meet after the other Friday meeting but asserted this was not a complicated situation and he did not feel it needed a meeting and he asked for the Respondent's formal position due the time constraints. Ms Beech replied the next day (10 February 2022) to say:

> "*I'm not sure if you are aware of all of the information in regards to when Liaqat first went sick in April. A meeting took place at the time to confirm that he could continue to carry out union duties (if authorised by Steve Hawker), but he would revert to sick when not carrying out those duties. Steve Skelly, Steve Hawker, Lucy Mcgiveron and Liaqat attended that meeting and the arrangements were confirmed in an email. Steve Hawker has never received any request from Liaqat to attend any union meetings*. *If you have further information that you would like to discuss, please arrange a further meeting with Steve Hawker as he has been involved with this matter previously.*"

98. Mr Layne replied on 14 February 2022 (1064) to say he had spoken to the Clamant and that the Claimant's interpretation and recollection of events were vastly different and that the Claimant's version appeared to be supported by a wealth of correspondence. He said it appeared that the Respondent's position was at polar opposites to the Claimant's and it was unlikely to be resolved at this level so he was now going to escalate it through the appropriate channels.

99. The Claimant had had a telephone consultation with Occupational Health on the 24 February 2022. They reported (1068-1069):

> *Mr Ali has been seen before by Occupational Health, please refer to previous reports for background information which is still relevant.*
>
> *Mr Ali told me that some reasonable adjustments were previously arranged by my colleagues which I understand from Mr Ali was agreed by management. He told me a perching stool was purchased for him to use following a workplace risk assessment to enable Mr Ali to continue to work in some capacity. Mr Ali told me the return to work with reasonable adjustments was never implemented and he was left only able to perform trade union duties during this period, which he did. He told me whilst he was performing trade union duties, he was told he was classed as on sick leave. He told me as a result of this, he is now experiencing financial difficulties, as from the 2/12/2021 he has been placed on half pay. He told me this has also had an impact on his mental health and wellbeing whilst in the post-surgery recovery phase.*
>
> *Mr Ali told me he underwent a surgical orthopaedic procedure to repair a long-term musculoskeletal condition to his right leg. Mr Ali told me his surgery was on the 22/10/2022 and following his procedure he was placed in a Llizarov taylor spatial frame, which was bolted to his lower leg. Mr Ali told me this frame has now been removed and he is currently restricted to mobilising only*

on crutches with strict instructions to put a maximum of 40% of his body weight through his right leg. He told me he has a review with his specialist on the 4/3/2022 where, all being well he will be put on a rehabilitation programme back to his usual level of fitness.

Based on the information provided to me today Mr Ali is currently temporarily unfit for work. This is likely to remain the case for a further 4 weeks. I have made Mr Ali a review appointment for the 24/3/2022 to assess his progress and I will update you then with his consent.

Mr Ali asked me about the Equality Act 2010. In view of his long-term condition, although ultimately a legal decision, I would consider Mr Ali's underlying medical condition is likely to fall within the disability provision of the Equality Act 20210, therefore I would advise consideration is given to the Act in relation to any management decisions.

100. We accept Mr Toms' submission that the only time disability was raised it had to be raised by the Claimant and the Respondent made no enquiries with OH or anyone else to ascertain whether he might have a disability. We accept this is an indication that disability, at least in the case of the Claimant, was not a question that was taken seriously by the Respondent. The Respondent had done nothing to progress obtaining a stool for the Claimant while he was recovering from his operation. In our view, the Respondent was unreasonable and unrealistic in expecting that the operation would entirely resolve the Claimant's need for a place to rest at least during a period of recovery and rehabilitation back into the workplace following the operation and potentially beyond. As a minimum the Respondent should have discussed this with the Claimant and occupational health.

101. On 28 February 2022 the Claimant was advised by Ms Pullinger (NHS nurse) to continue using his leg brace (469) and on the same day the Claimant presented a grievance alleging disability discrimination and breach of TUPE (1070).

102. On 28 February 2022 the Claimant made his application to ACAS (5). In response to a supplemental question and as part of his evidence in chief when asked why he had not contacted ACAS before that point the Claimant said:

I did not take any action because, as I understood it, in 2021 even though it was confirmed to me that I was on sick but I was allowed to do Union Work I had not submitted a fit note or been declared unfit to work, adjustments were recommended via OH and pending and I was not aware of detriment on work or finances to less than 50 %, it was only after the op, in Dec 2021, that I started to explain my situation and to try and rectify it with the Respondent, therefore three months from that time.

103. On 28 February 2022 he also asked Ms Williams the following (in an email we were not provided with but the content of which we can discern from Ms Williams'

response later that day (1075). The Claimant's questions are in bold and Ms William's response is in plain text:

> ***The attendees****: Knee Brace RA held on Zoom, in attendance was myself – Gladys W, GWR East Safety Manager – Lee B, Yourself-Liaqat A and GWR Paddington Flagship Manager Dean H*
>
> ***Who place me on sickness ?:*** *It was decided by Dean H – From a duty of care to put you off-sick*
>
> ***What was the reason why I was place on sickness?*** *As above*
>
> ***What was the outcome in the meeting of the knee Brace that I was using when I was on my Gateline shift duties:*** *As per various discussion I had with you, you did mentioned significant improvement with the knee brace which was given by the hospital*

104. The Claimant replied on 1 March 2022 (1074) with further requests for information and Ms Williams replied on 15 March 2022 (the Claimant's questions are in bold and Ms William's response in plain text):

> ***Can I ask you in terms of, when I was wearing the knee/leg did you personally have any issues with it when I was using this as a support and aid to help me perform my shifts at work, prior to Dean Haynes decision to place me on Sickness in April 2021.*** *-I had no issues with the leg support apart from the size of the brace which we spoke about, according to several chats I had with you, you inform me the Knee support were really helping with the pain and you were going to get a smaller knee support from the hospital which could go under your trouser*
>
> ***Did you speak to the occupational health advisor, if so were they supportive of me wearing the knee/brace support?-*** *Yes I spoke to OH and OH said ultimately it was your decision as long as you were happy with the Knee brace and it was giving you support and helping the pain.*
>
> ***Do you know why Dean Haynes would not allow me to work with the knee/leg support?-*** *The Zoom meeting which I was asked to organise by Dean was to risk assess the Knee support.*

105. Nothing having been done since the abortive attempt by Ms Williams to arrange a meeting on the platform at Paddington Station in October 2021, on 11 March 2022 Mr Field sent an email to Ms Beech and Mr Bladen on the (1071) saying:

> *Further to your email yesterday (sorry was out of the office when sent), attached is the last Risk Assessment I am aware of in relation to a stool being used at the gate line.*
>
> *NR, myself & Lee did meet and discuss the RA and felt generally there may be a chance a stool could be allowed working to the RA however would be*

dependant on what type of stool was used – the next stage would be to try and identify a suitable stool and how practically we could implement its use alongside the risk assessment.

We have never got to that stage as we did not wish to commit to any additional expense (looking for and buying a suitable stool) until we knew the colleague requesting the use of a stool was ready to return to the work place at which point we would follow up.

106. Below this email was Mr Bladon's email of 20 May 2021 attaching his draft of the risk assessment. Presumably that draft of the risk assessment was attached to Mr Field's email but there was of course the later draft prepared by Mr Lewis. Contrary to the content of Mr Field's email the Respondent had purchased a stool which it had asked the Claimant to choose and which in evidence Mr Field said he immediately knew was not suitable on first sight of it.

107. On 24 March 2022 the Respondent's Occupational Health team had another consultation with the Claimant and prepared a report of the same date (1076-1077):

Mr Ali told me he attended his specialist review on the 4/3/2022. He told me he was given positive news in that his bone was healing very well, and he was ready to progress to walking without the aid of his crutches. This has been undertaken under the strict supervision of his specialist with Mr Ali weaning himself off his crutches slowly. He told me today he is able to walk around his house unaided and will progress this to outside in the next few days. He told me he has a further review with his specialist and physiotherapy team on the 1/4/2022.

Mr Ali told me his GP has issued him a further fit note up until the 25/5.2022. Mr Ali hopes he will be able to return to work in some capacity before this date if his rehabilitation progresses as he anticipates. In view of the information provided to me today this target date does appear to be achievable.

It would be prudent for management to discuss with Mr Ali now about his phased return to work, as I understand from Mr Ali that all the relevant risk assessments regarding his return to work have already been undertaken at the station. This may help prevent a delay in implementing a phased return to work which I anticipate is likely within the next 6-8 weeks.

I have made an appointment to review Mr Ali on the 25/4/2022@ 13:00hrs to assess his progress and will update you then with his consent.

108. Ms Williams updated Mr Field, Mr Haynes and Ms Beech with key details from this OH report on 26 March 2022 (1079) and added:

From his previous OH report dated 24:02:22 (extract from the report :-Mr Ali asked me about the Equality Act 2010. In view of his long-term condition, although ultimately a legal decision, I would consider Mr Ali's underlying medical condition is likely to fall within the disability provision of the Equality Act 20210, therefore I would advise consideration is given to the Act in

relation to any management decisions.) I have asked OH and the colleague a few questions which am still awaiting response: Is the colleague saying he's disabled or not ? if Yes – is he registered disabled and what's the nature of his disability.

109. Of course on 24 February 2022, as referenced above, the OH team had advised: *"In view of his long-term condition, although ultimately a legal decision, I would consider Mr Ali's underlying medical condition is likely to fall within the disability provision of the Equality Act 20210, therefore I would advise consideration is given to the Act in relation to any management decisions".*

110. On 3 April 2022 Mr Layne contacted Ms Williams by email on the topic of the Claimant's return to work, and risk assessments and reasonable adjustments (1088).

111. On 11 April 2022 the Claimant was provided with his ACAS certificate (5).

112. On 25 April 2022 the Respondent's OH team advise that the Claimant could return to work the following month on 26 May 2022 on a phased basis. They recommended (1082-1083):

That he have a stool nearby to accommodate a reasonable adjustment which will enable him to take short posture changes from standing, walking and sitting he is also allowed to self-pace and take short micro-breaks as and when required and when work duties allow

113. On 29 April 22 Ms Williams sent further questions to Occupational Health relating to the Claimant's return to work (1091-1092) and on 13 May 2022 the OH team provided their response:

Proposed Phased Return

ORIGINAL OH RECOMMENDATION: *If management are able to accommodate it I would suggest the following phased return programme. I would suggest for the first 2 weeks of his return he works 4hrs per day every other day.* ***MS WILLIAMS RESPONSE*** *Absolutely fine with this recommendation.*

ORIGINAL OH RECOMMENDATION: *I would advise he has a stool nearby to accommodate a reasonable adjustment which will enable him to take short posture changes from standing, walking and sitting.* ***MS WILLIAMS' RESPONSE/FURTHER QUESTION:*** *Getting a stool is proving very challenging with our stakeholders, instead of a stool what if we give him time during his shift for him to find a sit around the station course which is only about a minute walk from the Gateline for him to sit down or rest his legs would this help* ***OH RESPONSE:*** *Due to the type of surgery Mr Ali has had and the length of time full recovery/rehabilitation will take, it would be in Mr Ali's best interests for him to have a stool next to the gateline for him to perch on as and when work allows and his needs dictate. It may or may not be*

required for the longer term, however at present it is too early to say. I would suggest Health and Safety risk assess this request to fully understand if this possible. Has a risk assessment already been carried out in the past? if so would it be possible for me to see the outcome?

ORIGINAL OH RECOMMENDATION: *I would suggest he is also allowed to self-pace and take short micro-breaks as and when required and when work duties allow.* ***MS WILLIAMS' RESPONSE/FURTHER QUESTION:*** *How long will you suggest this micro breaks last for pls?* ***OH RESPONSE:*** *I would anticipate in the region of 3-5minutes, however depending on how Mr Ali feels it may be slightly longer and up to 10minutes. The perching stool would help facilitate this so Mr Ali is never too far from his gateline post.*

ORIGINAL OH RECOMMENDATION: *A review in Occupational Health after his initial 2 weeks, to monitor his progress and advise on the next steps of his rehabilitation back to full fitness.* ***MS WILLIAMS' RESPONSE/FURTHER QUESTION:*** *Am very happy with the 2 weeks review but based on his rehabilitation programme I will be grateful if we can have an anticipated timelines on these adjustments as you will agree as a business we would not be able to sustain this adjustment permanently.* ***OH RESPONSE:*** *The adjustments I have recommended are not permanent restrictions at present. We will need to monitor how Mr Ali is throughout his phased return period, adjustments may be added or taken away during the review process. It is really dependant on how Mr Ali responds to his rehabilitation back to work. Occupational Health will regularly review him and update you with his consent to ensure management are aware of his progress or any problems we may come across along the way.*

114. Ms Williams then said on 13 May 2022 to Mr Field and Mr Morgan, cc'ing Ms Beech, that she was a bit perplexed with this response from OH. Ms Beech then replied to Mr Field on this email train saying: "*Would you be able to discuss this information with Karen please as discussed. I think we need to explain what we can put in place as reasonable adjustments for the return to work, but if these aren't sufficient then he may have to remain sick until he is further recovered."*

115. We accept Mr Toms' submissions at paragraph 56 that this is an unusual case because normally it is the employer who is doing everything they can to get their employee back to work and often they will be criticising the employee for not doing sufficient to return to work. In this case, Mr Ali was trying to remain at work/return to work as soon as possible and it was the Respondent that was doing little of substance or meaning to facilitate that.

116. On 4 May 2022 Mr Collins, Regional Driver Manager, wrote to the Claimant about his grievance asking for dates for a meeting (1101) and the Claimant replied saying he would provide dates when he returned to work. Mr Collins sent a further email on the 18 May 2022 asking for dates and the Claimant responded saying "*as you have stated your unaware of the full facts, you'll need to revert to the HR team,&l egal team for further updates. They'll be able to confirm the position from their end. I trust that will be the end of the matter for the interim but thank you for checking in. Please note I am still off work*" (1100). We think it

likely that Mr Collins would have been somewhat perplexed by that response from the Claimant.

117. On 11 May 2022 the Claimant presented his claim to the Employment Tribunals (6).

118. On 16 May 2022 it seems Mr Field had a telephone call with Karen Blight in the OH team because later that day Ms Williams sent Ms Blight an email saying (1109-1110)

> "*[…] just following up on your earlier telephone conversation with Adam, pls find attached the Risk Assessment for Mr Ali. A confirmed by Adam, It's the practicality of implementing the Risk assessment that is proving challenging. There are some specific requirements that we need to adhere to for the Risk-assessment to be viable i.e. the Stool has to be fixed to the floor, the stool should be located at least 1m away from the operational Gateline, Stool MUST be suitably secured at all times, the stool should be removed completely from the area when not in use. I will be having a chat with Mr Ali soon to clarify this to him too, we certainly want him back to work but only if it's safe to do so, I Know you have another review meeting with him on Friday the 20th of May, kindly review the phased return to work recommendation and as per my earlier questions instead of a stool, would it be okay for us to give him time during his shift for him to find a sit around the station course which is only about a minute walk from the Gateline for him to sit down or rest his legs.*

119. This highlights the fact that the Respondent had made no progress in implementing the OH recommendation in well over a year.

120. On 20 May 2022 Karen Blight in the OH team reviewed the Claimant and recommended (1103-1104):

> *With regards to Mr Ali's return to work and the problems surrounding Mr Ali being provided with a perching stool at the gateline I would advise the following in order to move his return-to-work plan forward and ensure a safe return to work for him.*
>
> *1. In view of the potential issues regarding Mr Ali being provided with a perching stool I would suggest before any conclusive decisions are made that a workplace risk assessment is undertaken with Mr Ali and a RMT health and safety representative present to ensure and prepare for Mr Ali's safe return to work. I would recommend the risk assessment includes the feasibility of a perching stool at or near to the gateline on platform 6&7, and his usual gateline procedures including emergency procedures. This will then provide management, Mr Ali and Occupational Health with a clear understanding of Mr Ali's work requirements, his health and wellbeing, safety considerations and any other workplace difficulties that may arise from the assessment. Mr Ali is available to attend Paddington station anytime during the week of the 6th June 2022. He has a review appointment booked in Occupational Health for the 10th June 2022, so it would be preferable if the risk assessment report was available to view prior to his review date. It would be prudent for you to*

liase directly with Mr Ali prior to arranging the risk assessment, so that a convenient date and time is arranged for all those parties who would need to attend.

121. On the 22 May 2022 Ms Williams sent an email to the Claimant (1105) noting the phased return to work plan. She informed him that a lot of the recommendations were feasible but the provision of the stool was still proving challenging because of practicalities with risk assessment compliance and that she hoped there would be more clarity after his next OH visit. She said once she received the next review report she would liaise with stakeholders and update him.

122. The Claimant then provided a fit note dated 31 May 2022 stating he was fit to return with adjustments 26 May 2022 to 26 July 2022 (1122). The Respondent criticised the Claimant in cross examination because he had a tonsillectomy on the 25 May 2022 and did not inform the Respondent of this. However, we agree with Mr Toms' submissions on behalf of the Claimant that criticism could not be levelled at him for that because he had already been told by Ms Williams that he was not returning to work so it is not surprising that he did not inform the Respondent.

123. On the 27 May 2022 Mr Field, apparently due to Ms Williams' absence, asked the Respondent's OH team if the Claimant could use the seating near the gateline rather than a stool and OH responded saying Mr Field should look at her response to Ms Williams if Mr Ali consented to its release to him (1107-1109).

124. Mr Ali's sick pay ran out at the beginning of June 2022. The Claimant had a consultation with OH on 10 June 2022 (1125-1126) and OH prepared a report the same day which said:

Mr Alis updated me with his progress, which appears to be satisfactory. He told me he is now able to walk continuously for about 2 hours and walk uphill, whilst taking some short rest periods. His ankle symptoms are improving and are not causing him any concern. He continues with his physiotherapy.

Mr Ali told me he has not been contacted regarding attending work to undertake a workplace risk assessment before he commences with a phased return to work. He is very keen to return to work and I feel the next steps towards a full recovery which would also benefit his mental as well as physical health is a phased return to the workplace.

I note from your previous correspondence and most recent correspondence from Nicola Beech that accommodating a stool for Mr Ali may not be an option you are able to accommodate. However, my advice is that the workplace risk assessment as previously recommended is undertaken and for it to include of all of Mr Ali's gateline processes. This will help us, and Mr Ali understand if he can perform all of his duties safely and efficiently without putting himself or others at any risk. With regards to taking short breaks/ sitting it may be a question of him trying it and see how things are. However, by not undertaking the risk assessment this will be unknown. My advice is that this risk assessment is undertaken as soon as is reasonably practicable in order to not

delay Mr Ali's rehabilitation back to the workplace any longer. I would advise you contact Mr Ali directly to arrange a mutually agreeable day and time for the assessment to be undertaken.

125. Ms Williams sent an email to OH on 11 June 2022 (1129), without the benefit of seeing the report quoted above, saying:

"*Just to clarify a work place risk assessment was already conducted I sent a copy to you already. Unfortunately there is no other risk assessment for you to see apart from the one I sent, can Mr Ali's next follow up review be a face-to face with you to assess his movement.*"

126. Whilst we understand that Ms Williams was trying to assess the options for Mr Ali returning to work pending the provision of equipment that would allow him to rest his legs near the gateline, we do not consider her response to OH to have be a very helpful and was symptomatic of the fact that nobody at the Respondent was taking hold of the situation, looking at it practically and implementing the necessary meeting of experts to assess and find a viable option. That required a meeting on the platform with the relevant specialists.

127. On 13 June 2022 OH replied saying that the reason for the assessment was not solely to assess whether he required a perching stool. She said it would be in everyone's interest (in particular the Claimant's) for a work place risk assessment to be carried out of all of his gateline procedures, including emergency procedures, and with Mr Ali in attendance to ensure he is safe and able to undertake the tasks required of him to return to his post safely. She said that of course the risk assessment should include whether Mr Ali requires nearby seating/a stool to rest, where this is available and where the most suitable place for it to be place etc for him and the business. She asked if Mr Ali had been in attendance when the last risk assessment was undertaken (1127).

128. The Claimant attended a further OH consultation on 1 July 2022 and the resulting report (1131) commented that:

- His progress was as expected.
- He had not been contacted to attend a risk assessment nor had he had any communication from his management team in the previous 2 weeks.
- He had no idea what is going on regarding his return to work
- From an Occupational Health perspective there is nothing further they could add and their advice remained the same

129. On 7 July 2022 the Claimant sent an email to Ms Williams saying:

I am writing to advise you that the 21:47 what's app message that you send me last night (06-07-22) regarding a formal welfare meeting , from now on all work related issues can you please communicate by email for transparency and clarity.

The what's app phone call you made on the 4th July 22 , was very distressing and demoralising as well as discriminatory, where you clearly stated that you did not need to implement OH recommendation as they were only recommendation , and that I did not require a risk assessment . You cannot provide the stool which you repeated half dozen occasions in the conversation.You are fully aware that I have a disability . I do believe you are intentionally delaying my return to work by not implementing reasonable adjustments or carrying out a Risk Assessment hence a required by the Equality Act 2010 .If you insist on a formal welfare meeting on the 12th July , in spite of the fact you did a welfare check via the phone on the 4th July 22, which you confirmed you would put what we discussed in an email which you failed to do. For the formal welfare meeting can you please kindly liaise with Steven Layne as my TU Representative. […]

130. On the 8 July 2022 Mr Bladen sent Ms Williams an email questioning the need for a workplace risk assessment or whether what was being asked for was a 'Fitness RA (SMS-0735-50)' (1136-1137). He said that in either case this would be a wide-ranging document and not what is normally expected following return to the workplace after a medical absence, ordinarily, these are restricted to tasks of concern such as manual handling, climbing into cabs etc. He strongly believed that the answer to the question as to whether the Claimant is fit to return or not is one for OH to answer and that any restrictions needed should also be advised by OH who are the subject matter experts.

131. The Claimant attended a further consultation with OH on 18 July 2022 (1150-1151). OH stated that she had spoken with Mr Bladen on the 8.7.22 and he had agreed to carry out a risk assessment but this had still not happened.

132. The Claimant attended a welfare meeting on 18 July 2022 with Ms Williams (1142-1148) and he made it clear that he was 'not in a good place' as (i) financially he had not had any salary for two months (ii) he had had an operation and had a disability and should have been back at work with reasonable adjustments but nothing had been done and he pressed for the risk assessment mentioned by OH to be done. Ms Williams just said "*Sorry you feel that way but it's not the case, but take your opinion on board. But I do wasn't to know how you are and what you can do?"*

133. On 26 July 2022 Ms Williams sent the Claimant an email referencing his fit note expiring on 26 July 2022 (which said he was fit to return from 26 May with adjustments) and repeating reference to the challenges with providing a stool in light of the risk assessment requirements. She went on to say:

As I explained to you during the welfare meeting on Monday 18th July 2022, we have various sitting area around the station that is approximately 5-6 metres away from where you will be working at the gateline, also we have the old HEX ticket office area close to the gates where we can provide a sit there for you, this will be available for you to take microbreaks. We will be guided by you as to how often and how along these will need to be initially to aid you return to work.

Your current fit note is till the 26th of July so we are looking forward to seeing you back on your next working day which is Thursday the 28th of July at 1000 hours to commence your RTW. Will carry out your RTW interview and then organise your individual risk assessment to ensure that you are able to carry out the basics of your role safely and it isn't detriment for recovery.

Your phased return as recommended by OH is:

First two weeks of your return to work 4 hours per day every other day.

Advise you have a stool nearby to accommodate a reasonable adjustment which will enable you to take short posture changes from standing, walking and setting.

Suggest you are allowed to self-pace and take short micro-breaks as and when required and when work duties allow.

A review in occupational health after initial 2 weeks to monitor your progress and advise on the next steps of your rehabilitation back to full fitness

If there are any issues with this please let do let me now.

134. As was pointed out by Mr Toms for the Claimant, this email was sent only one clear day before the Respondent was suggesting that the Claimant return to work (1154-1156). The Claimant was understandably surprised by the email and said so in an email response of the same day (1154). He said "*its going off a tangent and coming up with conclusions prior to the Risk assessment. At the welfare meeting of 18-07-22. It was agreed for my welfare that a face to face on the Platform for the risk assessment would be conducted, myself present because it's to do with me an the RMT Steve Layne (H&S Rep), as well as management H&S. I should be referred to OH for their recommendation as OH have asked for this RA this to be done and want to see it. Can you please arrange this as per OH advise letters and this is in everyone's interest to move things forward and support my welfare […]*"

135. Ms Beech replied the next day (1153) to clarify that Mr Bladen from the safety team would be carrying out a risk assessment with him on the Claimant's first day back at work and that if there were any concerns from the risk assessment then they would go back to OH. The Claimant replied to inform Ms Beech that he had prebooked annual leave (1152-1153). The Respondent disputed that leave was pre-booked. The Claimant maintained that the risk assessment needs to be done prior to returning back to phased duties and asked for an update on is pay situation. Ms Beech (1152) said the risk assessment could be carried out before his return and said she would leave it to his manager Ms Williams to liaise regarding dates.

136. On the 21 August 2022 Ms Williams informed the Claimant that he was to have a risk assessment on the 25 August 2022 and to return to work that day

(1158-1159) but leave for an OH appointment at 11am in Reading. The Claimant returned to work on 25 August 2022 with a risk assessment being carried out by Mr Bladen (1170-1172). Mr Bladen's risk assessment included the following comments:

> *Liaqat was observed undertaking all the tasks required on the Gateline without difficulty and showed no signs of pain/discomfort. Liaqat was asked to release an item from the Gateline paddles using the methods in the Gateline Operating RA, this includes a physical release by forcing the paddles open. All tasks were observed as complete and no concerns were identified by Liaqat, Gladys or myself*.
>
> *Concerns were identified with Liaqat's ability to stand for long periods of time without rest, to date Liaqat reports being able to do 2 hours with periodic rest periods. To enable a continued recovery Liaqat will need to be rostered in a way that allows him to be surplus to the minimum gateline operating numbers as it is envisaged that Liaqat will need to take frequent and short rest periods. These rest periods are likely to be longer in duration in the first few days/weeks of the return-to-work phase as strength is built in the leg.*
>
> *Some flexibility is envisaged whilst the return-to-work phase is completed and frequent reviews between Liaqat, his Line Managers and OH is required to ensure the RTW phase is successful.*
>
> *Actions agreed as follows*
>
> *1. Liaqat is able to attend work as normal and there are no restrictions to these duties i.e., booking on etc*
>
> *2. Liaqat is able to undertake normal gateline duties without restriction other than the need for suitable rest periods, Liaqat can complete the full range of duties required of a Gateline Assistant*
>
> *3. Rest for Liaqat is a factor in the RTW OH assessment, to allow this Liaqat will need to be rostered as an additional resource to ensure the Gateline is compliant with the Gateline RA at all times*
>
> *4. Rest periods should be taken away from the Gateline, the use of public seating is adequate for this if appropriate.*
>
> *5. Liaqat should follow the RTW guidance as advised by OH.*
>
> *6. Liaqat should only undertake additional customer service duties as he feels comfortable and able to complete especially when manual handling is involved.*
>
> *7. Regular welfare communications with Line Managers are advised*
>
> *8. Continue OH appointments to advise on timescales of full return to normal duties.*

137. At the OH Consultation on 25 August 2022 the OH specialist noticed the Claimant was walking with a slight limp but he otherwise seemed steady and secure and she had no concerns about his fitness to begin a phased return starting on 27 August 2022 as follows for the first two week: four hours per shift on alternate days for the first two weeks then a six-day stretch and increase to 4 hours every day, minus one non-working day in the middle of this stretch (1173-1174). OH set out a dated plan.

138. The Claimant contacted Mr Collins about his grievance on the 15 September 2022 asking for a date to be scheduled for a meeting (1175). We accept that this has not been progressed by the Respondent.

139. On 22 September 2022 (1177-1178) an OH report documented that the Claimant did not feel able to increase his hours and that he needed to sit down after the first hour for 5 to 10 mins every half hour. OH proposed a further phased return to work plan.

140. On 7 October 2022 Occupational Health reported (1179-1180) that the Claimant he could increase the number of consecutive days worked but not his hours and that he still required regular breaks to sit down. She said the Claiamant felt an opportunity to sit or perch next to the gateline might help. She said the Claimant may fall under the disability provisions in the Equality Act.

141. On 2 November 2022 there was a welfare meeting at which the Claimant's Trade Union Representative suggested a perch bench and Network Rail agreed it by 30 November 2022 so long as it was temporary (B1231-B1233). Network Rail subsequently confirmed that, within reasonable constraints and without creating any precedent 'temporary' in this case could mean so long as needed (B1228). A site meeting to assess the perch stool with contractors finally took place on 28 April 2023. The steps that were then being taken in March and April 2023 should have been undertaken 18 months to two years before.