EMPLOYMENT TRIBUNALS

Claimant **Respondent**

v

Ms Eli Bar-On **London Underground Limited(1)**
Mr Darren Burrows (2)
Mr Zahir Khan (3)

Heard at: **London Central Employment Tribunal (via CVP)**

On: **13, 14, 15 (am only), 19-21 June 2023**
22-24 June (In Chambers)

Before: **EJ Webster**
Ms S Campbell
Ms S Plummer

Appearances
For the Claimant: **Ms Aly (Counsel)**
For the Respondent: **Mr Liberadzki (Counsel)**

JUDGMENT

1. The Claimant's claims for direct disability discrimination are not upheld.
2. The Claimant's claims for indirect disability discrimination are not upheld.
3. The Claimant's claims for victimisation pursuant to s27 Equality Act 2010 are not upheld.
4. The Claimant's claims for disability-related harassment are not upheld.
5. The Claimant's claim for failure to make reasonable adjustments are not upheld.
6. The Claimant's claims for unauthorised deduction from wages are not upheld.

RESERVED WRITTEN REASONS

<u>The Hearing</u>

7. The hearing was listed for 7 days. Due to a listing error the Tribunal was not able to sit on 15 and 16 June as the parties had originally been informed.

Unfortunately, one of the witnesses was not available during the week of 19 June. To accommodate this situation, the parties and the Tribunal agreed to sit early on 15 June to hear his evidence. The Tribunal is grateful to all involved for their flexibility in ensuring this was done.

8. The parties had agreed a bundle numbering 1125 pages. An additional bundle was served by the respondent in the afternoon of the first day of the hearing and this was agreed to by the Claimant. She was allowed to give some additional evidence in chief regarding those documents.

9. The hearing was beset by technical difficulties throughout both on part of the Tribunal and the parties. The Tribunal was grateful to everyone for their patience in dealing with those issues.

10. The list of issues had been agreed in advance between the parties. For the purposes of this Tribunal the issues have been slightly rearranged below in that they are grouped by type of claim as opposed to when the claims were brought. It was agreed at the outset of the hearing that the PCPs relied upon for the purposes of the indirection discrimination claim and the failure to make reasonable adjustments claim were not the existence of the job description but the requirement to carry out the activities within the job description as specified below.

11. The Tribunal heard oral evidence from the following individuals who also provided witness statements:

    a. The Claimant
    b. Mr Darren Burrows (R2)
    c. Mr Zahir Khan (R3)
    d. Mr Brian Liddle

12. The Respondent also provided a witness statement for Ms Anne Marie Costigan. On the first day of the hearing the Respondent filed a doctor's note stating that Ms Costigan had a condition that was causing her acute pain and hearing loss. Subsequently they served a fit note stating that the witness had an ear infection and she was not fit for work. It did not expressly cover whether she was fit to attend the Tribunal hearing or give evidence.

13. We accept that it had been Ms Costigan's intention to give evidence and that she prevented from doing so due to genuine ill health. We have read her witness statement and considered it but not given it as much weight as we would had the Claimant been able to challenge her evidence.

14. The Claimant had prepared for the case whilst unrepresented and only instructed Ms Aly for the purposes of this hearing. Her witness statement had been prepared without legal assistance. This meant that it was very long, numbering 95 pages. There was some discussion about reducing the witness statement but this could not be agreed upon and the Tribunal endeavoured to read the statement in its entirety though it was clear that roughly the first 1/3 of the statement was relevant to historical matters that were background

information only. Ms Aly agreed that this was less relevant to the Claimant's current claims but was important background information. Respondent's counsel did not cross examine the Claimant in respect of the background information due to the need to get through the relevant evidence however the Tribunal noted that this did not mean that they accepted it as a correct.

List of Issues

15. Jurisdiction – time limits
    a. First Claim- ACAS conciliation commenced on 28 April 2020 and concluded on 28 May 2020. The claim was received on 15 August 2020. Any complaint prior to 16 April 2020 is therefore potentially out of time
    b. Third Claim - ACAS conciliation commenced on 24 February 2021 and concluded on 11 March 2021. The claim was received on 11 April 2021. Any complaint prior to 25 November 2020 is therefore potentially out of time.
    c. If any proven discrimination complaint is out of time, did it form part of conduct extending over a period, such that it is in time?
    d. If not, is it just and equitable to extend the time limit?

    Wages claim (Claim 3)

    e. Did it form part of a series of deductions ending in time?
    f. Was it not reasonably practicable to bring the claim in time, and has it been brought within such further period as was reasonable (wages claims)?

16. Disability status

It is accepted that the Claimant was at all material times (from 11 April 2019 to 11 October 2020 for first claim and 29 January 2021 for second claim and 18 November to 16 December 2020 for third claim) a disabled person by reason of Ehlers-Danlos syndrome, fibromyalgia, psoriatic arthritis and a compromised immune system caused by methotrexate (medication for arthritis).

17. Direct disability discrimination – s.13 Equality Act 2010
    a. Did the First Respondent treat the Claimant less favourably than they treated or would treat others because of her disability in declining to investigate the Claimant's complaint of harassment and bullying dated 15 September 2019? (**First Claim)**

    b. Did the First and/or Second Respondents treat the Claimant less favourably than they treated or would treat others because of her disability in the decisions to remove her from her CSA1 grade and demote her to CSA2 grade, allegedly made and/or reiterated on the following dates: 11 April, 1 May, 31 October, 7 November and 11 November 2019; 17 May and 11 October 2020. (**First Claim)**

c. Did the First and Third Respondents treat the Claimant less favourably than they treated or would treat others because of her disability by sending her emails timed 16.22, 16.23, 16.33, 17.37 and 17.42 on 29 January 2021? (**Second claim)**

d. Did the First and Third Respondents treat the Claimant less favourably than they treated or would treat others because of her disability by deducting her company sick pay for the periods 12 October to 16 October 2020 (£1,206.05 gross) and 21 November to 6 December 2020 (£2,711.32 gross)? **(Third claim)**

18. The Claimant relies upon actual and/or hypothetical comparators including:

(a) Ms Julie Allen (CSA1, West Ham Station)
(b) Ms Alexis Bailey (CSA1, Acton Station).
(c) Mr Jim Blanks (CSA1, Victoria Station).

In the case of the above alleged comparators, were there no material differences between their cases and the Claimant's?

19. Indirect disability discrimination – s.19 Equality Act 2010 (**First Claim)**
    a. Did the First Respondent apply a provision, criterion or practice (PCP), namely the CSA1 job description which the Claimant was recruited for, and in particular the elements identified in a letter dated 6 August 2010, namely:

(i) Prolonged walking, standing and sitting
(ii) Climbing stairs.
(iii) Avoidance of regular breaks.

    b. Did the PCP put, or would it have put, people who have the same disability as the Claimant, at a particular disadvantage when compared with people who do not have the same disability as the Claimant?
    c. Did the PCP put the Claimant at that disadvantage?
    d. If so, was the PCP a proportionate means of achieving a legitimate aim?

The Respondent relies upon the legitimate aim of ensuring safety of customers and staff including by insuring the R1 met its legal obligations regarding safety in stations.

20. Failure to make reasonable adjustments – s.20 and s.21 Equality Act 2010 (**First Claim)**
    a. Did the First Respondent apply a provision, criterion or practice (PCP), namely the CSA1 job description which the Claimant was recruited for, and in particular the elements identified in a letter dated 6 August 2010, namely:

a) Prolonged walking, standing and sitting
b) Climbing stairs
c) Avoidance of regular breaks

b. Did the PCP put the Claimant at a substantial disadvantage in comparison with persons who are not disabled?
c. Did the First Respondent know, or could they reasonably have been expected to know, that the PCP in question put the Claimant at a substantial disadvantage, in comparison with persons who are not disabled, in relation to employment by the First Respondent?
d. Did the First Respondent take such steps as it was reasonable to have to take to avoid the disadvantage caused by the PCP?

The Claimant contends that it would have been reasonable to allow her to continue with the following adjustments, (which had previously been implemented in her CSA1 role) at another station, rather than demoting her to CSA2 level:

A) Avoid prolonged walking, standing and sitting.
B) Avoid climbing stairs
C) Allow regular breaks.

21. Victimisation – s.27 Equality Act 2010 (**First Claim)**
    a. Did the Claimant commit a protected act by:
    a) Submitting Employment Tribunal claim numbers 2202367/2013, 2205082/2013, 2201546/2014 and 2301511/2018 ("the Previous Claims")? **Accepted by R as being protected disclosures**
    b) Submitting a bullying and harassment complaint against the Second Respondent on 15 September 2019? **Accepted by R as being a protected disclosure**
    b. Did the Respondents subject the Claimant to a detriment by:
        a) The First Respondent declining to investigate the Claimant's complaint of harassment and bullying dated 15 September 2019?
        b) The First and Second Respondents' decisions to remove her from her CSA1 grade and demote her to CSA2 grade, allegedly made and/or reiterated on the following dates: 11 April, 1 May, 31 October, 7 November and 11 November 2019; 17 May and 11 October 2020.
    c. If so, were any such detriments because of the Claimant's protected act(s)?

22. Disability-related harassment – s.26 Equality Act 2010
    a. Did the First and Third Respondents engage in unwanted conduct by sending the Claimant emails timed 16.22, 16.23, 16.33, 17.37 and 17.42 on 29 January 2021? **(Second Claim)**
    b. Did the First and Third Respondents engage in unwanted conduct by deducting the claimant's company sick pay for the periods 12 October to 16 October 2020 (£1,206.05 gross) and 21 November to 6 December 2020 (£2,711.32 gross)? (**Third claim)**
    c. Was the unwanted conducted related to her disability?
    d. Did it have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

23. Unlawful deduction from wages (third claim)

a. Was company sick pay for the periods 12 October to 16 October 2020 (£1,206.05 gross) and 21 November to 6 December 2020 (£2,711.32 gross) payable to the Claimant in connection with her employment by the First Respondent?
b. Has the First Respondent unlawfully deducted any of the above sums from the Claimant's wages?

The Law

Time Limits

Discrimination Claims

24. The time limit that applies to discrimination claims is that set out in Section 123 of the Equality Act 2010. A claim must be presented within 3 months of the act complained of or within such further period as is just and equitable. The test for extension under Section123(2)(b) allows for the Tribunal to extend time where it is just and equitable to do so. That discretion is the exception rather than the rule: *Robertson v. Bexley Community Centre* [2003] IRLR 434, at para 25. Although the discretion is wide, the burden is on a claimant to displace the statutory time limits, *Chief Constable of Lincolnshire Police v. Caston* [2010] IRLR 327.

25. In *Abertawe Bro Morgannwg University Local Health Board v. Morgan (Unreported)* (UKEAT/0305/13/LA), Langstaff P held at para 52 that a litigant could hardly hope to satisfy the burden unless she provides an answer to two questions: The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is reason why after the expiry of the primary time limit the claim was not brought sooner than it was. The case of Owen v Network Rail Infrastructure Ltd [2023] EAT 106 held that a Tribunal had erred in finding that if no explanation or reason for the late submission of the tribunal claim could be found in the evidence, this necessarily meant that an extension of time should be refused, as opposed to that being a relevant, but not necessarily decisive, consideration to weigh in the balance.

26. In *British Coal Corporation v. Keeble* [1997] IRLR 336, the EAT considered Limitation Act 1980, s.33 to provide a useful checklist for a Tribunal's consideration of whether to exercise its discretion to extend time. That checklist sets out the following factors:

(a) the length of and reasons for the delay;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the extent to which the party sued had cooperated with any requests for information;

(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to cause of action;

(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

27. The courts have subsequently clarified that this is merely a useful checklist rather than a statutory requirement: *Southwark London Borough Council v. Alfolabi* [2003] IRLR 220.

28. The tribunal should consider whether to exercise its discretion to extend time separately in respect of each claim rather than doing so on a global basis.

Time Limits - Wages Claim

S 111 ERA 1996

(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) [Subject to the following provisions of this section]2 , an [employment tribunal]1 shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(2A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a)

29. 207B ERA 1996 Extension of time limits to facilitate conciliation before institution of proceedings

(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision").[...]2

(2) In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.
(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

30. S136 Equality Act 2010 - The Burden of Proof
S.136(2) provides that if there are facts from which the court or tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of the Equality Act, the court must hold that the contravention occurred; and S.136(3) provides that S.136(2) does not apply if A shows that he or she did not contravene the relevant provision.

31. The EHRC Employment Code states that 'a claimant alleging that they have experienced an unlawful act must prove facts from which an employment tribunal could decide or draw an inference that such an act has occurred' – para 15.32. If such facts are proved, 'to successfully defend a claim, the respondent will have to prove, on the balance of probabilities, that they did not act unlawfully' – para 15.34.

32. The leading case on this point remains Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931. This was further explored in *Madarassy v Nomura International plc 2007 ICR 867, CA*; and confirmed in *Hewage v Grampian Health Board 2012 ICR 1054, SC*.

33. In the case of Igen, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place (on the balance of probabilities). If so proven, the second stage is engaged, whereby the burden then 'shifts' to the respondent to prove on the balance of probabilities, that the treatment in question was 'in no sense whatsoever' on the protected ground.

34. The Court of Appeal in *Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT*, gave guidelines as follows:

(i) it is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail
(ii) in deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many cases the discrimination will not be intentional but merely based on the assumption that 'he or she would not have fitted in'
(iii) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal

(iv) The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination — it merely has to decide what inferences could be draw

(v) in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts

(vi) these inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information

(vii) inferences may also be drawn from any failure to comply with a relevant Code of Practice

(viii) when there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent

(ix) it is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act

(x) to discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground

(xi) not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment

(xii) since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden — in particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or any Code of Practice.

35. *Direct discrimination: Equality Act 2010 s13*
13 EqA "(1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

36. We have reminded ourselves that discrimination such as this is rarely obvious and it is unusual that any such treatment is openly admitted to or confirmed by clear written evidence as confirmation. The tribunal must consider the conscious or subconscious mental processes which led A to take a particular course of action in respect of B, and to consider whether a protected characteristic played a significant part in the treatment.

37. For A to discriminate directly against B, it must treat B less favourably than it treats, or would treat, another person. The Tribunal must compare like with like (except for the existence of the protected characteristic) and so "there must be no material difference between the circumstances" of the claimant and any comparator. (*section 23(1), EqA 2010*).

38. The claimant has relied upon several different comparators. We have considered the cases of *Owen v Amec Foster Wheeler Energy Ltd and anor 2019 ICR 1593, CA*, and which confirm that a comparator in disability discrimination cases are difficult to draw but must be drawn carefully. The

comparator must be in the same circumstances as the claimant but not with the same condition. In *Bennett v MiTAC Europe Ltd 2022 IRLR 25, EAT*, HHJ Tayler explained that, since in the case of direct disability discrimination, the relevant circumstances include a person's abilities. Therefore, when assessing such a claim it is necessary to compare the treatment of the claimant with an actual or hypothetical person with comparable abilities. So, if the consequence of a disability is a reduction in a person's ability to do a job and that reduction in ability is the reason for adverse treatment, it will not be possible to make out a claim of direct discrimination because the appropriate comparator would have the same level of ability as the disabled person.

39. Considering *Nagarajan v London Regional Transport 1999 ICR 877, HL* we have considered the relevant mental processes of the respondents and the context in which they made their decisions. As Lord Nicholls put it in '*Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on [protected] grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances*.'

40. We have reminded ourselves that it does not matter if the motive is benign. This is set out in the EHRC Employment Code (see para 3.14). In other words, it will be no defence for an employer faced with a claim under S.13(1) to show that it had a 'good reason' for discriminating.

41. We have also reminded ourselves that the protected characteristic need not be the main reason for the treatment provided it is the 'effective cause'. (*O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor 1997 ICR 33, EAT.*

42. <u>Disability related harassment: Equality Act 2010 s26</u>
(1)A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and

(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…..

(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

(5)The relevant protected characteristics are

disability;

Duty to make reasonable adjustments: Equality Act 2010 s21

43. S 20 Equality Act - Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

44. S 21 Equality Act - Failure to comply with duty to make reasonable adjustments

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

45. Schedule 8, Equality Act 2010 states that the duty to make reasonable adjustments arises unless the employer can show that it did not know or "could not reasonably be expected to know" that the employee is disabled or that there was a substantial disadvantage. The EHRC *Code of Practice on Employment* gives useful guidance on knowledge particularly at paragraph 5.15.

46. An employer is not under a duty to make reasonable adjustments unless it knows or ought to know the employee has a disability and is likely to be placed at the substantial disadvantage in question (per paragraph 20(1) Schedule 8, EA 2010)

47. Guidance for a tribunal's approach to reasonable adjustments was given in *Environment Agency v Rowan* [2008] ICR 218:

- The PCP must be identified;
- The identity of the non-disabled comparators must be identified (where appropriate);
- The nature and extent of the substantial disadvantage suffered by C must be identified;
- The reasonableness of the adjustment claimed must be analysed.

48. In *Tarbuck v Sainsbury's Supermarkets* [2006] IRLR 664**,** the EAT held that the only question is whether the employer has *substantively* complied with its obligations or not.

49. It is for the tribunal to assess for itself the reasonableness of adjustments. The Equality and Human Rights Commission Code of Practice gives useful guidance at paragraphs 6.28 and 6.29 on potentially relevant factors.

<u>Victimisation: Equality Act 2010 s27</u>

50. S27 (1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

Indirect Discrimination – s19 Equality Act 2010

51. The test for indirect discrimination requires a claimant (B) to show that the PCP puts (or would put) persons with whom B shares a protected characteristic at a particular disadvantage when compared with others (*section 19(2)(b), EqA 2010*).

52. *Section 6(3)* clarifies that "in relation to the protected characteristic of disability... a reference to persons who share a protected characteristic is a reference to persons who have the same disability". So, for indirect discrimination purposes, the "particular disadvantage" must affect those who share the claimant's disability. The EHRC Code states:
"It is important to be clear which protected characteristic is relevant. In relation to disability, this would not be disabled people as a whole but people with a particular disability – for example, with an equivalent level of visual impairment." (Paragraph 4.16.)

53. Any comparative disadvantage that would be suffered by those of the claimant's particular disability as a result of the PCP must be measured against actual or hypothetical persons whose circumstances are not materially different. This is, in effect, a way of checking that the disadvantage is caused by the PCP and not by other factors.

54. In this case that means that the comparator must have been someone with the same level of abilities to perform the role of a CSA1 who also needed to be moved from their station.

Unauthorised Deduction from Wages

55. s13 Employment Rights Act 1996

(1)An employer shall not make a deduction from wages of a worker employed by him unless—

(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2)In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4)Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5)For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6)For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7)This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employ.

56. S24 ERA 1996

(1)Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer—

(a)in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13,

(b)in the case of a complaint 33. under section 23(1)(b), to repay to the worker the amount of any payment received in contravention of section 15,

(c)in the case of a complaint under section 23(1)(c), to pay to the worker any amount recovered from him in excess of the limit mentioned in that provision, and

(d)in the case of a complaint under section 23(1)(d), to repay to the worker any amount received from him in excess of the limit mentioned in that provision.

(2)Where a tribunal makes a declaration under subsection (1), it may order the employer to pay to the worker (in addition to any amount ordered to be paid under that subsection) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.

Findings of Fact

57. All of our findings of fact are made on the balance of probabilities. Where we have reached a conclusion in favour of one party over another it is because we preferred their evidence on that point.

58. We have only set our findings in relation to facts that were relevant to our conclusions. Where we do not mention evidence that was before the tribunal that does not mean we have not considered it, it means that it was not relevant to our conclusions.

59. In this case we found that the Claimant provided us with a large amount of erroneous information and during the hearing her counsel pursued matters on her behalf that were not relevant to the agreed list of issues. Her witness statement was 95 pages long and approximately the first third dealt with matters that were background information at best. Whilst this is understandable for a litigant in person (which the Claimant was at the time of writing the statement) we were concerned by the number of questions put in cross examination to the Respondent witnesses that were not relevant to the issues we had to decide.

60. The decision to persist with putting questions and information irrelevant to the matters we had to decide often obstructed our ability to glean the information that was relevant to the Claimant's claims.

61. We also state here that we are only deciding the claims set out in the List of Issues. What was sometimes articulated by the Claimant in her evidence, particularly when answering some questions put to her in cross examination, was information that could be identified as giving rise to a s15 Equality Act 2010 claim. This was particularly relevant when she was asked about the respondents' reasons for treating her in the way that she alleged. What she appeared to say in response to those questions was that had she not had her disabilities, she would not have been in the position of needing adjustments etc. It is important that the Claimant understands that we are deciding the claims before us in the list of issues, not the claims she may believe she has articulated in evidence. By saying this we are not suggesting that any such claims have or do not have merit, simply that we are determining the claims before us. Following from that we have only made findings of fact relevant to those claims.

Background

62. The Claimant has been employed by the first respondent (R1) since 12 February 2007 and remains employed. She was first employed as a Customer Service Agent (CSA). In or around 2016, the role of CSA was split into two grades; CSA1 and CSA2. The CSA1 role had more safety critical aspects responsibilities included, whereas the CSA2 role, intended to be an entry level post, tended to focus on station areas in front of the ticket barriers and therefore had fewer safety critical responsibilities.

63. We accept the respondents' evidence that the CSA2 role was originally designed to be a new starter position as it had fewer responsibilities than the CSA1 role. However, over time, it has also become a role that managers can place people with difficulties performing aspects of the CSA1 role into. This is considered an alternative to dismissing people for capability reasons and, to a large extent, this includes people with disabilities who for many varied reasons may not be able to carry out the full extent of the CSA1 role.

64. In 2016, when the role was regraded into two separate roles, the Claimant was placed as a CSA1. This was despite the fact that her health then was essentially the same then as it was during the relevant periods for this claim. In addition, at that time she already had, to a large extent, the same adjustments to the role in place at that time as have caused the issues before us. The respondent's

explanation for that is that the existing staff in 2016 were all made CSA1s as the CSA2 role was intended for new starters and all their existing CSAs had the relevant training and experience to be CSA1s. The use of the CSA2 role for those with reduced capabilities came later.

Chronology of events

65. Due to the way in which the case was presented, the Tribunal's findings of fact below do not always follow a chronological order as it has been easier to reach findings on the different areas of the claim as opposed to listing them chronologically. For those reasons we summarise the order of key events now as a backdrop to the findings below.

66. The Claimant was employed as a CSA1. At the beginning of the narrative relevant to this case she was assigned to Piccadilly Circus. In or around November 2017 a complaint was made against the Claimant by a colleague alleging bullying and harassment. Whilst the complaint and subsequent disciplinary process were investigated and conducted, the claimant was moved, on a temporary basis to Lambeth North where her presence was above the numbers needed at that station. The outcome of the disciplinary process (set out in a letter dated 21 September 2018) was that the Claimant was found to have committed gross misconduct and was given a one year suspended dismissal and she was removed from the Bakerloo line.

67. Despite this she technically remained assigned to Lambeth North (a Bakerloo line station) until October 2020. There was some discussion as to the reason for the delay in moving her with the Claimant suggesting that the delay demonstrated that the Respondent could support her working in a role that was on the Bakerloo Line and over-establishment and should continue to do so. We find that the delay in moving her was due to a combination of different factors including several significant periods of sick leave, the Claimant's grievance of bullying and harassment against the R2 and the pandemic. From March 2020 the Claimant was classed as Clinically Extremely Vulnerable and shielded for much if not all of that period of time. When she was due to return to work once her period of shielding came to an end, she was to moved from Lambeth North to Victoria. This is discussed further below.

The Claimant's Health and relevant Occupational Health reports

68. The Claimant has the following conditions:
    a. Ehlers-Danlos syndrome,
    b. fibromyalgia,
    c. psoriatic arthritis and
    d. a compromised immune system caused by methotrexate (medication for arthritis).

69. It was not in dispute that these conditions had a long term substantial impact on the Claimant's ability to carry out day to day activities. Other than the OH reports we were taken to very little evidence regarding the Claimant's health.

70. We were provided with several OH reports and correspondence. They were as follows:

    a. 23 June 2010 (p1084)
    b. 18 October 2013 (p1087-1088)
    c. 13 February 2014 – 1089-1090
    d. 16 January 2018 – 174-175
    e. 8 May 2018 – 211-212
    f. 24 January 2019 – 331-332
    g. 25 February 2019-373-374
    h. 16 December 2019 (p502)

71. The respondent uses the word 'restrictions' to denote adjustments that are made where an employee cannot do something because of concerns regarding their (or others') health and safety or ability to do the work. They use the word adjustment to describe a step that is taken to enable someone to do a task. The example given was that a restriction would be that a person in a wheelchair must not be placed in a position that requires them to use stairs. An adjustment would be to provide a ramp for them to enable access to an area.

72. The first two OH reports suggest reasonable adjustments. The first (23.6.10) states that the following adjustments should be made:
    - *"No prolonged standing/walking/sitting*
    - *No climbing stairs*
    - *Regular breaks"*

73. The second (18.10.13) states that the adjustments had become restrictions (discussed below) and were as follows:
    - *"Prolonged standing/walking*
    - *Minimise stair climbing*
    - *Easy access to toilet facilities*

    And when she takes her restrictive medication [Tribunal emphasis/underline]

    - *No live track work*
    - *No work on platform edge"*

74. Subsequently the report dated 8 May 2018 gave the following restrictions:
    - *"No prolonged standing/walking*
    - *No excessive stair climbing*
    - *No work on live track*
    - *No work at the edge of the platform unless there is a train in the station*
    - *She requires easy access to toilet facilities*
    - *She requires regular rest (every hour for 10-15 mins to allow her to stretch)"*

    At no point is medication mentioned as a qualifying factor on the above restrictions.

75. The report dated 25 February 2019 gave the following restrictions:

- *Non prolonged standing or walking*
- *Requires regular breaks from standing/walking duties (such as gateline at present) for about 5-10 minutes every hour. This could be flexible, depending on the business needs and rush hours*
- *No regular use of stairs. Could use stairs occasionally at her own pace and speed*
- *No work on the edge of platforms, unless there is a train in the station*
- *Needs easy access to toilet facilities*
- *No Track work*
- *Needs longer time for reading instructions or exams*
- *No security check around stations that require long walks, climbing of stairs, check of escalator rooms and other chambers*

The above restrictions are long term restrictions and Ms Bar-On has been working with them for years. There is no timeframe for the above restrictions to be lifted, they are practically permanent.

Ms Bar-On is not fit for full contractual duties of CSA1; she is restricted and requires work adjustments in accordance with work restrictions specified above.

Ms Bar-On is not fit for full contractual duties of CSA2, as she requires work adjustment to carry on in the CSA role. Please see work restrictions above."

At no point is medication mentioned as a qualifying factor on the above restrictions.

76. Of relevance to our conclusions is the fact that it is only the report of 2013 that makes reference to some of the restrictions (particularly the platform work) being conditional upon the Claimant taking medication at that time. All subsequent reports do not make the restrictions conditional upon the Claimant taking medication. The Claimant has given us oral evidence that she was only prohibited from the platform work when she took medication such as Tramadol and that this was sporadic and depended on her condition. Whilst that may be the case, the OH reports make no reference to that from 2018 onwards and during the relevant period. The Claimant did not, at the time that they were produced or at any time in meetings with the Respondents, challenge the contents of the reports as whether the restrictions were meant to fluctuate depending on medication. Further, she was unable to provide us with clear evidence of having notified managers of her not being on the relevant medication and then being put back on safety critical duties such as platform work. She could not remember when she had last performed that work or even give us a rough date as to when she had performed that work. Whilst we appreciate that she has not been at work as a CSA1 for a considerable period of time, given the nature of her claim that she could in fact carry out such work subject to her medication, that she could not recall a vague time when she had last performed that type of work. We therefore find that it was reasonable for the managers dealing with the Claimant to understand that the restrictions put

forward by OH were permanent and were not conditional upon the Claimant notifying them if she was on medication or not as they do not mention it other than in the 2013 report. We consider that had OH intended the restrictions to be conditional upon medication they would have said so. The Claimant has not provided medical evidence that counters the OH reports. She has maintained that it was incumbent on the Respondent managers to look back at the earlier reports and extrapolate from them that some of the restrictions were dependent on when she took medication. We disagree. We do not consider that this is what OH intended nor was it reasonable for the Claimant to expect that her managers undertook this exercise unless the OH doctors tell them to consider their earlier reports. We also find that the Claimant does not dispute this aspect of the OH reports at any stage despite knowing that she can respond to the reports and question elements of it if she disagrees with them.

The work performed by the Claimant

77. The roles of CSA1 and CSA2 have a large amount of overlap. The additional responsibilities of the CSA1 role when compared to the CSA2 role were set out in the document at page 158. The Claimant was taken to this document during cross examination. She accepted that she was unable to do the majority of those tasks that were CSA1 only roles. The main areas of disagreement between the parties was the extent of platform work the Claimant could do and whether she was licensed to carry out lift work.

78. Based on our assessment of the Occupational Health ('OH') reports which is set out below, we find that the Claimant was, at the relevant time, restricted from carrying out the majority of platform work in that OH stated that she should not carry out any platform work when a train was not in the station. This work was a key element of the work that differentiates CSA1 from CSA2 roles.

79. The Claimant was licensed to carry out lift work but having a license and being restricted from performing it by OH are two different things. The Claimant maintained that if she had been given the license then she must have been approved as capable of doing it. We disagree. We find that the Claimant had received the relevant training and relevant knowledge, but that OH clearly advised in their restrictions that the Claimant was not able to carry out work in the lift or escalator chambers. This was also specified on her license which we saw. This was another key aspect of the CSA1 role that differentiated it from the CSA2 role. The lift, escalator and platform work were also all safety critical aspects of the role.

80. We find that although the Claimant was classed as a CSA1 with restrictions, the restrictions were such that to a very large extent, she was performing the role of a CSA2, not a CSA1. R1's approach was to accommodate individuals with adjustments/restrictions within their current place of work and in their existing role insofar as they could. In this case that had meant accommodating the Claimant's inability to do platform work and work in lift or escalator chambers. All of these are safety critical roles. Not being able to work on the platform was a significant restriction on a CSA1's ability to provide the safety

critical support that R1 requires to comply with its health and safety obligations in running the service.

81. With regard to the adjustments that the Claimant is relying on for the purposes of this claim, she says that the CSA1 role also included the following requirements:

    (a) Prolonged walking, standing and sitting
    (b) Climbing stairs.
    (c) Avoidance of regular breaks.

82. It was not disputed by the Respondent that on occasion the CSA1s had to walk, stand and sit for significant periods of time and that they had to climb stairs. They did dispute that their CSA1s were not permitted to take regular breaks though they accepted that on occasion, at certain peak times, breaks may not always be taken as regularly as the Claimant needed to take them in accordance with the OH advice regarding the Claimant.

83. The Claimant agreed that these adjustments were made whilst she was at Piccadilly station. Her witness statement says as follows:

    "10.3 Each Occupational Health assessment report details and repeats my Reasonable Adjustments, as:
    "No prolonged standing or walking. Requires regular breaks from standing/walking duties (such as gateline at present) for about 5-10 minutes every hour. This could be flexible, depending on the business needs and rush hours. No regular use of stairs. Could use stairs occasionally at her own pace and speed. No work on the edge of platforms, unless there is a train in the station. Needs easy access to toilet facilities. No track work. Needs longer time for reading instructions or exams. No security check around stations that require long walks, climbing of stairs, check of escalators and other chambers". […] "The above restrictions are long term restrictions and Ms Bar-On has been working with them for years. There is no timeframe for the above restrictions to be lifted, they are practically permanent." [emphasis added] 25 February 2019 – Dr Tatiana Kutyreva, Lead Occupational Physician - Occupational Health. [page 373-374]

    10.4 For the avoidance of doubt the Reasonable Adjustments agreed with 1st Respondent actually consist of or amount to no more than:
    • Taking short breaks to stretch every hour - the frequency of which being flexible and can be fitted around business needs and busy times;
    • To minimise mobility activity comprising sustained or over exertion which cause symptom flare-ups through specific prolonged activity;
    • Avoidance of platform edge activities;
    • No accessing live track or restricted machinery apparatus chambers, which all CSAs wouldn't normally do.
    • Easy, step-free access to toilet facilities.

•That my disability is permanent, my Reasonable Adjustments are long term. And that there is no time-frame for the above restrictions to be lifted; they are practically permanent.

These Reasonable Adjustments have been in place and I have carried out my contractual duties with them for years. Even when I was moving about from station to station with the Special Requirements Team in 2010, my reasonable adjustments had been put on record and could be accommodated. All things considered, I believe my adjustments are not unreasonable and allow me to add value in a customer-facing CSA role."

84. It was not clear whether these adjustments would or could have been made to the CSA1 role at a different station had the Claimant been allocated to a different station as a CSA1. The evidence on this point is dealt with below when we discuss the redeployment process that was carried out.

Previous Tribunal Claims

85. The Claimant brought 3 earlier tribunal claims, all of which have been withdrawn or settled. Their facts are relevant only insofar as the Claimant has relied upon them as being protected disclosures. Although we did not see the content of the claims, the Respondent has confirmed that all of them made allegations of discrimination and therefore amount to protected disclosures for the purposes of the Equality Act 2010.

86. The existence of these claims is also relevant to our determination of whether the claims before us were in time or not and that is discussed below.

Disciplinary Action

87. The Claimant was disciplined in 2018. A colleague alleged that the Claimant had bullied her. The outcome of that disciplinary process was that the Claimant was given a suspended dismissal and was banned from working on the Bakerloo line. The Claimant appealed against the outcome but her appeal was not upheld and therefore the sanctions remained. The disciplinary outcome was given on 21 September 2018 and the appeal outcome was given on 21 February 2019.

88. There was significant discussion before us about the length of the sanction removing her from working on the Bakerloo Line. The Claimant asserted that it too only lasted 12 months from the date of the disciplinary outcome. The respondent asserted that it was indefinite. We find that it was intended to be permanent/indefinite. The letter does not provide a date when that sanction would be lifted whereas it expressly states that the suspended dismissal would only last 12 months. The Respondent's disciplinary policy is very clear in that it states that where a sanction is not given a time frame then it is permanent. Although the Claimant may have believed otherwise at the time, she has had full access to the disciplinary policy and was represented by a trade union representative throughout this process and subsequently. We therefore think it was reasonable for the respondent to assume that she understood that the Bakerloo Line removal was permanent because the policy is clear.

89. In addition when she does query this later as part of the Case Conference process with Mr Burrows (R2), we accept that R2 explained to her that the move from the Bakerloo line was not time limited. We find that R2's explanations on this point were clear as was the written policy.

Return to work

90. Whilst the disciplinary process was being investigated and concluded, the Claimant was moved, as a temporary measure, to work at Lambeth North station. She remained a CSA1 under the direct line management of R2 (area manager for Piccadilly Circus). The manager of Lambeth North station was Mr Liddle.

91. The Claimant was off sick from 23 November 2017. It is not exactly clear to the Tribunal when she returned to work but from the Respondent's chronology it appears that she does not return until around 23 August 2018 when she had a phased return to work.

92. The Claimant then remained assigned to Lambeth North until she moved to Victoria on or around 7/8 August 2020. This is despite the fact that the disciplinary process had, at the very latest, concluded on 21 February 2019 when she received the appeal outcome. As above, we found that the reason for that delay was multi-faceted and do not consider that it demonstrated that the Respondents did not place any great importance on the Claimant's move. It simply reflected the various difficulties and processes that occurred during that period. Had the Respondents considered that the move from the Bakerloo line or Lambeth North was not important presumably they would not have commenced the process at all after so long. There was no suggestion by the Claimant that there was a particular event other than the conclusion of the disciplinary exercise that prompted R2 to start trying to find the Claimant a different, permanent place of work.

Redeployment Exercise

93. Once the disciplinary exercise had been completed, and the Claimant had returned from sick leave in or around August 2018, the Claimant's line manager, R2, commenced steps to find somewhere for the Claimant to work on a permanent basis as she had been removed from the Bakerloo Line and Piccadilly Circus and her temporary placement of Lambeth North was also on the Bakerloo line.

94. The first case conference between the Claimant and R2 was held on 31 January 2019. In that meeting R2 stated that he needed to refer the Claimant to OH in order to determine what her current restrictions would be. He had referred the Claimant to OH recently prior to that because she was returning to work. That report said that she was fit to return to work, however R2 had not asked OH to comment on her current restrictions.

95. R 2 said at the outset of the first meeting that they would need to see what locations resourcing could find for her once the restrictions were confirmed by

OH and that if they could not find anywhere, then a possible redeployment to a CSA2 role would be considered. The Claimant objected, stating that she had been declared fit to return to work as a CSA1, that she had always performed a CSA1 role with adjustments/restrictions and that she did not want to be demoted to a CSA2 role. She agreed to see OH again though she felt that she ought not to have to given the very recent report and the fact that she was signed as fit enough to work. From the Claimant's point of view, nothing had changed in relation to her health and therefore she felt that nothing ought to change in relation to the role she was assigned to do.

96. The ensuing OH report, dated 25 February 2019, is detailed above**.** A subsequent meeting was held between the Claimant and R2 on 11 April 2019. At that meeting R2 informed the Claimant that Resourcing had not been able to find an alternative location as a CSA1 which could accommodate her restrictions which was not on the Bakerloo line and that she would need to be relocated to a CSA2 role.

97. The process by which R2 looked for alternative CSA1 roles was that he informed Operational Resourcing of the Claimant's restrictions by entering them on the SAP system. The SAP system was explained to us as a centralised HR system. Those details were then transcribed by Resourcing and sent in an email to all of the Area managers across the London Underground network to see if they could accommodate someone with those specific restrictions. The person remains anonymous. There was a voting button of 'Yes' or 'No'. No reasons or explanations for the responses were required from the Area Managers. None of the area managers said 'Yes' and therefore the Claimant could not, in the respondents' view, be relocated as a CSA1.

98. There was no documentary evidence substantiating that the above process took place. The Claimant in her evidence questioned whether R2 had actually undertaken this process. We find that he did. We reach this conclusion based on the fact that R2 held 3 case conferences with the Claimant and her union representative and delayed his decisions until the resourcing team had received responses from all of the area managers. Had the process been fictitious or manufactured there would not, on our opinion, have been such delays. R2 explained to the Tribunal that there was nobody overseeing the area manager responses and ensuring that they were not making potentially discriminatory decisions concerning who they agreed to take in such situations. However, he relied upon the Operational Resourcing team to send the emails and provide him with the responses and we accept this evidence. He ensured that the information on the SAP system was correct and based on up to date information from OH.

99. The Claimant understandably queried the logic of proposing to downgrade her. She had been doing the CSA1 role with adjustments/restrictions for many years. Her work had not changed and her restrictions had barely changed. There was therefore no reason to change things from her point of view.

100. R2 explained, during the Case Conference process, that the reason things had changed was that whilst her restrictions could be accommodated at

Piccadilly Circus as a CSA1, nowhere else on the network, that was not on the Bakerloo line, could accommodate those restrictions at that time. This would have been either due to the number of other restricted CSA1s they already had at their stations, or the specific requirements of the stations themselves. Each station had a critical safety requirement in terms of the number of staff they needed to operate at certain levels. If they did not reach that then the station could be unsafe for its users. This meant that if they already had too many people with similar restrictions or restrictions that clashed with the Claimant's then they would not also be able to accommodate an additional person at that level because it would mean that they did not fulfil their safety critical staffing requirements. R1 had legal requirements to maintain a certain level of staffing needing a critical mass of individuals who could perform various tasks as staff at each station. What each station required differed. When individuals already posted to a station required adjustments or restrictions, then they were made if possible and subsequent hiring and staffing decisions were made around them where possible. When someone moved into a new role, they were joining an existing team that already had in place people with adjustments and restrictions and that 'new' person had to fit round what was already in place and hiring and staffing decisions were made accordingly. The legal requirements that R1 ahd to comply with (and therefore had to be taken into account by Area Managers) meant that their rostered staff had to have a certain number of people labelled CSA1s but also had to have a certain number of CSA1s that could carry out safety critical tasks within that.

101. The Claimant suggested that she could stay at Lambeth North but R2 explained that there were no vacancies there as she had always been 'over establishment' (i.e. they did not need a member of staff to fill that role). His response is below:

"You can't stay at Lambeth North but we want to keep you in the company, so I am looking at this as the solution. The other alternative could be medical termination. We are trying to find a position for you as CSA 2"

102. There then followed a discussion about the Restrictions. The Claimant expressly confirmed that she agreed with the restrictions set out in the OH letter dated 25 February 2019. She did not at any point raise that some of them were only live if she was on relevant medication. She did raise that there was confusion over the frequency and length of breaks required and her ability to work on escalators and lifts. As a result R2 said that he would go back to Resourcing and get more information because of the Claimant's comments in this regard. He asked the Claimant if she had any preferences for stations if she had to be a CSA2 and she said she needed time to think.

103. R2 duly went back to Operational Resourcing to update the Claimant's profile and another email was sent to Area Managers asking if they could accommodate her as a CSA1. There was a further Case conference on 9 July 2019. At that meeting the Claimant was told that only two thirds of the Area Managers had responded to the latest email about her and so Resourcing was going to chase the remaining third before making any final decision. However R2 made it clear that if the final one third of managers responded and could not

accommodate her restrictions, then she would be moved to a CSA2 role with complete pay protection for 5 years and a 20% reduction in pay per year for the following 5 years in line with the LUL policy.

104. The issue of whether the requirement to move off the Bakerloo line had expired was discussed and R2 clearly explained that it was his view that this was a permanent sanction as opposed to the suspended dismissal which only lasted 12 months. Despite this explanation, this is a topic that the Claimant returned to frequently and continued to press before this Tribunal. As discussed above we consider that it was clear from the letter sent to her setting out the disciplinary outcome combined with the respondent's disciplinary policy that the removal from the Bakerloo line was permanent. and that this was clearly explained to the Claimant on numerous occasions by the respondent and was apparent from the policy.

105. When discussing the issue of being moved to a CSA2 role with pa protection, the union representative raised the issue of whether the pay protection for 5 years would in fact penalise the Claimant because she would not be entitled to pay rises given to the CSA1 grade and therefore over time would lose out financially. R2 said that he was unaware of this but would look into it. Before the next case conference could take place the Claimant raised a complaint against R2.

106. As an overarching observation, we found that R2 was genuinely trying to find the Claimant an alternative role at a CSA1 level. As he states, it would have been far easier for everyone involved to just move the Claimant to an equivalent role. The Claimant's suggestion that he held opinions that disabled people ought not to perform the role of CSA1 was not borne out by the evidence before us. We find that he had to find a way to move the Claimant because of the outcome of the disciplinary process which removed her from the Bakerloo line, not because he wanted to or had any personal motivation to do so.

<u>Bullying and harassment Complaint against R2</u>

107. The Claimant's brough a complaint against R2 (p460-467), dated 15 September 2019. She states clearly at the beginning that she considers that his treatment of her constituted bullying and harassment and that she was being discriminated against on grounds of disability. The basis for those allegations was the intention to move the Claimant. Her objection to the move appears to be on two bases. Firstly that R2 has no authority to do make such a decision (mostly because she says the sanction to move her had expired) and secondly because she asserted that the move was discriminatory relating to her protected characteristics "including disability".

108. The reference to moving the Claimant encompasses both the physical move to a different station and the fact that the physical move will result in the demotion to a CSA2 role though the two issues are rolled into one. The grievance does not set out in much detail how the move would be discriminatory but it is clear from the complaint that the Claimant alleges that it was.

109. Ms Costigan's explanation, (both in her witness statement and the outcome email sent to Mr Osborne), for concluding that the Claimant's complaints did not amount to discriminatory bullying or harassment was that the claimant's allegations did not amount to actions that could be disability-related bullying or harassment because it was a complaint about the decision to move the Claimant. That move was pursuant to the disciplinary outcome. Therefore the cause of the move was the disciplinary action not discrimination. She says in her witness statement that she considered "the cause of the complaint was conduct and not connected to any protected act made of [sic] disability." She considered that the complaint was actually about the decision to move the Claimant as opposed to the decision to downgrade her. She appeared not to distinguish between the two aspects of the move.

110. We accept, given the letter Ms Costigan wrote at the time regarding the Claimant's grievance, that she formed the decision that the Claimant had not been discriminated against and that what she was alleging did not amount to bullying or harassment. However she formed this view without meeting the Claimant or investigating the matter beyond reading the Claimant's grievance.

111. In circumstances where we have not been able to clarify that reasoning because Ms Costigan did not attend Tribunal we find it strange that having formed the view that the Claimant's grievance did not qualify as one of bullying or harassment, she does not then explain why she decides that the Claimant's complaint essentially has no merit at all as any sort of complaint and does not instead suggest that it is investigated under a different type of grievance process. She herself did not carry out any investigations or interviews. Instead she does in fact reach a conclusion of sorts by way of her review despite the fact that her witness statement says that her role was to review the complaint not investigate it or decide it. Her conclusion was that the Claimant needed to engage in the process she was in and sets out her view that the process R2 was following to move the Claimant was a normal one in all the circumstances.

112. It is quite common for employers to find that a complaint about a disciplinary or management process ought to be dealt with by raising those concerns during the process itself as opposed to by way of a separate grievance. Nevertheless, that is not entirely the explanation Ms Costigan has given either in her outcome email to Mr Osborne or in her witness statement. However, this is how Mr Osborne interpreted it. He says as follows in an email to the Claimant dated 4 December 2019:

"*Her* [Ms Costigan] *review was clear that your complaint did not in fact meet the definition and she advised that you engage with the case conference process, which is the appropriate forum in order that this matter is resolved."* (p499)

113. The Claimant has asserted that the reason Ms Costigan took these steps was directly discriminatory and because the Claimant had brought previous Tribunal claims and because she had alleged disability discrimination in the grievance itself. Whilst we do not wish to stray into our conclusions here we make the following factual observations.

114. We were provided with no evidence by the Claimant that Ms Costigan knew about the earlier Tribunal claims. The Claimant did not provide us with evidence that suggested she did nor explained to us how she says those claims influenced Ms Costigan.

115. During her cross examination, the Claimant did not want to assign a motive to Ms Costigan's decision saying that she did not want to speak for her. She did not seem to believe, nor did she articulate when given the chance, that Ms Costigan had reached her conclusion because the Claimant was disabled or because of the Claimant's earlier Tribunal claims or indeed because of the allegations within the grievance itself. The Claimant's own evidence did not suggest that she believed Ms Costigan treated her badly because of her disability or because she had brought Tribunal claims or her grievance. Rather she considered that Ms Costigan acted unfairly in not properly considering her grievance.

Conclusion of the Case conference process

116. Once the grievance had been concluded Mr Osborne told the claimant that she would continue to be managed by R2 and R2 wrote to the claimant on either 7 or 11 November (there are two copies of the letter with different dates in the bundle) with an outcome to her situation and informed that she was going to be redeployed to a CSA2 role. The use of the phrase medical redeployment is confusing. It confused the claimant at the time and the Tribunal during the hearing.

117. What R2 confirmed in evidence to us, (and we accept) is as follows. Insofar as is possible, an employee's requirement for adjustments or restrictions is accommodated in the post that they are in. Our understanding is that how reasonable an adjustment (or restriction) is for the business is assessed according to the resources at the station and post that the individual employee is in at the time. Therefore there are CSA1s only performing part of their role at several stations across the network. This included the Claimant for many years at Piccadilly Circus. We find that had the Claimant not needed to be moved due to the disciplinary outcome, it is more likely than not that she would have remained as a CSA1 at Piccadilly Circus with the same restrictions/adjustments being accommodated as they had been for many years.

118. R2 also explained the process. When someone is not able to do enough of their role to meet the business needs at their location (once adjustments/restrictions are in place), then they can be redeployed into suitable alternative employment with protection of earnings. This is managed through a process of Case Conferences as opposed to formally being called 'Medical redeployment' even though the cause of the process is the person's health and their ensuing need for restrictions on their duties. If there is no suitable alternative employment or the person does not want to take the suitable alternative employment, then they will be placed into a more formal medical redeployment exercise whereby they have 13 weeks to find alternative work across the business by way of a competitive application and interview process.

During that period they have the assistance of a team to help them find those roles. If no alternative role is found in those 13 weeks then the employee is dismissed by reason of capability. We accept R2's evidence in this regard and accept that had the Claimant not accepted the redeployment to a CSA2 role, she would have been put in the formal medical redeployment process of 13 weeks to find an alternative role across the business.

119. The decision to place the Claimant in a CSA2 role was explained to her in the outcome letter, dated 30 July 2019, as being caused by the fact that none of the stations she was permitted to work at could accommodate her working in a CSA1 role with all of her restrictions. In the letter R2 made it clear that it would be possible for the Claimant to return to a CSA1 role were such an opportunity to become available. The claimant says in her witness evidence that this was not a realistic statement because her conditions were never going to change. Nevertheless, it was possible that the opportunities would arise at perhaps one of the larger stations that could accommodate her restrictions at a CSA1 level in the same way that she had been accommodated for several years at Piccadilly Circus.

120. Once the Claimant's grievance against R2 had been finalised and an appeal decision provided, Mr Liddle, also an area manager was then told by Mr Osborne, Head of Customer Service, in around November 2019 that he needed to oversee the Claimant's redeployment. Claimant's counsel appeared to suggest in cross examination that this demonstrated that the Claimant's grievance against R2 was in some way upheld and demonstrated that the Respondent agreed in some way that the Claimant ought not to be managed by R2. We disagree. We consider that the decision was made by Mr Osborne to diffuse the tension and to attempt to move the situation on. As has been pointed out by the Claimant, she had been over-establishment at Lambeth North for a considerable period of time by this point.

121. Mr Liddle referred the Claimant to OH at this point in time to get an up to date medical report. This was reasonable step given that it had been 9 months since her last referral and anything could have changed in that time. The fact that the Claimant's conditions and impacts are 'practically permanent' does not mean that new things could not have arisen nor that her ability to do some tasks may have changed for better or worse.

122. The Claimant, across several emails, and over a significant period of time refused to engage with Mr Liddle. She was asked on several occasions to nominate a station to work at but on the basis that she refused to accept that she was being moved to a CSA2 role, she did not engage with him in this regard. Mr Liddle proposed that she work on the Victoria line. He then provided her with a list of stations and asked her to say what she preferred from that list. She did not provide a preferred location. This is not to suggest that the Claimant ceased communication with Mr Lidde, she emailed and continued to state that her move from a CSA1 to a CSA2 role was unfair. She did not however answer his questions regarding her move to a CSA2 role as she did not consider that it

was valid despite the clear outcome of the process that had been communicated to her by R2.

123. It was suggested during this hearing that Mr Liddle should have placed the Claimant on the Northern line given where the Claimant lived or the Jubilee line particularly given the good access facilities on the Jubilee line. We found this line of questioning and suggestions disingenuous and unhelpful. The Claimant at no time prior to this hearing suggested that she ought to have been placed elsewhere despite being directly asked where she wanted to be by Mr Liddle. She at no point engaged with Mr Liddle in a meaningful way to communicate what would be acceptable or preferable to her yet has used these proceedings to suggest that he was in some way calculating to make her life difficult by not placing her on the Jubilee line. This is despite the fact that no claim has been brought in respect of his actions and more importantly, no evidence was provided to suggest that she had communicated her desire to work elsewhere at any time.

124. During this part of the process the Claimant was off sick for short period of time in February 2020 and then, the pandemic occurred which necessarily slowed matters down.

125. Mr Liddle, through the Operational Resourcing team, found that there was a CSA2 role at Victoria station that could accommodate the Claimant's restrictions. The Claimant states that this position was also Over Establishment and that given that they were willing to have her Over Establishment at Victoria, there was no reason for her not to be Over Establishment as a CSA1 elsewhere.

126. We accept Mr Liddle's evidence that there was a vacant role at Victoria and that this is why she was placed there. We had no evidence beyond the Claimant's assertion to suggest that she would be over-establishment at Victoria.

127. On 7 September 2020, Mr Liddle wrote to the Claimant and informed her that he had selected the role at Victoria station for her because she had not nominated a preferred location. From this time her line manager was Zahir Khan (R3).

<u>Shielding and sick pay</u>

<u>12-16 October 2020</u>

128. The Claimant is classed as Clinically Extremely Vulnerable (' CEV') which means that during the Covid 19 pandemic she was required to shield on medical grounds. We have no doubt that this period of time was extremely challenging and difficult for the Claimant. We are sure that this coupled with the death of her mother made things very difficult for the Claimant to cope with and we are sorry for her loss.

129. The Claimant was placed on furlough until October 2020. It is not clear exactly when she was first placed on furlough but it was near the beginning of the scheme.

130. On 25 September following the government's guidance at the time, the Respondent wrote to the Claimant. The letter is set out below (p599)

Dear Eli,

End of Furlough:

I am writing to inform you; your current period of furlough will end on 10th October 2020.

You will return to rest day on Sunday 11th October 2020.
I have been advised you will be returning to work on the Victoria Area.
Area Manager Z Khan will contact you to discuss your vulnerable person risk assessment to facilitate your return to work.
Please report to the Victoria Area Manager Zac Khan on Monday 12th October 2020 at 10.00hrs, for a welcome meeting.
He is located at 1st Floor, Victoria Station house, 191 Victoria Street, London. SW1E 5NE, near Victoria Underground Station.
Your redeployment to a CSA2 role Victoria will commence from Sunday 11th October 2020.
I would like to wish you all the best at your new area and thank you for your time while working for the Piccadilly Area."

131. R3 then contacted the Claimant on 8 October suggesting a telephone risk assessment on the following day, 9 October 2020. The Claimant responded saying that she wanted to be accompanied by her Trade Union ('TU') representative and that he could not attend until 16 October.

132. R3 responded stating that he did not mind her being accompanied by a TU representative though it was not strictly necessary – however, he asked her to account for the time between when she was due to return to work, namely 12 October, and the revised meeting itself on 16 October.

133. The Claimant has suggested that she did not need to account for herself on the basis that she was shielding and had suggested an alternative meeting date within a reasonable period of the original meeting date.

134. During these proceedings the Claimant confirmed she understood the difference between being off sick and shielding and she said that she did. We find that the Claimant understood the difference between being available for work and shielding. At the point at which furlough ended she was technically 'available for work' for R1. The fact that she was unlikely to be able to physically return to the workplace might have made this feel like a slightly artificial difference, particularly in a role that required a physical presence at work. However, we find that the Claimant knew and understood that she was deemed as back at work from 12 October. The letter dated 25 September made that

clear. She also knew that she was choosing to postpone a risk assessment meeting that she had known was going to be scheduled and that had been reasonably requested by her line manager. It was her preference to be accompanied by a TU representative but not a necessity. She has provided no medical evidence that she could not engage in such a telephone meeting without support. This was a normal management conversation with her manager, no disciplinary action or issue was being raised. R3 could have, from 12 October onwards, reasonably requested that she speak to him on the phone without a TU representative as she was technically at work and being paid as if she was at work. Her request to defer the risk assessment did not mean that she was also delaying her obligation to be available to work (even if remotely) for the Respondent from 12 October.

135. She understandably wanted a risk assessment to occur before attending the workplace but it was her choice to delay the assessment. She has not suggested either at the time or before us that she needed the respondent to make a reasonable adjustment by, for example, giving her more time to arrange a union representative or allowing her to be represented by a particular union representative or that it would have been a reasonable adjustment to allow her a later return to work date. She has also not said that she was too unwell to attend a telephone meeting or provided any medical evidence of that. She has simply said that it was unreasonable to ask her to account for her time during days that she was meant to be at work and was due to be paid as if she was at work.

136. She also did not communicate to R3 that 12 October was the one year anniversary of her mother's death. Whilst we have every sympathy that this must have been a very difficult time for the Claimant, she did not tell the respondents about this at the time and therefore there was no way they could take it into account when deciding how to deal with her absence.

137. In those circumstances, we consider it was reasonable for R3 to ask her how she wanted to record that period of time on her record. He provided her with two options – unpaid special leave or annual leave. She did not make a choice so he assigned her unpaid special leave. R3's decision was motivated by his wish not to unilaterally decide that she was on annual leave and was prompted by her decision to postpone a telephone risk assessment without medical explanation.

138. She did not need to prepare anything for her risk assessment. We find it more likely than not that had she taken part in the telephone risk assessment on 9 October, R3 would have told her to continue shielding. Nevertheless this is not what she did.

<u>Unpaid Wages 21 November – 6 December 2020</u>

139. The Claimant's contractual entitlement to sick pay is set out at Appendix 1 of her contract of employment. The following requirements must be met to be entitled to sick pay:
    - Self-certification for the first seven days of absence;

- A medical certificate within nine days; and
- Further medical certificates where the absence continues, which should be supplied immediately following the expiry of the previous certificate unless mitigating circumstances prevent this.

140. The Claimant was signed off sick on 19 October 2020. She provided a sick certificate for that period. That certificate expired on 20 November. Her witness statement says that she obtained a fit note from her doctor before the expiry of the first certificate but she did not send it in because she felt that the information she had provided R1 and R3 with saying that she was a CEV and had to shield would be sufficient to let them know that she would not be at work. She has not explained why she got the fit note from the GP at all if she did not think it was necessary to cover her absence.

141. The Claimant says that she was not aware that she also needed to send the fit note in until she received R3's letter (dated 27 November) by post on 7 December. On receipt of that letter she promptly sent a fit note. Her company sick pay was reinstated from that date.

142. The Claimant states that R3 ought not to have suspended her company sick pay during the period between 21 November and 6 December because they knew she could not attend work from the information that she was shielding. She says that this ought to have been sufficient particularly when she then provided a sick certificate that covered the entire period.

143. In response to a question from the Tribunal she confirmed that she knew the difference between shielding and being off sick. When asked therefore why she felt that shielding meant that she did not need to send in her fit notes in accordance with the Company sickness absence policy, she gave what can best be described as an equivocal answer.

144. We find, on balance, that either the Claimant forgot to send in her sick certificate because she was unwell and had many understandable reasons for not remembering that her certificate was about to expire, or she had forgotten to renew it at all and only attended the doctor to obtain one when she received the letter from R3 and the GP duly backdated the note. We accept that she was unwell at all times. However, the Claimant has not provided either of those explanations to the respondents at the time or to the Tribunal. Had she done so at the time, perhaps the respondents would have been able to consider extenuating circumstances as R3 says he would do in the email on page 783 of the bundle.

"Your Company Sick Pay has now been re-instated from when you submitted your new medical certificate, Monday 07.12.20. The period where you remained off from work and did not supply us with a medical certificate to cover that time remains as Statutory Sick Pay until we conduct a fact finding interview with you. There may be mitigating circumstances which we are not aware of as to why you did not adhere to the Attendance at Work (AAW) procedure and we would need to fully understand this. As yet, we are unaware of any mitigating

circumstances that may have prevented you from supplying us with a new medical certificate immediately following the expiry of the previous one you sent to us as required by the AAW."

145. Instead, the Claimant has been expecting the Respondent and the Tribunal to consider the extenuating circumstances (i.e. that it was very difficult to get a GP appointment and very difficult for her to obtain a fit note because of her need to shield) whilst simultaneously stating that she was not obliged to supply a fit note in any event. This stance is unhelpful and undermined the Claimant's credibility before us. It is clear that the Claimant was contractually required to send in fit notes to cover her entire period of sick leave and that she failed to provide a relevant certificate for 7 days without a plausible explanation. Her explanation at the time was that she did not think she had to because she was shielding. That was not plausible given that she had been off sick in the previous month and complied with her obligations all whilst also shielding. In addition she had been off sick on numerous occasions in the past and therefore knew the policy requirements well. She knew what her obligations were but failed to comply with them. The reason for that has not been plausibly explained as she has maintained the stance that she did not have any such obligations.

<u>Emails sent on 29 January 2021</u>

146. It was not in dispute that R3 sent the Claimant a series of emails timed 16.22, 16.23, 16.33, 17.37 and 17.42 on 29 January 2021. The Claimant found this difficult and confusing because she was receiving so much information all at once. R3 has stated that whilst he accepts that it may have been a little overwhelming for the Claimant that was not his intention nor the purpose or intent behind the email. There had been a series of emails about different topics from the Claimant and there had been some delay in responding to them. He sets this out clearly in his first email to the Claimant at page 776

"There are a few reasons for the delay in responding to your emails; one is that the run up to and during the Christmas and New Year period it was extremely busy and the second is that, following that period, I was covering the adjacent Areas whilst a colleague was on annual leave and that took up a lot of my time as well. I also felt it prudent to wait for a response to be sent to you after you had sent an email to Managing Director, Andy Lord, which I have been told has now been done.

147. He explained to us in evidence that he wanted to respond to them all but keep each issue separate to ensure that he had responded to all the Claimant's point and to avoid confusion. He also said that when dealing with so many issues, he needed to set aside time to deal with the Claimant's situation and was able to set aside a period of time to deal with all of her emails at once.

148. The Claimant also sought, in evidence and cross examination (though it was not entirely clear from her pleaded case nor her witness statement), to suggest that it was not just the timing of the emails but also the content of the emails that she found difficult. She says that they made threats regarding her continued pay and a refusal to furlough her and that she would continue to be

managed under the absence at work policy. She says that she found the content of the emails as well as their timing and quantity amounted to harassment. During cross examination however she conceded that the reasons given were reasonable and that R3 had explained the delay to her at the time.

149. We found R3 to generally be a credible witness. He did make concessions at various points during cross examination but not ones that go to either his credibility overall or ones that affect the credibility of his evidence regarding the relevant facts. His explanation during his evidence to us about the emails was helpful and we have no reason to doubt it. The Claimant may have found the volume of emails overwhelming but she needed answers to her questions. She sent a series of different emails that needed answering. R3 was attempting to answer the Claimant's questions and explain R1's position in accordance with R1's Covid policies.

150. The Claimant was not on furlough and she was not always complying with the absence at work scheme. She objected to not being on furlough and R3 attempted to explain why this was the case. His responses in the email are factual. Their tone is not hostile or aggressive and he is explaining her situation to her and the First Respondent's position regarding her various queries and concerns. None of the content is objectively relating to her disability though of course the fact that she was not at work was related to her health.

Comparators

151. The Claimant relied on three comparators:

a. Ms Julie Allen (CSA1, West Ham Station
b. Ms Alexis Bailey (CSA1, Acton Station).
c. Mr Jim Blanks (CSA1, Victoria Station).

152. The only documentary evidence we had regarding them was a leaflet or magazine article produced by R1 for its staff which provided a narrative of the Ms Allen and Ms Bailey's conditions and how they were accommodated and supported by R1 to remain in work.

153. The main thrust of the Claimant's evidence regarding the comparators was that they all had significant amounts of restrictions but were retained as CSA1s an had not been demoted to a CSA2. We were provided with very little other information.

154. The evidence we heard from the respondent witnesses was also minimal. Mr Burrows did not know any of the individuals' cases so did not comment. Mr Khan did not know Ms Bailey but was familiar with Ms Allen and Mr Blanks. He did not know any detail about Ms Allen's restrictions or adjustments. He did know Mr Blanks had a series underlying health condition and had health conditions. He conceded in cross examination that although the restrictions were described as temporary because they were reviewed regularly, they had been in place for a considerable period of time.

155. Crucially with regard to the comparators, we were not told whether any of them had moved to different stations either by choice or on compulsion by the respondent.

Conclusions

156. We take this opportunity to reiterate the points made at the outset of this judgment which is that the Tribunal has only reached conclusions on the claims brought before it. That means that we have confined our comments to the actions of all parties insofar as they relate to our conclusions. The absence of commentary about various aspects of either the Respondents' or Claimant's behaviour much of which was discussed at length before us, does not mean we have not considered or condone it– simply that it is not relevant to the claims we have to determine.

Jurisdiction/Time limits

157. The Respondent asserts that the following incidents are out of time:

First Claim

(i) Not investigating C's complaint of harassment and bullying dated 15 September 2019 (pleaded as an act of direct discrimination and victimisation)
(ii) Demoting the Claimant to CSA2 (pleaded as an act of direct discrimination and victimisation)

Third Claim

a. Deducting her company sick pay for the periods 12 October to 16 October 2020 (£1,206.05 gross) and 21 November to 6 December 2020 (£2,711.32 gross)? (pleaded as direct discrimination and harassment and an unauthorised deduction from wages claim under ERA 1996)

158. The Respondent accepts that all incidents relied upon in the second claim are in time.

159. Neither party made submissions to us concerning the Reasonable Adjustments claim and the Indirect discrimination claim in respect of whether they are in time or not though the List of Issues sets out clearly that any incident that predates either 16 April 2020 (First Claim) or 25 November 2020 (Third Claim). We therefore address the timing of those claims below under the relevant conclusions for those claims.

Demoting the Claimant to CSA2

160. The Claimant's first claim alleged that the decision to remove her from her CSA1 grade and demote her to CSA2 occurred or were reiterated on the following dates: *11 April, 1 May, 31 October, 7 November and 11 November 2019; 17 May and 11 October 2020.* She claims that the decision to demote her was an act of direct discrimination and victimisation.

161. It is the respondent's submission that any complaint prior to 16 April 2020 is out of time. We accept that the respondent's analysis taking into account the date the ET1 was submitted and the duration of the ACAS EC period is correct.

162. The Claimant asserts that the decision to demote her was made or reiterated on several occasions and amounted to a continuing act . We disagree. We consider that the decision to demote her was communicated to her clearly, by letter dated 30 July 2019 by R2. We accept the Respondent's submissions that at the very latest, this decision was 'reconfirmed' to the Claimant on 7 and 11 November 2019 but our primary finding is that R2 reached the decision and communicated it to the Claimant on 30 July 2019. Thereafter, no 'fresh' decisions were made by any of the Respondent employees regarding the Claimant's demotion. We consider that this decision, whilst communicated to the claimant on numerous occasions, was made on 30 July and clarified on 7 and 11 November. This was not a continuing act. This was a one off decision that had continuing consequences as per *Barclays Bank plc v Kapur and ors* [1991] ICR 208 (HL). The claimant's attempt to suggest that the discrimination did not 'bite' (our words not hers) until she took up her post in Victoria is, as pointed out by the Respondent, not plausible when she herself had already contacted ACAS and submitted an ET1 alleging discrimination on 28 April 2020 and 15 August 2020 respectively.

163. 30 July 2019 and indeed 7 and 11 November 2019 are well before 16 April 2020. The latest limitation date for those dates would be 10 February 2020 and as set out above our primary finding is that the decision was made by R2 on 30 July meaning that the primary limitation date was 29 October 2019. The Claimant did not contact ACAS for another 6 months. This part of the Claimant's claim is therefore, on the face of it out of time and we must assess whether to extend time. We must therefore consider whether it is just and equitable to extend time in all the circumstances.

164. We have taken into account the Claimant's belief that the situation was ongoing and therefore she did not need to submit a claim, but we do not accept that this is plausible. We do not accept that she reasonably believed that the decision to demote her had not been made or was being repeatedly 're-made' given her grievances on the topic and her continued representations against it. The Claimant had previously submitted 3 claims to the Tribunal alleging discrimination. She would have been aware of the 3 month deadline. At all times during the internal process she was supported by a Trade Union representative who would have been able to provide her with advice on deadlines.

165. Once she had contacted ACAS on 28 April 2020, she then waited until 15 August 2020 to submit an ET1. She did not take prompt action even once she had notified ACAS, waiting almost 4 months between contacting ACAS and submitting her ET1. Whilst we accept that this was the height of the first lockdown, we do place considerable weight on the fact that the Claimant had trade union support and had made several claims to a Tribunal beforehand this must have known the importance of deadlines.

166. We have taken into account the Claimant's ill health, the impact of the pandemic and her mother's death but note that the pandemic post dated the original limitation date (which we have found the Claimant would more likely that no have been aware of). The Claimant's submissions suggest that the fact that she continued to contest her demotion throughout the period is a factor that ought to be considered in the Claimant's favour for the purposes of extending time but we consider the opposite is true in circumstances where she had the levels of support she had and a knowledge of tribunal proceedings on 3 separate previous occasions. She knew that a decision had been made and was seeking to challenge it.

167. The cogency of evidence is likely to be affected by matters where they are delayed by 9 months or so but not to any significant extent that has been highlighted to us or explained by the Respondent. The fact that these matters are being heard in 2023 is not caused by the Claimant's delay regarding submission of the first claim.

168. Clearly, not extending time and considering a claim out of time has a significant negative impact on the Claimant but we find that in all the circumstances of this case, taking into account the guidance given by the relevant cases, it is not just and equitable to extend time in circumstances where the claimant was aware of the decision made, was aware of its impact, was able to submit grievances and protest against that decision, was receiving significant levels of support from her Trade Union, and was aware of the time limits that applied given her previous Tribunal claims. For all these reasons we do not extend time.

<u>Not investigating the Claimant's complaint of harassment and bullying dated 15 September 2019</u>

169. The Claimant's first claim also alleged that the failure to properly investigate the Claimant's grievance regarding her demotion was an act of direct discrimination and victimisation. The grievance was submitted on 15 September 2019. Ms Costigan made a decision regarding how to deal with the grievance on 8 October 2019 and the Claimant received the 'outcome' letter from Ms Costigan on 21 October 2019. The three month deadline for the claim would have been 20 January 2020. The Claimant did not contact ACAS until 28 April 2020. She then submits her ET1 on 15 August 2020.

170. We consider that this was a one off incident. It is not part of a continuing act regarding the decision to demote the Claimant. The decision of how to deal with the Claimant's complaint is separate from the original decision to demote her and made by a different person, namely Ms Costigan. It is therefore considerably out of time.

171. Even if we are wrong in that and it forms part of a continuing act connected to R2's decision to demote the Claimant, our conclusion above is that the demotion claim is in any event also out of time and that there were no

subsequent decisions after 30 July 2020, simply re-statements of the original decision.

172. We have considered whether it is just and equitable to extend time. We are aware that it is our obligation to consider each claim separately when considering whether it is just and equitable to extend time and have done so. Nevertheless, our conclusion that it is not just and equitable to extend time is based on the same reasons as to why we do not think it is just and equitable to extend time for the demotion claim as set out above and we do not seek to repeat those reasons here.

<u>Not paying the Claimant company sick pay for the periods 12 October to 16 October 2020 and 21 November to 6 December 2020 (pleaded as direct discrimination and harassment and an unauthorised deduction from wages claim under ERA 1996)</u>

173. We address the discrimination allegations first. It was not in dispute that any claim in relation to the second period (16 October – 21 November 2020) was in time. The Respondent did dispute that the this second period was linked to the first period and formed a series of deductions and/or a continuing act for the purposes of the discrimination claim.

174. The first period was 12-16 October 2020. The Claimant would have been paid any such pay on 18 November 2020. The three month time limit would have concluded on 17 February 2021. The Claimant contacted ACAS on 24 February 2021 with conciliation lasting until 11 March 2021.She submitted her claim to the Tribunal on 11 April 2021.

175. It was agreed that this meant that any incident before 25 November 2020 would have been out of time.

176. We conclude that the two incidents of withholding pay were different and not part of a series of deductions. The reason for the Claimant not being paid between 12 and 16 October 2021 was that she refused to engage with R3 and accept that she was technically back at work and needed to account for her time during a period when she had chosen to delay a telephone meeting with her manager. The reason for the deduction from pay for the second period was because the Claimant failed to comply with the Respondent's sickness absence policy. On the basis that we have found that these were the genuine reasons for the deductions from the Claimant's pay (please see below for our full conclusions), we do not accept that there was a common thread or continuing act linking them as they were not paid for entirely different reasons.

177. We also do not accept that there was a series of deductions as defined in *Bear Scotland Ltd v Fulton* [2015] ICR 221 (EAT) in that there is not a sufficient factual link or similarity of subject matter between the deductions.

178. We therefore consider that the initial period from 12 to 16 October 2021 is out of time for the purposes of the discrimination claims. We must therefore consider whether it is just and equitable to extend time to allow the discrimination claims to be considered out of time in all the circumstances. The

Claimant was one week out of time for contacting ACAS and commencing Early Conciliation. However she then waited the full month from Early Conciliation concluding on 11 March before submitting her ET1 on 11 April 2021.

179. We are mindful of our observations (set out above) regarding the Claimant's level of knowledge, the support from the Trade Unions at this point and her experience with other claims in the ET, including, at this point, two 'live' claims that she had recently issued. We have also considered the Claimant's health at this time and the fact that at this stage, the Claimant had been shielding and quite isolated for a considerable period of time. Whilst there is only one week in it, the decision to grant an extension as being just and equitable is not the default position simply because there has only been a short delay. To apply that would undermine the existence of the deadline in the legislation.

180. Whilst we recognise that the Claimant's health may have been an issue, we also note that her engagement with and pursuance of discrimination claims against the Respondents had increased her contact with the Tribunal service and no doubt increased her understanding of deadlines. In fact, by the time she submitted the third claim, she had already had a preliminary hearing regarding the first claim (13 January 2021). The List of Issues prepared following that hearing show that the issue of time limits in respect of the first claim was an issue that would be decided (p40). We therefore do not accept that it is just and equitable to extend time in all the circumstances as the Claimant has not provided a credible reason for missing the deadline for this claim.

181. The test under the Employment Rights Act 1996 is different. The Claimant must show that it was not reasonably practicable for her to present her claim in time. This is a higher bar than that set for discrimination claims. We find that the Claimant has not established that it was not reasonably practicable for her to present her claim in time. She was well enough to have presented two previous claims to the Tribunal, she had had assistance from a union representative even if not in submitting the actual claim form, she was well enough to attend a Tribunal preliminary hearing and she was aware of the time limits applicable to these cases. It was therefore reasonably practicable for her to have brought the claim in time.

182. If our conclusions regarding whether these incidents are 'in time' are incorrect, we have gone on in any event to explain our substantive conclusions in respect of those claims.

Did the First Respondent treat the Claimant less favourably than they treated or would treat others because of her disability in declining to investigate the Claimant's complaint of harassment and bullying dated 15 September 2019? (**First Claim)**

Direct Discrimination

183. The Tribunal has struggled to reach a conclusion on this matter due to the lack of evidence or submissions provided on the point by either party. Both

parties would have benefitted from Ms Costigan's attendance at the Tribunal as her witness statement does not address some of the issues we have had to decide. We accept that her non-attendance was unintentional and draw no adverse inferences. Nevertheless, it means that the evidence on this point is sparse.

184. As set out in the explanation of the law above, the Claimant must show that the Respondents treated her less favourably than someone else in the same material circumstances (a comparator) on grounds of disability.

185. We were not provided with information or evidence as to how the Claimant considers that her comparators would have been treated differently in the same circumstances and she conceded in cross examination that the named comparators she has identified were irrelevant to this part of her claim. Overall we had little information concerning those comparators.

186. We have therefore considered a hypothetical comparator which, in these circumstances, would be non-disabled person being transferred following a disciplinary process, who had the same level of capability to perform the role of CSA1 who had brought a grievance alleging discrimination against her line manager regarding the transfer process.

187. The claimant did not give us much information on how she believed Ms Costigan would have treated such a comparator in the same circumstances. The Claimant's evidence was, at best, that she felt that it was unreasonable for Ms Costigan not to investigate her complaint in all the circumstances and that her conclusion was so at odds with the policy that she must have been motivated by something else. However she did not provide us with evidence of why she believed Ms Costigan's that something else was her disability. When asked she refused to ascribe a motive to Ms Costigan's actions.

188. Considering Nagarajan v London Regional Transport 1999 ICR 877, HL we have considered the relevant mental processes of Ms Costigan where we can. We recognized that direct evidence of a decision to discriminate will seldom be obvious or volunteered by the perpetrator and therefore we have to try to glean the grounds of the decision, from the surrounding circumstances.

189. Ms Costigan did not attend the Tribunal and, even if her statement were to be taken at its highest (which we have not for the reasons explained above), she does not provide what the Tribunal considers is a complete explanation for her actions.

190. It is not in dispute that Ms Costigan did not investigate the complaint. On the face of it, the complaint contains allegations of bullying and harassment and repeatedly refers throughout the grievance that she considers it discriminatory on grounds of disability.

191. Ms Costigan's explanation for declining to progress the complaint to investigation was that she considered it to be a complaint about the decision to move the claimant as opposed to a complaint that met the definition of

discriminatory bullying or harassment under R1's internal policy definitions. She reached that conclusion without talking to the Claimant and understanding why she was asserting that it was discriminatory. That seems to be a questionable decision when it is clear that the employee is complaining that the act of moving her was discriminatory. With no conversation with the Claimant or evidence about the situation beyond the Claimant's disciplinary outcome and her complaint, it is not clear from her witness statement why Ms Costigan concludes that the complaint was not capable of meeting the definition of discrimination or harassment based on the evidence we have from her. It is also not clear why she then does not investigate it or consider it as a different type of complaint/grievance. The fact that she considers it is not bullying or harassment does not, in our view, mean that it is not a complaint or grievance at all that is clearly alleging discrimination.

192. To assist us in understanding Ms Costigan's actions we turned to the evidence we do have. We have considered her witness statement and more importantly her explanatory email to Mr Osborne at the time. In the email she explains that she considers that the Claimant's grievance is about the move which is the outcome of the disciplinary process. She says that the move is a common outcome from such processes and that the claimant needs to accept it and engage with the process and move on. She effectively states that whilst the claimant may not like the move and the fact that the move will result in a change to location AND (our emphasis) role, her recourse regarding that is through the process itself and in particular with a challenge to OH's opinions. We can see from the Claimant's point of view that this is not a particularly insightful or supportive conclusion. Nevertheless we consider that it demonstrates Ms Costigan's motivation which was to try to stop the Claimant delaying or reopening the decision to move her from London Bridge and the Bakerloo line in the first place. It is fair to say that the Claimant's complaint goes over and repeats old ground, including matters that have been clarified to her already. For example the Claimant's complaint restates her opinion that the Bakerloo line sanction had expired – something that she has already been told is not correct yet appears not to accept.

193. The Tribunal cannot simply guess at someone's motivations but we can draw inferences from the circumstances if the Claimant has provided us with facts from which, without any explanation, discrimination could be the cause. Nevertheless, a Claimant must do 'something more' than just present us with a set of facts and ask us to find discrimination.

194. On balance, we find that the Claimant has not shifted the burden of proof because she has not provided us with any evidence that suggests that Ms Costigan's actions were less favourable than she would have treated anyone raising a complaint of discrimination against a line manager that was trying to move them following a disciplinary sanction. That is not the comparator we have drawn above, but we find that the Claimant has not explained or suggested that there was any disparity between how she was treated and how anybody else would have been treated in the same circumstances. She has not ascribed a motive to Ms Costigan's actions either thus leaving us to somehow have to guess at what those motives might have been. Without the Claimant alleging in

evidence that the reason why she was treated in the way that she was was her disabilities it is not clear how we, the Tribunal can nevertheless ascribe that motivation to her.

195. If we are wrong in that and the burden of proof has shifted to the Respondent because of what we have found to be an incomplete explanation by Ms Costigan in her witness evidence, then we have carefully considered if a non-discriminatory reason for the treatment has been provided. We conclude that it has. We accept, based on Ms Costigan's email to Mr Osborne, that at the time she wanted to prevent the Claimant delaying or reopening the decision to move her from the Bakerloo line in the first place. We consider, on balance that she would have made a similar finding about a grievance brought by a non disabled person in the same circumstances and her motive in not investigating the grievance was to avoid prolonging the Claimant's move and the finalization of the disciplinary sanction against her.

196. For all those reasons, we find that the reason Ms Costigan declined to investigate the Claimant's complaint was that she did not want to allow the Claimant to continue to avoid and obfuscate the attempts to move her following the CDI outcome and she felt that the proper place for those concerns was the case conference process not a complaint. This is a non-discriminatory reason.

197. The Claimant's claim for direct discrimination regarding this incident is not upheld.

Victimisation

198. The Claimant's claim is that the same incident was an act of victimisation because the complaint she brought alleged discrimination and because of her previous Employment Tribunal claims which were brought in 2013, 2014 and 2018.

199. Ms Costigan was employed by the Respondent from 2005 so it is possible that she was aware of the previous ET claims. She does not cover this in her witness statement. The Claimant's witness statement asserted that Ms Costigan had previously dealt with her complaint of anti-Semitic harassment and bullying and that this meant she was not impartial. She did not assert that Ms Costigan was motivated by the fact that she knew about the Claimant's previous ET claims and wanted to put a stop to the Claimant's grievance as a result. The Claimant also argued that Ms Costigan was not independent and impartial because of pressure from the HR team. We had no evidence, beyond the Claimant's assertions, to substantiate those allegations.

200. The Claimant told us in evidence that she did not know Ms Costigan's motivation. She did not link her treatment back to the basis of her grievance or previous ET claims, simply that she had brought a grievance alleging discrimination and it was not investigated rather than asserting that it was the allegations of discrimination and ET Claims that motivated Ms Costigan to refuse to investigate it.

201. We consider that the Claimant has not shifted the burden of proof because she has failed to provide us with any evidence, including her own oral evidence, stating that Ms Costigan's decision was motivated by the Claimant's allegations of discrimination in her previous ET claims or her complaint. If we are wrong in that and because Ms Costigan has not addressed this matter in her witness statement, we again turn to what Ms Costigan said at the time regarding her motivation in her email to Mr Osborne. We accept that this email represents the explanation for her treatment of the Claimant at the time as is set out above in our conclusions concerning direct discrimination.

Demoting the Claimant to CSA2 (pleaded as an act of direct discrimination and victimisation)

Direct Discrimination

202. It is not in dispute that the Claimant was demoted from CSA1 to CSA2 by R2.

203. The reason given by the Respondent for this decision was that following the outcome of the disciplinary case against the Claimant whereby she was removed from the Bakerloo line stations, no other station across the network could accommodate her restrictions at that time.

204. The Claimant stated that this could not be correct because she had been doing the job of a CSA1 with the same restrictions for a number of years before the move. Her health had not changed and therefore the Respondent's ability to accommodate her ought not to have changed. She also disputed that she should have been removed from the Bakerloo line once 12 months had lapsed and she disputed that she could not do some of the safety critical aspects of the CSA1 role at all times. She also considered that she could have been placed over establishment at a station that could accommodate her needs or remain at Lambeth North despite the removal from the Bakerloo line.

205. The Claimant was taken to a document which set out the role of a CSA1. During cross examination she conceded that she could not do the majority of the tasks that were CSA1 only tasks and not shared in the CSA2 job description. There was some dispute regarding whether she could do some of the safety critical aspects of the CSA1 role when she was not taking medication. We find that even if she could that was not clear from her OH reports and not clear to her manager nor was it reasonable for anyone to be able to guess or understand that from the information provided by the Claimant or in her OH reports. We conclude that the Claimant therefore could not do the operational support tasks set out in the CSA1 job description and had, in effect, been doing the role of a CSA2 for several years albeit she was still called a CSA1.

206. The Tribunal considers that R2 took reasonable steps to try and find a CSA1 role for the Claimant, that was not on the Bakerloo line. We accept R2's evidence that he wanted to slot her into a CSA1 role if he could because it would be easier. He made several attempts to ensure that the search was thorough and based on up to date information regarding the Claimant's

restrictions. He pushed for all managers to respond before he made a decision.

207. When it became clear that there were no CSA1 roles available, he considered that the best option was to deploy the Claimant as a CSA1 because there was a role available that could accommodate her restrictions/adjustments. Such a move included income protection for 5 years and thereafter a graded reduction in salary. He checked that the pay protection included pay rises and was told that it did.

208. The Claimant provided us with relatively little information about the comparators she relied upon. In submissions, Ms Aly suggested that it was incumbent upon the Respondent to provide the relevant information about the comparators. A Claimant may need to request that information from the Respondent but her stance to say that it is for the Respondent to prove the relevance or otherwise of the comparators is incorrect. From the evidence we had we accept the Respondent's submissions which were as follows:

a. Julie Allen was restricted from working in a subsurface station because of breathing difficulties and therefore worked in above ground stations. She could still do, as far as we can tell, platform or machine room work which were safety critical aspects of the CSA1 roles. There was some evidence to suggest that she was moved to a different station to accommodate her restrictions.
b. Alexis Bailey could not do early shifts and needed more frequent rest breaks as a result of her disabilities. We had no evidence that she could not do the platform work.
c. Jim Blanks had restrictions following a cardiac arrest. They have been in place for a considerable period of time but are reviewed regularly and not yet deemed permanent.

209. We therefore do not consider that they were in a comparable position. The key differences are as follows:
a. They could do some if not all of the safety critical work involved in the CSA1 role
b. In Mr Blanks case, even if he could not do that work (which we do not have conclusive evidence of), his restrictions were temporary; and
c. None of them had to be moved after their restrictions/adjustments were put in place (save for Ms Allen who was possibly moved as an adjustment) and had additional restrictions on where they could be placed.

210. We do not think that they were suitable comparators as they were not in broadly comparable positions. A suitable hypothetical comparator would be someone else who, after having had restrictions in place for some time (whether caused by different disabilities or due to other reasons), had to be moved following a disciplinary case and could not work on the Bakerloo line. If the Claimant was treated less favourably than them, then she may have been able to establish that she had been directly discriminated against. As per *Bennett v MiTAC Europe Ltd 2022 IRLR 25, EAT*, the relevant circumstances include a person's abilities. So, if the consequence of a disability

is a reduction in a person's ability to do a job and that reduction in ability is the reason for adverse treatment, it will not be possible to make out a claim of direct discrimination because the appropriate comparator would have the same level of ability as the disabled person. The Claimant has not shown us that the comparators she has identified had the same level of ability as she did. In determining whether there has been less favourable treatment, her hypothetical comparator should have the same level of ability as the Claimant.

211. We do not consider that the Claimant has demonstrated that she was treated less favourably than such a hypothetical comparator. We consider that the Respondent has demonstrated that there was no less favourable treatment of the Claimant and have explained the reason why she was moved to a CSA2 role. The Claimant was moved to a CSA2 role because she had to be moved from her existing post following disciplinary action against her. When that move was being explored, her abilities were significantly restricted to the extent that she was fulfilling hardly any of the requirements of the CSA1 role. This meant that finding an alternative role at that level was difficult. Despite several attempts, no other stations confirmed that they could accommodate her restrictions/ reductions whilst also satisfying their safety critical responsibilities. We accept that the lack of CSA1 roles at appropriate stations was genuine at the relevant time. We did not have evidence to suggest that managers would lie to evade having to accommodate people with disabilities. Whilst we expressed surprise that there were no other CSA1 roles at the time across the TFL network, we had no evidence to suggest that the Respondent witnesses were incorrect and we accept R2's evidence that he tried hard to find a CSA1 vacancy for the Claimant and followed the normal process for finding such a role.

212. There was no evidence provided to us that R2 acted negatively towards the Claimant because of her disabilities whether consciously or unconsciously. The evidence we have indicated that he tried his best to relocate the Claimant to a CSA1 role and when that did not work he used the next best tool her had which was to place her in a CSA2 role with income protection. His next step had that not been possible, would have been to place her in medical redeployment but he did not do that as the Claimant was redeployed into a CSA1 role. The respondents' evidence was that because people placed within the medical redeployment process were rarely redeployed and he considered that it was better for the Claimant to be a CSA2 than to go through that process. The failure to properly explain the terminology around that does not detract from the fact that the CSA2 role was the next best option in the circumstances and at no point did the Claimant, other than in these proceedings, suggest that she ought to have been given the opportunity to be medically redeployed instead of being allocated a CSA1 role.

213. We do not consider that the Claimant has shifted the burden of proof and demonstrated that there were a set of circumstances from which we the Tribunal could infer discrimination. However, if we are wrong and the Claimant has shifted the burden of proof by virtue of the fact that she was demoted to a CSA2 role following many years of performing the CSA1 role with the same adjustments, we go on to consider whether the Respondent has provided a

non-discriminatory reason.

214. We find that the reason that the Claimant was demoted from a CSA1 to a CSA2 was multi-faceted but not discriminatory. She had been removed from working in her original station or on the Bakerloo line following a disciplinary case against her and that this meant that she had to move stations. At the time that they had to move her, there were no stations which could accommodate the Claimant's restrictions/adjustments due to the safety requirements needed at the other stations that were not already being met by enough staff at those stations. This would have been the case if someone without the Claimant's disabilities, but with the same level of capabilities, was in the same situation.

215. The other stations may have already had CSA1s with restrictions in place that meant that they could not accommodate another CSA1 with those particular safety critical adjustments in place at that time. They could only accommodate so many staff with so many adjustments/restrictions and comply with their safety obligations.

216. Therefore we do not uphold the Claimant's claim for direct discrimination regarding this issue.

Victimisation

217. We also do not consider that the reason for the Claimant's demotion was because she had submitted earlier Tribunal claims or her complaint. Firstly the complaint post dated R2's decision to demote the Claimant. It cannot therefore have been the cause of the treatment. With regard to the Tribunal claims, we had no evidence to suggest that R2 acted because of the earlier Tribunal claims. We again look at the behaviour that he did display which was that he followed a thorough process, adjourning the decision 3 times to ensure that proper checks had been carried out and proper medical evidence obtained before making the decision. We consider that had he wanted to somehow retaliate against the Claimant for her past claims, he would have taken a far more hurried approach without taking such care. There was no evidence that he was somehow being manipulated by HR who had a different agenda. Had the First Respondent wanted to retaliate against the Claimant for bringing such claims, they had had the opportunity to do so when the Claimant was disciplined for gross misconduct but they chose not to dismiss her and suspended her dismissal and moved her.

218. As set out above, we accept that the genuine reason the Claimant was moved to a CSA2 role was because she had been disciplined and needed to move stations. At the relevant time, there were no CSA1 roles available that could accommodate her restrictions/adjustments. She was therefore placed in the CSA2 role which required fewer safety critical roles and

Not paying the Claimant company sick pay for the periods 12 October to 16 October 2020 and 21 November to 6 December 2020 (pleaded as direct discrimination and harassment and an unauthorised deduction from wages claim under ERA 1996)

219. We have found as fact that the reason that the Claimant was not paid between

12 October 2020 and 16 October 2020 was because she requested that a risk assessment meeting be moved and then did not account for her time or availability in the intervening period. She was given the option to take that time as annual leave but did not respond to that suggestion and was therefore given unpaid leave for that period. We do not accept that the Claimant has demonstrated that the reason she was treated less favourably than a real or hypothetical comparator or that the reason she was not paid was her disability. We consider that the same approach would have been taken by R3 regardless of the individual's health. She has pointed at a decision that she considers to have been unfair and said it must have been due to her disability but she has not evidenced why.

220. If the presentation of that situation has shifted the burden of proof then we consider that the Respondent has given a non-discriminatory reason. The Claimant did not want to attend the meeting without her Trade Union representative. R3 agreed to move the meeting but explained the repercussions of delaying the meeting namely that the Claimant would need to explain why she was not available for a meeting earlier than a week later and account for her time during that period even if he was not requiring her to physically attend the workplace. She refused to do that without plausible explanation. That was the reason her pay was suspended during that period. That is a non-discriminatory reason.

221. With regard to the second period of time (21 November to 6 December 2020), we find that the reason the Respondents did not pay her for that period was because she did not provide a sick certificate for that period. Their policy is clear on this point. The Claimant knew the policy well and knew of her obligations to provide a sick certificate. Her explanation for her failure to provide the certificate has been that she was not required to. We do not agree that that this is what the respondent's policy says nor that the Claimant genuinely believed that at the time. Her reasons remain unexplained but we have guessed at them above. Had those guessed at explanations been given for the missing certificate, perhaps the Respondents would have taken a different view. Nevertheless, the reason for their treatment of the Claimant was the sickness absence policy, not the Claimant's disability.

Disability-related harassment

222. R3 did sent the Claimant emails timed 16.22, 16.23, 16.33, 17.37 and 17.42 on 29 January 2021. It is questionable as to whether this conduct was unwanted. The Claimant has sent numerous emails to R3 that needed answering. He answered them. However we accept that the Claimant did not want him to answer them all at once after a delay an did not like their content.

223. We do not consider that their content obviously related to the Claimant's disabilities though they answered various questions which concerned the Claimant's health they were dealing with various issues including her sick pay. They are not about her disabilities, they are about issues surrounding her absence and her return to work from lockdown. She wanted to be furloughed again however R3 stated that it was R1's policy not to furlough people already on sick leave. They do not contain threats as suggested by the Claimant but

contain the decisions that have been reached regarding her sick pay and whether she would be placed on furlough or not. They also explain what the First Respondent's policies were regarding fit notes and sick pay and reminds her to follow that process in the future.

224. We do not consider that they were intended to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her. R3 explained why he was answering them in quick succession and we have accepted that explanation. It is not related to the Claimant's disability but was because R3 had been on leave and because he was particularly busy at that time due to the pandemic and because he wanted to ensure that he answered all the Claimant's queries in turn.

225. We understand from the Claimant's evidence that she found that they did have that effect. In particular she found the information that she was not going to be paid for the various periods of time upsetting and anxiety provoking. Her evidence to us was that she believed he should have exercised his discretion given the ongoing pandemic to allow her late production of a fit note for the relevant period to be sufficient to pay her. She also saw no reason as to why she would not be furloughed given that she easily could be.

226. We do not consider that the tone of the emails or their timing could reasonably be construed as creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant given the explanation R3 gave for the delay.

227. We do not consider that the content could reasonably be construed as creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant when R3 was just explaining the decisions he had made pursuant to R1's policies on sick pay and furlough. We accept that the Claimant did not like the answers and was upset by them nor did she agree with the policies or that R3 did not have the discretion to make a different decision, but that is not the same as the acts amounting to harassment pursuant to the Equality Act 2010. She knew the Respondent's sick pay policy and knew that she had failed to comply with it. She also knew that it was not mandatory for R1 to place employees on furlough and the decision not to place her back on furlough was a policy decision and not one taken against her relating to her disabilities.

228. We therefore do not uphold the Claimant's claim for disability related harassment regarding the emails.

229. The claimant's was not paid company sick pay for the periods 12 October to 16 October 2020 to 21 November to 6 December 2020.

230. We have found that the Respondent was contractually entitled not to pay the Claimant for these periods. The decision relating to that was not related to

the Claimant's disability. It was a decision related to their policies and the Claimant's failure to comply with them. The Claimant knew the sickness absence policy and knew of her obligations to comply with them. She also knew the difference between being off sick and shielding and the difference between being on furlough and shielding.

231. The decision not to pay her was unwanted. However it was not intended to create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, it was intended to ensure compliance with their sickness absence policy.

232. We do not accept that it was objectively reasonable for the Claimant to construe that decision as creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant because she knew that what was being communicated to her was the Respondent's policy and her contractual rights. That she disagreed with them and considered them unreasonable does not mean that it was objectively reasonable for her to consider that they constituted harassment.

233. The Claimant's claim for disability related harassment fails.

Indirect Discrimination

1. The PCPs relied upon were the CSA1 role's requirement to do the following
   (i) Prolonged walking, standing and sitting
   (ii) Climbing stairs.
   (iii) Avoidance of regular breaks.

2. We accept that on occasion all of the above provisions were required for people carrying out the CSA1 role though we do not think that it was routine for the role to require 'avoiding regular breaks' though it may have occurred on some occasions. We accept that the claimant's medical conditions meant that the above PCPs were difficult for her to comply with and that her OH reports clearly state that she should not be required to do any of the above.

3. The test for indirect discrimination requires a claimant to show that the PCP puts (or would put) persons with whom they share a protected characteristic at a particular disadvantage when compared with others (*s 19(2)(b)*, Equality Act 2010).

4. *S6(3)* Equality Act 2010 confirms that "in relation to the protected characteristic of disability... a reference to persons who share a protected characteristic is a reference to persons who have the same disability". So, for indirect discrimination purposes, the "particular disadvantage" must affect those who share the claimant's disability.

5. The EHRC Code states:

"It is important to be clear which protected characteristic is relevant. In relation to disability, this would not be disabled people as a whole but people with a particular disability – for example, with an equivalent level of visual impairment." (*Paragraph 4.16*.)

6. We were not provided with any information or evidence from the Claimant as to how others who had her specific disabilities, either separately or cumulatively, were or would be affected by the above PCPs. The Claimant has a complex set of health issues and whilst a Tribunal can use its knowledge to determine impacts or consider the appropriateness of comparison pools, we were given no information whatsoever of the impact of these PCPs on others with the Claimant's disabilities and how they would also be placed at the same disadvantage as the Claimant by these particular PCPs.

7. We heard relatively little evidence from the Claimant as to how these PCPs put her at the disadvantage she relies upon namely that she could not be relocated into a CSA1 role as opposed to a CSA2 role. The thrust of her case appears to have been that it was these requirements (and her inability to perform them without adjustments) that meant that the Claimant was not allocated to a CSA1 role in a different station when she had to be moved. In effect, her inability to do these roles meant she was not offered a CSA1 role somewhere else in the network. She has not however isolated these PCPs from the other requirements of the CSA1 job description for which restrictions/adjustments were required for her.

8. The Claimant has not provided us with information from which we could determine that other people with the same disabilities as the Claimant would also be put at a particular disadvantage as her nor that people in the same circumstances but who do not have her disabilities, would not have been put at the same disadvantage. Neither party addressed us on who the appropriate comparator would be in these circumstances. We consider that it would be someone who
    (i) did not have the Claimant's disabilities
    (ii) had also been disciplined and needed to be moved from their existing station
    (iii) was barred from the Bakerloo Line,
    (iv) was unable to carry out all the same aspects of the role as the Claimant including the same safety critical aspects of the role such as platform work and lift and escalator chamber work.

9. We think it is perfectly possible that others with different disabilities may well have found the three PCPs relied upon difficult to comply with. However, there has been no specificity to the Claimant's claims under this heading and no attempt to demonstrate to us that others would not have experienced the same

disadvantage as the claimant if they did not have the Claimant's disabilities but were otherwise the same circumstances.

10. This issue was not addressed in the Claimant's written submissions or her evidence or in cross examination. We have no information on 'Group Disadvantage'. Nor in fact do we have any evidence of the Claimant experiencing a disadvantage because of these 3 PCPs in particular. We note that they had been adjusted whilst she was at London Bridge and Lambeth North before she was moved and, it is the Respondent's evidence, which we accept, that it was primarily the safety critical aspects of the job (platform work and accessing live track or restricted machinery apparatus chambers*)* and the fact that the Claimant had so many restrictions together that meant it was more difficult to find her an alternative CSA1 role.

11. The Claimant has therefore not established that these PCPs caused the disadvantage of not being able to be transferred to a CSA1 role in a different station as opposed to being changed to a CSA2.

12. We therefore do not uphold the Claimant's claim for indirect disability discrimination.

13. We have decided this part of the claim on its merit. However, as part of the First Claim, it is in the list of issues that any incident that predates 16 April 2020 is potentially out of time.

14. It is not in dispute that the PCPs remained in place throughout the Claimant's employment (which is continuing) and are requirements for the CSA1 role. However, the last time that they would have been applied in a way that disadvantaged the Claimant in the way that she alleges, would have been during the process when an alternative CSA1 role was being sought for her. That process finished, at the latest, on 30 July 2019 when R2 informed the Claimant that there were no such roles available and she would be redeployed as a CSA2.

15. We accept that the PCP of requiring CSA1s to carry out this aspect of their roles would amount to a continuing state of affairs, a continuing policy. However its application to the Claimant had ceased long before she brought her claim to the Tribunal. The decision to demote the Claimant to a CSA2 role was made on 30 July 2019. Thereafter the impact of the three PCPs named above ceased to impact on the Claimant's ability to be relocated in a CSA1 role elsewhere. She was therefore no longer subjected or required to comply with the CSA1 job description. The disadvantage ceased at that time as there were no subsequent decisions made regarding her relocation.

16. On the face of it therefore, the claims are out of time. We must consider whether it is just and equitable to extend time. For the same reasons that we do not consider that it was just and equitable to extend the Claimant's other claims for discrimination, we do not think it is just and equitable to extend time. We have considered the additional elements of the fact that there remained an underlying, ongoing PCP in place that the CSA1 role required a Claimant to be able to do the

above matters. Nevertheless, the specific disadvantage relied upon by the Claimant ceased at the point at which she ceased carrying out that role and she was aware of that as at 30 July 2019.

Failure to make reasonable adjustments – s 20 and 21 of Equality Act 2010

17. The claimant relies on the same PCPs for her reasonable adjustments claim as she did for her indirect discrimination claim. We therefore accept that they were in place throughout the relevant period though we had little evidence to suggest that CSA1s are or were routinely asked to not take regular breaks.

18. It is not in dispute that whilst the Claimant was stationed at London Bridge and subsequently, when she was sent to Lambeth North, adjustments were made and accommodated by the Respondents.

19. The Claimant's claim is that the substantial disadvantage she experienced when compared to a non-disabled employee was that she could not meet the above requirements and therefore no alternative CSA1 role could be found that allowed for those adjustments and she was regraded to a CSA 2. The adjustment she asserts ought to have been made was that she continued to be employed as a CSA1 level without needing to perform these aspects of the role as she had previously for many years. We understand that a Tribunal is not confined to considering the adjustments suggested by the Claimant in determining whether there was a failure to make reasonable adjustments.

20. The Respondent argued as follows:

    (i) The reason she could not be accommodated in the CSA1 role anymore was because she had to be moved. Previously they had been able to accommodate her restrictions/adjustments at her existing station.
    (ii) Other stations at the relevant time could not accommodate her adjustments which amounted to far more than the PCPs listed in this claim. It was the entirety of the Claimant's PCPs which resulted in her not being allocated a CSA1 role, not the three PCPs pleaded.
    (iii) Not keeping her as a CSA1 but demoting her to a CSA2 with pay protection, was a proportionate means of achieving a legitimate aim in that they had health and safety obligations to comply with when staffing a station, each station had to have a certain number of staff who could perform safety critical aspects of the role at any one time to comply with those obligations and they could not allocate her to a station permanently on an over capacity basis as a CSA1 when she could not perform the role of a CSA1.

21. We accept the Respondent's evidence that whilst they did not have a record of the basis on which the station managers had said that they could not accommodate the Claimant, the most important aspect of the CSA1 role in terms of its differentiation from the CSA2 role was its safety critical aspects.

22. We have found that the Claimant was unable to carry out almost all of the safety critical aspects of the CSA1 role and it is more likely than not that it was these

issues which meant that the stations could not accommodate her. We have found that the Claimant had so many adjustments/restrictions in place that in effect she had only been performing the tasks of a CSA2 in any event. This necessarily meant that stations would find it difficult to place her as a CSA1 whilst also complying with their health and safety obligations in having the right number of the right level staff available to man the station.

23. We conclude that it was not these 3 PCPs that caused the disadvantage upon which the Claimant relies. The parts of the job description that caused the Claimant the disadvantage was the requirement to be able to do the safety critical aspects of the CSA1 role.

24. Therefore had the above PCPs been adjusted in the way that they had been before i.e. she was not required, as per OH advice to do any of these tasks, it would not have ameliorated the disadvantage. We consider that it was her failure to be able to carry out the safety critical elements of the role that meant that the Area Managers could not accommodate her as a CSA1. Alternatively, it was the fact that she required so many adjustments (including the 3 PCPs relied upon) that led to the disadvantage. Therefore only adjusting these 3 would not have ameliorated the disadvantage either.

25. If we are wrong in that, or if the fact that these PCPs contributed towards the disadvantage, we consider that the Respondent has demonstrated that in all the circumstances of the case, at the relevant time, it was not reasonable for them to make adjustments that in essence meant that she would be allocated to a station as a CSA1 when she could not carry out the majority of what distinguishes the CSA1 role from the CSA2 role because the relevant area managers told the Operational Resourcing that they could not accommodate her restrictions/adjustments at that time. We accept that the area managers making that decision would have to balance accommodating their existing staff's restrictions/adjustments and fulfilling their health and safety obligations in manning the station. If they were not able to do that then it would not have been a reasonable adjustment to assign the Claimant as a CSA1 role to those alternative stations. In making that adjustment they would have had to compromise the health and safety obligations which they are not permitted to do.

26. We also consider that the Respondent has made a reasonable adjustment for the Claimant in that they have transferred her to a CSA2 role whilst preserving her pay as being at the same rate as a CSA1 (including any pay rises) for 5 years and, after those 5 years have completed, they will reduce her pay by 20% of the difference between the two salaries until her pay is reduced to that of a CSA1. During that period she could still apply for a CSA1 role across the network. We consider that the adjustment made has therefore ameliorated the majority of the disadvantage to the Claimant. We accept that there is some disadvantage both in status and eventually in pay. Nevertheless the severity of the impact has been offset.

27. For all these reasons, the Claimant's claim for reasonable adjustments therefore fails.

28. We have decided this part of the claim on its merits. We note that both parties failed to address us on the timing of the reasonable adjustment claim in submissions. However, as part of the First Claim, it is in the list of issues that any incident that predates 16 April 2020 is potentially out of time.

29. The decision not to make the adjustments sought was made on 30 July 2019 and is therefore out of time. We do not consider that there was a continuing act of discrimination. The decisions that her restrictions/adjustments could not be accommodated by any of the area managers were decisions by them in response to R2's requests. Those decisions were crystallised and communicated to the Claimant on 30 July 2019. We therefore consider that the Claimant's claim for reasonable adjustments is out of time.

30. We do not consider that it is just and equitable to extend time for the same reasons given above under the direct discrimination claim concerning the demotion.

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31. We have determined that it was reasonably practicable for the Claimant to bring a claim regarding the period between 12 October and 16 October 2020 is out of time and therefore do not make any further findings on this point.

32. With regard to the period between 21 November and 6 December 2020 we have found that the Claimant failed to comply with the Respondent's sickness absence policy which clearly states that sick pay will only be payable if a valid fit note is produced once an earlier fit note is provided. The Claimant failed to do that without proper explanation. She was not contractually entitled to decide that telling the Respondent that she was shielding was sufficient to justify her absence and she was aware of that at the time. Therefore the Respondent was contractually entitled not to pay her for the period when she had failed to provide a valid fit note despite being absent and her earlier fit note having expired.

33. The Claimant's claim for unauthorised deduction from wages is not upheld.

Employment Judge Webster

Date: 1 September 2023

JUDGMENT and SUMMARY SENT to the PARTIES ON

04/09/2023

FOR THE TRIBUNAL OFFICE