EMPLOYMENT TRIBUNALS

Claimant: Mrs Q Anderson

Respondent: London Underground Ltd

Heard by: Remote video (CVP)
On: 6-8 September and 29 September 2023 (in Chambers)

Before: Employment Judge Young
Members: Mr M Bhatti
Mr I Middleton

Representation
Claimant: Litigant in Person
Respondent: Ms R Thomas (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is:

The Claimant's claim for discrimination on the grounds of pregnancy is unfounded and is dismissed.

REASONS

Introduction

1. The Claimant has been employed by the Respondent who run London Underground since 25 October 2010. The Claimant was employed as a Train Operator from 2012 until 23 June 2022. The Claimant became pregnant in August 2021 and this claim concerns the Claimant's successful application to be a Train Manager, a role she currently occupies. Early conciliation started on 18 February 2022 and ended on 21 February 2022. The claim form was presented on 15 March 2022.

Hearing

2. The hearing was listed to be heard via CVP over a period of 3 days. However, the hearing went part heard and evidence and submissions were

heard within the 3 days via CVP. The Tribunal deliberated in person at Watford Employment Tribunal on 29 September 2023.

3. The Tribunal was provided with an electronic bundle of 561 pages, an index to the bundle of 8 pages and the Respondent's chronology. We heard evidence from the Claimant who also provided a witness statement and evidence from the Respondent witnesses: Stacey McManus Trains Operations Manager, Cheryl Alexander Trains Operations Manager and Mercillina Adesida Senior Trains Delivery Manager; all of whom provided written witness statements.

4. The Claimant raised an objection in respect of the bundle because she said she was only sent additional documents the day before. The Claimant said that the Respondent added documents on Monday 4 September 2023 that she had never seen previously. However, the Claimant then agreed that the documents added to the bundle were relevant and so she had no objection to their addition. The Respondent explained what documents were added to the bundle and explained that Employee D is Mr Brooks, Mr Wallis is Employee E. Counsel asked for the documents to be added to the bundle following a conference with the client the previous week. The Claimant confirmed that she was happy to proceed but she wanted it on record that she sent some of the documents to the Respondent's solicitors on Friday 1 September 2023, but they were not acknowledged, the Respondent responded with the documents added to the bundle.

5. The parties also agreed that the additional issue of whether the discrimination alleged in issue 2.1.9 was in time needed to be considered. Although this was not added to the list of issues, it was agreed that the Tribunal needed to consider the issue of whether the alleged acts complained of were in time to determine issue 2.1.9.

Amendment Application

6. The Claimant wished to add paragraph 20 of her witness statement to the list of issues, but also said that she would like to avoid a postponement as it has affected her life. The Claimant explained that she did not make the application earlier as she was not aware she had to. The Claimant said at the preliminary hearing she did raise the issue, but it was not recorded in the case management order. The Claimant said that she understood the issue regarding the reference to Mr Askor being offered the West Ruislip depot secondment on 4 March 2022 which she was not offered was accepted by the Employment Judge despite objections from the Respondent's counsel. The Claimant's application was that she did not have access to legal advice nor was she legally trained and she interpreted issue 2.1.9 as showing LUL leaped frogged lower scoring candidates over her. The Claimant asserted that the facts of her case remain the same. The Claimant said that as far as she was concerned it was not a new claim, but

a re-labelling exercise. The Claimant stated that the Respondent was aware of disclosure provided which included screenshots of messages with Sammy Askor [306]. The Claimant admitted she had been told about Mr Askor getting the secondment on 22 March 2022. The Claimant was asking the Employment Tribunal to be flexible as she had been. She understood the need to provide further clarification of her claim. The Claimant referred to previously challenging access to information in redacted documents but was told for reasons of confidentiality and privacy that the documents could not be unredacted so that she could obtain names of individuals who has scored lower than her. The Claimant said that had she known GDPR had no bearing, then she would have requested LUL supply data, names and details relating to the case. She said that she would not have to rely on Sammy Askor of evidence of the discrimination towards her. The Claimant said that without this amendment her case suffered a detriment, in that she was relying on the balance of probabilities and a tailored narrative to suit LUL.

7. The Respondent opposed the application and referred to the principles of Selkent, Vaughan v Modality and Cox v Addeco. That is to say that the factors relevant to consider are the nature of amendment, time limits and timing and manner of application and the balance of injustice and hardship. Ms Thomas said that the issues had been ventilated, whilst the Respondent acknowledges that the Claimant is a litigant in person, the issue the Claimant seeks to add to her claim was raised at the preliminary hearing and discussed. The Claimant did not refer to it in her claim form and it is a different allegation. It is not re-labelling. The Claimant could not have put it in the claim form as she did not know about it until 22 March 2022, after her claim form was issued. The Respondent would wish to call people, who they do not have witness statements for. The Claimant's application is out of time. If the Employment Tribunal were to allow the amendment there would be prejudice to the Respondent, as they would not be able to properly defend it. There would need to be a postponement and disclosure on that issue, and the individuals who could potentially give evidence would have to be spoken to. Both are on annual leave, Ms Counday is on leave until 11 September and Mr Rahman is on leave until 12 September. Mr Bailey is available, and they have been in contact but without those witnesses it would cause real prejudice in the immediate term. Without speaking to the witnesses there may be further prejudice. And if the case could not continue it would involve wasted costs. In contrast the Claimant had 9 other allegations as set out in the list of issues. The matter was raised before Employment Judge Brady, and it was rejected. The Respondent had counsel who attended the preliminary hearing and has a note of this, although it is not in the case management order. The application should be refused.

8. The Employment Tribunal's decision was that the Claimant's application is refused.

9. The reasons were that it was a brand new claim not mentioned in the claim form. The Claimant knew about it in 2022 and raised it at the preliminary hearing on 17 February 2023 and it was rejected by Employment Judge Brady as not being part of the issues because it was not in the claim form. We considered that if it was so fundamental to the Claimant's case she would have written in to the Employment Tribunal to point out that it was part of the list of issues by 10 March 2023, but she didn't do that. The alleged discrimination took place on 4 March 2022, the Claimant knew about it on 22 March 2022. The application was being made on 6 September 2023, approximately 18 months later. We considered that an inordinate amount of time in the circumstances. It has been 7 months since the preliminary hearing and the Claimant hadn't raised it with the Tribunal until the first day of the hearing.

10. We considered that the Claimant was a litigant in person and was not aware that she had to make an application to amend; however, the balance of injustice and hardship was in favour of the Respondent who could not possibly defend the allegation with witnesses who are currently on annual leave so could not attend within the 3 days allocated. It would require a postponement which is not in accordance with the many aspects of the overriding objective including saving expense and avoiding delay to the case. This is especially where the Claimant had indicated that she wanted to have early resolution. It would not be proportionate to postpone the hearing for 1 allegation where the Claimant has 9 allegations that could be dealt with. The balance of hardship against the Claimant is much less as the Claimant already has 9 allegations that she is pursuing that would entitle to her to the same amount of financial loss whether she is successful in this complaint or not. For those reasons, the Claimant's application was refused.

The Claim and Issues

11. The claim is pregnancy and maternity direct discrimination (Equality Act 2010 section 18)

12. The issues to be determined are (using the same numbering in Employment Judge Brady's case management order dated 26 February 2023):

    2.1 Did the Respondent treat the Claimant unfavourably by doing the following things:

        2.1.1 On 6.01.2022 Stacey McManus told the Claimant that she would not qualify as a Trains Manager in the time that was left before the start of her maternity leave?

        2.1.2 At the beginning of January 2022 Stacey McManus made unusual enquiries outside of the usual practice of London Underground to enquire whether the Claimant was fit for the role.

2.1.3 Having provided a start date for the Claimant in November 2021, in January 2022 the Respondent failed to confirm the start date for the Claimant's secondment as a Trains Manager at the West Ruislip depot.

2.1.4 In or around January 2022, not allowing the Claimant to swap the location of her secondment at West Ruislip with another trainee based at Earl's court.

2.1.5 Ignore the Claimant's requests to undertake training which led to delay and then meant that the courses became unavailable prior to the commencement of the Claimant's maternity leave.

2.1.6 Refused to allow the Claimant to start at the depot while the person who she was replacing was still there thus causing a delay in qualification prior to the commencement of the Claimant's maternity leave.

2.1.7 On 20 January 2022 withdrew the offer of a secondment at the West Ruislip depot.

2.1.8 In or around January 2022 the Respondent failed to conduct a pregnancy risk assessment.

2.1.9 Despite the Claimant scoring highly in the recruitment campaign she was offered a place as a Trains Manager in November 2021 whereas other male colleagues who scored lower in the recruitment campaign were offered positions earlier.

2.2 Did this amount to unfavourable treatment?

2.3 Did the unfavourable treatment take place in a protected period?

2.4 If not did it implement a decision taken in the protected period?

2.5 Was the unfavourable treatment because of the pregnancy?

2.6 Was the unfavourable treatment because of illness suffered as a result of the pregnancy?

3. Remedy for discrimination

3.1. What financial losses has the discrimination caused the Claimant?

3.2 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

Findings of Fact

13. The Employment Tribunal heard evidence on matters that did not form part of the Claimant's case. Where that is the case, the Tribunal will only make findings that are relevant to determine the agreed issues set out above. The following findings are made on a balance of probabilities. All references in square brackets are a reference to the bundle page numbers.

14. The Claimant applied for the role of Train Manager in the February 2021 recruitment campaign. The Claimant told her employing manager Ms Cheryl Alexander who was a Trains Operations Manager that she was pregnant on 10 August 2021 [158]. The Claimant was undergoing IVF and was implanted on 4 August 2021 and was pregnant from this moment onwards until her delivery date. The Claimant's baby was due on 22 April 2022 [160]. The Claimant went on maternity leave on 24 April 2022. The Claimant returned from maternity leave on 25 December 2022. The protected period started on 4 August 2021 [160].

15. On 3 September 2022, the Claimant was informed that she had been successful in obtaining the role of a Train Manager by TfL recruitment. The Respondent's policy is that before starting a role as Train Manager, there was a requirement to undergo a secondment where compulsory training of Rules and Procedures course and a Desk Management course would be undertaken. The Claimant would also be required to obtain sign off in respect of training in a logbook in order to gain full qualification. Secondments are governed by the Respondent's secondment policy [542-546].

16. It was the Respondent's policy that pregnant women do not undertake train operator work. The Claimant was then allocated alternative duties of working in skills development from 17 September 2021. This was work that the Claimant had asked to do in order to fulfil her alternative duties.

17. On 16 September 2021, the Claimant's employing manager Ms Alexander, undertook a risk assessment of the Claimant in respect of her pregnancy [161]. The Claimant referred to the risk assessment stating it would be reviewed monthly, but she did not have a monthly review. The Claimant accepted in evidence that nothing changed regarding her situation other than her size and she was doing the same alternative duties throughout. Ms Alexander gave evidence she was in regular contact with the Claimant when she was undertaking alternative duties and would ask the Claimant about her well being and if any changes happened, this was conveyed in

whatsapp messages. Ms Alexander said that had she been told of any changes she would have reviewed the risk assessment. We accept Ms Alexander's evidence on this point. We find that there was no requirement for there to be an actual monthly risk assessment. The September risk assessment only needed to be reviewed once the Claimant's situation changed. Although the Claimant did get bigger because of her pregnancy this change did not affect the Claimant's situation.

18. On 27 October 2021, the Claimant emailed Twahid Rahman who is in Ops resourcing whether she was on a waiting list for the Train Manager role. In that email the Claimant told Mr Rahman that she was pregnant. Mr Rahman responded that the Claimant was 42nd on the waiting list and congratulated the Claimant on her pregnancy.

19. On 30 November 2021, Ms Marie Counday who worked in Ops resourcing asked Ms Alexander if the Claimant could be released from 2 January 2022 to undertake a secondment as a Train Manager. Ms Alexander agreed to release the Claimant [183].

20. Ms Alexander informed the Claimant on 2 January 2022 that she had agreed to release the Claimant for her secondment. Ms Alexander did not give a location or start date for the secondment.

21. Ms Stacey McManus was a Trains Operations Manager at West Ruislip depot, and job shared her role with Simon Curtis another Train Operations Manager. Ms McManus was to be the Claimant's employing manager once she started her secondment at West Ruislip depot. The Claimant would be replacing Alan Slade who was a Train Manager at West Ruislip depot. Mr Slade was successful in being promoted to a Service Manager role. The Claimant's secondment was a fixed term secondment, with a view to permanency. The permanency of the Train Manager role could not be guaranteed for the Claimant because, if Mr Slade failed his Service Manager training, he would return to his Train Manager position at West Ruislip depot. It was proposed to Ms McManus that Mr Slade would start his secondment as a Service Manager on 2 January 2022 [208]. However, the proposed date altered due to the Establishment Planning contact non availability leading up 2 January 2022 and post 2 January 2022 a confirmed date needed to be agreed by Ms McManus and Mr Slade's seconding Manager before Ms McManus could agree to release Mr Slade.

22. At 11:26 on 4 January 2022 by email Ms Counday informed Ms McManus that the Claimant would be seconded to her and would need a risk assessment. At that stage it was thought that Mr Slade may move at the end of January 2022. In that email Ms Counday informed Ms McManus that the secondee was pregnant [204].

23. It wasn't until 14:35 that day that Ms McManus emailed Ms Alexander to ask to have a conversation about the Claimant [200]. Ms McManus said she asked to have the conversation because she had queries about why the Claimant was on alternative duties and wanted to know more about the Claimant. The Claimant argued that the existence of the conversation and the queries about her suitability were unusual. We find that Ms McManus did know that the Claimant was pregnant when she spoke to Ms Alexander. It was Ms Counday who informed her, not Ms Alexander. It was likely that Ms McManus knew that the Claimant's pregnancy was a possible reason why the Claimant was on alternative duties. Asking whether the Claimant was fit for duties would be part and parcel of getting to know more about the Claimant and would have included more than the Claimant's pregnancy. We do accept that she wanted to know more about the Claimant and that is the reason why she contacted Ms Alexander, and this would not have been unusual practice. We find the Claimant did not point to anything that Ms McManus did to her resulting from the enquires.

24. Later in the afternoon on 4 January 2022, Ms Alexander texted the Claimant to inform her that her secondment would be at West Ruislip depot. [201] Ms Alexander did not give the Claimant a start date for her secondment at West Ruislip.

25. By teams Chat on 4 January 2022, the Claimant messaged Ms Counday and requested a risk assessment because of the lengthy commute from the Claimant's home in Clacton on Sea to the West Ruislip depot. The Claimant stated that it was a 6 hour round trip. [527]. Ms Counday responded the same day that the Claimant's secondment would be at West Ruislip depot [528]. We find that Ms Counday did not refuse the Claimant's request for a risk assessment, nor did she respond to the Claimant's query regarding the risk assessment.

26. We find the Claimant did not ask Ms McManus to undertake a risk assessment of her duties as a Trains Operations Manager. We accept Ms McManus' evidence that she would have done a pregnancy risk assessment a few days after the Claimant started her secondment at West Ruislip depot and it would have been at this point that the New and Expectant Mothers Risk Assessment [78] would have been applicable and the Claimant's travel arrangements would have been considered then. We find that there was no requirement to undertake a risk assessment in respect of the Claimant's duties as a Train Manager at West Ruislip prior to the start of the secondment.

27. Between 4-5 January 2022 the Claimant spoke to Thomas Healy who was another Train Operator on secondment as a Train Manager but at Earls Court depot. The Claimant asked if she could swap secondment locations with him. Mr Healy lived closer to West Ruislip than Earls Court and so

agreed to the swap as it was convenient for him. However, Mr Healy had already commenced his secondment, but the Claimant had not.

28. By letter dated 5 January 2022 [209], the Claimant was informed that she was successful in her application for a secondment and would be placed at West Ruislip depot. The offer letter did not give a start date of the secondment but stated that the secondment would be for 12 months. The Claimant was required to complete a form to accept the secondment and was informed that *"once the allocation has been given to you it cannot be changed"*. This was in respect of the location of the secondment. The Claimant signed the form of acceptance on 6 January 2022 [212].

29. The secondment that the Claimant was offered was an open secondment which was defined in the Respondent's secondment policy [544]. The Claimant accepted in evidence that she was offered an open secondment and not a development secondment. The Respondent's secondment policy clearly stated that "*The opportunity to undertake a secondment is not guaranteed and business requirements will take precedent*" [544]. The Claimant argued that she should have been allowed to start her secondment before Alan Slade left for his secondment however the Claimant accepted in evidence that she did not tell anyone that she wanted her secondment to start whilst Mr Slade was still in the position at West Ruislip depot.

30. On 21 December 2021, the Claimant contacted Ops resourcing to ask about her Train Manager training. [189] Ms Counday did not respond to the Claimant until 6 January 2022, when she informed the Claimant that there was a course on rules and procedures on 24 January 2022 [221]. We find that the Claimant's request was not ignored. The Claimant had not been offered the secondment until 5 January 2022. We find that the Claimant accepted the secondment offer on 6 January 2022. The Claimant could not be placed on a course before that date. Op resourcing responded to the Claimant's query once the Claimant had accepted the secondment offer. There was no delay in responding.

31. Following the Claimant's confirmation of her secondment, the Claimant emailed Ms McManus on 5 January 2022, about her situation and informed Ms McManus about her pregnancy and asked to have a frank and open conversation about her secondment with Ms McManus [213-214].

32. In response to the Claimant's email requesting a conversation with Ms McManus, Ms McManus contacted the Claimant on Teams on 6 January 2022. There are no notes of the conversation. The Claimant's case was that Ms McManus told her in that conversation, she would not pass the training in time to qualify for the higher pay before going on maternity leave. Ms McManus denied saying this, Ms McManus said that she confirmed to the

Claimant that she did not know whether she would be qualified in time but that it was possible she might not be signed off. In evidence the Claimant admitted that Ms McManus did not say she would not qualify in time as a Train Manager before commencing maternity leave. We find that Ms McManus said to the Claimant she did not know whether she would be qualified in time but that it was possible she might not be signed off. The Claimant accepted that there was nothing wrong with this comment. We find that Ms McManus did not say that the Claimant would not qualify in time.

33. It was also in the Teams conversation on 6 January 2022 that the Claimant requested a swap with Thomas Healy at Earls Court in respect of her secondment. Ms McManus asked the Claimant to confirm her request in writing and told her that she would go and take advice.

34. On 6 January 2022, the Claimant emailed Ms McManus to request a swap of location with Thomas Healy at Earls Court in respect of her secondment. The Claimant also messaged Ms Counday on the same day to ask if it was possible to swap with Mr Healy. Ms Counday responded within minutes to say that she would find out and get back to the Claimant [529]. By email dated 6 January 2022, Ms Counday refused the Claimant's request to swap. Ms Counday explained that this was due to the business needs. [221] We find that Ms Counday's refusal was in accordance with the Respondent's secondment policy.

35. Mr Healy emailed Ms McManus on 11 January 2022 regarding an update on the swap. Ms McManus responded by email some minutes later that she will discuss it with Mr Curtis and whomever and come back to him. Mr Curtis responded to Mr Healy on 18 January 2022 to let him know that mutual transfers between seconded Train Managers were not being accepted [248]. Ms McManus' explanation of why the Claimant could not swap was because it became apparent that Alan Slade may not move and so the Claimant's secondment could not start during the same period the Claimant was asking about the swap. Ms McManus said that her colleague advised the Claimant on 17 January 2022. However, the Claimant says she was not told. We find that the Claimant was not advised on 17 January by Mr Curtis or anyone about the swap. We find the Respondent did inform the Claimant she could not swap with Mr Healy on 6 January 2022 because the policy did not permit swaps unless there was a business need before the Claimant went on maternity leave.

36. On 6 January 2022, the Claimant responded to Ms Counday's email [221] informing her about the availability of places on the rules and procedure course on 24 January 2022. The Claimant requested that she be booked on 24 January 2022 rules and procedure course. Ms Counday responded that same day that unfortunately she had just been informed that the course was then fully booked. The Claimant was told the next available course was 28 March 2022. [220]. The Claimant then requested to be booked on the 28

March 2022 course. [220]. However, when on 17 January 2022 Ms Counday tried to book the Claimant on 28 March 2022 course [239], she was informed that the Claimant had annual leave booked between 27 March-9 April 2022. [239] By email 17 January 2022, Ms Counday informed the Claimant that 28 March 2022 course could not be booked because the Claimant had annual leave booked in that period [243]. By email 18 January 2022, the Claimant then requested that her annual leave be moved [246]. On the same day, the Claimant's annual leave was moved [246]. The Claimant emailed Ms Counday on 18 January 2022 to confirm that her annual leave had now been moved.[251]

37. However, that same day, it was confirmed to Ms McManus that Mr Slade's training was delayed. Ms McManus explained by email to Ms Counday that there was no longer a requirement for a secondee. [253] This was because due to lack of available trainers, Mr Slade was unable to start his training until 27 March 2022 [254]. There had been ongoing conversations between Ms McManus, Mr Slade, Mr Rahman and Mr Slade's secondment manager between 10- 18 January 2022 to try and get confirmation of when Mr Slade's training could start [253-257]. Ms McManus' evidence was that it wasn't until Mr Slade was released that the Claimant's secondment could start. In those circumstances, Ms McManus said the Claimant could not be given a start date. We accept Ms McManus' evidence on this point. The Claimant was told by email on 20 January 2022, that her promotion could not occur at that time as there was no vacancy to backfill at West Ruislip depot [259]. The Claimant was put first on the waiting list for a secondment but did not start a secondment until 24 June 2022, when she started at Neasden depot. The Claimant qualified as a Train Manager on 2 August 2022.

38. The Claimant's position was that she should have been allowed to start her secondment anyway even though Mr Slade could not start his and it was not unusual for there to be overlap, although she admitted in evidence that she did not ask to overlap with Mr Slade. The Claimant said that she would be able to complete her secondment before going on maternity leave. Mr Slade's secondment was not due to start until 27 March 2022. The Claimant was due to go on maternity leave on 22 April 2022 and did go on maternity leave on 24 April 2022. It would have only left less than a month for the Claimant to qualify. The Claimant had refused a secondment at Hainault in or around 14 February 2022 because she said she would not have been able to complete it before her maternity leave [273]. The Claimant said in evidence she refused the offer of a secondment at Hainault because it was not in writing. We find that the Claimant refused the offer because she would not have been able to complete it before the start of her maternity. She would not have accepted a secondment she could not complete before the start of her maternity leave and the Claimant believed that approximately the 9 weeks and 6 days between 14 February – 24 April 2022 would not have been enough time for the Claimant to complete her training.

39. The Claimant also referred to other colleagues, Employees A & B who the Claimant said were released for training whilst the Claimant was not. Ms Alexander's evidence was the Claimant's training was not delayed due to her pregnancy. Employee A and Employee B neither of whom were pregnant, took a number of months to be signed off and endured delays with getting their logbook finalised and signed off, Employee B did not receive sign off until 7 March 2022. We accepted Ms Alexander's evidence on this point.

40. Ms McManus' evidence was that overlap would have been a cost to her depot which she could not afford and that overlaps were not usual. We find that the Claimant did not ask to overlap with Mr Slade.

41. On 27 January 2022, the Claimant emailed Mr Rahman to enquire whether she had been booked on the rules and procedure course for 28 March 2022. Mr Rahman responded the same day to confirm that the Claimant had not been booked on the course and that the course was now full. The Claimant gave evidence that she believed that her requests to be booked on the rule and procedure courses was ignored because of her pregnancy. The Claimant gave evidence that the course was not booked due to a series of unfortunate circumstances. We accept the Claimant's evidence on this point. We find that the reason why the Claimant was not booked on a training course before her secondment was cancelled was because the Claimant had annual leave booked which covered 28 March and that annual leave needed to be moved before the Claimant could be booked on the course. It was not the case that the course was unavailable prior to the commencement of the Claimant's maternity leave it was because the 24 January 2022 course became fully booked before the Claimant could book it.

42. The Claimant was frustrated with the delay in starting her secondment and on 17 January 2022 emailed Ms Counday to raise a grievance that she was being discriminated against on the grounds of her pregnancy because she wasn't given a start date, nor a risk assessment, she had received no response to request for a swap and that the request was declined like her request to move location of her secondment. The Claimant said in her grievance that she was aware of other instances where trainees were allowed to swap and of trainees being granted the same location as their substantive roles. [241]. The Claimant said that she first found out about that there were male Train Operator who scored lower than her who were offered secondments in a conversation with Ricky Bailey and Paul Howard on 24 January 2022. However, the Claimant asked Mr Rahman about the issues on some date between 24- 28 January 2022. Mr Rahman provided the Claimant with an answer to her question about this on 28 January [271] confirming that Train Operator who did score lower than the Claimant were offered secondments before her. We find that the first that the Claimant knew about the issue was 24 January 2022.

43. On 25 February 2022, the Claimant lodged a formal grievance [274-284]. Ms Alexander investigated the Claimant's grievance. During the grievance meeting on 30 March 2022 [323-326] the Claimant referred to a work colleague who became known as Employee C. The Claimant said that Employee C was allowed to choose his location [324]. The Claimant also referred to other male colleagues who she said were offered a secondment placement before her even though they received lower scores than her. However, the Claimant did not name any particular colleagues at that time, nor did she provide any evidence of the individual male names.

44. Ms Alexander did not investigate the allegations where the Claimant compared herself to other male colleagues, but investigated the other grievances raised and dismissed the grievance and informed the Claimant by letter dated 28 August 2022 [349-356].

45. On 31 August 2022, by email the Claimant appealed her grievance [364] which was heard by Ms Mercillina Adesida, Senior Trains Delivery Manager on 28 October 2022 [380- 394]. Ms Adesida investigated the circumstances surrounding Employee C. Ms Adesida said that Employee C was asked to move location because of a disciplinary matter. Emails at pages 517-526 demonstrate that Employee C was offered various locations where there was a business need. Ms Adesida also explored whether male colleagues of the Claimant were offered secondment placements before her even though they scored lower than the Claimant. Ms Adesida's evidence was that it was the case that male Train Operators who scored lower than the Claimant were offered secondment placements before the Claimant. Ms Adesida said this was because following Covid 19 there was a crisis of recruitment over a long period of time. This crisis meant there were not enough Trains Managers. Consequently, job offers for Train Managers were not based directly on scores, but on the basis of whoever completed the recruitment process first. Applicants were offered placements almost immediately after interview until the roles were filled. We find that Employee C's circumstances were different to the Claimant's and Employee C was not allowed to change location but was moved due to a disciplinary matter and because of a business need. We also find that male Train Operator candidates were offered secondment placements ahead of the Claimant who scored higher than them as part of the February 2021 recruitment campaign before November 2021. We find that these lower scoring male Train Operator candidates were offered secondments, because there was a crisis of lack of recruitment which meant there were not enough Train Managers. As a result, job offers were not based directly on scores, but on those applicants who applied and undertook and successfully passed interviews after which there was a need to immediately fill the Train Manager role.

46. By letter sent to the Claimant by email dated 27 January 2023, the Claimant's appeal was dismissed [409- 417].

47. In March 2022, the Respondent provided FAQ to inform secondees like the Claimant in what circumstances a secondment location could be changed in the February 2021 recruitment exercise [309]. The basic position was that a secondment location could only change due to business needs and that included a swap.

Relevant Law

Time Limits

48. Section 123 set out the time limits under the Equality Act 2010 ("EQA 2010"). It states as follows: *"(1) [Subject to sections 140A and 140B,] proceedings on a complaint within section 120 may not be brought after the end of— (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable… (3) For the purposes of this section— (a) conduct extending over a period is to be treated as done at the end of the period; (b) failure to do something is to be treated as occurring when the person in question decided on it. (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something— (a) when P does an act inconsistent with doing it, or (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."*

49. Section 123(1)(b) EA 2010 provides the Tribunal with the discretion to hear a discrimination claim if it is just and equitable to do so. The EAT decision of British Coal Corporation v Keeble and ORS 1997 IRLR 368 has been approved repeatedly as confirming that a Tribunal should consider the checklist under section 33 of The Limitation Act 1980, as adjusted for tribunal cases. Although the Court of Appeal in Southwark London Borough Council v Afolabi [2003] ICR 800, warns Tribunal's not to adhere slavishly to the checklist.

50. The factors that a Tribunal ought to take into account under Keeble are as follows: the length of, and reasons for, the employee's delay; the extent to which the strength of the evidence of either party might be affected by the delay; the employer's conduct after the cause of action arose, including his/her response to requests by the employee for information or documents to ascertain the relevant facts; the extent to which the employee acted promptly and reasonably once she knew whether or not she had a legal case; the steps taken by the employee to get expert advice and the nature of the advice s/he received. Unlike in the unfair dismissal jurisdiction, a mistake by the employee's legal adviser should not be held against the employee and is therefore a valid excuse.

Pregnancy discrimination

51. Section 4 Equality Act 2010 includes pregnancy as a protected characteristic. Thus Section 18 EA 2010 provides that, if possessing the protected characteristic, a woman has to demonstrate unfavourable treatment because of pregnancy or maternity leave.

52. Section 18 says:

"(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —

(a) because of the pregnancy, or

(b) because of illness suffered by her as a result of it.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

(c) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(d) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy"

53. The test for unfavourable treatment was formulated in the case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11 in that case the House of Lords as it was then, said that unfavourable treatment arises where a reasonable worker would or might take the view that they had, as a result of the treatment complained of, been disadvantaged in the circumstances in which they had to work.

54. In considering whether unfavourable treatment is because of pregnancy / maternity leave, we must consider whether the fact that the Claimant was pregnant or exercising her right to take maternity or going on maternity had a significant (or more than trivial) influence on the mind of the decision maker.

55. The influence can be conscious or subconscious. It need not be the main or sole reason, but must have a significant (i.e., not trivial) influence and so amount to an effective reason for the cause of the treatment.

56. Section 136 EA 2010 sets out the relevant burden of proof. Initially it is for the Claimant to prove, on the balance of probabilities, primary facts from which a Tribunal could conclude, in the absence of any other explanation from the Respondent, that the Respondent committed an act of unlawful discrimination. Once the Claimant has shown these primary facts then the burden shifts to the Respondent and discrimination is presumed unless the Respondent can show otherwise. Could conclude means a reasonable Tribunal could properly conclude from all the evidence.

57. The Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258, 56. It is not enough to show that the Claimant has been treated differently or unfavourably and is pregnant or took maternity leave. There must be some evidential basis on which it can be inferred that the Claimant's pregnancy or exercising her right to take maternity leave or going on maternity leave is the cause of the unfavourable treatment.

58. In practice this means that the Claimant must prove a basic case which is more than simply showing, in pregnancy case for example, that she was pregnant and that she was treated unfavourably in the protected period, and that the employer knew that she was pregnant. Whilst in a pregnancy discrimination claim the Claimant does not have to show that she was treated less favourably than another person, but only that she has been treated unfavourably, any evidence of how others were treated may support her claim.

59. As direct evidence or an admission of discrimination is rare, and Tribunals often have to infer discrimination from all the material facts. If the Claimant does not prove any primary facts, the claim fails at stage one. If, however, the Claimant succeeds at stage one, the burden of proof shifts to the Respondent. At the second stage, discrimination is presumed to have occurred, unless the Respondent can show otherwise. The Respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-discriminatory. We can consider numerous factors when testing the reason put forward by the Respondent for the treatment.

60. No comparator is needed during the protected period, and no justification defence is available in respect of pregnancy discrimination. Pregnancy or maternity leave must be a substantial reason for the treatment, (see O'Neill

v Governors of St Thomas More [1996] 372.)

61. The protection will only apply under section 18 EA 2010 if an employer or the person who treats a woman unfavourably knew or ought to have known or is to be treated as having known that the Claimant was pregnant at the time of the unfavourable treatment.

62. The remedy for discrimination is governed by section 124 of the Equality Act 2010. Where compensation for discrimination is awarded, it is on the basis that, the Claimant must be put into the financial position she would have been in but for the unlawful conduct.

63. Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102 established the bands for injury to feelings awards, which have been progressively updated. In Vento, the Court of Appeal laid down three levels of award: most serious; middle; and lower.

64. The Court of Appeal suggested that the top band should apply to the most serious cases, such as where there had been a lengthy campaign of discriminatory harassment on the prohibited ground; that the middle band should be used for serious cases which do not merit an award in the highest band; and the lower band would be appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.

65. When making an injury to feelings award, the Tribunal must keep in mind that the intention is to compensate, not punish. It must, therefore, be conscious of avoiding conflating different types of awards so as to prevent double recovery. The Tribunal should not allow its award to be inflated by any feeling of indignation or outrage towards the Respondent.

66. Awards should not be set too low as that would diminish respect for the policy of the anti-discrimination legislation.

Submissions

67. The Respondent provided written submissions which covered points in respect of the evidence heard. The Claimant initially stated that she did not have anything else to give. But in summary said that she tried to identify the males who had lower scores, but she was shut down. There was a lot of financial pressures. There is a very small group of people who have the power to make decisions. Her conversations with Ricky Bailey led her to believe that there were people who had lower scores than her who got a secondment before her. It didn't make sense to her as someone doing alternative duties. The Claimant said she didn't understand why he would have been happy to offer others the role before her. When offered permanency, it is not always at the place of your training. Hainault is a popular depot because of the location. The maternity package of 6 months full pay and hybrid working for pregnancy is a generous package. There is nothing to prevent a swap being temporary. She had to make a choice between her baby and career development as a response to issue of being

treated more favourably. She had financial pressure.

Analysis and Conclusions

Did Stacey McManus on 6.01.2022 tell the Claimant that she would not qualify as a Trains Manager in the time that was left before the start of her maternity leave – Issue 2.1.1.

68. We concluded that there was no unfavourable treatment in the protected period in respect of this issue as the Claimant accepted that Ms McManus did not tell the Claimant on 6 January 2022 that she would not qualify as a Trains Manager in the time that was left before the start of her maternity leave.

At the beginning of January 2022 Stacey McManus made unusual enquiries outside of the usual practice of London Underground to enquire whether the Claimant was fit for the role – Issue 2.1.2.

69. We have found that Ms McManus' enquiries made at the beginning of January 2022 were not outside of the usual practice of London Underground. We do not conclude that Ms McManus' enquires whether the Claimant was fit for the role was unfavourable treatment. We considered whether we could infer from the fact that Ms McManus knew the Claimant was pregnant and so would have known that this could be the reason why the Claimant was on alternative duties as discriminating against the Claimant on the grounds of her pregnancy by making this enquiry. However, we accepted the non discriminatory reason put forward by the Respondent that Ms McManus wanted to know more about the Claimant coupled with the fact that the Claimant did not point to anything unfavourable resulting from these enquires by Ms McManus.

In January 2022, the Respondent failed to confirm the start date for the Claimant's secondment as a Trains Manager at the West Ruislip depot – Issue 2.1.3.

70. We conclude that the failure to confirm in January 2022 the start date for the Claimant's secondment as a Trains Manager at the West Ruislip depot was unfavourable treatment which took place during the protected period. However, we do not conclude that this unfavourable treatment took place because of the Claimant's pregnancy. The Respondent was unable to confirm that start date because the Trains Manager who the Claimant was covering in the secondment could not be released into his new role at that time due to the lack of a trainer so remained in the Trains Manager role.

In or around January 2022, not allowing the Claimant to swap the location of her secondment at West Ruislip with another trainee based at Earl's Court – Issue 2.1.4.

71. We conclude that it was not unfavourable treatment not allowing the Claimant to swap the location of her secondment at West Ruislip with another trainee based at Earl's Court in or around January 2022. The Claimant wanted the swap on the basis of her pregnancy because she would be expected to travel long distances which was more difficult for her whilst pregnant. However, the Claimant agreed to the West Ruislip location when she accepted the secondment, and she did not have to accept it. There was no risk assessment done to ascertain whether a change of location of the secondment was necessary or there were other ways to deal with the Claimant's long distance travel and we accepted that a risk assessment was not necessary until the Claimant had actually moved to the West Ruislip depot. It was just too early to tell. The Claimant suffered no detriment as she had not moved to the West Ruislip depot. The Respondent's refusal to allow the Claimant to swap was not because of the Claimant's pregnancy, it was the Respondent's policy which the Claimant knew and accepted. The Claimant relied upon Employee C as a male comparator who she says was allowed to move his secondment location. We found that this was not a swap and so the circumstances were not comparable. Notwithstanding, we conclude that no inferences of discrimination can be drawn as the reason why Employee C was allowed to move was because his move aligned with the Respondent's business needs. Unfortunately, this was not the case for the Claimant.

The Claimant's requests to undertake training were ignored which led to delay and that meant that the courses became unavailable prior to the commencement of the Claimant's maternity leave– Issue 2.1.5.

72. We have found that the Claimant's requests to undertake training were not ignored and there was no delay. We considered the allegation made by the Claimant in evidence that she was not booked on 28 March 2022 course because Mr Rahman who knew about her pregnancy did not want to book her on the course because of her pregnancy. We have found that the Claimant accepted that the course was not booked due to a series of unfortunate circumstances. In those circumstances there was no unfavourable treatment of the Claimant in the protected period or at all.

The Respondent refused to allow the Claimant to start at the depot while the person who she was replacing was still there thus causing a delay in qualification prior to the commencement of the Claimant's maternity leave. – Issue 2.1.6.

73. We found that the Claimant did not ask to overlap with Mr Slade as the Claimant admitted this in evidence. We therefore conclude that the Claimant was not subjected to less favourable treatment as there was no refusal to allow the Claimant to start at the depot while the person who she was replacing was still there.

    The Respondent withdrew the offer of a secondment at the West Ruislip depot on 20 January 2022 – Issue 2.1.7.

74. We conclude that the withdrawal of the offer of a secondment at the West Ruislip depot on 20 January 2022 did amount to unfavourable treatment in the protected period. However, there were no primary facts from which we could infer there was any unlawful discrimination by the Respondent. The offer was withdrawn because Mr Slade could not start his secondment until the end of March 2022 which was approximately a month before the Claimant went on maternity leave. The Claimant would not have been able to finish her secondment before going on maternity leave in those circumstances as we found that the Claimant did not believe she could have completed her training in approximately 9 weeks. The withdrawal had nothing to do with the Claimant going on maternity leave and was not in any way related to her pregnancy.

    In or around January 2022 the Respondent failed to conduct a pregnancy risk assessment – Issue 2.1.8.

75. We conclude it was not unfavourable treatment for the Respondent to not have conducted a risk assessment in January 2022. We have found that there was no requirement for there to be an actual monthly risk assessment as the Claimant had asserted. We accepted that the September risk assessment needed to be reviewed once the Claimant's situation changed. Although the Claimant did get bigger because of her pregnancy this change did not affect the Claimant's situation and the Claimant accepted that. We accepted that Ms Alexander was in regular contact with the Claimant and there were no changes. In those circumstances, we do not conclude that the reason why the Claimant did not have a monthly review of her risk assessment was because of her pregnancy. We accepted it was not necessary for Ms McManus to carry out a risk assessment until the Claimant attended work at West Ruislip depot. We concluded the Respondent's reason for not carry out a formal monthly review or a risk assessment in January 2022 was it was not necessary because the Claimant's situation did not change and was not because of the Claimant's pregnancy.

    Despite the Claimant scoring highly in the recruitment campaign she was offered a place as a Trains Manager in November 2021 whereas other male colleagues who scored lower in the recruitment campaign were offered positions earlier – Issue 2.1.9.

76. The Respondent said that this complaint was out of time as the discrimination took place before November 2021. We have found that male Train Operators scoring lower than the Claimant were offered secondments before the Claimant following the February 2021 recruitment campaign but before November 2021. However, we have found the first the Claimant knew about this issue was on 24 January 2022.

77. We considered section 123 EA 2010 to determine whether the Claimant's claim was in time and that if it was not in time whether to extend time? We have concluded that the Claimant's claim is out of time, however we considered the principles set out in Keeble and we exercise our discretion to extend time because the Claimant did not have the information which would have enabled her to determine whether she had been discriminated against until 24 January 2022. The Claimant brought her claim on 15 April 2022 so in those circumstances within the statutory time limit of 3 months of learning of the alleged discrimination. We consider therefore it is just and equitable to extend time to have jurisdiction to consider the Claimant's complaint under issue 2.1.9.

78. We found that it was the case that male Train Operators were offered secondment placements who scored lower than the Claimant. We considered whether we could infer from that finding of fact the Respondent discriminated against the Claimant on the grounds of her pregnancy. We conclude that we cannot. Whilst we conclude that the Claimant was treated less favourably in these circumstances, the reason why the male Train Operator candidates were offered the secondment placement ahead of the Claimant who scored higher than them was because there was a crisis of lack of recruitment over a long period of time meant there were not enough Trains Managers. As a result job offers were not based directly on scores, but applicants had to engage with booking a date for interviews and tests they were offered placements almost immediately after interview. This reason was a non discriminatory reason and so there was no discrimination on the grounds of pregnancy.

79. In conclusion, the Claimant's claim fails and is dismissed.

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Employment Judge Young

Date 2 October 2023_____

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
16 October 2023
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FOR EMPLOYMENT TRIBUNALS