Case Number: 2300219/2019
2305504/2019
2304788/2020
2308389/2020

EMPLOYMENT TRIBUNALS

Claimant: **Mr J White**

Respondent: **(1) Transport for London**

(2) Mr J Burdon

(3) Mr K Sarr

Heard at: **London South Employment Tribunal**

On: 13, 14, 17,18,19, 24, 25 October 2022
28, 29, 30 November, 1, 2 December 2022
8, 9 and 10 March 2023 (In Chambers)
24 March 2023 (In Chambers)

Before: EJ Webster
Ms J Jerram
Mr K Murphy

Appearances
For the claimant: In person
For the respondents: Ms I. Ferber (Counsel)

RESERVED JUDGMENT

1. The Claimant's claims for direct disability discrimination are not upheld.
2. The Claimant's claims for discrimination arising out of disability (s15 Equality Act 2010) are not upheld save for the claim that his dismissal occurred because of something arising from his disability which is upheld.
3. The Claimant's claims for failure to make reasonable adjustments are not upheld save for the failure to adjust the policy that RPIs must be deployed in hotspots. That claim is upheld.
4. The Claimant's claims for disability related harassment are not upheld.
5. The Claimant's claims for victimisation are not upheld.
6. The Claimant's claim for unfair dismissal is upheld.
7. The Claimant's claim for wrongful dismissal is partially upheld.

REASONS

The Hearing

1. A preliminary hearing with a different employment judge shortly before the first hearing had agreed some adjustments for the claimant. Frequent breaks were taken and the claimant was also reassured at the beginning of every section, that he could take a break at any time should he wish to do so.

2. The claim was heard by hybrid hearing. The parties and the Tribunal were in person but, other than when they were giving evidence, all the respondent witnesses were absent from the Tribunal room and allowed to watch via CVP link as opposed to in person.

3. The Tribunal allowed the claimant to give evidence from the representative's table.

4. The Tribunal refused the claimant leave to record the proceedings but the respondent provided a note taker (a pupil from Ms Ferber's chambers) who sent copies of her notes to the Claimant at the end of each day and on occasion over the lunch break to assist the claimant with his conduct of the case. For the avoidance of doubt, the Tribunal had no oversight of those notes and did not view them.

5. The claimant made an application to amend his claim on the first day to include claims that he said had come to light on disclosure of some documents in August 2022. The application was partly allowed and partly rejected. Reasons were given on the day but in summary, the amendments that were allowed were, in our view, more detailed information that fell under claims that had already been pleaded but that the claimant wanted to set out as separate incidents. The amendments that were not allowed, brought fresh factual claims

involving new individuals that would have required new witness evidence from witnesses who were not already called and this would have caused the respondent significant prejudice to defend at this late stage of the proceedings. It was not in the interests of either party for the hearing to be postponed at this late date which is what would have needed to happen were that evidence required.

6. There were applications by both parties to add documents to the bundle as the case progressed. The main issue arose when the claimant cross examined a witness stating that an email had been sent when it was apparent that the email had been recalled and the claimant would have been aware of that because of the information he had received via an SAR. Those documents were added to the bundle.

7. Due to judicial and administrative resources, the hearing was split into four sections as per the dates above. Days 12-16 were all in Chambers and the parties did not attend.

8. We had written witness statements for the following:

    a. The Claimant
    b. Ahsen Mir (AM) (claimant's trade union representative)
    c. Reydon Downer (RD) (Claimant's friend and support worker)
    d. John Burdon (JB) (the Second Respondent and the Claimant's line manager)
    e. Khalil Sarr (KS) (The Third Respondent and the Claimant's next line manager and the person who made the decision to dismiss)
    f. Amrit Phlora (AP) (witness for the Respondents)
    g. Anand Nandha (AN) (witness for the Respondents)
    h. Dayo Abifarin (DA) (witness for the Respondents)
    i. Mark Burch (MB) (witness for the Respondents)
    j. Nick Bignall (NB)(witness for the Respondents)
    k. Roger White (RW) (witness for the Respondents)
    l. Sean Conroy (witness for the Respondents and the person who heard the Claimant's appeal against his dismissal)

9. We heard from all of the above witnesses save for Mr Mir who did not attend. The only explanation provided for him not attending was that he had personal matters to attend to. We have therefore attached less weight to his statement though we have read it. Mr Downer was available to give evidence and his witness statement was accepted as evidence in chief but he was not cross examined.

10. KS was permitted to amend his witness statement to deal with the matters arising from the claims that we allowed as amendments to the claims at the outset of the hearing. That was served before the outset of the second group of days we sat for.

11. We had a very large bundle of documents numbering over a thousand pages. We were taken to relatively little of it. Where we were not expressly taken to it, we may not have considered it due to the huge volume of evidence and documents we were provided with.

12. The Tribunal assisted the claimant by asking questions on his behalf if they needed clarification. Ms Ferber assisted by pointing out to the claimant where he may not have put his case to the relevant respondent witnesses particularly in respect of claims where their motivation for certain acts needed to be established. On occasion the Tribunal assisted in asking those questions too.

List of Issues

13. The List of Issues had been set out and agreed by the parties during a preliminary hearing before EJ Beale on 10 February 2022. That list is appended to this Judgment. In that list I have retained the same paragraph numbers as were set out in EJ Beale's orders so as to avoid any confusion as the parties addressed the Tribunal by reference to those numbers during the evidence and in submissions.

14. In addition to these Issues, the Claimant applied to amend his claim at the outset of the hearing. That application was partially allowed and the additional points are set out in bold in the List of Issues. The reference from the Claimant's application to amend are in square brackets for ease of reference. The reasons for our decision were given orally at the time and are not fully recorded here. In summary we agreed to allow those amendments that were, in effect, further particularisation regarding the actions of witnesses already due to attend. We did not allow the amendments which would have required new witness evidence to be adduced. In order to offset any disadvantage to the respondent of the allowed amendments, they were given permission to file an amended witness statement on behalf of KS to deal with the additional matters.

15. We have referred to the Claimant as such and the First Respondent as such. We have referred to all others by their initials including the second and third respondents. Page references are to the bundle.

Facts

16. This was a very complicated claim because of the way in which it had been pleaded by the Claimant. It has meant that it was frequently difficult to understand exactly what the claimant's claims were and to see, colloquially, the wood for the trees.

17. He relied upon numerous incidents across several years as being separate acts of discrimination under several headings. This can be seen from the length of the List of Issues. It can also be seen from the length of the claimant's witness statement which was over 200 pages long and is also reflected in the length of this judgment and the time needed by the Tribunal to deliberate. This unwieldy approach to what was in fact, a relatively simple set of events, has made it very difficult to determine properly and efficiently.

18. All of our findings of fact have been made on balance of probabilities. Where there was a conflict of evidence between the parties, if we have found in favour of one party over the other it is because we preferred their evidence on that issue.

19. As has already been alluded to, this was a case with many interweaving facts. We have only made findings in relation to the facts that assisted us with our decisions regarding the claims brought. Where we do not make reference to a matter that was covered during the hearing that does not mean that we have not considered it, it means that we did not find it relevant to our conclusions.

20. In very brief summary, we consider that the claimant's claims can be broken down into 3 key areas:

(i) Complaints about the respondent's failures to make reasonable adjustments prior to October 2019 and their ongoing impact throughout his employment

(ii) The events associated with the Claimant not being able to return to work following the grievance meeting on 2 July 2019, including attempts at redeployment and his dismissal

(iii) Several 'side' issues regarding conversations or comments alleged to have happened with or about the Claimant and general accusations about the conduct of the respondent and its managers towards the claimant.

21. All three of these areas are related to each other and the Claimant says that the interrelation between them informed the respondents' decisions and subsequent behaviour. The Claimant was employed brought grievances about many of the issues that occurred during his employment and the way in which those grievances were managed and dealt with also forms the basis for some of the Claimant's claims. Where possible we have dealt with matters chronologically but some topics sat outside or in addition to the chronological events and have therefore been dealt with under separate headings.

22. We have a number of overarching observations regarding this case.

23. Firstly, the Claimant has taken, throughout these proceedings, and throughout his employment, a very literal and at times rigid approach to all rules or policies and his interpretation of communications with him. This means that he has often seemed unable to understand nuances within both oral and written communications and has also meant that his interpretation of written policies has been such that he cannot allow any deviation from them without stating that it is a serious breach. He interprets any slight deviation or any interpretation of the policies that is different to his as entirely wrong. That has caused friction with the respondents and his colleagues. It has also led to large amounts of evidence being heard by the Tribunal on matters which were largely irrelevant to the claimant's case.

24. The claimant's approach was not coped with well by many of the claimant's managers and the claimant's colleagues. We find that at the heart of this case was a fundamental inability for the two parties to be able to communicate effectively with each other without the claimant or the respondent managers considering that the other was being obstreperous or aggressive and that has created the majority of the difficulties during the claimant's employment and ultimately led to the existence of these claims.

25. Our second overarching observation concerns the respondent's approach to reasonable adjustments. The respondent's witnesses all confirmed in evidence that the respondent's policy was that when 'Reasonable Adjustments' recommended by OH amended someone's working pattern or responsibilities whilst at work, they could only remain in place for 12 weeks as part of a phased return to work. This is clearly set out by AN during a meeting with the claimant on 2 July 2019 (p643)

> *"The intention of any adjustment is temporary and should be a gradual step to return to full duties within a reasonable timeframe."*
>
> During that 12 week period adjustments such as reduced hours, amended duties or joint working were considered and often put in place for their employees. However, after that point, either the individual was required to go back to their previous work pattern/practice or they would need to submit a flexible working application that permanently amended the hours. We heard no evidence that suggested that other adjustments, such as to the type of work carried out or where it would be carried out, could be continued on a permanent basis if that is what someone's health required. Such a permanent adjustment never seemed to have been considered though people often had adjustments either temporarily extended or repeatedly put in place for each return to work after each period of absence. The Tribunal asked one respondent witness whether, if they bought a piece of equipment for someone as an adjustment, it too would be removed after 12 weeks and

the answer was 'no'. However, the withdrawal of other types of adjustment was the norm even if it was to result in the individual being unable to carry on in their work and resulting in the equivalent of a capability management process possibly leading to dismissal. The Respondents' refusal to consider permanent adjustments to the claimant's working life and the refusal to accept or consider that some of them might need to be permanent was the source of a large amount of friction and misunderstanding with the claimant.

26. The respondent's policy was that if, after the 12 week 'phased return' period the individual could not manage their entire role, they would be subjected to an absence management or capability process.

27. Finally, the claimant has demonstrated a deep distrust of and refusal to constructively engage with the respondent and its managers. That is not uncommon in tribunal proceedings but the extent to which it has influenced this case is notable. The distrust partly arises from the inability for the parties to communicate with each other constructively, but it is not insignificant in causing many of the situations that are now brought before us for determination. His periodic refusals to engage with the Occupational Health ('OH') process, his periodic refusal to share his OH reports or information, his allegations surrounding misuse of his medical information (which were largely unfounded) and his refusal to engage with KS regarding his absence management have all been at the root of the way in which the respondents dealt with him. It was not suggested to us at any point that there were medical reasons that caused any of these refusals. The claimant asserts that it was his anxiety that prevented him from attending the meeting with KS in March 2020 but we have no medical evidence to support that assertion. Nor does it explain the previous and subsequent tone and substance of his engagement with the respondents over several years. In contrast, at the point that he was placed in redeployment, the claimant became able to and does engage wholly in the process. Other than being at fear of losing his employment, we have nothing to suggest that his health changed in between. This suggests that the refusal to cooperate with the respondent prior to this was deliberate.

<u>Claimant's Role</u>

28. The claimant worked as an Revenue Protection Inspector ('RPI'). The role entailed checking that passengers had paid their fares on London buses. If the passenger had not paid the fare then the RPI would issue a ticket or a fine. It was common ground between the parties that this was a confrontational role that often resulted in aggressive and sometimes violent altercations with members of the public and on occasion other members of TFL staff such as bus drivers. Illustrating this was the fact that RPIs were issued with 'spit kits' as standard because they were spat upon so frequently.

29. The claimant was employed from 21 September 2009 until 2 October 2020. He was based in the south west and worked from Monday to Friday 0600 to 1330 hours. He worked on fixed morning shifts following a flexible working request – this was made to allow for his caring responsibilities. He had a clean disciplinary record and was nominated for various awards. He was a part of the training team. During evidence the managers at the respondent did not doubt his ability to do his job in that they said he knew all of the policies and procedures well. They did question his ability to work with colleagues and members of the public after he became unwell. We deal with that further below.

30. We do not, on balance, think that the Claimant attracted any more hostility or was involved in any more attacks than other RPIs. Perhaps he reported them more but we had little evidence on this point and conclude that on balance the claimant was not involved in more hostile or aggressive incidents than others.

31. There were various terms and working practises alluded to in the tribunal hearing. The RPIs were deployed across London. Generally their regions denoted where they started and whose management they fell under. RPIs were allowed to start work from close to home – they all, generally speaking, started work from where they wanted and that was usually close to home. They could arrange to work with another RPI if they wanted. We heard from the respondent witnesses that people would travel (whilst also working) from home and meet a colleague somewhere and then dual check together for as long as it suited them. There were no rules around dual or group checking that we were taken to. Some RPIs chose to work alone and that was also usually allowed.

32. On occasion, RPIs would join up with the police or transport police and meet at a particular location and carry out a checking operation that involved coordination. On those occasions RPIs would be required to start work at a certain time from a certain location. We did not hear how frequent those operations were but they did not sound unusual.

33. Another phrase we heard was ‘hotspot’. This denoted an area of London where there were particularly high incidents of fare evasion or difficulties with aggressive passengers. There were also clearly certain times of the day where there were more passengers and therefore more chance of fare evasion. It was agreed that there were hotspots but we were not provided with any facts or figures in terms of how much worse these areas were than others. The claimant conceded in cross examination that aggressive episodes and fare evasion could take place anywhere across the network.

34. A further phrase referenced was ‘Direct Travel’. This was a practice whereby RPIs would be paid for travelling from one destination to another without having to check along the way. It is relevant to the issues surrounding whether the

claimant ought to have been able to travel to meet colleagues without it being part of his working time.

35. The claimant's witness statement states that aggression and assaults were deemed to be part of the job. We agree. It was clear that all RPIs experienced assaults and aggression on a frequent basis and that whilst measures were put in place regarding what to do when these things happened, there was little done to prevent them at the relevant time.

Claimant's Health

36. The claimant was diagnosed with PTSD in or around 2017. The diagnosis was PTSD with depressive episodes. The claimant states that he also has a separate diagnosis of depression.

37. We were taken to relatively little of the medical evidence during the Tribunal hearing. We have gleaned that the Claimant started to experience symptoms for which he required counselling in or around 2014 but it does not seem to be in dispute that he was formally diagnosed with PTSD in 2017 and started taking Citalopram at that point.

38. We consider that alongside that diagnosis was a separate diagnosis of depression. Although the Respondent suggested that he had PTSD with depressive symptoms we find, on balance that he had two separate conditions albeit that they are linked.

39. Throughout the information regarding this aspect of the claimant's health it is clear that the ascribed cause of the PTSD was incidents at work. It is clear that he states throughout to all the doctors involved, that he considers the cause to be the culmination of the attacks at work. There appears to be an incident in 2017 involving the police that marks a significant deterioration of his condition.

Claimant's return to work and 'adjustments'

40. The claimant was off sick from November 2017 to January 2018. During this period his fitness for work certificates (p 457 (1 December 2017) and 459 (27.12.17)) both cite PTS. There was no OH report requested by the respondent at this stage.

41. On his return to work he attended a case conference on 12 January 2018 with his then staff manager Mark Little. It was agreed at that meeting that the claimant could work the first and last hour on his own but would carry out dual

checking for the remainder of his shift. This was discussed and described as a reasonable adjustment. The claimant believed it to be a permanent reasonable adjustment. The respondent viewed it as a temporary measure aimed at getting the claimant back to work.

42. The claimant says that nothing was done to assist him with finding colleagues to dual work with. We accept that this is correct. JB accepted as much in evidence. RW was a little more equivocal saying that he made some calls on certain days to find out who was on shift and who would or could work with the claimant. However he too agreed that he It was the respondent's view that they could not require other RPIs to work with someone else for any or all of someone's shift. Their justification for this was manyfold in relation to the claimant:

(i) They could not ask someone to travel out of their way to meet a colleague. The RPI was a largely self-managing, solo role and any decision to deviate from that was up to the individual RPI. Dual working could not be imposed.

(ii) It was easier for the RPIs to agree their work between them

(iii) The claimant's colleagues did not all want to work with him as they found him difficult to work with

(iv) Those that did agree to work with him did not want to always have to work with him

43. We accept the claimant's assertion then that in fact, no adjustments were actually made to his role at this time because it was a known and allowed practice for RPIs to dual check if they wanted to. Therefore, the fact that the respondent 'allowed' the claimant to dual check between the first and last hours of his shift was not, in fact, an adjustment because he would have been allowed to do so without any agreement from his managers. An adjustment would have been made if the managers ensured that there was always someone available to dual check with. That did not happen – the responsibility for organising that fell to the claimant. We accept that he struggled to find someone to work with at times. This was born out by the evidence that we were shown of colleagues asking not to work with him and by various managers' evidence to us that they found it difficult to find people willing to work with the claimant. Therefore what has been described as an adjustment by the respondent at this time was not an adjustment because no assistance was provided by the respondent to ensure dual checking for the claimant. This was the case throughout the remainder of the claimant's employment.

<u>The Bag incident</u>

44. In April or May 2018, the claimant's work bag broke. It was an important part of his equipment. He contacted JB to tell him that he was going to get another bag

which JB approved. Later however JB emailed the claimant to say that the length of time he took to do so was excessive.

45. The claimant brought a grievance alleging victimisation as he had, by then, brought a claim in the employment tribunal and felt that this was what prompted JB's email.

46. In the outcome letter Ms Sanders, who dealt with the claimant's grievance or complaint, explains that JB felt that the claimant had been unreasonable in the length of time it took him to buy one and had not understood that the claimant was going to wait until 10am when the shops opened. The claimant asserted that JB had known about this and agreed it. Ms Sanders found that on balance the claimant had probably told JB of this and that JB should not have sent the email. She found that in circumstances of this kind, where there was confusion, it was nevertheless reasonable for a manager to try to ascertain where an employee was or how they had spent their time and she concluded that JB's behaviour was not as a result of the tribunal claim but because he had been dealing with a different, stressful incident elsewhere and had not remembered everything he had discussed with the claimant. She concluded that he had not taken into account that the claimant had told him that he would wait until the shops opened at 10am. shops had not yet opened.

47. On balance, we agree with the Ms Sanders' conclusions as although JB was wrong, it is not wrong for a manager to try to ascertain why an employee was not working for over 3 hours where he had understood something different during their conversation. As we have said before, this claim has arisen from a series of fundamental misinterpretations during conversations and communications between the key protagonists in this case. This is one of them. The claimant has assigned discrimination and ulterior motives to that misunderstanding. We do not as we were provided with no factual basis on which to do so.

<u>Return to work – May 2018</u>

48. On 10 May 2018 the claimant attended a meeting with his supervisor RW to discuss the reasonable adjustments. RW brought JB in as well. They wanted to discuss the removal of the phased return to work and the adjustments and that they didn't understand the reasons for him not being able to lone work. We accept that they also asked Mr Little to join them in the meeting as the claimant was asserting that the adjustments were permanent under the Equality Act and they believed them to be part of a temporary 12 week phased return that had not been revisited.

49. The dates concerning what meetings occurred when and which led to OH referrals is a little unclear at this point. The chronology provided to the Tribunal

was incomplete. The claimant was referred to OH and he attended on 2 August 2018 (p951). He refused to allow JB access to that report because he had concerns about data breaches. We were not provided with much information about the alleged data breach from HR to Mark Little in 2017 save that it was the claimant's justification for not releasing this report to Mr Burdon. We were provided with no real facts about this incident save that it troubled the claimant at the time and since. The OH report recommended the that the non-lone working adjustment remained in place.

50.. It was JB's opinion that the original adjustments to lone working were temporary and that they could only ever be in place for 12 weeks. The claimant was invited to a review meeting in June 2018. JB states that his decision not to allow the claimant to continue his practice of only lone working for the first and last hours of his shift was because he was relatively short staffed as a different team had been formed recently with several RPIs moving into that team - and he was therefore not able to sustain the claimant having to work with someone else 5 hours per day. He could not afford to lose the resource of the claimant if he did not have anyone to work with.

51. In August 2018 they had a further review meeting (496-499). As with all the other meetings with JB the claimant behaved in a defensive and somewhat aggressive way. He was of the view (rightly or wrongly) that JB was attempting to withdraw his adjustments and as a result made allegations of unlawful treatment rather than seeking to engage in a collaborative conversation.

52. JB was, at the time, in a position where he did not have access to up to date OH advice as the claimant continued to refuse access to it. It was the claimant's right to do this but he knew that this meant that JB's decision would be made without the guidance or support from OH as a result. It is not clear why the claimant refused to allow access to his report at this time given that it clearly confirmed what he wanted namely that non lone working ought to be able to continue.

<u>22 October 2018 incident</u>

53. On 22 October 2018 the claimant was not able to find anyone to work with. He contacted his supervisor Roger White and asked him what he should do. We accept Roger White's evidence that he attempted to find someone for the claimant to work with but was not able to. The person the claimant normally worked with said that it jeapordised his health and safety not to have a break from the claimant. He asked RW to keep that from the claimant. This placed RW in a difficult position as he could not find anyone to work with the claimant either.

54. We do not accept that Roger White told the claimant he could go home. We accept that Roger White was not sure what to do to ensure that the claimant could carry out his responsibilities on shift. We do not accept that RW agreed that the claimant could go home particularly when it was not within his authority to do so. We accept he may well have asked what the claimant wanted him to tell Mr Burdon who was in charge – but not that he told the claimant he could go home.

55. The claimant did go home and once there appeared to ignore all contact from the respondents. He has provided no plausible explanation for that. He just said that once home he would switch off his work devices. We find that the claimant deliberately turned off his phone in order to avoid being called back to work. There was no other reason for him to avoid calls from his colleagues at this time given that he was meant to be on shift.

56. It was subsequently legitimate and reasonable for Mr Burdon to investigate why he had gone home and why he remained uncontactable for the duration of his remaining shift. Mr Burdon may well have understood that Mr Roger White had not been able to find anyone to dual work with the claimant – but it was reasonable to question why the claimant then simply went home without authorisation. In any event it is also clear that once he had spoken to the claimant about this incident Mr Burdon did not take any disciplinary action against him. Trying to obtain an explanation for an employee's actions was reasonable in these circumstances.

57. The claimant was not accompanied at the meeting. As this was an investigation only meeting we do not consider that it was unreasonable that it occurred without notice and without representation. We were provided with no evidence, medical or otherwise, that suggested that the claimant ought to be given notice of such meetings or to be accompanied at such meetings as a reasonable adjustment for his disabilities. This was a fact finding meeting following which no disciplinary action was taken.

58. During the meeting the claimant was asked questions about why he left work. The claimant, based on the hearing notes that we saw, became agitated and felt that he is being put in a difficult quasi-disciplinary position and being bullied by JB and DA. We see no evidence of that in the notes. Conversely we see the claimant becoming anxious or stressed (in a non-medical sense) and responding negatively to questions. We accept that JB was, quite reasonably, trying to find out why the claimant had left work that day and then not been contactable thereafter. Removing himself from a position of difficulty ie. lone working is one thing, however remaining uncontactable during working hours so that you provide no explanation for your behaviour to your managers is another.

59. As a result of this meeting no further action was taken against the Claimant with JB accepting his explanation though becoming increasingly worried about the sustainability of the dual working 'adjustment'.

Reasonable adjustments – next stage

60. The outcome letter (p 527) following the review meeting in August 2018 (see para above) does not appear to have been sent to the claimant until 25 October 2019. JB was unable to explain this delay. We believe that it had been forgotten by JB and only became an issue again when the 22 October 2018 incident occurred and they realised that the claimant was still only one working for an hour each end of his shift.

61. That letter sets out that the claimant was no longer going to be able to insist upon dual working for the 5 middle hours of his shift. It is not in dispute that JB considered that the situation was not workable because it meant staffing issues and it meant that the claimant may insist upon going home again if he could not find anyone to work with. The incident on 22 October informed that decision as did the fact that he did not understand why, if the claimant could work for 2 hours alone, he could not work for longer than that alone on some occasions if a colleague could not be found.

62. JB has subsequently reviewed the OH advice that he did not have the opportunity to review at the time. His witness statement says that he would have tried to retain the non lone working situation for longer had he known about the OH advice. However, we refer above to the fact that the respondents never, in fact, had changed anything apart, perhaps, from how they would view the claimant if he stopped working or left work were he not to be able to find a colleague to dual work with during the middle 5 hours. It is difficult to see therefore what JB would have done differently in the circumstances as he did very little in the first place.

63. We would note further, however, that the claimant made it clear in various meetings that he would only work with certain colleagues. It was not just his colleagues that would not work with him, he also had people he refused to work with. This reduced his pool of people that he could work with to avoid him not being able to work at all. The claimant provided no evidence that his refusal to work with certain other individuals was related to his health. He said that he wanted to ensure that he was working in a safe environment and that, in essence, he did not trust some of his colleagues. We have been provided with no medical evidence to suggest that the claimant's behaviour in this regard was related to his health or why he could not trust some of his colleagues. He seems to have taken a dislike to some people and they to him. Poor relationships with

colleagues is not something that the claimant has suggested arises out of his disabilities.

64. As a result of receiving this decision about the withdrawal of non-lone working, the claimant raised a grievance about the matter.

Grievances

65. The claimant brought a grievance on 11 November 2018 (560). This is the first protected act he relies upon for the purposes of his victimisation claim. The grievance is about various matters including the conduct of the 22 October 2018 meeting and the decision to remove the reasonable adjustments such as they were, of dual checking.

66. He received an informal outcome from Emma Sanders (p566, 26 November 2018) which concluded that there was no case to answer. It is accepted that she did this without meeting the claimant or the manager involved. We did not hear evidence from her so it is difficult to understand how or why this approach was taken. However we were provided with no evidence to suggest that she was motivated to take an informal approach because of the content of this grievance. Her outcome is detailed and does not suggest that she is somehow taking him less seriously because she has not met with him or because of his health conditions.

67. JB's statement then says that he had become aware that, despite his letter requiring the claimant to work without any adjustments that was delivered in October, and the outcome of the grievance being sent, the claimant was still refusing to lone work for more than 2 hours per day.

68. It is not clear why DA takes over this issue from JB but his involvement prompts the next grievance dated 28 November 2018 which is about DA bullying the claimant regarding the grievance outcome. We had relatively little evidence from DA about this point as it is not covered in his witness statement. Nevertheless his response during cross examination was that he had been asked to speak to the claimant to see if the matter could be resolved as he was a mediator.

69. The Claimant considered this inappropriate as he felt he had an outstanding formal grievance to come and would not speak to DA as a result. We think there was nothing inappropriate in DA attempting the conversation. We understand the Claimant's belief however that the formal grievance had not been concluded as he had not been told that they were following an informal process at this point. Further the claimant objected because he did not believe that DA ought to have a copy of JB's letter as it discussed his disability and he had not given

consent for that to be released. We accept that HR gave DA the letter because he was a mediator and they wanted to see if the matter could be resolved. Nevertheless we also understand the claimant's concerns about the letter being passed to DA without the claimant being told why.

70. The 28 November 2018 grievance was sent to Tricia Wright (p578-579) who acknowledges the grievance and then sent on to Emma Sanders. Darren Dubois was asked to consider this grievance.

71. It was reasonable for DA to suggest a meeting with the claimant at this time. He wanted to speak to an employee who had now brought two grievances in quick succession, and who was not carrying out his role in the way that the respondent felt was reasonable at that time. His relationship with his line manager was difficult and an attempt to understand what was leading to the grievances and the difficult relationship is a plausible explanation by the respondents.

72. We find the first respondent and DA reasonably believed that asking the claimant to have a meeting or discussion was appropriate and the fact that the claimant then refused to have a normal discussion with DA was potentially a refusal to comply with a reasonable management request particularly in circumstances where the claimant was not working in the way that the first and second respondent had asked him to a this point. That they wanted to challenge the claimant's refusal to attend a meeting with management was prompted not by the claimant's grievances but by his actions surrounding them and refusing to meet with managers.

73. Darren Dubois, another manager within the respondent then called the claimant to a meeting to discuss the refusal to meet with DA and his grievance. The claimant attended that meeting and found it difficult. We did not hear from DD so it is difficult to ascertain exactly what happened at the meeting. Nevertheless, the Claimant was then off sick for a month between 6 December and 31 January 2019. The reason for the absence on the sick certificate was stress at work and then stress at work, back pain/shoulder pain/wrist pain.

74. The Claimant returned to work on 1 February 2019. His sickness review meeting (11 February) was with JB and his union representative was in attendance. JB agreed to the Claimant having a phased return to work but stipulated that pending the OH referral the claimant could not lone work at all. The Claimant was not happy about that as it entailed travelling either side of his shift to meet a colleague to work with. This is where the claimant says he ought to have been allowed to do Direct travel. JB refused.

75. The claimant highlighted that it was difficult for him to find someone to work with. That is clearly born out by the respondents' evidence that several members of the claimant's team did not like working with him. JB even said in evidence that managing the claimant was part of the reason he chose to leave the respondent. The managers found it difficult to find someone for the claimant to work with and use that fact before the Tribunal as justification for wanting to withdraw the lone working adjustment; it therefore is curious that they made it an absolute condition for him to return to work at this point in time. It is also curious to us that the claimant finds this step so objectionable when he has been arguing for dual checking to reduce his risk levels. We found it difficult to square the fact that the claimant wanted lone working as much as possible – but only if it absolutely suited him in every way i.e. that he did not need to travel unpaid for a period of time to meeting people.

76. Nevertheless, we consider that JB made this decision in good faith following comments from the claimant and his union representative regarding the possible triggers to his PTSD at this point.

77. Nevertheless, there were then no steps taken to support the claimant in dual checking arrangements. The claimant suggests two colleagues that he would work with but was told that this was too few due to possible availability issues. The claimant also states that there are colleagues he definitely will not work with because he does not consider them safe to work with, thus limiting the potential pool. His refusal to work with some has not been explained to us other than the references during the meeting that he did not consider them safe and this could trigger his anxiety - but we have no medical evidence to suggest that the claimant's dislike or unwillingness to work with these people was justified or genuinely due to his safety. None of the medical evidence or OH reports say that the claimant ought to be allowed to choose who he could and could not work with.

78. Conversely, we see no evidence that the respondent took steps to see if either of the individuals suggested were spoken to or their availability checked. Further we see no evidence that they considered whether these two colleagues could be used as and when their shifts coincided but required alternatives to be used by the claimant when they were not. In short, no possibilities for assisting the claimant in organising dual checking were explored by the respondent.

79. During the meeting the claimant asked JB if he thought that PTSD was a disability and JB said that he did not know as he was not a doctor. We understand that the claimant must have felt this was very frustrating given that he had an OH report saying that it was likely he was. Nevertheless, we also accept that JB is not medically or legally trained and therefore his comment was

correct. Further it is correct to say that JB had not seen an OH report that confirmed the claimant was disabled at that time.

80. The Claimant was referred to OH at this stage and agreed to attend two meetings. The OH reports are dated 14 and 21 February (615 and 619) recommends a mixture of dual and single checking, avoiding hotspots and 3.5 days per week working. It does not specify or comment on whether the claimant is disabled for the purposes of the Equality Act but it clearly recommends what are referred to as Adjustments.

81. Following this the claimant continued working without any of the suggested adjustments being made. The Respondent states that they did facilitate the dual working but in reality they did nothing to support it as is already discussed above.

82. The respondent did not allow the Claimant to avoid hotspots because they said it was not commercially viable. They did allow the claimant to work for only 3.5 days per week but they refused to pay him a full time wage for that work.

83. The respondent's justification for saying that he needed to continue working in hotspots was commercial. We accept that this was the genuine reason they decided not to allow him that adjustment. The respondents felt that the purpose of the RPI was to help them tackle fare evasion in the difficult hotspots and that solely deploying someone in the quiet routes would not be them fulfilling their obligations. Whether that was proportionate is something we consider below.

84. The respondent said that the Claimant could work the reduced hours of 3.5 days per week but that they would reduce his pay having already paid him in full during his phased return of 4 weeks when he had also worked reduced hours. The claimant considers that this was not reasonable and they ought to have continued paying him in full. As a result he did not reduce his hours.

85. The claimant also asked to be allowed to do customer service role if he was unable to find someone to work with. The respondent refused that on the basis that the was not sufficient work to do of this kind and because they needed him to fulfil his obligations as an RPI as opposed to carrying out different work.

86. These decisions were conveyed to the claimant in a meeting on 18 March 2019. The letter summarising the decision is at pages 627-629.

87. The next grievance dated 22 March 2019 of which we did not have a copy or any evidence so have made no findings in that regard. We think that this is dealt with by Anand Nanda at the July 2019 hearing.

88. The Claimant was then off from May-June 2019 due to various different types of leave including parental leave and annual leave. There was no explanation from the respondent as to why the consideration of the Claimant's 22 March grievance was delayed until 2 July. Whilst the Claimant was away from May-June, there was no reason given for it not to be heard in March or April.

Meeting with Anand Nandha 2 July 2019

89. The Claimant attended the meeting on 2 July 2019 with his union representative and AN. The Claimant left this meeting abruptly. He says that this was because he found it too stressful and he considered that AN was biased and displaying microaggressions against him.

90. AN tried to go after the claimant and he and the union representative waited a while thinking the claimant might return but he did not. We accept that the union representative told AN that the reason for the Claimant leaving the room in the way that he did was the Claimant's health and nothing that AN had done or said. It is not clear if the Claimant went back to work after this. He did have some of his shift to complete. He had been working without incident before the meeting. Nevertheless, he was then signed off sick and his fit note expired on 15 August 2019.

91. In the meantime, on the day of the meeting, AN made the decision to stand the Claimant down whilst they obtained an OH report. Unfortunately, the Claimant did not find this out until 14 August when he was resent the forms. The decision to stand him down was sent to him via email and post. He was not at work so did not check his work emails. However it is not clear why he did not receive the postal version. We accept that AN took reasonable steps to communicate his decision with the claimant.

92. We accept AN's evidence that he took the steps to stand the claimant down because he was concerned about the claimant's welfare and how he would deal with difficult customers given that he had been unable to answer straightforward questions about his grievance at a meeting with a manager. We have taken into account that the claimant had been at work for a reasonable period of time before coming to the meeting and had been working without any reasonable adjustments in place. Nevertheless it is clear that his behaviour during this meeting appeared to suggest that he would not able to deal with confrontation with the public when he was responding so negatively to questions about his own grievance. AN's letter states as follows: (p646).

> Having listened to the information that you had provided up to the point that you had left, and noted the disproportionate and at times aggressive response to the reasonable questions that I had presented to you, I am concerned as to how your condition may affect the way you deal with difficult passengers during the course of your duties as a Revenue Protection Inspector and your response to challenging situations. I note the length of time that you have stated that you have had this issue and that there appears to be no improvement.
>
> Having carefully considered the situation, I have genuine concern about your health and wellbeing and your potential interactions with difficult passengers that you may come into contact with and the risks that this could create. As your employer, we owe a duty of care to take reasonable steps to assess and avoid potential risks to your health and safety. As such I have made the decision to stand you down from your duties with immediate effect from today the 2nd July 2019 whilst we undertake a further occupational health assessment.

93. In circumstances where the claimant had a known condition that meant he could respond badly to confrontation; where he had displayed that behaviour in a meeting with a manager and then abruptly left the meeting without any explanation; was not contactable immediately afterwards and his union representative attributed the behaviour to his condition; we find that it was reasonable for AN to want to seek OH advice and support before being sure that the claimant could return to work.

94. The claimant alleges that AN displayed micro aggressions towards him during this meeting. Whilst the Tribunal is familiar with the term micro aggressions and understands it in theory; it is not clear what the Claimant means by the term in this context or what he suggests AN specifically did that amounted to micro aggressions. Apart from asking questions about the claimant's situation and asking him how his managers knew about his condition and its implications, AN did not speak much at all. For most of the meeting he listened to the claimant. We find that his questions sought clarity on matters and were not aggressive in any sense. The notes demonstrate that AN was trying to ascertain the history of not just the claimant's relationships with colleagues but also who knew what and when about his condition and its effects. That is a reasonable way to conduct an investigation. The claimant has sought to cast aspersions on AN's character due to matters that are entirely irrelevant to the issues at hand regarding his private life. We do not accept that this is relevant when we have notes of the meeting and consider that the claimant's attempts to use this information was disingenuous and undermined his credibility as opposed to the credibility of AN. We also accept that AN was told by the claimant's union representative that he had not done anything wrong in the meeting and that the claimant's behaviour was caused by his PTSD, not by anything AN had done.

95. We accept that the claimant was not aware that he had been stood down until shortly before he was due to return to work as his fit note had expired. It is not clear why the claimant did not see the letter as it was posted to his home address. Nevertheless we accept, on balance, that he did not know he had been stood down and the respondent assumed that he did know. This led to them speaking/emailing at cross purposes for a considerable period of time. We accept the claimant's assertions that the respondent had several opportunities to clarify the situation that he remained stood down until he went to see OH. However it is also clear this was not entirely relevant because the claimant was off sick for much of the period and so it was not until his return to work date loomed that it came to a head. Nevertheless there were several opportunities where the respondent managers ought to have realised that the claimant was intending to return to work on 15 August and therefore unaware of the stand down orders, yet did nothing to clarify the situation.

96. It was an error on the part of the respondent not to reply to the claimant's emails where he indicated that he was returning to work on 15 August when they knew that in fact he was 'stood down' and even if his fit note expired, they did not want him to return to work until he had seen OH. The fact that they did not reply and there is no evidence of them replying suggests an oversight at best by the respondent and carelessness at worst.

<u>20 September 2019 OH report and attempted return to work</u>

97. The Claimant was subsequently referred to OH (p684) and we the report is dated 20 September 2019. This report refers to the February 2019 report. It says as follows:

> *"However, based on my assessment today, and our very detailed and lengthy consultation, I am of the opinion that he is fit for work with the adjustments that have been recommended in the memo dated 21st February 2019."*

98. As KS only read this report it was reasonable for him to infer at this stage that perhaps there was something more to be seen in the February report because of the reference to it. It was understandable that he asked to see the February OH report to check what adjustments it recommended. We do think however that had KS read the OH report properly and considered the letter from JB to the Claimant (p 627 18 March 2019) which detailed the reasonable adjustments discussed then he could have realised that he did have all the information he needed. He did later read the letter from JB to the claimant and this informed his decisions later on. Nevertheless we accept that he interpreted the reference to the adjustments in the February 2019 report as indicating that there was

something he did not know about the claimant's situation that he needed to know.

99. The Claimant's subsequent response to KS was, we find, wholly unreasonable. He firstly gave consent over the phone assuming in any event that the report would be on his file and accessible to his manager. However he changed his mind in a way that can best be described as inexplicable following an email exchange between KS and the OH provider.

100. Following the telephone conversation with the claimant when he told KS that he would give his authority for KS to see the report if KS sent him the contact details for the person he was dealing with at OH, KS wrote to OH on 15 October 2019 (p722) saying that he had consent from the claimant and that the claimant would confirm that as he was copied in. By doing this he was providing the claimant with the contact details for the OH administrator and giving the claimant the opportunity to confirm his consent. He was not, we find, giving consent on the claimant's behalf. He was recording the content of their conversation.

From: Sarr Khalil (Operations Manager)
Sent: 15 October 2019 16:31
To: Brown Karen <KarenBrown1@tfl.gov.uk>
Cc: 'jay white' <jayslater9823@gmail.com>
Subject: RE: Re: 9823251

Hi Karen,

I have liaised with Jason and he's happy to give his consent for the memo to be sent to me. I have copied him to confirm this.

Regards,

101. However, the claimant somehow interpreted this differently and on receipt of this email revoked his consent.

Dear khalil Sarr,

I acknowledge receipt of your email a few moments ago.

Just to clarify I did not give you consent to the OH report dated 21/02/2019, I requested for you to send me the email address of the person dealing with your enquiry.

Your email appears to assert that I have given consent so they should forward the report to you. I clearly stated I would be happy to provide the person with my written consent, that has not occurred and I may have moved away from that position.

102. The Claimant's response during this exchange is unreasonable and irrational. Firstly, we find nothing wrong with KS stating that the claimant had given him permission to see the report when it is clear that he was. KS does not seek to give permission to disclose on the claimant's behalf hence the fact that he copies the Claimant in saying that the Claimant will confirm his consent by emailing the OH provider. Had KS been trying to go behind the Claimant's back he would not have copied him in. Further by copying him in he is giving the Claimant the contact details for the relevant person in OH.

103. Secondly, it is clear that the Claimant doesn't believe that there is anything in the report that is not also in the February 2019 report. It is therefore even less justifiable that he then seeks to prevent KS from seeing it. His point to us was that KS did not need to see the report because it was essentially a repeat. That as may be, but it is also an argument as to why there was no good reason for the claimant to deny KS access to the report.

104. In the face of that refusal, KS did attempt to obtain clarity regarding the most recent report and he emailed OH with some questions. The claimant did not give permission for the answers to those questions to be released until March 2020.

105. The respondent ascribes the delay in meeting with the claimant and discussing his return to work was solely due to the claimant's refusal to allow KS to see the OH report or the answers to the further questions. The claimant asserts that the delay was less favourable treatment because of his disabilities.

106. We conclude that the delay was due to a combination of the fact that KS had relatively recently taken over management of the claimant, that the claimant was not chasing any return to work and was therefore not top of KS's list of matters to deal with, and KS was unsure as to how best to deal with the situation so left it for some time. We also accept KS's explanation that he did

not want to place the claimant under any significant pressure to provide access to his OH report. He was mindful of the fact that the claimant had responded badly in a meeting with AN and that his condition could be triggered by pressure. This lack of chasing from KS contributed to the delay. However that is not to say that KS did not try to stay on top of the situation. Although the delay seems like a long time, there are examples of correspondence and contact between AN and the claimant or OH at regular intervals during this period and they demonstrate that KS was seeking the OH report or the answers to his OH questions on a reasonably regular basis.

107. By letter dated 28 February 2020 KS invited the claimant to a meeting. He called it a medical case review meeting. The purpose of the meeting was to discuss his medical condition and the OH advice that he had access to and all surrounding issues. By this time the claimant had been suspended on medical leave since 2 July 2019. The Claimant refused to attend. The reason the claimant refused to attend was because he did not agree or understand which internal management policy was being applied to his situation. He asked for a copy of the policy and KS sent him the Attendance at Work policy. (p757-758) The claimant did not consider that this was appropriate because he was not unwell and not off sick and therefore an absence process ought not to be applied. When he queried this KS said that he would be happy to deal with any questions or issues regarding the relevant policies at the meeting. KS accepted in evidence that there was no perfect policy tailored to the situation where someone is fit to work subject to adjustments but remains absent from work. He considered that given that the claimant was absent from his role, initially because of concerns regarding his health, that the attendance policy was the closest fit to the circumstances. We accept that he would have discussed and explained this at the meeting had it proceeded. The claimant considered KS' written explanation insufficient and continued to refuse to attend a meeting alleging that KS was displaying microaggressions and discriminating against the claimant and that he would not attend for his own health and safety.

108. KS stated that he needed to have the meeting and said that it would go ahead in the claimant's absence if he did not attend and that KS would have to make a decision regarding what would happen next in the claimant's absence. Subsequently the respondent held the meeting on 10 March 2020 in the claimant's absence.

109. The Claimant states that when he sent his email saying that he would not attend the meeting on the date suggested, KS was obliged to reschedule it within 7 days because the policy says that where someone is unable to attend a meeting it should be rescheduled within 7 days. We find that the Claimant clearly communicated to KS that he was not willing to attend the meeting not that he could not attend the meeting due to some sort of diary clash or other

inability to do so. He was clear that he would not attend the meeting not that he could not attend the meeting.

110. In that meeting KS concluded that the adjustments recommended by OH could not be accommodated by the respondent.

111. The main reason for all of the refusals was that none of the adjustments would wholly remove the possibility of confrontation with a member of the public. It was the risk of confrontation and its potential to trigger the claimant's PTSD that the respondent and KS viewed as being the obstacle to the claimant returning to work. This is set out in KS' letter to the claimant dated 26 May 2020 p770-774). We accept that the reason it took so long for this letter to be sent was the commencement of the Covid 19 pandemic and the first lockdown being initiated.

112. The claimant asserts that he could have returned to work. He was well enough to return to work. His fit note stated that he was well enough subject to the adjustments. He had been at work just before the July meeting and that had been without some of the adjustments that were recommended.

113. The respondent states that the OH recommendations were guidance only. They assessed them and deemed, at that stage, that none of the adjustments were sustainable for long enough to avoid the possibility of confrontation and that therefore the claimant could not return to work because he would have been at risk of his PTSD being triggered.

114. KS made this assessment without knowing whether there were other adjustments that had been suggested. He also had to make this assessment without discussing the situation with the Claimant because he refused to attend. Had the Claimant attended the meeting then perhaps two crucial things would have happened:

(i) The Claimant could have explained that there were in fact no further adjustments recommended in the February report; and
(ii) The Claimant could have explained that he could work with some of the adjustments or the adjustments could have been amended or agreed between them.

115. Instead, KS had to make the decision reasonably believing that he was missing information concerning other reasonable adjustments and more importantly without being able to talk to the claimant about how he could return. We accept that in calling the meeting KS' intention had been to try and get the claimant back to work but that was not possible when he was refusing to attend meetings.

116. KS did consider re-referring the Claimant to OH. The respondent's medical redeployment guidance (p1184) says that an employee must be referred to OH at this point.

> *"When considering referring an employee to redeployment. you must:*
> - *Refer them to Occupational Health*
> - *Arrange a review meeting to discuss the various options and restrictions with them and your HR representative*
> - *Ensure accurate notes of the meeting are taken and agreed. where possible*
>
> *They can be accompanied by their trade union representative or workplace colleague at this meeting.*
>
> *Following the review meeting. you must:*
> - *Implement and monitor the arrangements agreed*
> - *Refer the employee to Occupational Health for further assessment. if necessary*
> - *Arrange a future review meeting, if necessary. with them and your HR representative to discuss the options*
> - *Make accurate notes of the meeting and agree them where possible"*

117. KS emailed OH on 11 June 2020 (p1368). He asked questions including whether the claimant was fit for redeployment and if yes, what restrictions needed to be considered. This was after he had made the decision to place the claimant into redeployment.

118. OH responded saying that to provide answers a new referral would have to be made to which KS responded that he could not make a new referral, they were closing the case and it had taken far too long. He says that he was just seeking answers to his questions. (1368). KS defended that decision and those comments by stating that he had spent the last 6 months waiting for the claimant to give him authority to see information that he thought was relevant to the last OH referral. The OH doctor's response also makes reference to the fact that the employee has yet to give consent for the release of the responses to the last questions asked by KS in October 2019.

119. KS's justification therefore was that he did not want to make another referral or seek the claimant's consent again because it had added so much delay to the process to date and he was still none the clearer as the claimant was blocking his access to the advice. He acknowledged in evidence that the policy said 'must' but felt that in these circumstances there was nothing to be gained by referring the Claimant to OH as he considered that the Claimant

would not comply in a way that helped inform his decision making process. Therefore ,in those circumstances, another OH referral seemed to serve little purpose. He had also seen that the Claimant had, at various points in the past, refused to allow access to OH reports. He therefore chose not to refer the claimant to OH at that time in breach of the guidance of the respondent's redeployment policy.

120. Again we note that this was done in the absence of the claimant. We consider that the claimant, through his behaviour, reinforced KS's impression that the claimant would not engage with him constructively or allow him to obtain an updated OH report to guide his decisions.

Redeployment

121. As a result of this decision, the claimant was placed in redeployment. He started to take part in the process very actively. He did not say that he was too unwell to take part. He says he did this because he had to – otherwise he faced losing his job. However it is difficult to square this explanation with his refusal to take part in the return to work process that KS had attempted prior to that. He had also been told that his role was at risk then yet he refused to take part. He has provided no plausible explanation for the difference in his approach to these two processes. We do not accept that he was genuinely worried for his health and safety when he refused to attend the meeting in March 2020 or that his refusal to disclose the February 2019 OH report was related to his disabilities. He has provided no medical evidence that substantiates either assertion. We find that he was trying to protract the process and his deep seated mistrust of the respondents led to him taking this stance.

122. The redeployment exercise involved the claimant searching for alternative roles. He was referred to a separate department within the organisation which dealt with assisting people to find alternative roles. It is worth noting that this was in the middle of the pandemic. This meant that there were few roles available and any recruitment exercises were often paused or stalled as a result.

123. The claimant applied for 4 roles and, prior to being put in redeployment, had already applied for a train driver role which was also an internal vacancy.

124. Of the 4 roles that he applied for within the redeployment time frame it was deemed that he did not have the necessary qualifications or meet the basic requirements of any of the roles. Of the train driver role, he made it to the next round but the entire process was paused for some time and there was no sign that the process would recommence. It is our understanding from witness

evidence in this hearing that the exercise did not restart for a considerable period of time after the claimant was dismissed.

125. The claimant has made various assertions relevant to the redeployment exercise.

126. Firstly he states that he was told that he should only apply for permanent roles and should not apply for anything that was for a fixed term. He relies on the sentence in the redeployment letter (pg 773)

> *"Within those 13 weeks you will, with the support of the Redeployment Centre, seek to find a permanent job within the company."*

127. It is clear that he genuinely believed this at the time as he told the person helping him with redeployment that KS had told him only to apply for permanent roles and therefore did not apply for any of the fixed term roles available. We find that his interpretation of this sentence is understandable but odd. We consider that it is clear that it is saying that the aim (our emphasis) is for the employee in redeployment to find a permanent role. However that does not mean that this is the only type of role open to them and nowhere does it suggest any such restriction on the roles that can be applied for to avoid the person being dismissed.

128. It is regrettable that the redeployment consultant did not challenge the claimant's perception of this when he sent his email dated 20 August 2020 (p809) but we do not consider that it was KS' intention to suggest that the claimant could ONLY apply for permanent contracts. We believe that this was a standard HR letter with standard wording. The claimant had several calls with KS over the period of the redeployment and at no point did he raise this as a question or a query. The aim of the redeployment exercise was to find the claimant alternative employment that he was capable of regardless of the permanency of the role. The preferable position is for the employee to be permanently employed because it provides certainty to the individual and the business – but that is described as an aim not a requirement.

129. Secondly the claimant asserts that the respondent ought not to have put him in redeployment at all because the role of RPI had changed significantly during the pandemic and this was not considered when considering whether he was fit to return to work.

130. It was agreed that the role temporarily changed during the pandemic. Initially everyone was furloughed – the time frame varied but there was a global furlough across RPIs for around 2 weeks. Thereafter they were asked to provide checking services at the entrance to stations etc to provide 'guidance'

on mask wearing and to ask people to wear them if they could. This moved on to mask-wearing enforcement when the mandatory mask-wearing legislation came in.

131. We accept that KS did not take this into account when he was assessing whether the claimant was well enough to return to work. However we make the following observations:

(i) The RPI role change at this point was temporary.

(ii) The role remained confrontational as it remained an enforcement role. The claimant asserted that telling people or guiding people to wear masks would not have been confrontational. We disagree – it is well know that this was a flash point (and remains one) for people and challenging people about their choices would have inherently carried some risk.

(iii) The Claimant did not attend the meeting to discuss this with KS. Had he engaged with the situation at this time, he could have discussed the changes with KS and they could have considered whether it reduced the risk. His failure to attend was crucial to the fact that KS had to make the decision without any such constructive dialogue.

132. The claimant asserts that the respondent ought to have considered slotting him into a new role without the need to go through redeployment. We accept that this could have been something the respondent ought to have considered at the end of the redeployment exercise. However we think it was entirely reasonable to require the claimant to first try to obtain a different role through the normal processes as there was nothing in his health history to suggest that he could not apply for and interview for alternative roles. He was a person who clearly had a good CV and training and at no point during the process suggested that his health prevented him from actively taking part in the application and interview process. We also note that there were very few roles available at the time largely due to recruitment freezes because of the pandemic. Of the ones that the claimant identified as possible alternatives, he did not meet the basic requirements for any of the roles at any time.

133. The claimant has also pointed out that there was a reorganisation ongoing at the time that he was not consulted about and that would have impacted on his ability to stay in role. This reorganisation essentially involved the RPI and two other enforcement roles being brought under one umbrella title of Public Transport Operations Officer. The claimant provided evidence of how employees had, over the years, transferred between the 3 roles quite regularly. He considered that the skills were the same and that he could have done those roles. Therefore, if he had been consulted properly during the reorganisation, it

would have been apparent that he could have done the other 2 roles which he judged to be less confrontational and that would not have required him to apply for anything either.

134. The respondent witnesses said various things about the reorganisation. Firstly, they considered that all three roles involved some confrontation. The best summary of the respondent's view of the three roles is set out in Mr Conroy's witness statement (para 15.5):

> *"I considered Mr White's contention that the role of RPI had changed significantly; however, I disagreed with this. TfL were looking to upskill RPIs so that they could also check parking tickets and ensure taxi compliance. The eventual aim was for the three roles to become "one officer" and that RPIs would have the skills to be deployed in any one of those three areas (on buses, checking parking tickets and taxi compliance). For various reasons this has not materialised but even if it had, combining the roles as "one officer" would not remove or reduce the element of confrontation. It would still be a compliance and policing role which would have the end result of issuing some form of penalty."*

135. We accept that the taxi compliance role was potentially less confrontational as the individuals usually worked in pairs but that the respondent considered that it still involved risk and KS was not alone in considering that.

136. Secondly they were clear that each role was different. The transfers that had occurred previously between roles had been done via a recruitment process or expressions of interest and were not, as the claimant asserts, automatic at the point at which someone requested a transfer.

137. Finally, and perhaps most crucially, we heard that the reorganisation was only completed recently and that in essence, the three roles remain separate and whilst they now all have the same title, the cross training required for people to be able to do all three has not yet been completed. Mr Burch said that the reorganisation had only started substantively about a month before this hearing started. Mr Conroy gave the evidence already quoted above. Therefore the change has been, to date, little more than a name change. At the time that KS was making his decisions, the reorganisation was in its infancy and in any event would not have resulted in any significant change to the level of risk posed to the claimant at that time.

<u>Dismissal</u>

138. There then followed a final sickness absence review meeting on 18 September 2020. Again the claimant challenged the policy being used during

these proceedings. The respondents defended it as being the most appropriate as the claimant was absent from his job due to his health even if he was not technically signed off sick. Again, we understood the claimant's frustration here because he was not signed off sick; but we accept that this policy was likely to be the closest thing that was going to assist the respondents in following a fair process in these circumstances.

139. At the meeting, the decision regarding his dismissal was deferred because he was waiting for the outcome of 2 applications for alternative roles. It was therefore deferred to 1 October 2020.

140. Given that the claimant was engaging in the process and attending the meetings with KS, we were not provided with a robust explanation from the respondent as to why they did not refer the claimant to OH again at this stage. We understand that KS judged it pointless at the point at which he put the claimant into redeployment because of the claimant's previous refusal to engage. Nevertheless, at this point, the claimant was engaging and therefore it seems strange that there was no consideration given to the possibility of re-referring to OH at this point.

141. The claimant states that KS makes the assumption that there had been no change to the claimant's health and diagnosed him himself without any medical expertise. We do not agree entirely. KS clearly asks the claimant how he is. The claimant says that he still has his health conditions and that he still takes medication for them. We accept that, in his view, this means that he is communicating that he remains well enough to work because the last OH report deemed him well enough to work subject to adjustments. KS interpreted his comments as meaning that he remained the same and therefore could not do the role without adjustments which he had already deemed were not either reasonable or sufficient to enable the claimant back to work given the risks. We agree that based on the claimant's answer, KS assumed that this meant that the claimant was the same as he had been before.

142. We do not know if the claimant's condition remained unchanged. We have been provided with no medical evidence from the claimant as to whether he was better, worse or the same. He relies upon the same OH report that indicates that he was well enough to work and the fact that his fit note has expired. However neither of those provide us with information that his condition had improved since then. We assume from the absence of medical evidence that he remained well subject to treatment. We also assume, based on his answer to KS and his evidence to us, that he remained the same and would have needed some adjustments. The fact that he had previously been working without adjustments does not mean that he ought to have been able to return without them. We accept that the claimant had worked without them - but that

does not mean that either he ought to have, or that he could have continued to work without them. It is clear for example, that in June 2019 after only a few weeks back at work (we have disregarded the time off that the claimant had that was not sick leave related to his disabilities) he had an altercation with a member of the public (through no fault of his own) and that this combined with the meeting with AN on 2 July 2019 resulted in him being signed off sick.

143. Ultimately, at the point at which the claimant had exhausted the redeployment process, KS made the decision to dismiss the claimant. He considered that nothing had changed with the claimant's health and therefore the risk factors remained the same. He considered that the risk needed to be nil. The Claimant asserts that he ought not to have made such an assessment as he was not qualified to do so and had not sought up to date OH information.

144. It is clear that KS did not seek an up to date OH report.

145. The correspondence between KS and OH is at pages 1375 and 1380. KS contacts OH on 4 September 2020 and asks as follows:

"Hi there,

The below employee has been put in redeployment which is now coming to an end. His situation hasn't improved as he's still suffering from his condition. Is okay for me to proceed with the case based on the report or would you like to see him again?"

He chases for a response and gets the following response on 10 September 2020:

"In response to the manager's question, if the employee's situation remains the same then there is no reason for us to see him except the employee request for a review of the manager has any other questions that he will like us to answer before proceeding with managing the case."

146. In evidence KS says that the reason he said nothing had changed was because when he asked the claimant how is health was, the claimant told him that nothing had changed. We have reviewed the notes of his meetings with the claimant. When asked how he was the claimant would frequently respond with 'I am here'. He did not expand upon that.

147. At the penultimate meeting on 18 September 2020 KS asks the claimant how his health is. The exchange is as follows (p 821):

"KS: How are you Jason?

JW: I am here

KS: How is your condition? Is there any improvement? Is it still the same or has it worsened?

JW: Well my condition is still there, and anxiety is still there. I take regular medication for my condition and there is other treatment option I am awaiting to start."

148. KS is clearly trying to ascertain whether anything has changed. The Claimant does not indicate that it has. His answer is fairly generic. The Claimant was aware that his job was at risk at this point. The letter inviting him to the meeting says that his health will be reviewed and that the meeting may end with his dismissal. He does not say that he is feeling better or worse. We understand his point that he was already certified as fit to work subject to adjustments. Therefore, in his opinion, he did not need to persuade KS that he was well enough to work. His point is that they ought to have considered the adjustments again or referred him to OH to see if anything had changed.

Appeal

149. The Claimant appealed against his dismissal on 22 October 2020 (p855). The appeal was heard by Sean Conroy on 26 November 2020.

150. The appeal email from the Claimant is short. It says that the dismissal was biased and unfair and represented a wider agenda to construct the claimant's dismissal due to his disability by any means. The decision to dismiss was inconsistent with the advice from OH, that there was no evidence to support KS's decision and there was a failure to follow the reasonably adjustment policy and the decision to dismiss fell outside the range of reasonable responses available.

151. We accept Mr Conroy's evidence that he was unable to secure a notetaker for the meeting because of the pandemic and therefore took a note himself.

152. The basis for the Claimant's grounds of appeal was expanded upon at the appeal meeting. At its root, the claimant's appeal was based on the fact that the claimant felt that if the respondent were to put in place the reasonable adjustments then he could continue working and that failure to do so had led to his dismissal.

153. The claimant also objected to KS's characterisation of what had happened with regard to the OH reports and stated that it was clear in any event that KS had seen the report and therefore was lying in the dismissal letter.

154. We consider that Mr Conroy considered all the above points. He found that whilst understandably confusing, KS had not seen the report, but he had, at the time he made the decision to dismiss, seen the letter discussing the relevant reasonable adjustments dated 18 March 2019 from JB to the claimant. Therefore, although KS thought he was making a decision without the full picture, he was in fact making the decision in full understanding of the information that existed at the time. Even with that information he decided that the claimant could not return to his role because of the possible risks.

155. Mr Conroy also considered whether the role of RPI had changed significantly and disagreed with the claimant both taking into account the pandemic related changes and the reorganisation.

156. He therefore concluded that KS's decision had been reasonable in all the circumstances.

157. Mr Conroy also considered the payments that Mr White says he was owed. He found that the claimant had been paid correctly because at the time of his dismissal he had not served the requisite period of time to be entitled to free travel after dismissal and he had been paid his full notice entitlement of 11 weeks' notice. He found that the claimant had not been paid 3 bank holidays which he ought to have been paid and the claimant was paid accordingly.

OTHER ISSUES

<u>The claimant's request for paid study leave and overhearing the conversation outside his grievance meeting about pay – 11 October 2019</u>

158. It is clear that there was an unwise conversation held between AP and NB about the claimant's request for payment for his study leave. It indicates that the respondent managers were somewhat fed up with the claimant and we find that it is more likely than not that they had already decided not to pay him his leave prior to the meeting.

159. However, we consider that the reason for this conversation and its tone was the tone and content of the grievance itself. The claimant has asked to be paid for some days he took to study for and take an exam in project management. This request was refused on the basis that the first respondent's policy only allowed for payment of study leave when the qualification or course was job related. The claimant's job involved no project management. The

claimant stated that the first respondent did however need project managers and was actively recruiting them and therefore the course was business related and could have benefitted the first respondent which is what is stated in the policy.

160. We note two things – first that the policy does says that the study must be "business related" but it also says "role related". It is very clear that the claimant was not employed in a role where a project management qualification could be put to good use. Secondly he was not applying for or in line to do such a role. He embarked on his course for his own benefit and attempted to get paid for it. It may have led to career progression within the first respondent at some point but that was far from clear or certain or even, as far as we can tell, within the claimant's intentions at the time. When the paid leave was refused because the course had nothing to do with the role he performed, the Claimant brought a grievance. Even before us, he refused to accept that it was reasonable for an employer not to fund someone to take leave for a purpose that was entirely unrelated to his job at the time or any agreed or planned career progression. As it was, he was allowed to take special unpaid leave as opposed to having to use his annual leave. We consider that this was a reasonable solution and were the respondent to have really been wanting to be difficult or vindictive then they would have made the claimant use his annual leave to have this time off.

161. Therefore references to other managers who would be cross if they did pay him this money was a fair reflection of how people felt about this request and grievance. It seemed to the respondents, quite reasonably, that this was the claimant 'trying it on' with his over literal interpretation of a policy that clearly had a possible and more reasonable different interpretation in all the circumstances.

<u>The retirement party comments – 30 August 2019</u>

162. The claimant asserts that he was called by a colleague, Dudley Higgins, who told him that he had spoken to RW at JB's retirement party and that they had told him that the claimant had not been dismissed but it was only a matter of time.

163. The claimant relies upon this conversation as being evidence of several things. Firstly as an act of discrimination in its own right but also as evidence that there was an ongoing conspiracy at the first respondent to dismiss the claimant and that all actions were aimed at that outcome. There were various references throughout the claimant's witness statement to a 'conspiracy theory' agenda within the respondent to get rid of the claimant. Mr Conroy says that this was suggested at the appeal hearing and it has been suggested by the

claimant in evidence that this conversation is proof that these conversations were ongoing.

164. The evidence the claimant provided was phone records between him and the individual. His witness Reyon Downer also covered this incident in his witness statement saying that the conversation was on speaker phone whilst he was with the claimant.

165. The claimant says that he did not speak to Mr Higgins often and that this demonstrated that he had called to discuss something serious as did the text message. We note that Mr Higgins was one of the witnesses that the claimant had originally made an application for a witness order for but subsequently withdrew as the claimant has the respondent had tampered with him. At the outset of the hearing the Tribunal indicated that they thought that his evidence was relevant and that they would be minded to grant a witness order application if the claimant wished to make it. He said that he did not because he had been tampered with.

166. We do not agree that there was any evidence that this witness had been tampered with. Quite the contrary, when the respondent found out that the claimant wanted him to give evidence, the respondent wrote to him stating that he could freely give evidence and assuring him that there would be no negative repercussions. That was a reasonable step to take in circumstances where the claimant had indicated that the person feared retribution and that this was the reason a witness order was required. We find no ulterior motive here. It is of course for the claimant to decide how he evidences his case and it was his decision whether he wanted to call Mr Higgins or not.

167. We accept that the claimant's absence was discussed by Mr Higgins with RW. We do not accept what was put to the respondent witnesses in cross examination that the individuals discussing the claimant at the party would not have known that the claimant was off and had been off for some time. That would be common knowledge in a team that size regardless of whether the reason for absence was on the roster sheet or not.

168. We conclude, on balance, that, in a social setting, a manager was asked if they knew what was happening to the claimant. We think it is more likely than not that RW said that he did not know and he was not sure when the claimant would return. At this point in time the claimant had only been off for a month or so. Comments to that effect are very different from what the claimant now seeks to assert which was that there was a conversation about the fact that the respondent was going to make sure the claimant did not return. We find the respondent's evidence more plausible than the claimant and Mr Downer's account for various reasons. Firstly, there was then such a long period of time

before the claimant was eventually dismissed (this conversation was in August 2019 and he was dismissed almost a year later). Had there been such a plan or any concerted intention or effort to get rid of the Claimant amongst the respondent managers or the HR function behind them, we believe that the claimant would have been dismissed far sooner than he was. Secondly, had there been such an intention, KS would not have made all the efforts he did to obtain OH evidence and advice, to meet with the claimant and then to place him in redeployment. Finally, we consider that the Claimant's credibility regarding various allegations against the Respondents has been undermined by his disingenuous assertions about AN, his misinterpretations of various communications with the respondent such as that surrounding the authority for KS to see the February 2019 report, and his suggestion in cross examination that KS had in fact been sent the OH report when he had full knowledge that OH had withdrawn the email to KS. There is no evidence of such a conspiracy beyond this one conversation and we do not accept the version of the conversation we have been given by the claimant or Mr Downer as plausible.

Working for another employer

169. In the course of this litigation, the claimant disclosed documents which demonstrated that he had additional employment for another employer. The respondents applied for permission to use that document to start an investigation into whether the claimant was in breach of his contract of employment by working for someone else at the same time. A different tribunal granted that application.

170. As a result the respondent started that investigation. The claimant explained that he had permission to do a second job and that it was common amongst the respondent's employees that they worked in other roles both with and without permission. He gave the examples of Dudley Higgins, Desmond Dallas, Sheldon Dean, "Amy from South West team 1", and Ochukho Achora. He says they all in different circumstances had second jobs which were known to the respondent managers and against whom no disciplinary action or even investigation was taken. He stated that he had even told one of them to retrospectively apply for permission in circumstances where the individual had been spotted by his line managers unloading a delivery van. The respondent accepts in its submissions table that individuals were sometimes given retrospective permission once an investigation had been carried out. In evidence, the respondent managers said that they did not know about most of the second jobs that the claimant raised in his witness statement regarding these individuals. Given the lack of evidence regarding these second jobs for others, we accept that the respondent managers did not know about them and this is why they were not investigated.

171. The claimant did not attend the investigation meeting. In any event, no further action was taken against the claimant.

172. We consider that it was reasonable for the respondent to want to ask questions about the claimant's alternative employment given that they did not have a record of his permission that was apparently granted in 2011.

173. We do not accept that the claimant has established that his comparators were in the same situation. One resigned before any process was followed and another applied for retrospective permission and we don't accept that the claimant has evidenced that the first Respondent knew about this comparator's second job beforehand. With regard to the others we do not consider that the claimant has provided evidence to show that the respondent managers knew about these second jobs.

Grievances

174. Although we have mentioned some of the claimant's grievances above, given that some are relied upon as being protected acts for the purposes of the victimisation claim, we record the basis and narrative of the formal grievances here.

175. The first grievance was made on 11 November 2018 to Tricia Wright (560). It alleged disability related harassment by JB and RW and that reasonable adjustments had been withdrawn and/or were not being made. It was a long detailed email that clearly references discrimination.

176. The second grievance was dated 28 November 2018 (p578). That was a complaint against DA regarding the fact that he had a letter to the claimant from JB regarding the outcome of his reasonable adjustments request. He stated that he felt that it was a breach of his data protection and that he was being victimised.

177. The third grievance is undated but the claimant says that it was sent on 22 March 2019 (p635). This grievance is against JB and alleges that he is failing to fully understand the claimant's situation and failed to implement reasonable adjustments.

178. Subsequently there was a formal grievance regarding the claimant's right to paid study leave. We do not have the exact date for that but it is cut and paste into an email pages 676-677 that was sent to MB on 4 September 2019. We consider that it was sent at some point between May and September 2019.

179. That was investigated and the claimant attended a meeting as referenced above and was not upheld.

180. The grievances of 28 November and 22 March were the grievances that AN met the claimant about on 2 July 2019 and subsequently tried to rearrange a meeting to meet him on 4 October 2019.

181. AN's grievance outcome decision is at page 732 – dated 6 November 2019. The outcome regarding the pay issue from Nick Bignall is at page 743 and is dated 8 November 2019.

182. We consider that it is pertinent to quote in full from the claimant's witness statement regarding his approach to grievances as we consider that it is his approach to these grievances that demonstrates how resistant he was at this point to engaging with the respondent positively and the reason behind him refusing to attend meetings. It is not related to his disabilities. It is clear that it was due to his theories about the respondent's motives.

> *[para 200] "Anand Nandha had written to me 4 October 2019, he informed me that he wanted to reconvene the grievance meeting from the start (694). I responded and asked him to confirm whether he was talking about adjustments to support my attendance (693). Anand Nandha, stated that he was referring to day and time. If there was anything else I needed I should let him know (693). It suddenly dawned on me that Anand Nandha had suspended me pending an OH assessment which he had received the outcome of and he had not convened a meeting about my return to work which was more important at this time. It was also a dangerous situation to attend a grievance meeting with the respondent as I was suspended at the last grievance meeting I attended. The respondent could have been plotting further treachery against me. In light of what had happened at the grievance hearing with Nick Bignall it further established that the respondent's processes were a sham."*

183. This paragraph echoes the grievances and the meetings that occurred to discuss them. The manner in which the claimant approached the process was invariably to be aggressive and confrontational.

184. However it is also clear from the timeline that the respondent took a long time to deal with the grievances and sometimes adopted an informal process when the claimant had not requested it. This understandably added to the claimant's frustration and undermined his faith in a fair outcome being delivered especially as some of them are about his current working conditions.

<u>Comparators A and B</u>

185. Comparator A was attacked at work and suffered significant physical injuries and PTSD. He subsequently had a series of disability-related absences.

On return from all of those absences he had various adjustments made for 12 weeks periods in accordance with the respondent's policy that adjustments ought only be in place for 12 weeks as part of the phased return.

186. In particular, he was allowed direct travel on his return in February 2015, and he had various adjustments on a phased basis including the need to do dual checking. However we accept DA's evidence that:

a. These adjustments were always temporary
b. The comparator had to organise the majority of his dual checking arrangements.
c. So C not treated less favourably on that basis.

187. Our observations and findings regarding comparator A are as follows.

a. He also had PTSD. Therefore he was not different from the claimant in respect of the disability that he had. A comparator is meant to be in the same position save for the disability. Here many of the claimant's complaints were that he was treated more favourably than the claimant despite the fact that he had PTSD as well.
b. Comparator A, from the evidence we had, did not fail to disclose his OH reports or attend his meetings with the respondent.

188. Comparator B fell over and hurt his hand and was off for 6 months. He was allowed to return to work as and when he was signed as well to return. At this point he was fit to return without the same adjustments that the claimant needed. Once he had completed his phased return to work he continued to work without difficulty. We note that at no point did he refuse the first respondent access to his OH reports and as far as we can tell he attended all meetings with his managers.

189. The remaining comparators were relied upon solely in relation to the claimant being investigated regarding his alternative employment and have been discussed above.

<u>Policies</u>

190. We were provided with and considered when we were taken to them, the following policies in the bundle.

Grievance policy and procedure for Surface Transport operational employees

Grievance policy and procedure for Surface Transport operational employees
Reasonable adjustments
Blank reasonable adjustments for disabled people form
Pay for Performance Business Rules and Administration Guide
Discipline at Work Policy
Attendance at work policy and procedure
Attendance at work Policy
CPOS Operational Staff Notice – Uniform
Medical redeployment guidance

191. The longer term absence policy that was applied to the claimant appears in the Attendance at work policy. Pg 1172.

192. We conclude that it was appropriate for the respondents to apply this policy in circumstances where there wasn't a specific policy for someone who was not signed off sick but was nevertheless judged to be incapable of carrying out their role by the managers. In those circumstances, given that he was away from work, this was the most appropriate policy to apply.

Specialist report

193. The claimant alleges that KS failed to ask for a specialist report. This matter was confusing for the Tribunal. It was not clear whether such a report existed given that there was no such report in the bundle. We have concluded that there was no such report but that the claimant was asked to provide one.

194. It is first mentioned at p684 when KS asked OH if there was one. This is in his initial referral of the claimant to OH.

195. Paragraph 18 of KS' witness statement refers to page 687 where claimant says that he has never been asked for one on 24 September 2019.

196. We find that KS did ask Karen Brown at the OH provider for a copy of the specialist report on 4 October 2019 (p696).

197. Subsequently, KS expressly asked the claimant for a copy on 24 October 2019 (pg 691).

198. The claimant's position is that he was never asked for it but he clearly was. The issue of the existence or whereabouts of the report appears to then get joined with the disclosure of the February 2019 report (p771-772) and becomes, from the respondents' point of view, another example of the claimant refusing to provide access to information. However it is clear that no such report actually exists.

199. We also consider that the claimant's position regarding this is confusing. His ET1 dated 24 August 2020 at paragraphs 44, 46 and 55 says as follows:

*"44 The respondent failed to consider my GP specialist report and 0H report dated 21 February 2*019. which it had In its possession and had read.

…

46 The respondent states that it made its decision because I did not give access to a specialist report or OH report dated 21 February 2019. The fact is the specialist report was not requested and the respondent had the requested OH report and knew its content.

…

55 The respondent failed to consider my GP/specialist report and OH report dated 21 February 2019."

200. The claimant asserts that the respondent failed to consider a GP/specialist report that, as far as we can tell from the evidence we have reviewed, we have not been provided with and have therefore concluded does not exist. It is not clear why he continues to assert that it does exist despite him not disclosing it.

<u>Monday phone calls</u>

201. Part of the claimant's claim is that KS failed to answer his calls on Mondays despite requiring him to call in every Monday.

202. KS did require the claimant to call him every Monday. In his letter 4 October 2019 setting out this request (p691) KS tells him to raise concerns if the time does not suit him. We note that the claimant had no issue with the time for the call – it appears it was KS that was busy at the relevant time with meetings. However, it is also clear that at no point does the claimant raise any concerns regarding the calls at this time.

203. We accept KS' witness evidence (paragraph 5 of his statement) that describes how brief the calls were and how the claimant's response to questions about his well being were short and most of the time he answered 'I am here' in response to KS's question of 'How are you?'.

204. Nevertheless it is clear that KS took very few of the claimant's calls. In cross examination KS said that after making the arrangement with the claimant his diary changed meaning that he had meetings on Monday mornings. He accepted that in hindsight he should have changed the time of his calls with the claimant.

205. However, until the claimant raised a claim in the tribunal regarding this matter, he had not raised any concerns with KS regarding the situation, nor did he raise the impact on his health and wellbeing that he now says it was having. He left messages on KS' answer machine and given his previous minimal responses to KS' questions, KS assumed that the claimant was alright with leaving a message. We find he had no reason to think otherwise as the claimant did not raise it as a concern.

Reasonable adjustments

206. The two main reasonable adjustments that OH suggested and that the respondents considered were removing the claimant from working in hotspots and allowing him to dual check either for some or all of his shift.

207. Avoiding hotspots was considered at various points. We heard considerable evidence on the point from JB and RW. The claimant asserted that there were various areas (e.g. Brixton and Croydon) where there was a higher level of altercations and that if he was able to avoid going to them, he would reduce the likelihood of becoming involved in an confrontational situation with a customer.

208. The respondent said that although this might be something that they could consider from time to time, a permanent move away from this would be to remove the very point of the RPI role. They needed RPIs in the hotspot areas because the reason they were hotspots was because they were the source of the majority of fare evasions. They also said that in the meetings where hotspots were discussed, the claimant and his representative were vague as to what areas he would need to avoid and only identified two routes that he would be happy to ride and this was not sufficient. They also pointed out that confrontation with customers could occur anywhere and therefore whilst avoiding hotspots would reduce confrontation it was not sustainable long term nor would it remove the risk of the claimant's PTSD being triggered by an altercation with a customer.

209. The respondent also gave evidence that they had had a reduction in the number of staff at that time and therefore reducing the number of people they had performing the essence of the RPI role in the areas that needed it most, was not reasonable in all the circumstances.

210. The second adjustment was dual checking. This was the source of the majority of friction between the claimant and the respondent prior to him leaving the meeting with Mr Nandha.

211. We have already described dual checking above. In all OH reports, dual checking was recommended by OH as a way of reducing the claimant's anxiety regarding confrontation. The respondent has said that it was not sustainable long term for various reasons:

i. RPIs were free agents and were, most of the time, allowed to start work from wherever they wanted and to restrict that for others was unreasonable
ii. It was very difficult to find the claimant people to work with as they either found him difficult to work with or he refused to work with them
iii. Direct travel (where the claimant could have travelled to meet a colleague at a different start location whilst being paid) was not sustainable and in any event did not offset the problem of finding people for the claimant to work with
iv. The claimant was very rigid about the times when he needed someone to work with and would remove himself from work if someone could not be found therefore reducing flexibility.

212. We have also found that the respondent did not in fact arrange dual checking either for the claimant or Comparator A. They allowed it, but they did not assist in arranging it. We therefore found that in reality they did not make a reasonable adjustment here, they simply agreed or on one occasion ordered, that the claimant ought to work in this way. It was then for both the claimant and Comparator A to make it happen.

Spurious allegations

213. Given the nature of this case we consider that it is appropriate to set out the allegations that the claimant has made either during his employment or as part of his Tribunal claims, that we find were baseless and have caused significant difficulties for the Respondents and been the basis for significant aspects of these claims. It has been difficult for us to understand the motivation of the claimant in raising these matters but given our subsequent conclusions

we consider that it is important to say that the following allegations are all without foundation.

a. The claimant's assertion that DA ought not to have been given a copy of his reasonable adjustment letter. DA was a manager within the respondent who needed to discuss the overall situation regarding the claimant's relationship with his manager JB and his grievances generally. It was not inappropriate for a manager, in these circumstances, to understand what the position was concerning his adjustments.

b. The claimant has alleged that KS ought not to have had asked for or had regard to the February 2019 report because it was out of date and asserting that this was why he would not allow KS access to it. It is clear that he originally agreed that KS could have access to that report and only changed his mind because of his interpretation of a subsequent email send by KS to OH. He then added another, entirely fabricated reason, for his refusal of access.

c. The fact that he withdrew consent for KS to see the report because of his interpretation of an email from KS to OH instead of being separately sent the contact details for the OH person dealing with the matter.

d. He has maintained throughout his evidence to the Tribunal that the outcome of his employment was predetermined because of the conversation between RW and Dudley Higgins at JB's leaving party.

e. That he alleges that the respondent informing OH that he had taken leave in addition to sick leave was somehow detrimental when there is no evidence to suggest that OH interpreted this negatively and when OH had access to this information in any event – something the claimant knew.

f. His theory that the respondent managers were all conspiring against him as set out in paragraph 200 of his witness statement thus informing his decisions not to attend meetings.

g. That in cross examining KS, the claimant asserted that KS had in fact seen the February 2019 report and was lying when he said he had not. He relied upon an email from Karen Brown (p1388) which had recently been disclosed by the claimant. That email suggested that Ms Brown had sent the report to KS. However, the claimant would also have been aware of the emails from Karen Brown which recalled that email at the point that the claimant withdrew his consent and show that the email was

successfully withdrawn and therefore KS had never read it. We find that the claimant was disingenuous with this line of cross examination and sought to suggest that KS was lying on the basis of evidence that he knew was incomplete.

Discussion and Conclusions

214. As discussed at the beginning of this Judgment, the way in which this claim has been pleaded has caused the Tribunal difficulties in ensuring that it considers each matter properly due the vast amount of slightly different allegations and claims brought. In order to avoid missing anything or our decisions below are set out in response to the exact allegation in the List of Issues. However we make the point again that as a litigant in person, whilst the claimant acquitted himself well during the hearings, he was not always able to fully explain the basis for his legal claims to us and amidst such an enormous amount of witness evidence and documentary evidence, the Tribunal has had to be proportionate in the way in which it has written up its decision but also respond to the claims as they have been pleaded and explained to us. We address the discrimination claims first.

215. We have taken each claim individually and analysed them below. However as an overall observation, the claimant did not provide information from which we could ascertain that he had been treated less favourably than someone who did not have the disabilities he had. For the most part, he pointed at treatment that he perceived to be negative and said that it must have been caused by or because of his disability. He did refer to comparators but by and large he provided little evidence that suggested that they were in the same or similar positions to him. By contrast, the respondent was able to demonstrate that their decisions regarding those other comparators were made either because the comparators had different conditions and therefore other options were open to them, or because the comparators engaged with them and as a result the management process of their working lives was easier and more constructive.

216. The claimant does not, in our view, have the insight into his behaviour to see that his responses to perceived slights by the respondent resulted in him being obstructive and unengaged with the process that ultimately led to his dismissal. It is our primary finding that it was his obstructive behaviour, for the most part, that caused the respondents to behave in the way that they did. We were not given any medical evidence to suggest that the claimant's difficult behaviour arose from or was related to his PTSD or depression. For the most part the claimant did not accept that his behaviour was difficult. Whilst it may be open to a Tribunal to sometimes infer that behaviour has been caused by a condition which the claimant has no insight into – we do not accept that this

argument has been run by either party and we do not have the evidence or facts to reach any such conclusion.

217. In a slight deviation from the normal structure of a Judgment, due to the length of this Judgment, we have set out the law for each area at the outset of each section of analysis and conclusion rather than in an entirely separate subheading.

Jurisdiction

218. 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, lest her claim be shut out irrespective of its validity: *Chief Constable of Lincolnshire Police v. Caston* [2010] IRLR 327. 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.

219. 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.

220. 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.

221. 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: *Morgan* .

222. The respondent's written submissions helpfully set out the premise for their case regarding jurisdiction as follows:

*(1) "C's first ET1 [**5**] (alleging failure to make reasonable adjustments and victimisation): lodged 18 January 2019. Early conciliation began on 3 December and ended on 10 December 2018 [**1**], so any allegations of failure to make reasonable adjustments or victimisation pre-dating 4 September 2018 would be out of time.*

*(2) C's second ET1 [**22**] (alleging direct disability discrimination, discrimination arising from disability, harassment, and further allegations of failure to make reasonable adjustments and victimisation): lodged 15 December 2019. Early conciliation began on 13 December 2019 and ended on the same day [**2**], so any allegations of direct disability discrimination, discrimination arising from disability or harassment pre-dating 14 September 2019 would be out of time.*

By reference to paragraph 12 of the List of Issues, there are no allegations of direct disability discrimination pre-dating 14 September 2019.

There are, however, numerous allegations of discrimination arising from disability and harassment pre-dating 14 September 2019: they are listed at pages 1 to 3 of the Respondent's Chronology (cross-referred to paragraph numbers in the List of Issues) and date from October 2018 to August 2019. Those allegations are out of time."

223. Under claims for discrimination arising out of disability this includes paragraphs 16.1 -16.4 in the list of issues.

224. Under harassment, this this includes claims under paragraphs 23.1-23.4 in the list of issues.

225. The respondent has not specified with regard to the failure to make reasonable adjustments claim which decisions regarding reasonable adjustments or failing to make reasonable adjustments it considers out of time.

226. None of the acts relied upon as acts of direct discrimination or victimisation are out of time and the respondent does not appear to suggest that they are.

227. Turning then to the claims for discrimination arising out of disability. We must first ascertain if they are out of time and then consider whether it is just and equitable to extend time.

228. We address each allegation of discrimination arising out of disability in terms of jurisdiction in turn.

> *On 25 October 2018, the Second Respondent refusing to allow the Claimant to carry out his checks with a colleague for all except the first and last hour of his shift;*

229. This is out of time as it occurs before 14 September 2019. The claimant has not provided an explanation as to why he did not submit a claim about it under this particular head of claim. However, he did submit a claim in January 2018 which cites this incident but alleges that it is victimisation. Therefore although the labelling of the claim as being one of discrimination arising out of disability is new, the substance and facts of the claim were raised in time. Therefore the respondent had to prepare evidence in relation to this matter already and knew that this was the case so no evidence is compromised in relation to this claim. The claimant has not told us what professional advice he took. We note however that he was represented by the union at all his internal meetings. He therefore had access to some advice though we do not know if he had access to legal advice at this time nor whether he took steps to obtain it.

> Although a difficult exercise given the lack of submissions made to us in this regard, in respect of this matter, given that the subject matter had already been raised by the claimant in an ET1 dated January 2018, we consider that it would be just and equitable to extend time in all the circumstances.

On 18 March 2019, the First Respondent refusing:

> *i. to agree that the Claimant would not be deployed in hotspots (volatile areas);*
>
> *ii. to provide a colleague to work with;*
>
> *iii. the Claimant's request to work reduced hours of 3½ days per week for three months;*

230. This is out of time as it occurs before 14 September 2019. It is not part of a continuing act. The claimant specifically relies on the refusal on 18 March 2019 which is a one off occurrence or decision even if it had recurring implications for the claimant.

231. The claimant has not provided an explanation as to why he did not submit a claim about it earlier. It post-dates his first ET1 (January 2018). His second ET1 which included this claim, was submitted on 15 December

2019. The claimant clearly understood how to make a claim at this time. He has not explained why he did not raise this matter in a legal claim earlier. However, the claimant did bring an internal grievance in relation to this decision. The first attempt by the respondent to deal with that grievance was in the meeting on 2 June 2019 but that got curtailed when the claimant left the meeting. The outcome to that grievance was given on 25 November 2019. The delay to the decision was not wholly the fault of either party as it occurred initially due to the claimant's ill health and subsequently due to the claimant's refusal to attend a meeting to discuss it again. The claimant has brought his claim about this matter within time of the outcome of his internal grievance about the matter.

232. We therefore consider that it is just and equitable to extend time to consider this part of the case. The subject matter was a source of consideration for the respondent throughout the period of time from 18 March until 25 November 2019. There was no significant delay between the claimant receiving that outcome and him submitting a claim and there is no prejudice to the respondent in terms of availability of evidence given that they knew about it soon after they had concluded their own internal consideration of the matter. We consider that it was reasonable of the claimant to want to wait for the outcome of an internal process before submitting a claim.

a. On 2 July 2019, during a grievance meeting Anand Nandha:

i. showing micro aggression and bias;

ii. insisting on dealing with two grievances at once;

233. We have applied exactly the same consideration and reasoning to this matter as we do at paragraphs 476-478 above and reach the same conclusion. We accept that this meeting was not part of the grievance submitted by the claimant; it was the grievance meeting itself and it led to the outcome in November 2019. The issues regarding timing are therefore the same.

a. On 2 July 2019, after the grievance meeting, suspending the Claimant from work without his knowledge;

234. We have applied exactly the same consideration and reasoning to this matter as we do at paragraphs 476-478 above and reach the same conclusion. We accept that this meeting was not part of the grievance submitted by the claimant; it was the grievance meeting itself and it led to the outcome in November 2019. The issues regarding timing are therefore the same.

235. Turning then to the claims for discrimination related harassment. We must first ascertain if they are out of time and then consider whether it is just and equitable to extend time.

236. We address each allegation of harassment in terms of jurisdiction in turn.

On 23 November 2018, 27 November 2018 and 3 December 2018, Dayo Abafarin and JB harassing and bullying the Claimant to attend an informal meeting about the Claimant's grievance, and starting disciplinary proceedings against the Claimant when he refused;

237. This is out of time as it occurs before 14 September 2019. The claimant has not provided an explanation as to why he did not submit a claim about it under this particular head of claim.

238. The facts underpinning this claim were partly referred to in the Claimant's January 2018 ET1. He does not reference the 3 December incident but he does talk about the 23 and 27 November 2018 and the informal meetings. However, he did submit a claim referring to this incident in January 2018 which cites this incident but alleges that it is victimisation. Therefore although the labelling of the claim as being one of discrimination arising out of disability is new, the substance and facts of the claim were raised in time. Therefore the respondent had to prepare evidence in relation to this matter already and knew that this was the case so no evidence is compromised in relation to this claim. The claimant has not told us what professional advice he took. We note however that he was represented by the union at all his internal meetings. He therefore had access to some advice though we do not know if he had access to legal advice at this time nor whether he took steps to obtain it.

239. Although a difficult exercise given the lack of submissions made to us in this regard, in respect of this matter, given that the subject matter had already been raised by the claimant in an ET1 dated January 2018, we consider that it would be just and equitable to extend time in all the circumstances.

On 2 July 2019, during a grievance meeting, Anand Nandha showing micro aggression and intimidation towards the Claimant;

240. We apply the same reasoning to this jurisdiction assessment as we do to the same facts claimed as discrimination arising out of harassment. We therefore find that it is just and equitable to extend time.

On 2 July 2019, following the grievance meeting, Anand Nandha suspending the Claimant from work without his knowledge;

241. We apply the same reasoning to this jurisdiction assessment as we do to the same facts claimed as discrimination arising out of harassment. We therefore find that it is just and equitable to extend time.

On 30 and 31 August 2019, at a leaving function for the Second Respondent, supervisor Roger White telling Dudley Higgins (who told the Claimant) that the Claimant had been fired, but it was not official yet;

242. This incident was raised in the second ET1 dated December 2019. The claim is out of time as it is before 14 September 2019. It is not part of a

continuing act. It is a one off incident. The claimant has provided no reason for this matter not being raised in time though we note that the delay is only 2 weeks. We have considered the guidance set out in Keeble. The cogency of the evidence is not affected given that it is only a short delay. The claimant has not told us what professional advice he took. We note however that he was represented by the union at all his internal meetings. He therefore had access to some advice though we do not know if he had access to legal advice at this time nor whether he took steps to obtain it.

243. Although a difficult exercise given the lack of submissions made to us in this regard, in respect of this matter, given that the delay was only a short period of two weeks, we consider that it would be just and equitable to extend time in all the circumstances.

Disability

244. The Respondents accept that the Claimant was a disabled person within the meaning of the Equality Act 2010 by virtue of Post-Traumatic Stress Disorder. The Respondents disputed that the Claimant was a disabled person within the meaning of the Equality Act 2010 by virtue of depression. However they accepted that not much turned on this.

245. We accept, based on the claimant's medical notes and his impact statement that both the PTSD and the depression were separate conditions (e.g. see letter page 965-966 from CBT therapist to GP). We consider that separately and cumulatively they amounted to impairments which had a long term, significant adverse impact on the claimant's ability to carry out day to day activities.

246. We consider that the respondent knew of both of these conditions as they were alluded to by the OH reports and in any event the impact and effect of the two conditions was broadly similar. The respondent knew about the relevant symptoms whether they were due to depression or PTSD as they had OH reports that informed them of this.

Burden of Proof – s123 Equality Act 2010

247. 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 EqA, 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.

248. 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.

249. 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*.

250. 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.

251. 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.

Direct discrimination: Equality Act 2010 s13

252. 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."

253. 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.

254. 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*).

255. We have been careful to consider whether there was an indissoluble link between the treatment and the disability. In *Owen v Amec Foster Wheeler Energy Ltd and anor 2019 ICR 1593, CA*, the Court of Appeal held that the concept of disability is not a binary one, and that it is not the case that a person's health is always entirely irrelevant to his or her ability to do a job. So the concept of indissociability, which has been applied to other protected characteristics does not always translate to the context of disability discrimination.

256. The claimant has relied upon different comparators for different acts of discrimination and he has also relied upon a hypothetical comparator. 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. We have also born in mind the guidance set out by HHJ Mummery in In *Stockton on Tees Borough Council v Aylott 2010 ICR 1278, CA*, According to Lord Justice Mummery: '*In this case the issue of less favourable treatment of the claimant, as compared with the treatment of the hypothetical comparator, adds little to the process of determining the direct discrimination issue. I am not saying that a hypothetical comparator can be dispensed with altogether in a case such as this: it is part of the process of identifying the ground of the treatment and it is good practice to cross check by constructing a hypothetical comparator. But there are dangers in attaching too much importance to the construct and to less favourable treatment as a separate issue, if the tribunal is satisfied by all the evidence that the treatment (in this case the dismissal) was on a prohibited ground*.' Thus, it seems that, although considering the treatment of a comparator will often be the most straightforward way of determining whether direct disability discrimination has occurred, the issue may sometimes take a back seat to a common-sense appreciation of the facts.

257. We have therefore considered what is referred to as the 'because of' or 'reason why' test to the claimant's assertions. We have considered, the subjective motivations — whether conscious or subconscious — of the respondents in order to determine whether the less favourable treatment was in any way influenced by the protected characteristic relied on. As set out in *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*.'

258. We have reminded ourselves that it does not matter if the motive is benign or 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.

259. 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*).

260. We have further considered that, particularly in cases of mental health conditions, stereotypical assumptions can play a part in influencing a decision maker's treatment.

261. In *Stockton on Tees Borough Council v Aylott 2010 ICR 1278, CA*, Lord Justice Mummery, noted that '*direct discrimination can occur, for example, when assumptions are made that a claimant, as an individual, has characteristics associated with a group to which the claimant belongs, irrespective of whether the claimant or most members of the group have those characteristics'*. However, he went on to state that there must be evidence from which the tribunal can properly infer that wrong assumptions were being made about that person's characteristics and that those assumptions were operative in the detrimental treatment, such as a decision to dismiss.

262. This was confirmed in *Aitken v Commissioner of Police of the Metropolis 2012 ICR 78, CA*, when the Court of Appeal when, on the facts of that case, the employer had not acted on the basis of stereotypical assumptions about mental disability. The tribunal had expressly rejected that allegation, finding instead that the employer acted on the basis of how the claimant appeared to others. The police force would have treated a non-disabled person whose behaviour also appeared to be threatening and aggressive in an identical way.

263. What is noteworthy here is that the claimant's behaviour that influenced his initial suspension from work has been ascribed to his disabilities - though in fact the claimant and the respondent have provided no medical evidence to substantiate that. However his continued absence from work, caused, we find, by his refusal to share the February 2019 report with KS and his refusal to attend the meeting in March 2020 have never been ascribed by the claimant or justified by the claimant as being caused by his disabilities. Instead, he is clear, that his behaviour in this regard was entirely justified by the respondent's behaviour. Something we reject entirely. Therefore it is in this context, that KS was making his decisions regarding the claimant's continued absence from work and that is crucial, in our view, to determining the motive behind the respondents' actions.

264. We turn now to the specific incidents relied upon by the claimant as being acts of direct discrimination.

Refusing to lift the Claimant's medical suspension following receipt of an Occupational Health report dated 20 September 2019;

265. We accept that the respondent did not allow the claimant to come back to work. However, we consider that the reason for the treatment was not the claimant's disability, but a combination of his failure to disclose the report from February 2019 to KS and his failure to attend the meeting on 10 March

2020 It was the claimant's difficult and obstructive behaviour that meant that he could not be returned to work.

266. We consider that KS' motive when attempting to obtain the February 2019 report was to try and understand the reasonable adjustments that had been suggested in the past to ensure that he understood everything that needed to happen to allow the claimant a safe return to work. In the absence of that he tried to obtain answers to further questions from the OH professional – something which again the claimant refused to allow release of. The refusal to allow KS access to the medical reports in this regard was the claimant's right but it also meant that KS considered he might be making a decision 'in the dark'. The claimant says that he did not release the reports because JB already knew as the reports ought to have been on his file, secondly that KS had in fact read them, thirdly that the September 2019 report included everything relevant so he did not need the February report and finally that KS had behaved in such a way with regard to emailing OH regarding the claimant's initial consent that, in effect, KS deserved not to know because he had in some way misbehaved by sending the email that he did to OH.

267. Firstly we have concluded that KS did not see the report from February 2019 at any time until he was asked to write a witness statement for these proceedings. Secondly we find that he genuinely believed that they were useful and important recommendations for reasonable adjustments in the February report and this was what prompted him to ask for it and think that he needed it and finally, we find that his email to OH regarding the claimant's consent was reasonable and not an attempt as the claimant now states, to somehow subvert the claimant's consent.

268. With regard to the meeting on 10 March 2020, it was entirely reasonable for KS to believe that the claimant's response to his invitation to attend the meeting was him refusing to attend – not that he was entitled to expect another meeting to be arranged within 7 days. The respondent's policy regarding meetings is that they will rearrange if someone is unable to attend – not that they will rearrange because someone is choosing not to attend. By any reasonable reading of the claimant's email, he is refusing to attend a meeting with KS because he does not believe that they are following a fair procedure or the correct policy. When KS suggests that they discuss procedure and relevant policies at the meeting, the claimant still says no. He is refusing to attend the meeting and KS was reasonable to interpret that the claimant had no intention of attending the meeting so to rearrange would be pointless. When the Tribunal asked the claimant in evidence what he would have done if KS had rearranged within 7 days, the claimant did not properly answer the question. We conclude that he would not have attended unless and until he was satisfied that the policy being followed was the correct one – something that could not happen given that there was not a specific policy designed exactly for this purpose.

269. The claimant has not asserted that his behaviour described above was caused by his disability. He has sought, throughout these proceedings to

justify his decisions and behaviour and at no point has he said that they were as a result of his disabilities. Instead, he says that they were justified because the respondent was discriminating against him.

270. The claimant has also not asserted that KS was making stereotypical assumptions about his health by assuming that he could not return to work. We analyse KS's decision to place the claimant in redeployment below, but solely in relation to the decision making up until that point (i.e. to keep the claimant off and to go ahead with the 10 March 2020 meeting), we find that KS' aim and motive was to try and gather the correct information so that he could get the claimant back to work. He was not trying to keep the claimant away. He was proactive in trying to remain in contact with the claimant and in trying to ensure that he had the right information to make his decisions. He wanted to meet with the claimant to discuss the situation as he wanted him to return to work. He was not making assumptions regarding the claimant's health – in fact he did the opposite and tried to find as much information as he could so that he was not in a position to have to make assumptions. Therefore there was no refusal to allow the claimant back to work, there was a delay whilst KS attempted to obtain the relevant information, then, when he could not obtain that information he sought to make a decision in the claimant's absence. In that context, his decision making was not discriminatory. We find that any individual who behaved in the way that the claimant did regarding his OH report and attendance at the meeting would have been treated in the same way.

From 7 October 2019, requiring the Claimant to call his staff manager every Monday at 10am;

271. The respondent did ask the claimant to call every Monday. There was discussion around whether KS deliberately failed to take the calls because he was always in a meeting at 10am on a Monday. We consider that the requirement to call in once a week was reasonable in terms of staying in touch with a member of staff who was not at work. The fact that KS' commitments changed after this point and subsequently meant that he had a meeting at that time was regrettable and ought to have been reconsidered by him at the point at which he had regular meetings at the same time as the scheduled call. However we consider that this was an oversight on KS' part as opposed to being because of the claimant's PTSD or depression. We consider that any comparator who was off work for any reason, would have been asked to call in at the same time each week. That it coincided with a meeting for KS was coincidental and unfortunate but not the reason for the claimant being asked to call.

Deciding the outcome of his grievance prior to his grievance hearing (namely, on 11 October 2019, during a break in the Claimant's grievance hearing, the Claimant alleges he overheard a discussion of the Claimant's request for payment during his period of study leave);

272. The discussion that the claimant overheard was, by Mr Phlora's own admission, ill-judged and ought not to have been had in the claimant's earshot. It is also quite possible, we have found, that the decision regarding the claimant's grievance was all but pre-decided. However we consider that any decision making, whether it was made at the time or beforehand, was prompted by the fact that the claimant's grievance was patently unfounded. His assertion that he ought to be paid for study leave for a course that was not in any way related to his job was and is unfounded. The claimant's role did not require any project management skills. The claimant sought to assert that it could have benefitted the business i.e. the first respondent as a whole because the first respondent needed project managers. However, the claimant was not working nor seeking to work at this stage, as a project manager or in a role that required such skills. There was therefore no benefit to the respondent either at the time or in the near future and it was and remains difficult to see how the claimant felt that this justified a grievance.

273. Any ill judged comments about the claimant and whether he ought to be paid by the respondent were because of the claimant's apparent inability to see that his claim for pay was unfounded, as opposed to his disabilities causing or contributing to the decision making process whenever it occurred. We consider that any employee, who was seeking payment for time off in the same circumstances would have been met with the same response and would have been spoken about in the same way.

Not allowing the Claimant's workplace colleague to participate during the grievance hearing on 11 October 2019 contrary to the Claimant's statutory right to a fair grievance process;

274. We have found that the claimant's representative was allowed to participate during the grievance process – he was simply informed that he could not answer questions on behalf of the claimant; something which is standard in most grievance processes and we found was a standard policy applied by the respondent. Had the claimant not been disabled but had brought a grievance in the same circumstances, we consider that his representative would have been told the same rules.

On 10 March 2020, the Third Respondent holding a capability case conference in the absence of the Claimant, rather than rearranging the case conference once he was informed the Claimant would not be attending;

275. This is discussed above. For completion we consider that the case conference was convened in the claimant's absence because KS reasonably inferred that the claimant had indicated that he was not going to attend as opposed to that he could not attend. In those circumstances there was no requirement under the policy to rearrange the meeting within 7 days and we have concluded that the claimant would not have attended even if KS had rearranged the meeting because it was not the date that he objected to but the fact that he did not agree with the policy being applied.

276. It was this decision not to attend that caused KS to go ahead in the claimant's absence. It was not because of the claimant's disabilities.

On 26 May 2020 the Third Respondent:

(i) disregarded OH advice dated 21 February 2019 and 20 September 2019, namely "it is possible that a confrontational situation with a non compliant passenger triggers a negative response". "This statement does not mean that a confrontational situation will trigger a negative response, however it is a possibility" and substituted his own view;

277. We do not consider that KS assumed that a confrontational response with a non-compliant passenger would occur simply that it was a possibility and that in the face of that possibility, KS was not willing to allow the claimant back to his role. The claimant's case is, essentially, that KS gave too much weight to the idea that the PTSD could be triggered rather than seeing it as a possibility which the claimant had worked with successfully for some time before he was suspended and therefore ought to have been allowed to continue to work with thereafter.

278. We have carefully considered whether KS has made a stereotypical assumption regarding this situation given that the OH report simply writes it as a possibility and yet he decides that it is not a sustainable possibility in the future. He does this without re-referring to OH at this stage and without a full understanding of the reasonable adjustments that the OH had recommended at this time.

279. However we consider that KS came to a decision based on the information he had available to him, not on the basis of discriminatory assumptions about PTSD or depression. Sadly that information did not include the claimant's opinion and input, nor did it include a complete understanding of the reasonable adjustments suggested. However that was not through lack of trying on KS' part. The respondent makes the point that the OH advice is just that, advice, and that the manager has to make the decision. KS' view, in the limited circumstances that he faced, was that any risk was too much and that he could not take steps to alleviate those risks sufficiently. The evidence he gave the tribunal was that he did not consider that any risk was justifiable given the possible repercussions for the claimant or members of the public.

280. We do not consider that this was a stereotypical assumption made by KS because of the claimant's conditions. We find that he reached this decision based on the information he had and in a vacuum from the claimant's opinion. That was a reasonable conclusion given that the claimant had, on several occasions, been off sick due to altercations that had occurred whilst performing his duties. We accept that motivation is different from motive and that something could both be reasonable and discriminatory. This is not the test we are applying -nevertheless we think it is relevant later in our subsequent conclusions and we think it points to motive as well.

281. It was not put to KS in evidence that he had reached this decision because he made discriminatory assumptions about mental health conditions. What was put to him by the claimant was that he had reached this decision because the claimant suffered from PTSD and depression. We find that the reason why KS reached this decision was because of the information he had about the fact that the claimant could become unwell were he to come back to work in this role and face confrontations. It was the risk and KS's desire to avoid that risk that prompted the decision.

(ii) *stated there were no reasonable adjustments that could be put in place to reduce or remove the confrontational nature of the role, contrary to OH advice, namely OH advice stating "In my professional opinion, I believe the chance of a confrontational situation is likely to be significantly reduced if the recommendations can be accommodated";*

282. As stated above, KS reached a conclusion regarding the risk essentially reaching the conclusion that there ought not to be any risk. We consider that he would have treated any person whose health would be put at risk by performing the role in the same way. His view was that there were no reasonable adjustments – we analyse them properly below. He considers that the reasonable adjustments recommended by OH would not avoid the risk entirely – more that they would reduce it. He did not see that as sufficient in all the circumstances and therefore reached a different decision. He did this not because of the claimant's disabilities but because he wanted to avoid the risk which he judged insurmountable even if it might be reduced by adjustments.

(iii) *failed to consider an OH report dated 21 February 2019, and failed to consider the Respondent's reasonable adjustments policy/guidance notes.*

283. KS did not fail to consider the OH report. The claimant failed to disclose it to him. He could not consider a report that he was not allowed access to. The Claimant's disabilities were not the reason why KS did not consider this report.

(iv) *failed to consider the Claimant's specialist report/medical records which were not requested from Claimant's GP.*

284. Whilst KS did want to see a specialist report, it appears that there was not one in existence. The Claimant has not disclosed a specialist report from his GP or anyone else. With regard to the other medical records, it is correct that KS did not request sight of the claimant's GP records. However he did not do this because he had one OH report and the claimant was refusing him access to other information regarding his health. It was therefore reasonable that KS deduced that it was unlikely that the claimant was going to allow him access to his GP records. Any failure to act was caused by the claimant's behaviour regarding his medical information and by the fact that KS

had access to an OH report and did not need to consider the claimant's GP notes at this time.

(v) *wilfully and purposely lied saying that the Claimant did not consent to him receiving the OH memo dated 21 February 2019 and his specialist report;*

285. We do not find that KS lied deliberately or otherwise. He had not been given access to either the OH memo, nor a specialist report. He stated those facts.

(vi) *placed the Claimant into medical redeployment.*

286. KS placed the claimant into medical redeployment for two reasons:

a) The fact that the claimant refused to engage in the process and therefore denied KS access to important information including his thoughts on the situation and the February report

b) The fact that he reached the conclusion, in these circumstances, that there were not any adjustments that could sufficiently reduce the risk to make it safe for him to return the claimant to, what has been agreed to be, a confrontational role for fear that it would exacerbate his condition. We consider that were KS to have to make a decision about a person who did not have the claimant's disabilities, but who was also suspended from work and would not release the relevant medical information or attend meetings with KS and was also judged to pose a potential risk to himself if he returned to work – would also have been placed in redeployment.

287. Therefore the reason for the treatment was not the fact of his PTSD and his depression but the above reasons instead.

On 1 October 2020 (dismissal date), refusing to extend the period of medical redeployment in order to allow the Claimant to secure a train operator role, refusing to return the Claimant to his substantive position or offering him alternative employment

288. We conclude that the reason the respondents refused to extend the period of redeployment was that they considered that the possibility of a train operator role was too distant. We accept the respondent's evidence that this recruitment process was paused due to the pandemic and there was no date on which the claimant would know whether the role would be progressed or not. The claimant did not have the promise of a role, he had just progressed to the next stage. KS had already extended the period for 2 weeks to allow the outcome for two other roles that the claimant had applied for thus indicating that he was willing to consider extending on other occasions. Therefore the reason for not extending the redeployment period further was that there was no imminent possibility of an alternative role being available.

289. We find that the reason the claimant was not returned to his substantive role was that KS judged that nothing had changed with regard to his health condition and therefore the Claimant could not return to it. KS considered that the adjustments that OH suggested were not reasonable for the reasons set out already above.

290. We find that in all the circumstances of this case, it was not discriminatory for KS not to re-refer the claimant to OH either at the point of redeployment or when dismissing him. This is an unusual set of circumstances that calls for close consideration and has given the tribunal considerable pause for thought. The respondent's long term absence policy clearly states that a referral to OH ought to happen. KS does not refer the claimant to OH again either at the redeployment stage or prior to dismissal. The last OH information he has about the claimant is therefore from September 2019 which, by the time of dismissal is over 9 months out of date.

291. Firstly, considering the direct discrimination claim. We find that the reason KS did not re-refer the claimant to OH was not because he had depression or PTSD, but because the claimant had refused to allow KS access to his February 2019 OH report and subsequently to answers to questions to OH. That refusal had significantly prolonged the claimant's absence from work. KS wanted to avoid further delays. Not because he wanted to dismiss the claimant, but because he wanted to manage the situation. The fact that managing the situation led to the claimant's dismissal still does not meant that this was KS' aim or intention at the outset of the process. We have concluded that KS' aim when he took over line management of the claimant was to assess what was needed to bring the claimant back to work in a way that was safe. At almost every substantive stage of that, the claimant was obstructive thereby preventing KS from being able to find a way forward. The claimant may argue that his obstruction was justified – but whether it was or not – the point remains that it was the obstruction that caused KS to act as he did, not the claimant's depression or PTSD.

Using a document (disclosed by the Claimant to the Respondents in error) showing the Claimant was carrying out other work, as a reason for unfounded and baseless disciplinary proceedings against the Claimant from 2 September 2020;

292. The respondent became aware of the claimant carrying out alternative work because of the disclosure exercise. EJ White allowed an application by them to use that document for the purposes of a disciplinary investigation. The respondent's policy is that alternative work can be carried out but subject to permission. They had no records of whether the claimant had that permission. Subsequent to the investigation they took no disciplinary action against the claimant.

293. Whilst the claimant provided evidence of other employees who had other roles and were not investigated by the respondent, we did not find this

evidence persuasive or that the individuals were in sufficiently similar positions to be appropriate comparators. The comparators the claimant said had been treated differently were in different positions. One person who had been working resigned before the investigation could be concluded. He may well have been sanctioned as he did have another job without permission. The other person, the claimant says he had told to apply for retrospective permission because he had been spotted by one of his managers making deliveries for a supermarket. The manager who had supposedly spotted him says that he has no recollection of that matter. The individual was granted permission when he applied. The respondent was not aware, at the time that permission was granted, that this was, in effect, retrospective. It therefore did not seek to take disciplinary action or investigate his behaviour because they had previously been unaware of this. Therefore there was no need for them to discipline at that time. They investigated the claimant because it came to their attention that he had another job and they had no relevant paperwork on the matter. Once they had concluded their investigation they decided that he probably had had permission and no disciplinary action was taken.

294. We find that the reason they investigated the claimant was not because he has depression or PTSD but because they discovered that he was working in another job and wanted to ensure that the proper permission had been sought. On establishing that they took no further action.

On 1 October 2020, dismissing the Claimant for capability

295. The Claimant's dismissal occurred because the first respondent and KS assessed that he could not do his substantive role due to the risk it posed to him and subsequently there were no suitable roles within the respondent that he could be redeployed to. We find that these were the reasons for his dismissal.

296. We have already considered the build up to the dismissal and found that KS' action in firstly placing the claimant in redeployment was not discriminatory. During redeployment, (apart from the failure to refer the claimant to OH) KS followed the respondent's redeployment process. He spoke to the claimant regularly, the claimant engaged with the redeployment specialist and he applied for several roles. At the point at which the normal period ended, KS extended the period for the outcome of 2 applications. When they had been resolved, KS met with the claimant (virtually).

297. The claimant has provided evidence of a comparator who was allowed back to his substantive role at the conclusion of a period in redeployment because his condition improved and he was able to return to work. The claimant says that his condition had also improved in that he now only needed 2 adjustments as opposed to three and he also considers that KS failed to consider how much the RPI role had changed by then due to the pandemic. He also considers that KS failed to consider the possibility of transferring him to one of the other roles given the imminent reorganisation of

the three roles which would result in them all coming under one umbrella title. We assess this under the reasonable adjustments claims.

298. The reason for the comparator's different treatment was an improvement in his health during the redeployment process. Whilst we accept that the claimant was not referred to OH at this time, it is clear that at no point does he divulge to anyone that his condition has improved and that he thinks he would be well enough to return to his substantive role in a way that did not involve the adjustments that the respondent had assessed as being not sustainable or reasonable and that they were therefore unwilling to make. He has not evidenced before us that his health had improved or changed since the assessment in September 2019 which said he was only well enough to return to work subject to the adjustments.

299. Even though we have found that there was an unreasonable failure to adjust the policy of requiring the claimant to work in hotspots (see conclusions below) there remained the dual checking requirement that the claimant was adamant needed to be implemented and that OH had said ought to be implemented to reduce the risk of a recurrence of PTSD. In those circumstances, the decision to dismiss the claimant in October 2019 was not made because of the claimant's depression or PTSD but because of the perceived risk to the claimant of returning to his RPI role, the fact that the respondent believed it could not accommodate the adjustments required and the lack of alternative employment available at the end of the redeployment exercise.

300. For the purposes of the direct discrimination claim we must consider the reason why the claimant was dismissed. We find that the reason was the lack of alternative employment available at that time. We do not consider that the reorganisation had taken place by then nor was it about to. In any event we consider that the other roles that now come under the same umbrella as the RPI role, also carried confrontational risk. The train driver role was also not an imminent possibility even though the claimant had progressed to the next round. The recruitment process was stalled. The decision not to wait for its outcome was not because the claimant had depression or PTSD but because there was a global pandemic, the recruitment process was not proceeding and had no end date and as a result KS took the decision that the respondent could not reasonably wait indefinitely for that to conclude with the claimant remaining an employee.

On or before 1 October 2020, failing to seek OH advice and guidance before dismissing on medical grounds.

301. We have discussed this above. We conclude that the failure to refer the claimant to OH at this stage occurred because of the claimant's refusal earlier in the process to share his OH report and answers to questions.

In the dismissal letter dated 15 October 2020:

i. stating the Claimant's medical condition had not improved enough to return him to his substantive role;

302. We have analysed this in detail above. We conclude that the respondents stated that the claimant's medical condition and not improved because the claimant told them it had not improved. The claimant was expressly asked if it had and he gave an answer that could reasonably be interpreted as indicating that nothing had changed.

(I I) *the Third Respondent denying he had seen and was aware of the OH report dated 21 February 2019 and its recommendations;*

303. We have found that KS had not seen the OH report and was therefore not lying.

(iv) the Third Respondent knowingly and purposely making spurious statements that the Claimant confirmed at a sickness review meeting on 18/9/2020 that there were no changes to his medical condition;

304. The claimant had given an answer at this meeting as follows:

"JW: Well my condition is still there, and anxiety is still there. I take regular medication for my condition and there is other treatment option I am awaiting to start."

We consider that KS reasonably interpreted this as being the claimant indicating that his condition had not changed. We find that the reason KS stated that there was no change to the claimant's condition was because that is what he understood from the above answer. He did not say this because the claimant had PTSD or depression but because he believed it to be true.

(v) applying its long term sickness absence policy to the Claimant knowing it did not apply;

305. The respondent applied its long term sickness absence policy to the claimant because it was the closest policy that did apply to the situation, i.e. due to a health-related reason the claimant was not performing his substantive role at that time. There is a difference between the claimant being off sick and not being able to perform his substantive role but we consider that it was nevertheless appropriate to apply this policy in all the circumstances.

(vi) rejecting the Claimant for the Train Operator role by dismissing him (it was an internal vacancy)

306. The respondent did not reject the claimant for the train operator role. They judged that they could not await the outcome of the recruitment process before dismissing the claimant because it did not have an end date and had been stayed due to the pandemic. The reason for the treatment was not the

claimant's depression or anxiety but the indefinite nature of the recruitment process.

(vii) *stating there were no reasonable adjustments that could be made*

307. The full context of this statement within the dismissal letter is as follows:

> Occupational Health advice stated that it is possible, should you be placed *in a confrontational situation, it could trigger your PTSD. Given that the very nature of the Revenue Protection Inspector (RPI) role is one of confrontation (because it is a role where you are expected to detect and defer fare evasion on the TfL network), it is my view that you are unable to continue in your role as an RPI because we cannot remove the confrontational nature of the role which risks triggering your PTSD. All other options have been considered including whether there are any reasonable adjustments that could be accommodated by the business that would allow you to return to your RPI role. However, I have concluded that there are no reasonable adjustments that could be made by the business that would allow you to return to your RPI role.* (p848-849)

308. The claimant states that this decision, (set out in the same letter as KS accepting that he could accommodate the claimant not working in hotspots and dual working) must be discriminatory because it was made because he has PTSD. We disagree. We consider that this decision is made because of the potential risk of triggering the PTSD and the possible harm that would ensue as opposed to the fact that the claimant has PTSD. Had a comparator, who had a similar risk of being triggered by confrontation even with the reasonable adjustments, we consider that the respondent would have made the same decision in these circumstances. The claimant accepts that the reasonable adjustments would not have removed the triggering risk but only reduced it. He judged, and OH judged that this was an acceptable level of risk. The respondents did not.

> ***Khalil Sarr on 11 June 2020, asking OH if claimant is fit or have any restrictions to being placed in redeployment without OH assessing the claimant. P 1369***
>
> ***Khalil Sarr on 4 September 202, stated to OH that claimants situation has not improved as he is still suffering from his condition. P 1375***
>
> ***Khalil Sarr on 10 September 2020 failing to inform claimant of the option to review his condition with OH as he had decided himself that the claimants condition had not improved. P 1380.***

309. The above three matters all refer to KS's actions around contacting OH about the claimant. They were allowed to proceed as part of the claimant's application to amend. They have been left in bold for that reason. We take them

together because we do not consider that the claimant has demonstrated that KS at any time in any of the above incidents acted because the claimant had depression and anxiety. He acted this way because

(i) He was trying, in the most time efficient way, to find out information about the claimant's condition so that he could be properly informed when he made his decisions.

(ii) He used unfortunate language that many people with ongoing health issues object to, namely the use of the word 'suffering'. However we consider that he used this word in a colloquial way to denote that the claimant still had his conditions which was correct. He did not intend to be derogatory. We find that he would have used this word regardless of what condition the claimant had – it was not because of his PTSD or depression, it was because the claimant had a health condition which he continued to have.

(iii) There was no obligation on KS to inform the claimant that he had the right to an OH review. There has been no evidence that KS withheld this information deliberately or that it occurred because the claimant had PTSD or disability.

310. We therefore do not uphold any of the Claimant's claims for direct disability discrimination.

Discrimination arising out of disability (s15 Equality Act 2010)

311. Section 15 EQA 2010 provides as follows:

(1) A person (A) discriminates against a disabled person (B) if –
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

312. The 'Something Arising' put forward for each less favourable treatment element become quite convoluted and extended at various points. It was therefore difficult at times to unpick exactly what the claimant alleged was causing the treatment. We have had regard to the advice set out in Pnaiser as follows:

313. In *Pnaiser v NHS England* [2016] IRLR 170 the EAT gave the following guidance:

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

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

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).

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

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

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

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, "discriminatory motivation" and the alleged discriminator must know that the "something" that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the

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

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

314. The use of the phrase 'in consequence of' has been helpful particularly when dealing with the somewhat complicated chains of causation that the claimant sets out on occasion below. We have reminded ourselves that motive is irrelevant (as per Pnaiser above) and carefully considered, in a case where there appear to be multiple issues alleged as being the 'something arising', that there can be more than one factor that causes the less favourable treatment and that our assessment of what was in the minds of the respondents at the time is key but consideration of their motive is irrelevant.

315. As an overall comment, many of the claims in this section rely upon the fact that they are caused by the claimant having a negative reaction in his meeting with Anand Nandha and leaving the meeting and then subsequently being placed on medical suspension. It is correct that this is the starting point for the chain of events that then followed. The claimant's response in that meeting did arise from his disabilities. Nevertheless, we find that the placing of the claimant on medical suspension at this stage was a proportionate means of achieving a legitimate aim, namely assessing the claimant's health and his ability to carry out the role.

316. Also underpinning several of the below claims is the fact that KS proceeded with the case conference meeting in the claimant's absence. We find that this did not occur for a reason arising out of the claimant's disability, but because the claimant refused to attend the case conference meeting. His refusal to attend has not been shown to be arising from his disability. This is set out further below. That failure to attend the meeting meant that it placed KS in an invidious position as he had to make decisions regarding elements such as risk and possible adjustments without the input of the claimant. Whether this failure to attend was the sole cause will vary but where other issues arising out of disability do cause any unfavourable treatment, the subsequent analysis of the proportionality of those decisions is made in the context of the fact that refusing to attend the case conference did not arise from the claimant's disabilities.

317. The list of issues was very helpful in listing the unfavourable treatment and the 'something arising' from the disability that the claimant relied upon separately. However, for the purposes of our decisions on each issue, we have put the two together for ease of reference. The unfavourable treatment is underlined – the "something arising from" is in italics.

On 25 October 2018, the Second Respondent refusing to allow the Claimant to carry out his checks with a colleague for all except the first and last hour of his shift;

The something arising is "The Claimant says that as a result of his disabilities it arose that he suffered heightened anxiety at peak times giving rise to adverse difficulty to do his job as such he needed reasonable adjustments."

318. JB never refused to allow the Claimant to dual check. JB did not assist the claimant in arranging that dual checking but there was no refusal. The unfavourable treatment did not therefore take place.

On 18 March 2019, the First Respondent refusing:

i. to agree that the Claimant would not be deployed in hotspots (volatile areas);

ii. to provide a colleague to work with;

The something arising is that

a. it arose that he suffered panic attacks, poor concentration and inability to function as a result of his disabilities. As a result the Claimant could not work in hotspots/volatile areas;

b. that it arose that he required reasonable adjustments of working with a colleague as he experienced increased anxiety, lack of concentration and panic attacks as a result of his disability;

c. that it arose that he experienced significant fatigue as a result of his disability and was unable to work full-time hours.

iii. the Claimant's request to work reduced hours of 3½ days per week for three months;

The Something arising is

a. that it arose that he experienced irritability, stress reactions and taking flight as a result of his disabilities;

b. that it arose that he suffered from loss of concentration and stress reactions as a result of his disabilities.

319. The respondent did not agree to remove the claimant from hotspots or to arrange dual checking for him. There was therefore unfavourable treatment. However the reason for those decisions was, rightly or wrongly, the business and functional needs of the respondent. It was not because of the Somethings Arising given above. The fact that the claimant needed reasonable adjustments was not the reason for their refusal. The fact that the claimant suffered anxiety, was not the reason for the refusal.

320. The respondent allowed the claimant to work for the reduced hours of 3.5 days per week but they would not agree to pay him in full for those reduced hours. The unfavourable treatment therefore did not occur. In any event, their refusal was not because of the 'somethings arising' relied upon – it was a commercial business decision.

On 2 July 2019, during a grievance meeting Anand Nandha:

i. showing micro aggression and bias;

ii. insisting on dealing with two grievances at once;

The something arising is the Claimant says that he experienced panic attacks, stress reactions and took flight from a grievance hearing as a result of his disabilities.

321. We have not found that AN showed micro aggression or bias during the meeting.

322. We accept that AN's intention was to deal with the two grievances at once. We do not consider that the claimant has established that this was unfavourable treatment as there has been no evidence from the claimant indicating how this was unfavourable beyond the fact that he claims to have been unaware that both were going to be discussed before attending the meeting. The respondent had however made him aware in writing as it was set out in the invitation letter, so we do not accept that the less favourable treatment occurred as described. In any event, the reason AN wanted to deal with both the grievances at once was not because the claimant took flight from the grievance hearing. The decision to deal with both matters together predated the meeting. The meeting itself did not proceed for long enough for it to be established that AN was going to insist on considering both in any event as the claimant left before the meeting could be concluded and before they had even touched on both grievances.

On 2 July 2019, after the grievance meeting, suspending the Claimant from work without his knowledge;

The something arising is the Claimant says that he experienced panic attacks, stress reactions and took flight from a grievance hearing as a result of his disabilities.

323. We accept that the claimant was suspended because of his behaviour at the meeting. We also accept that the behaviour arose from the claimant's PTSD. However we do not accept that the decision to suspend him was done deliberately without his knowledge. That occurred due to a failure of the postal system not because the respondent deliberately chose not to tell the claimant.

From 20 September 2019 to 26 May 2020, refusing to implement the recommendations made by Occupational Health in a report dated 20 September 2019 and continuing to keep the Claimant on suspension. The recommendations were to allow the Claimant to undertake a mixture of single and dual check (timed) and to avoid deploying him in volatile areas.

The Claimant says that panic attacks, stress reaction and taking flight from a grievance meeting, and the subsequent OH report that the Claimant was fit for duty with reasonable adjustments, were as a result of his disabilities.

324. We accept that the respondent would not enact the adjustments recommended by OH which meant that the claimant did not return to work. However, the reason for the refusal to implement the report was KS's perception that he needed to see the Feb 2019 report and subsequently the claimant's refusal to attend the meeting with KS to discuss the medical information he did have. The respondent did not act as it did because the claimant had left the grievance meeting or because he needed reasonable adjustments.

From 14 October 2019 to 9 December 2019, refusing to answer the Claimant's telephone calls to the staff manager at 10am every Monday;

The Claimant says that it arose that he had panic attacks, stress reaction and took flight from the grievance hearing resulting in his suspension and the requirement to call the First Respondent every Monday at 10:00 hours. It further arose that the Claimant was deemed fit for duties with reasonable adjustments as a result of his disabilities.

325. KS did not refuse to answer the claimant's telephone calls every Monday. There is evidence that he took some calls. We also accept that he did not take many because he had a meeting at that time which meant he was often unavailable. However, any failure to take calls arose because KS was frequently in a meeting at that time as opposed to because of the something arising described above.

From 20 September 2019 (date of OH report), not providing any updates to the Claimant on his return to work, despite the Claimant asking for clarification on 7 October 2019;

The Claimant says that it arose that he had a panic attack, stress reaction and took flight which led to his suspension and OH referral and report; from that it also arose that the Claimant was fit for duty with reasonable adjustments because of his disabilities.

326. It is not clear how the claimant says that being fit to work with reasonable adjustments caused the respondents to fail to provide him with any updates regarding his return to work. We consider that it is clear that he had a call on 7 October 2019 with KS (which in turn disproves his earlier allegation that he never got to speak to KS). We do not accept the claimant's evidence that he was told by KS that he knew nothing about the claimant coming back to work. We consider it more likely than not that it was during this conversation that KS discussed needing to access the February 2019 report and when the claimant said that he would give his consent if KS gave him the contact details for the person at OH that KS had been dealing with. We therefore consider it more likely than not that KS told him that he needed that information so that he could consider what could be done to assist the claimant's return to work as opposed to him saying that he knew nothing about it. We therefore do not accept that KS failed to give any updates. The claimant knew what was happening and why.

On 10 March 2020, the Third Respondent holding a capability case conference in the absence of the Claimant, rather than rearranging the case conference once he was informed the Claimant would not be attending, contrary to the Respondent's Longer Term Absence Policy;

The Claimant says that it arose that prior to the time of the sickness absence case review he experienced a state of heightened panic attacks and significant anxiety as a result of his disabilities which meant he could not attend the meeting.

327. As has already been discussed above, we consider that KS proceeded with the capability case conference in the claimant's absence because the claimant clearly indicated in his email that he was not going to attend a meeting with KS. We have found that there was no breach of the Longer Term Absence Policy as in these circumstances there was no obligation on KS to rearrange the meeting within 7 days. The claimant had clearly said that he was not going to attend as opposed that he could not attend. His grounds for saying that he could not attend have varied. He relies upon the fact that he would not attend because he disagreed with the policy being used and refused to attend to discuss what policy would be suitable. He is now seeking to say that he was too unwell to attend and that he had significant anxiety and a state of heightened panic attacks that meant he could not attend. He did not say that at the time, he simply said that he needed to protect himself. Further he has provided no medical evidence that he was too unwell to attend at the time or that this refusal to attend arose because of his disabilities. We find that this explanation has been created after the event and that on balance of probabilities, he was well enough to attend the meeting and chose not to.

From 26 May 2020, the Third Respondent placing the Claimant into medical redeployment, on the basis that the Claimant could no longer carry out his substantive role, disregarding the contents of the OH reports dated 21 February 2019 and 20 September 2019. On 26 May 2020, in making its decision as regards medical redeployment, the Third Respondent based its decision on inaccurate facts in the following respects:

i. the Third Respondent stating that he made the decision as regards medical redeployment because the Claimant did not give him access to a specialist report or an OH report dated 21 February 2019, whereas in fact the specialist report was not requested and the Respondent had the requested OH report and knew its contents.

The Claimant says it arose that he had panic attacks, stress reaction and taking flight from the grievance hearing resulting in suspension until dismissal, OH referral and report resulting in him being deemed fit for duty with reasonable adjustments, and stating that it is possible that a confrontational situation with a non-compliant customer triggers a negative reaction in the Claimant. Further his state of heightened panic attacks and significant anxiety resulted in him not attending a case conference.

The Claimant says that it arose from the OH report dated 20 September 2019, that the Claimant was fit for duty with the reasonable adjustments recommended in the OH report from 2019. It also arose that the First Respondent wanted a specialist report of the Claimant's condition following the Claimant's panic attack, stress reaction and taking flight from the grievance hearing on 2 July 20219, due to his disabilities.

328. The claimant was placed in redeployment because KS assessed that he could no longer do his substantive role. However he did not disregard the OH reports. He considered the September 2019 report and he did not have access to the February 2019 report. We accept that the specialist report was not requested, but nether did it exist. KS wrote to say if there was a specialist report he wanted a copy but as it did not exist, he never received a copy. It was not inaccurate to say that the did not receive a copy of the February 2019 report or specialist report. The unfavourable treatment therefore did not occur as described.

(i) the Third Respondent stating that the Claimant could not do his role due to a possibility of a confrontational situation triggering his disability, which was contrary to the OH reports;

i. the Third Respondent stating that there were no reasonable adjustments that could be made to reduce or remove the confrontational nature of the job, whereas the Respondent failed

to follow its reasonable adjustment policy/guidance notes and failed to consider what reasonable adjustments could be made.

The Claimant says it arose that he had panic attacks, stress reaction and taking flight from the grievance hearing resulting in suspension until dismissal, OH referral and report resulting in him being deemed fit for duty with reasonable adjustments, and stating that it is possible that a confrontational situation with a non-compliant customer triggers a negative reaction in the Claimant. Further his state of heightened panic attacks and significant anxiety resulted in him not attending a case conference.

The Claimant says that it arose that ***"It was possible for a confrontational situation with a non-compliant customer triggers a negative response",*** *also that the Claimant was fit for duty with reasonable adjustments as a result of the Claimant's disability.*

329. KS made a decision to place the claimant into redeployment because he decided that there was a risk the claimant would have a negative response to a confrontational situation. The respondent did not however fail to follow their reasonable adjustment policy. KS called the case review meeting to discuss the possible reasonable adjustments and any possible risk assessment. We have accepted KS' evidence that he would have carried out these steps had the claimant attended the meeting. Therefore do not consider that the unfavourable treatment as relied upon by the claimant happened as described i.e. it seems to be a key part of this particular treatment that the decision was contrary to the reasonable adjustments policy.

330. However, if we are wrong in that, we have assessed simply whether the decision to place the claimant in redeployment arose from the fact that OH had advised that 'It was possible for a confrontational situation with a non-compliant customer triggers a negative response." Applying the decision in Pnaiser, it is clear to us that this OH advice plays a part in KS' decision to place the claimant in redeployment. It cannot just be explained away by the respondent saying that it was caused by the claimant failing to attend the meeting – clearly the OH advice was a significant factor.

331. The question then is whether it was a proportionate means of achieving a legitimate aim.

332. We consider that it is correct that the role could not be reduced to a non-confrontational role. The claimant has suggested several possible adjustments that would have reduced the risk of confrontation such as, body worn cameras, dual checking and avoiding hotspots and taking into account that the RPI role had changed at that time due to the pandemic. The claimant considers that all of these options and situations ought to have been considered

before making the decision that all risk must be avoided. He accepted that the risk could not be reduced to nil but he said that this was not what was required from a medical point of view as he had been working in the role without any adjustments for a considerable period of time prior to his medical suspension without being triggered.

333. It has been difficult for the Tribunal to assess as whether placing the claimant in redeployment at this time, without having recently trialled any of the reasonable adjustments suggested by OH or doing a risk assessment was a proportionate means of achieving a legitimate aim.

334. We heard evidence, which we accept, that body worn cameras were not introduced until well after the decision was made and that they reduced the risk but did not remove it. We conclude that KS did consider the reasonable adjustments that were suggested by OH and he considered them carefully as set out in paragraph 33 of his witness statement.

335. We also heard evidence that the RPI role had changed but it was a temporary change and there remained confrontation to a considerable degree at this point because of needing to enforce mask wearing. We accept this evidence.

336. It is not for the claimant to have to suggest what adjustments could have been made and we are not, at this stage, determining a reasonable adjustment claim but a s15 Equality Act claim. However the proportionality of the respondent's actions is somewhat dependant on whether there were adjustments that could or should have been made.

337. It is clear that KS made his decision because of the OH assessment regarding risk. We note that KS did not carry out a risk assessment at this time but have accepted his evidence that he would have obtained one following the meeting with the claimant at which he was hoping to discuss all the possible adjustments and risks. His evidence at this point (para 33 of his witness statement) is as follows:

> *"I concluded that I could not put Mr White's health at risk by exposing him regularly to confrontational situations, in the full knowledge that this would trigger his PTSD and cause a negative response. Neither could I risk exposing colleagues or the travelling public to those negative responses. Furthermore, I felt that Mr White would not be capable of being sufficiently effective in his role in terms of being able to address the central aim of the role, i.e. reducing fare evasion across TfL's network. I had no confidence that the situation was likely to improve in the foreseeable future."*

338. We accept that the aim was legitimate, the question is whether the actions were proportionate. The respondent's defence is that in the absence of any cooperation by the claimant in clarifying and agreeing adjustments and

support, it was proportionate to conclude that the claimant was not able to carry out the role of RPI and therefore he ought to be placed within redeployment.

339. Whilst this has been a finely balanced issue, we conclude, on balance, that it was proportionate. Had the claimant attended and engaged in the discussion then we find it more likely than not that adjustments would have been trialled and risk assessments carried out. But in circumstances where the claimant had been absent for 9 months, primarily because of his refusal to actively engage in firstly the OH report release, secondly allowing KS to ask questions of OH and finally refusing to attend the case review meeting, (all of which were not caused by or arising from his disability), it was proportionate for KS to make this decision even taking into account the fact that it was such a significant decision regarding the claimant's career.

On 1 October 2020, dismissing the Claimant for capability and, in the dismissal outcome letter dated 15 October 2020, basing its decision to dismiss on unfounded or incorrect grounds including:

i. the Respondents stating that the Claimant was not able to continue in his role because OH advised that it was possible that a confrontational situation with a non-compliant passenger could trigger the Claimant's condition, which the Claimant says is the Respondent manipulating and disregarding the OH advice;

The Claimant says that it arose that he had panic attack, stress reaction and taking flight from a grievance hearing which led to his suspension until dismissal, and OH referral and report which stated the Claimant was fit for duty with reasonable adjustments, which resulted in redeployment unsuccessfully after which it arose that the Claimant was fit for duty with reasonable adjustments. "It was possible for a confrontational situation with a non-compliant customer causes a negative response", the claimant still had his condition, took medication, was awaiting other treatment options and the Respondents' diagnosis that the Claimant was not fit enough to return to his role were all due to claimants' disabilities.

The Claimant says that it arose that he had panic attacks, stress reaction and took flight from a grievance hearing which led to his suspension until dismissal and OH referral and report, which stated that as a result of his disability, the Claimant was fit for duty with reasonable adjustments. It also arose from the OH report that it was possible that a confrontational situation with a non-compliant customer triggers a negative response.

ii. the Respondents stating that there were no reasonable adjustments that could be made to allow the Claimant to return to his RPI role because OH advised that it was possible that a confrontational situation with a non-compliant passenger could

trigger the Claimant's medical condition, which the Claimant says is the Respondent manipulating and disregarding OH advice.

The Claimant says that it arose that he had panic attacks, stress reaction and took flight from a grievance which led to his suspension until dismissal and OH referral and report which said he was fit for duty with reasonable adjustments. It also arose from the OH report that a confrontational situation with a non-compliant customer triggers a negative response.

iii. The Respondents stating the Claimant's condition had not improved enough to allow a return to his substantive role.

The Claimant says as ***above at 19.10(b)*** *in addition to the Claimant confirming that his condition is still present, taking medication and waiting to start further treatment options.*

340. We have taken these three separate but related elements together as our assessment of them is the same.

341. Firstly we need to assess whether the unfavourable treatment, as described, actually happened.

342. Clearly, the claimant was dismissed for capability. We conclude that this occurred because of something arising from his disability namely the OH advice that a confrontational situation with a non-compliant customer could trigger a negative response. That advice directly led to KS' conclusions that the claimant could not carry out his role as he decided that even with reasonable adjustments, the claimant could not work with no risk of his condition being triggered.

343. We do not conclude that the respondent's interpretation of the OH advice was a manipulation of what OH had said. It is correct that KS says that a confrontational situation 'would' trigger a negative response as opposed to 'could' trigger a negative response. However when considered in the context of the letter overall, we do not think that this reflects what KS thought at the time that he made the decision. It is clear that he understood that it was a risk as opposed to a certainty. Further KS does not disregard the OH advice he has. He considers it and considers the adjustments recommended but does not feel that they would be sufficient to allow the claimant to continue doing his role in the way that the respondent needed him to do his job whilst also avoiding the risk which he said was too great even when reduced.

344. We accept that the dismissal letter states that there were no reasonable adjustments that could be made to allow the Claimant to return to his RPI role because OH advised that it was possible that a confrontational situation with a non-compliant passenger could trigger the Claimant's medical condition. We do not accept that this is the respondent manipulating or disregarding the OH advice. We make the same findings as in the paragraph above.

345. It is correct that the respondents state that the claimant's condition had not improved enough to allow a return to his substantive role.

346. Therefore, some of the unfavourable treatment from that letter did occur though not all as the claimant describes.

347. Of the unfavourable treatment that we did find happened, we accept that the advice from OH that the claimant was at risk of his PTSD being triggered arises from or is in consequence of his disabilities.

348. We must therefore consider whether the treatment was a proportionate means of achieving a legitimate aim. The respondent relies upon the following defence (as summarised in the Respondents' Table of Factual Submissions)

> *"Mr Sarr genuinely believed that C lacked capability to carry out his role; that is the reason he dismissed him.*
>
> *i. His lack of capability clearly did arise from his disability, but there is no evidence that his repeated obstructiveness and lack of cooperation with OH and with his managers arose from his disability*
> *ii. KS's inability to identify what adjustments might be effective for C (and therefore might be reasonable) was caused by C's obstructiveness, not by his disability*
> *iii. Even if justification is necessary, dismissal was justified*
> *iv. It was a legitimate aim for KS and R to safeguard the health and safety of C and of bus passengers*
> *v. In the absence of any cooperation by C in clarifying and agreeing adjustments and support, dismissal was proportionate"*

349. We found that placing the claimant into redeployment was not either directly discriminatory or discrimination arising from disability. The respondent's case is essentially that dismissal flowed from the deployment decision because the claimant did not find an alternative role whilst in redeployment and that the status quo remained in terms of the claimant's health and ability to do his job at the end of the process. The issue that has meant the Tribunal questions these submissions is that at this point i.e. once he is placed in redeployment, the claimant was engaging with the respondent and KS. He was attending all the telephone meetings with KS, he applied for roles and he engaged with the redeployment team in trying to find alternative work. The discussions regarding his health were perfunctory though, we find, genuine on the part of KS. There was however no discussion about a possible OH referral despite the re-engagement of the Claimant at this point.

350. There was therefore, at this stage, across a period of 14 weeks, nothing like the same level of obstruction and failure to engage that in effect, justified or explained the respondent's decisions earlier in the process. Therefore we

conclude that the respondent has failed to establish that there was the same absence of any cooperation by the claimant at this point in time.

351. Had KS attempted to speak to the claimant at the point at which the redeployment process was coming to an end about reasonable adjustments or risk assessments, and in effect reopened the possibility of an OH referral then we consider that it would be more likely than not that he would have obtained 'buy in' or engagement from the claimant. Afterall we make the point that the claimant made repeatedly; he was well enough to work subject to adjustments. Those adjustments when considered without the claimant's input appeared not to have offset the risk that KS felt existed (again in isolation from a discussion with the claimant). However he has said in his letter dated 26 May 2020 that he did think that those adjustments could have been accommodated. We accept that it is possible that one outcome of a conversation regarding being placed back in the RPI role would have been that KS still concluded that the risk remained regardless of adjustments. However, it is also possible that on discussion with the claimant, it was established that risks had been sufficiently offset and he could return to work.

352. We see from the example of one of the comparators, that at the end of a redeployment process, the person was brought back into their substantive role because their health improved. We are not drawing exact parallels here as we do not know that the claimant's health improved and we have also seen that his answers to questions from KS suggested that it remained the same. However, KS was no longer in the same position he had been in in October where he was making a decision without the possibility of input from the Claimant. He had the claimant in numerous meetings and at no point did he raise the possibility of returning to his substantive role following a conversation with the claimant. During evidence he said that if the claimant had attended the meeting in October, he would have explored the risk issue more, he would have discussed the adjustments suggested by OH and he would have carried out a risk assessment. Yet, at the point when he came to consider dismissal because redeployment had not worked, he did not have that conversation despite the claimant attending all meetings in the interim and clearly engaging with him and the redeployment expert throughout.

353. It is not in dispute that the issues regarding the possible risk to the claimant and the need for reasonable adjustments arose from the claimant's PTSD. We find that KS' failure to properly reconsider the possibility of allowing the claimant to return to his substantive role arose from the fact that the claimant needed adjustments and had previously been absent from work on medical capability.

354. We do not consider that this was a proportionate means of achieving a legitimate aim. We consider that KS had several options at the point at which redeployment ended:

a. Extend the redeployment exercise
b. Re-refer to OH and either dismiss or reinstate in his substantive role
c. Discuss the situation with the claimant and consider reinstating the claimant in his substantive role without an OH referral
d. Dismiss the claimant.

355. We consider that KS entirely failed to contemplate options (b) and (c) , or at most, gave very little thought to either. We conclude that any failure to consider options (a) reasonable given the specific circumstances and have set out our reasoning for that elsewhere.

356. However, in circumstances where;

(i) the claimant's request for adjustments could have been accommodated by KS (according to him),
(ii) the claimant was engaging in the process and could well have engaged with KS regarding a return to work discussion and a possible OH referral at this stage,
(iii) he was signed as fit to return to work and had been throughout, and
(iv) we have found that one of the PCPs ought to have been adjusted,

we conclude that it was disproportionate not have the conversation he says he wanted to have 12 or 14 weeks earlier so that he could establish whether the only way the claimant could return to work was if <u>all</u> risk was removed entirely and to consider whether the claimant could be referred to OH. The desire to aim for no risk at all, where all staff were known to be at risk every day, and in the absence of any proper conversation or consultation to properly assess the level of risk was not a proportionate means of achieving a legitimate aim.

357. In circumstances where the claimant had done the job for a relatively long period of time with no adjustments at all, had had only one meeting that gave cause for concern and was now engaging fully in the meetings and redeployment exercise, it no longer remained proportionate for KS to aim for no risk whatsoever of a trigger to the PTSD when he had not done a risk assessment and he could accommodate the OH suggested adjustments that would have reduced the risk even if not eliminated it. He could have sought to understand how much or if the reduced risk was sufficient at this point because he now had access to the claimant that he had not previously had.

358. We consider that the failure to have that conversation arose from the situation the claimant found himself in – suspended following one difficult meeting and requiring reasonable adjustments. That failure then led directly to the claimant's dismissal.

359. We have recognised throughout the difficulties the respondent managers had in engaging with the claimant and this is why previous decisions around this arose out of the claimant's behaviour, not something arising from

his disability. But at this stage, that is no longer the case and we do not consider that it was proportionate either.

360. We therefore uphold this part of the Claimant's claim for discrimination arising from disability under s 15 Equality Act 2010 and find that his dismissal arose from something arising out of his disability.

> KS on 11 June 2020 treated the claimant unfavourably by seeking OH advice on whether the claimant was fit for redeployment and restrictions after the decision to put the claimant in redeployment had already been made. (p1369)
>
> *It arose as a result of his disability the claimant required dual checking and not to be deployed in hotspots the claimant remained fit for work.*

361. It is correct that KS only sought OH advice after he had made the decision to put the claimant into redeployment. KS informed the claimant of his decision to put him in redeployment on 26 May 2020. This email was sent on 11 June 2020. It is possible that this could amount to unfavourable treatment because had the claimant not been fit to take part in redeployment, he would have struggled to participate. However he was not too unwell to participate and has never suggested that to us. It is difficult therefore to see how this was unfavourable for the claimant in all the circumstances as he has not suggested that the failure to refer him to OH to see if he was fit for going through the redeployment process would have changed his ability to engage with the redeployment process. The claimant has maintained throughout that he was well enough to engage in the process and therefore any referral would presumably, even on his case, have found that the referral was fine from a health point of view.

362. Any delay or oversight in seeking OH advice was not arising from the fact that the claimant required reasonable adjustments or that he remained fit for work – it arose because KS failed to follow the redeployment process either through ignorance or as a mistake.

> Khalil Sarr on 11 June 2020, at 15.01 treated the claimant unfavourably by refusing to make a referral to OH (p1368)
>
> *It arose that as a result of the claimant's disability the claimant required reasonable adjustments as per OH report 684-686.*

363. We accept that KS did not make an OH referral. He states that the case had been going on for 6 months and needed to be concluded. That is capable of being unfavourable treatment but as per our analysis above it is hard to say how this was unfavourable to the claimant given he has never asserted that he required any adjustments to the redeployment process or that he in any way had difficulties with it.

364. We also do not consider that this occurred because the claimant needed reasonable adjustments. He has never suggested that he needed reasonable adjustments to the redeployment process. It occurred because the claimant was being placed in redeployment. We accept that being placed in redeployment arose from the claimant's disabilities but that is not what has been pleaded by the claimant here and we are making findings based on the case as brought by the claimant.

Khalil Sarr on 4 September 2020, at 12.11 treated the claimant unfavourably by diagnosing the claimant when not legally qualified stating 'His situation has not improved and the claimant is suffering from his condition." (1375)

It arose that the claimant takes medication, has undertaken counselling and is awaiting counselling for his condition. The claimant remained fit for his role.

365. We accept that labelling someone as 'suffering' from a condition could amount to unfavourable treatment. We do not accept that KS saying that his condition had not improved was unfavourable treatment when it was a reflection of what the claimant expressly told KS during the meeting on 18 September 2020 and a fair reflection of what the claimant had indicated during all previous meetings or calls with KS when he had responded or failed to respond in any way to KS's question of how he was. The claimant never stated that his condition had improved at all. There is no evidence to suggest that any refusal to indicate to his manager how he was feeling from a health point of view arose from his disability.

366. In any event the reason for KS's comments did not arise from the fact that the claimant took medication or had undertaken counselling or was awaiting counselling or remained fit for his role. It arose because KS understood, from the claimant's answers, that his condition remained unchanged. His use of the word suffering was used colloquially in the sense that many people do not understand that people with long term conditions do not like or identify with the word 'suffering' when referring to their health condition.

Disability related harassment: Equality Act 2010 s26

367. (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;

368. We have not analysed each allegation below as to whether the conduct was unwanted because it is clear from the facts that the allegations that we have found occurred were unwanted by the claimant.

369. We have taken each allegation as pleaded.

On 23 November 2018, 27 November 2018 and 3 December 2018, Dayo Abafarin and the Second Respondent harassing and bullying the Claimant to attend an informal meeting about the Claimant's grievance, and starting disciplinary proceedings against the Claimant when he refused;

370. We have found that the claimant was asked to attend a meeting. There was no harassment or bullying. It was legitimate for DA to ask the claimant to attend a meeting to discuss the situation and when he refused for them to consider whether that refusal amounted to misconduct. They did not proceed with a disciplinary process thereafter. Any treatment was not related to the claimant's disability and it was not objectively reasonable for the claimant to view it as a situation which created a hostile degrading environment.

On 2 July 2019, during a grievance meeting, Anand Nandha showing micro aggression and intimidation towards the Claimant;

371. We have concluded that AN did not show any micro aggressions or intimidating behaviour towards the claimant at this meeting.

On 2 July 2019, following the grievance meeting, Anand Nandha suspending the Claimant from work without his knowledge;

372. We do not accept that AN deliberately suspended the claimant from work without his knowledge. He emailed him and sent him a letter in the post and there was no intent to deprive him of knowledge. Once the claimant

became aware of that it is not objectively reasonable for the claimant to find that it created a hostile degrading environment.

On 30 and 31 August 2019, at a leaving function for the Second Respondent, supervisor Roger White telling Dudley Higgins (who told the Claimant) that the Claimant had been fired, but it was not official yet;

373. We have found as a question of fact that this did not occur.

On 19 September 2019, the Second Respondent maliciously using authorised statutory leave that he authorised for the Claimant in a letter to OH to paint a bad picture of the Claimant, despite the fact that the Claimant alleges that he has never triggered the absence or attendance policy;

374. We do not accept that the second respondent acted maliciously in setting out the claimant's leave in the report to OH. His intent was to provide OH with a complete picture of the claimant's attendance at work so that OH could see that not all absences from work were related to his health when they were considering the claimant's health and attendance at work. Further, JB would have been aware that the claimant's absence record and medical records would have been available to OH as they were an internal function within the respondent and therefore would find out from other sources that the absences were not all sickness absences. There would be no point in trying to infer anything negative and it is clear that OH did not interpret it as such.

On 22 October 2019, despite the Claimant informing Anand Nandha that he would not participate in the grievance process, Anand Nandha ignoring this and proceeding to produce a grievance outcome;

375. The claimant left the meeting before the grievance meeting had been concluded. Subsequently, AN stood the claimant down pending an OH assessment. AN offered to reconvene the grievance meeting on 4 October 2019. The claimant replied to AN setting out that he would not attend the grievance meeting because he had overheard the conversation between Mr Phlora and Mr Bignall. He alleged that AN was therefore displaying bias and a disregard for policy and it was on that basis that he refused to attend.

376. Firstly we consider that any decision to reconvene the meeting or conclude the grievance process was not related to the claimant's disability. If we are wrong in that because some aspects of the grievance were about the claimant's health we consider that the claimant's email dated 22 October 2019 (p725) makes absolutely no reference to his health or concerns in that regard. We therefore do not consider that the claimant thought that reconvening the meeting was in any way related to his health either. However, if we are wrong in that then we have considered whether it is behaviour which could objectively amount to an intimidating, hostile or degrading environment and we do not accept that it is.

Anand Nandha failing to investigate the grievance or to produce any notes in respect of JB, Mark Little, Dayo Obafarin or Gavin Locker, all of whom were involved in the grievance, which the Claimant says should have happened by 23 April 2019 or, at the latest by 10 August 2019;

377. We do not accept that there was a failure by AN to investigate the grievance. The claimant left the grievance meeting before AN could complete his discussion with him. He attempted to reconvene that meeting but the claimant refused to attend. By the time it was clear that the claimant was not going to want to conclude the process with a subsequent meeting, JB, Mr Little and Mr Locker had all left the respondent's employment so could not be interviewed. AN did speak to Mr Abifarin but we accept he did not take a note of that meeting. We do not accept that this meant that he did not investigate the grievance.

Anand Nandha failing to interview Dayo Abifarin, which the Claimant says should have happened within 28 days of the grievance being lodged in November 2018, so by 28 December 2018, or by the latest 10 August 2019

378. This refers to the claimant's grievance dated 28 November 2018. The respondent's policy does say that the process ought to be concluded as soon as possible and preferably within 28 days. (p1114). However, we think it was reasonable for AN to wait until he had interviewed the claimant to establish the basis for the grievance before interviewing others. The time line for this grievance is as the respondent has set out namely that the claimant went off sick shortly after lodging the grievance, he had a phased return to work in February/March, he had meetings with JB regarding reasonable adjustments in March 2019, then in May and June 2019 the claimant was on various types of leave and on his return he was invited to attend a grievance meeting. We accept that there may have been a delay on the part of the respondent between March and May 2019 that has not been explained. However, any delay is not related to the claimant's disability. Subsequently, the claimant left the meeting with AN thus meaning that the grievance could not proceed again. We have discussed this above.

379. We find no link to the claimant's disability; any delays were not related to that other than that the respondent rightfully paused the process when the claimant was off sick. The decision to wait to investigate until after they had heard from the claimant was not related to the claimant's disabilities. Finally, even if we are wrong in all that, it is not objectively reasonable of the claimant to consider that these delays created a an intimidating, hostile, degrading, humiliating or offensive environment related to his disability.

On 10 March 2020, KS holding a capability case conference in the absence of the Claimant, rather than rearranging the case conference once he was informed the Claimant would not be attending;

380. We have already made extensive findings in relation to this incident which we will not repeat here save to say that we have concluded that the claimant refused to attend and there was no obligation on the respondent to rearrange the meeting. Any decision to proceed was not related to the claimant's disability but arose because the claimant refused to attend due to a disagreement as to what policy was being followed.

On 29 May 2020, the Claimant receiving an email notifying him that the capability case conference on 10 March 2020 had been held in his absence, the Third Respondent ignoring the Claimant's representations that there were health and safety reasons for him not attending the meeting, the Third Respondent lying by saying that the Claimant had not given any reason for not attending the meeting or contacting the Third Respondent, and the Third Respondent failing to re-arrange the meeting.

381. We do not accept that the claimant saying that he needed to protect himself by not attending the meeting amounted to him saying that there were health and safety reasons for not attending. It was reasonable for the respondent to interpret this correspondence as the claimant asserting that he does not agree with the policy being followed and that he is protecting himself from attending because of that. After he wrote that email he was expressly told that the respondent would proceed in his absence and that one of the possible outcomes of that meeting could be his dismissal. The claimant continued to refuse to attend and has produced no medical evidence to substantiate his health and safety concerns that he is now relying upon. His answers about whether he would attend a meeting within the 7 days were equivocal and not direct. He said that within 7 days his medical condition would have calmed down and he would have attended but he gives no basis whatsoever for that assertion and we do not accept it. There was no obligation on KS to rearrange the meeting in these circumstances particularly when the claimant did not suggest an alternative date and did not provide any suggestion in his letter that anything would change in the next 7 days which would make attendance likely.

382. Even if the claimant was surprised by the decision by KS to proceed in his absence, we do not accept that it was objectively reasonable for him to perceive this decision as creating an intimidating, hostile, degrading, humiliating or offensive environment relating to his disability.

On 18 September 2020, the Third Respondent lying when he said that he had not seen the OH report dated 21 February 2019, and that that prevented him from making reasonable adjustments;

383. KS has not lied about this matter. We have concluded that he did not see the report.

On 14 October 2020, the First Respondent unlawfully accessing and sharing the Claimant's medical information without the Claimant's consent;

384. We accept the ICO findings that this was a genuine mistake on the part of the respondent. We therefore consider that this does not amount to action by the respondent to create an intimidating, hostile, degrading, humiliating or offensive environment related to the claimant's disabilities. It is not reasonable for the claimant to view it as such once he had the ICO report confirming that it was a genuine mistake.

On 15 October 2020, the Third Respondent lying when he said that the Claimant had confirmed there had been no changes to his medical condition;

385. We have concluded that KS did not lie for two reasons:

a. He genuinely considered that the claimant's condition had not changed because the claimant had told him it had not.

b. The claimant has produced no evidence to suggest that his health condition had changed. He has told this tribunal that he had completed one course of treatment and was awaiting another. That is not an indication of a change in someone's overall health condition.

On 15 October 2020, the Third Respondent lying when he said that the Claimant's medical condition had not improved enough to allow a return to work in the RPI role?

386. KS was not lying. Please see conclusions above**.**

Khalil Sarr, 11 June at 1401 hours contacting OH to access medical information about claimant without his knowledge or consent and

Khalil Sarr 11 June 2020 at 15.10 hours, p1368 again contacting OH to access medical information about claimant without his knowledge or consent

387. KS was trying to ascertain whether OH would be able to give an opinion on the claimant's fitness to go through a redeployment process. Given the impasse that the claimant had caused by refusing to allow the claimant access to previous reports and information we conclude that KS was trying to ascertain what, if anything, he needed to consider when deciding what the next steps might be with regard to the claimant. We find that he knew that were he to be given information regarding the claimant and/or decide to refer him to OH, he would have shared that with the claimant.

388. It is not clear on what basis the claimant asserts that trying to ascertain this information amounted to violating his dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment. We consider that there was no attempt at secrecy, KS was just trying to find out what would be involved in getting OH's opinion on two matters – when they said that they would need a new referral, he decided not to proceed. Had he decided to proceed he would have informed the claimant.

Khalil Sarr on 4 June 2020 at 1211 hours stating to OH that the claimant was suffering from his condition.

389. It is not clear exactly what aspect of this allegation the claimant says amounted to violating his dignity, or. creating an intimidating, hostile, degrading, humiliating or offensive environment. We have already analysed the use of the word 'suffered' above and found that whilst many people with long term health conditions understandably object to the use of this word – this was not something that KS intended in this context. His use of the word was simply meant to imply that the claimant was still diagnosed with his conditions. That was true. The claimant has given us no evidence to suggest that his conditions had improved. He gave no information to KS to suggest that his condition had improved. He maintained throughout and still maintains to us now that he required the same adjustments because of his conditions. The claimant has not indicated to us how he found the comments violate his dignity or created an intimidating, hostile, degrading, humiliating or offensive environment but we conclude that it was not objectively reasonable for him to find them so.

390. We do not uphold any of the claimant's claims for disability related harassment.

Duty to make reasonable adjustments: Equality Act 2010 s21

The Law

391. 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.

392. 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.

393. 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.

394. Case law and the EHRC Code suggest that knowledge will sometimes be imputed to the employer. The EHRC Code advises that employers must "do all they can reasonably be expected to do" to find out this information.

395. 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)

396. 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.

397. The duty does not arise however unless the employer knows or ought reasonably to know that the employee is disabled *and* that the PCP put him at a substantial disadvantage. The EHRC *Code of Practice on Employment* gives useful guidance on knowledge particularly at paragraph 5.15.

398. 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.

399. 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 upon potentially relevant factors.

Conclusions

400. There are a number of PCPs and adjustments that were discussed during the course of the hearing. As a Tribunal, we have reminded ourselves that where a number of adjustments interact or might work in combination to potentially ameliorate the disadvantage suffered by the disabled claimant, it is necessary for the tribunal to adopt a holistic approach when considering the reasonableness of the adjustments overall (*Burke v The College of Law and anor 2012 EWCA Civ 37, CA*.) In that case the Court of Appeal accepted that where an employment tribunal concluded that it was difficult to consider the various adjustments the respondents had made as regards supervision, work location and time requirements in isolation, because each had a bearing on the other two, it was entirely appropriate for the tribunal to consider the adjustments as a whole.

401. We are also aware that it is our opinion of the reasonableness of the adjustments that matters as opposed to the view of the respondent at the time – though of course we must consider what the respondent considered at the time. The most important factor in establishing whether something is a reasonable adjustment is the effectiveness of the proposed step or steps. It is most unlikely to be reasonable for an employer to have to make an adjustment that involves little or no benefit to the disabled person in terms of ameliorating the disadvantage. However, there does not have to be absolute certainty of an adjustment removing a disadvantage in order for it to be reasonable. We have to satisfy ourselves that, on the evidence we have been provided with, that there would have been a chance of the disadvantage being alleviated. Our focus must be on whether the adjustment would, or might, be effective in removing or reducing the disadvantage.

402. The claimant has relied on numerous PCPs and for each has set out the substantial disadvantage that he says existed as a result. As before, we have restricted our findings to the case as pleaded by the claimant. The PCP is in bold. and the substantial disadvantage is in Italics for each one.

A policy that staff must single check and must arrange dual checking, in all circumstances, if needed;

The Claimant says that single checking at peak times heightened his state of anxiety substantially making it very difficult to communicate with customers, deal with conflict and resulting in being unable to function. The Claimant also says that his disabilities made it difficult for him to engage with others and he

avoids it. The Claimant says that it would have been a reasonable adjustment for the First Respondent to restrict the Claimants' single checking activities to the first and last hour of the shift and arrange dual checking for the Claimant in-between.

403. The respondent did not have a policy that staff must single check. It is clear from the claimant's own evidence that his colleagues frequently arranged to dual check together. There was a clear working practice that people could dual check if they wanted to and there were no rules around it other than when the RPIs were working jointly with the police. The claimant's concerns were that if he did not want to or was not able to single check, he had to arrange his own dual checking which is analysed further below.

A policy of deploying staff in hotspots and volatile areas;

The Claimant says that working in hotspots/volatile areas resulted in him experiencing very bad thoughts and fear for his safety, impaired concentration, fatigue and inability to function. The Claimant says that it would have been a reasonable adjustment for JB to not deploy the Claimant in hotspots/volatile areas.

404. It is accepted by the respondent that they had the above PCP in place. We accept that it placed the claimant at a substantial disadvantage as described above.

405. It is the respondent's case that this was a proportionate means of achieving a legitimate aim. Firstly they argue that the OH reports say that not deploying him in hotspots 'may perhaps minimize his triggers' as opposed to avoid them as he could have been triggered at any point, anywhere, by a confrontational situation. Secondly they argue that to restrict the claimant to so few routes, particularly if he was also having to dual check at the same time, would reduce their already limited capacity to perform what was the key role of enforcing fare evasion given that hotspots were hotspots because it was where most evasion took place.

406. We find that the respondent was aware that there was a substantial disadvantage to the claimant in that they understood that the claimant's PTSD could be triggered if he was in a confrontational situation. It is not clear that they knew that whilst he was in hotspots he experienced the level of symptoms outlined above. We have not been given any evidence that this was communicated to the respondent as it is not in the OH reports. However, on balance we think that they knew that he was at a disadvantage because of his PTSD. They do not appear to have challenged that in their evidence or in submissions.

407. JB makes it clear that he would not entertain the possibility of this adjustment at all when he was the claimant's line manager. As a result, the claimant returned to work for a considerable period of time without this

adjustment at all whilst having the diagnosis of PTSD and having had various phased returns to work.

408. KS, in contrast says that he would have been able to accommodate it (p772) if he considered it would have reduced all risk to nil. We consider that this was an unrealistic approach to adjustments. Whilst we understand that KS was attempting to make as safe a decision as possible, we think that taking the approach that all risk had to be reduced to nil was unreasonable. We think it is clear that reducing the claimant's exposure to hotspots would have a good chance of reducing his exposure to confrontational situations and also, the knowledge that he was less likely to be confronted would also reduce the claimant's levels of stress and anxiety linked to his PTSD and have made him feel supported.

409. However, the effect on the risk to the claimant is not the only matter we which need to consider with regard to the reasonableness of the adjustment. Whilst we appreciate that KS said that he thought he could have considered it, we believe that it is more likely than not that this would have been on a temporary 12 week basis as opposed to a permanent adjustment. We consider that the claimant's claim is that these were permanent adjustments that needed making – after all that was the subject of grievances and disagreements with JB and others earlier in the case.

410. JB did not consider it was reasonable adjustment even for a 12 week period. However, we believe that the respondent entirely failed to attempt any sort of reduction to the claimant's hotspot exposure at any point in time. It was clear that the OH advice was designed to reduce exposure to altercations, not to avoid them altogether. Therefore, any reduction to the claimant working in hotspots could have gone some way to reduce the risk.

411. We conclude that it would not have been proportionate to remove the claimant from hotspots on a permanent basis. The main purpose of the RPI was to enforce fare evasion. To remove one and, if working in tandem with another RPI, two RPIs from effectively doing that on the main areas that needed enforcing would not have been proportionate. We agree with the claimant that JB's figures of the fare loss across the buses is exaggerated – nevertheless we accept that the main purpose of the RPI was fare evasion regardless of the pandemic and removing someone permanently from doing that role in high incident areas would not, in our view be reasonable based on the evidence we have heard.

412. However, there was no consideration given to possible other ways of limiting the exposure such as reducing the number of days he had to work in hotspots or only making him work in hotspots for a maximum number of hours in any given week (which would thus have reduced the problems they had about the rigidity of him leaving a shift when the 2 hours of sole working was up for example). The respondents took an all or nothing approach. They continued to

do this even when it was clear that the claimant could and would work (and did work) without this adjustment for a considerable period of time.

413. We find that KS' acceptance that this adjustment could have been accommodated in his letter dated 26 May 2020 demonstrates that JB could also have accommodated it previously. Even if KS was making that concession thinking it was solely in reference to a 12 weeks period, we think that had it needed to be reviewed after 12 weeks, either during JB's management of the claimant or KS's - a different version of the reduction could and should have been considered and was not.

414. We find that JB's refusal to consider any options short of completely removing the claimant from hotspots was unreasonable. Requiring RPIs to be able, at all times, to be sent to hotspots is not a proportionate means of achieving the legitimate aim of needing to enforce fare evasions. Fare evasions could and do happen everywhere across the bus network. Therefore whilst the majority of resources may need to be dedicated to hotspots, and all RPIs need to be able to go to them, we do not consider that it is proportionate not to consider reducing the claimant's need to go to hotspots to some extent given that the OH advice was clearly a recommendation to reduce confrontation not to avoid it entirely.

415. The refusal to make that adjustment occurs on several occasions namely every time the claimant returned to work from a period of sickness absence from 2018.

416. KS certainly makes the decision again when he decides to dismiss the claimant as opposed to considering whether the claimant could return to his substantive role. He states that the claimant cannot return to his role because the adjustments would not reduce his risk to nil. We do not think it is proportionate to aim for a nil risk work environment when the claimant had returned to work previously without this adjustment being made.

417. We therefore uphold this part of the claimant's claim as we find that the respondent failed to make a reasonable adjustment to the PCP of requiring RPIs to work in hotspots.

A practice that staff must arrange dual checking in all circumstances themselves;

The Claimant says that he was at a substantial disadvantage because he found it very difficult to engage with others as it made him very anxious so he avoided it. The Claimant says it would have been a reasonable adjustment for JB to arrange colleagues for the claimant to work with.

418. We accept that this PCP was in place. The usual and expected practice was for staff to arrange their own dual checking arrangements. There were a few occasions in which Mr Roger White assisted the claimant in finding

out who was on shift etc. but it is clear to us that the responsibility on a day to day basis fell on the RPIs.

419. The respondent acknowledged in submissions that the Tribunal had raised their eyebrows regarding this situation. Ms Ferber said that whilst it sounded simple it was not. The reasons given during evidence for not arranging someone for the claimant to work with were as follows:

a. That RPIs were free agents and were used to working as they pleased. This was an important part of their job and the respondent did not feel able to interfere with the other RPI's 'freedoms' [our word not theirs].

b. No travel at the beginning of a shift could be done as direct travel as it was not cost effective and this prevented people from being able to travel to meet each other before starting the shift

c. The claimant's colleagues found him difficult to work with. Several refused to work with him, others said they could but needed breaks from him including one person saying that they needed a break for their own health and safety

d. The claimant refused to work with certain people which narrowed the pool

e. They did not mind the claimant dual checking but could not support his rigid approach which was that (when the phased returns to work were occurring) he would stop working altogether if he could not find someone as soon as he reached the second hour of his shift.

f. Dual checking did not remove the risk of a confrontational situation occurring and therefore did not remove the risk of triggering his PTSD.

420. This was a very difficult decision to reach. We accept that the claimant was placed at a substantial disadvantage because he found it more difficult (though not impossible) to single check as it made him feel stressed and anxious.

421. We do not however have any evidence (apart from his witness evidence to the Tribunal) to substantiate his claim that the fact that he found it difficult to engage with his colleagues arose from his disabilities. He has not provided medical evidence of that and it is not suggested in the OH report. His witness statement says this but we have seen no reference to it elsewhere. There are several discussions between the claimant and his managers on this point and nowhere does he say that he finds it difficult to ask colleagues because of his disabilities. There was however recognition from those who managed the claimant that it was difficult for them to arrange people to work with the claimant – they acknowledged that it would also be difficult for the claimant and it is not difficult to imagine that such difficulties would be harder to manage if you had depression and PTSD.

422. On the face of it, arranging for the claimant to work with another individual would appear simple. However we appreciate that in practice it was not. We find that the main block to the respondent thinking it was reasonable was the fact that requiring a colleague to restrict their own working practices was difficult for the respondent to achieve. This was because the RPIs were used to being independent, but also because of the number of staff who would not work with the claimant and the number of staff the claimant would not work with.

423. We repeat our conclusion that KS' approach to trying to achieve nil risk was unrealistic but again, it is not the sole basis that we must consider. We consider, based on the evidence we had, that it would be operationally impossible to guarantee the claimant someone he could work with, partly because of the small number of people they could find to work with him and partly because of simple things like shift patterns, annual leave etc. There was insufficient 'office' work for the claimant to do if someone could not be found on any given day and the claimant was so rigid in his approach that the respondent risked having an RPI out of action on a regular basis that they could not sustain due to demand and resources.

424. We also think that this adjustment must be considered in tandem with the hotspots adjustment which is discussed above. If, as is suggested by the claimant, he had to have dual checking for the majority of his shift, and he needed to reduce his exposure to hotspots, then putting the two together, would mean that they would have two RPIs away from hotspots for a significant period of the claimant's shifts.

425. Taking into account all the operational difficulties which we accept the first respondent would have faced in arranging this adjustment, we conclude that it was not reasonable to adjust the policy to allow the claimant guaranteed dual checking time.

A policy that staff work full time hours;

426. This PCP was not in place. The claimant was allowed to work part time but he was not allowed to work part time and get paid full time.

A practice of making the grievance process a hostile environment;

427. We do not accept that this was a PCP in place at the respondent. The claimant says that he found the grievance processes hostile but we find that save for one ill-judged discussion that he overheard between managers about them disagreeing with the claimant's application for paid study leave, there is no evidence that such a PCP existed. We are aware that a one off situation could amount to a PCP but we do not consider that this applies to a one off conversation overheard by the claimant.

A practice of dealing with multiple grievances at one time;

428. We do not accept that this was a PCP. We consider, that on this occasion, as one grievance had not been dealt with in a timely fashion, the respondent chose to put them together to try and ensure that they were resolved. We also accept AN's evidence that had the claimant remained at the meeting then it would have been possible to consider whether they needed to be dealt with separately. If we are wrong in that, we cannot see the substantial disadvantage to the claimant. The claimant had been told that both were being dealt with and could have prepared as such. His failure to prepare was not the fault of the respondent. Any unreadiness by the claimant for the meeting with AN was not the fault of the respondent but that of the claimant.

A *practice of suspending staff from work and subjecting them to fit for duty assessment if they are deemed to have acted unreasonably at a grievance hearing;*

429. We have not found that this is a PCP. This was, again, a one off incident and decision made in response to the claimant's troubling behaviour at a meeting. The claimant was not deemed as acting unreasonably. AN was concerned that the claimant was not well and responded.

430. If we are wrong and this decision to suspend the claimant and then require him to undergo an OH assessment does amount to a PCP, then it is not clear how the claimant says it ought to have been adjusted. We presume that something along the lines of allowing the claimant to continue working pending the outcome of the OH report or not requiring an OH report at all after just one difficult meeting.

431. We find that it would not be reasonable to adjust this practice in these circumstances. The respondent was entitled to be concerned about the claimant's safety. He had a known condition that was triggered by confrontational situations, his role was frequently confrontational and he had had a significant negative response to straightforward questions from a manager about his own grievance. His own union representative had said that this was caused by his PTSD not by anything AN had done. It was therefore entirely reasonable to require the claimant to attend an OH assessment in these circumstances and any adjustment would have placed the claimant at risk.

Arbitrary and prolonged suspension practices;

432. There was nothing arbitrary about the claimant's suspension as set out in the paragraph above. We find that the reason the suspension was prolonged was the claimant's refusal to allow access to relevant OH information, not because of the actions of the respondent. This therefore does not amount to a PCP that was in place at the respondent.

A *practice of disregarding recommendations for reasonable adjustments made by Occupational Health*;

433. Again, our first finding is that this was not a PCP in place at the first respondent. The respondent considered the adjustments suggested by OH – they did not disregard them. They applied some of the adjustments some of the time. They did not apply the adjustments in October 2020 but this was because they judged them to either not avert the risk and/or because the claimant did not attend the meeting. Therefore OH's suggestions were not disregarded – they were considered.

a practice of failing to answer telephone calls required to be made by suspended staff at 10 a.m. on Mondays;

434. We do not accept that this PCP was in place. It is clear that KS did not answer many of the calls but he did answer some. We were not given sufficient information on how many calls the claimant says were not answered. He says all of them but we do not accept that as he later relied on a call between him and KS.

A practice of not providing suspended staff with updates or a timetable of their return to work;

435. We do not accept that this occurred. The claimant was aware that his return to work was conditional firstly on the receipt of the OH report and then, once that had been received, on KS receiving information regarding the February 2019 report which the claimant obstructed. We consider that this would have been clearly communicated in the call when KS outlined to the claimant why he needed sight of the Feb 2019 report and the Claimant orally agreed to it. We accepted KS' evidence that he did not initially want to chase the claimant to comply as he was wary of placing the claimant under pressure. Further we accept that he did, in January 2020, chase the claimant and OH and received no further information. He then sought to schedule a review meeting in March 2020 and that was refused by the claimant. Therefore the claimant was fully aware that the reason for the delay was the continued absence of the OH information that KS needed.

A *practice of redeploying staff for periods of sickness absence*;

The Claimant's disabilities meant that he was more prone to be off work for longer periods which would more likely trigger JB's actions to redeploy him. The Claimant says that it was reasonable to follow Occupational Health advice that the Claimant was fit for duty and return him to work, the Claimant also says that it was reasonable for the First Respondent to not subject him to a longer term sickness absence process which did not apply as he was not sick but off work due to suspension or, where it found that the longer term sickness absence process was applicable, to follow it properly and start at stage one which required the implementation of reasonable adjustments.

436. The PCP in operation was to place individuals into redeployment where they were unable to carry out their substantive role. It was not to redeploy staff simply because they had been off sick or had periods of sickness absence. In the past when the claimant had been off sick he was not placed in redeployment. We had no evidence that they had this policy for others either. They did redeploy people but not for periods of sickness absence. The claimant was also, as he has been at pains to point out, not absent because he was sick. We therefore do not consider that this policy, as pleaded, was applied to the claimant.

A PCP of applying the First Respondent's longer term sickness absence policy;

The Claimant says that he was prone to be off work sick due to his disabilities for a longer period of time, triggering the First Respondent's longer term sickness absence procedures in the process ultimately leading to dismissal. The Claimant says it was reasonable for the First Respondent to apply its longer term sickness absence policy correctly; applicable to staff that were off work with illness not staff who were fit for duty, as was the Claimant, the Claimant says it was also reasonable for the First Respondent to allow him to return to work as he was fit to do so.

437. It is accepted that there was such a PCP – the respondent had a policy in place for long term sickness absence and it applied the structure and process of that policy to the claimant. The claimant says that he was disadvantaged because he was more likely to be off sick and therefore ultimately more likely to be dismissed.

438. The respondent says that there was no disadvantage caused by the policy because it is the employee's state of health that causes the dismissal, not the application of the policy. We do not consider that this is the correct analysis.

439. There are many cases which discuss the application of capability processes which include trigger points that lead to sanctions including dismissal. Adjustments that have been considered in the past cases have included increasing the length of time before a sanction is applied. Here the claimant says simply that the policy ought not to have been applied to him.

440. We find that it was not strictly applied, it was adjusted. What was applied was the consideration of whether the claimant could do his job after a long period off work where OH said that he could not perform his role without adjustments. The adjustments were considered insofar as KS could without all relevant medical information and it was judged that rather than being off sick, the claimant was unable to do his role. Given that the aim of the policy is to ensure that either individuals return to work or the first respondent is able to have a functioning workforce, we do not consider that an adjustment to this

policy of allowing the claimant to return to an unsafe role where adjustments were not possible, would be a reasonable adjustment.

A PCP of not applying the First Respondent's reasonable adjustments policy and reasonable adjustments;

441. The respondent did apply their reasonable adjustments policy and they did make reasonable adjustments at various stages.

A PCP of not obtaining a specialist report;

They do not have such a PCP. There was a clear misunderstanding that arose between OH and KS. There was no such report in existence.

A PCP of not obtaining occupational health advice before dismissal;

The Claimant says that he was subjected to a dismissal because Occupational Health advice was that he was fit for duty with reasonable adjustments; in the Third Respondent's opinion there were no adjustments that could be made and also the Third Respondent edited OH's statement that "A confrontational situation with a non-compliant customer triggers a negative response." The Claimant says that it was reasonable for the First Respondent to return him to work as he was fit for duty, and implement OH recommendations, transfer the Claimant to another role, obtain up to date OH guidance to find out the true position as the report it relied on was out of date, more than a year old. It was also reasonable to obtain OH guidance prior to dismissal because the First Respondent's own policy required it to do so and it was also reasonable for the First Respondent to heed the Claimant's position that he was fit to return to work and it was reasonable for the Third Respondent to take OH advice in its full context as the opinion went on to clarify that it does not mean that it will happen but it is a possibility.

442. We find that the Respondent did not operate this PCP. It had a policy that stated that before dismissing an employee for capability they should refer to OH. It is clear however that the claimant was not referred to OH before dismissal.

443. We have considered the applicability of the case of Ishola v Transport for London [2020] EWCA Civ 112 where Simler LJ provides helpful guidance on what amounts to a PCP. It is possible that one off acts can amount to a PCP but not all one off acts remediable by adjustments can amount to a PCP. Simler LJ held that all three words in PCP connote a *'state of affairs, indicating how similar cases are generally treated or how a similar case would be treated if it occurred again.'* In relation to practice, she stated that this implies the way in which things are generally done or will be done. Simler LJ stated that it is not necessary for a practice to already have been

applied to another person, if there is an indication that it would be done again in future if a similar case were to arise. Simler LJ further held that where an employee is unfairly treated by an act or decision of an employer and neither direct discrimination nor disability-related discrimination is made out, it is *'artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.'*

444. We conclude that the respondent's normal practice was to refer people to OH before dismissal for capability. It did not apply that normal practice in the claimant's case because of his history of refusing consent for the sharing of his OH reports or OH responses to questions. There was no suggestion or indication that it would be done again in future. This was a specific decision made in a specific set of circumstances. We recognise that it not having happened before does not mean it is not a practice, but the comparator evidence we were provided with and the witness evidence we heard, all stated that the respondent normally did refer people to OH and would have done again. Comparator A for example, who also had PTSD was re-referred to OH at the point at which his time in redeployment finished. He was then brought back into his substantive role. We therefore conclude that there was no such PCP in operation even though the claimant was not referred to OH at this point.

a practice of deciding staff were not fit for role;

445. It is not clear at what stage the claimant says that this PCP was applied to him. We are not clear if he is suggesting it happened at the point at which he was placed in redeployment or the point at which he was dismissed or both.

446. We do not have any evidence that this was a PCP in place at the respondent beyond its application to the claimant. The reason it was decided that the claimant was not fit for his role prior to redeployment was his continued absence prior to his time in redeployment, his failure to attend the meeting with KS and his refusal to release his OH notes coupled with KS considering the medical information he did have which stated that his condition might be triggered by the confrontational nature of the role. We consider that the decision relating to the claimant was a one off decision and not a PCP. We consider that the same consideration went into the decision to dismiss the claimant at the end of the redeployment process.

447. We were not provided with information that suggested that this decision would be made again or that there was a general state of affairs that at the point at which someone was unable to do their role for a certain period of time they would be declared unfit.

a PCP of restricting time in redeployment to 13 weeks;

The Claimant says that he was substantially disadvantaged due to difficulties concentrating, fatigue, increased anxiety resulting in reduced capacity to take part in the recruitment campaign. The Claimant says that 13 weeks was not enough time to secure a job, as a result the threat of dismissal loomed over him. The Claimant says that it was reasonable for the First Respondent to transfer the Claimant to an alternative vacancy without the need to apply, extend the time in redeployment to allow the Claimant to secure the train operator role, allow the Claimant to apply for secondment opportunities.

448. This PCP did exist. The respondent adjusted it by 2 weeks in order to ensure that two outstanding applications were concluded before they dismissed the claimant. Further, we do not accept that the claimant was substantially disadvantaged in the way that he states. He has not provided any evidence that he could not apply to roles due to difficulties concentrating, fatigue or increased anxiety. There is no medical information to suggest that and he did not raise it with either KS or the redeployment specialist. He clearly applied for roles that he considered suitable. He did not point to any roles that he wanted to apply for but was not able to. He has elsewhere pointed to the fact that there were not many roles because of the pandemic as opposed to there being roles he wanted but could not apply for. We therefore do not consider that there was the disadvantage to the claimant that he relies upon.

a PCP of not offering employment to redeployed staff and instead requiring them to apply for roles.

The Claimant says he was at risk of dismissal because he had limited time in redeployment in which to secure a job, as a result he had heightened anxiety, difficulties concentrating, fatigue and a reduced capacity. The Claimant says that it was reasonable for the First Respondent to transfer the Claimant to a suitable alternative vacancy instead of the Claimant going through the recruitment process.

449. We accept that the respondent's normal practice was to require those who were no longer able to do their role to go through redeployment as opposed to being slotted into alternative roles. We do not accept that it placed the claimant at the disadvantage he relies upon though or that the respondent ought reasonably to have known of that disadvantage. We have already made those observations in the paragraph above.

450. In conclusion therefore we uphold the claimant's claim that there was a failure to adjust the respondent's policy of requiring the claimant to work

in hotspots. We do not uphold any other aspect of the claimant's claims for failure to make reasonable adjustments.

Victimisation: Equality Act 2010 s27

451. 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.

452. *S27 (1) A person (A) victimises another person (B) if A subjects B to a* The Claimant relies upon the following protected acts (together the "Protected Acts"):

a. His grievance dated 11 November 2018 (the "First Grievance");

b. His grievance dated 28 November 2018 (the "Second Grievance");

c. His grievance dated 22 March 2019 (the "Third Grievance");

d. His Employment Tribunal claim with case number 2300219/2019, dated 18 January 2019 (the "First Claim");

e. His Employment Tribunal claim with case number 2305504/2019, dated 15 December 2019 (the "Second Claim");

f. His email complaint about discrimination dated 13 January 2020; **[also relied upon for additional complaints below]**

g. Email 5 March 2020 (757)

h. His email complaint about discrimination dated 6 March 2020;

i. Email dated 5 May 2020; (755)

j. His email complaint about discrimination dated 8 July 2020; and

k. His Employment Tribunal claim with case number 2304788/2020, dated 24 August 2020 (the "Third Claim").

453. We accept that all of the above communications amount to protected disclosures within the meaning of s27 Equality Act 2010. The respondent has made no submissions to us arguing that they are not and it is clear that all of them make reference to the claimant being discriminated against in some way.

454. We have addressed each alleged detriment in turn. The claimant did not specify which protected act caused which detriment but relies on the cumulative effect of those that had occurred by the time of the detriment relied upon. The detriment is in italics.

On 11 November 2018, not dealing with the First Grievance in line with policy, and not offering an appeal contrary to policy and ACAS Code of Practice;

455. We accept that this is capable of being a detriment. There has been no explanation of why this was dealt with as an informal grievance whatsoever. Nevertheless the grievance outcome was thorough and reasonable and there is nothing to suggest that the reason it was dealt with informally was because the claimant had mentioned discrimination in the grievance. The claimant has not established any causative link between the two whatsoever.

On 28 November 2018, not dealing with the Second Grievance in line with policy, and not offering an appeal contrary to policy and ACAS Code of Practice;

456. We do not accept that this occurred. The claimant's grievance was dealt with in line with the respondent's process and the claimant was offered the right to appeal in the letter sent on 25 November 2019 (p735).

On 18 March 2019, failing to implement the OH recommendation of (a) allowing the Claimant to undertake a mixture of single and dual checks (timed), (b) avoid deploying the Claimant in volatile areas and (c) working 3 and a half days per week for 3 months with pay protection.

457. The various reasons behind this decision are fully explored above. The claimant has not established any causative link between any failure to implement the adjustments and his grievances. We find that each adjustment was refused for the business grounds that the respondent outlined at the time

and before us. The reasonableness or otherwise of those decisions is discussed in the relevant findings above.

On 22 March 2019, not dealing with the Third Grievance in line with policy, and not offering an appeal contrary to policy and ACAS Code of Practice;

458. We do not accept that this occurred. The claimant's grievance was dealt with in line with the respondent's process and the claimant was offered the right to appeal in the letter sent on 25 November 2019 (p735).

On 2 July 2019, suspending the Claimant;

459. The suspension took place because the claimant left a meeting abruptly and AN was concerned about his health and ability to do the job. It did not occur because he had brought claims or grievances.

From 20 September 2019 (date of OH report) to his dismissal on 1 October 2020, preventing and delaying the Claimant's return to work;

460. The respondent did not prevent and delay the claimant's return to work because of any grievances or claims brought. The respondents acted as they did because of the claimant's refusal to provide the February 2019 report and then his refusal to attend the meeting with KS. This resulted in him being placed in redeployment which subsequently led to his dismissal. The existence of the grievances or tribunal claims played no part in this decision making process.

On 2 July 2019, at a grievance hearing:

i. The Chair Anand Nandha failing to make reasonable adjustments;

ii. Anand Nandha showing micro aggressive and obvious bias;

461. The claimant has not set out what adjustments he believed AN should have made. We have found that AN did not show micro aggressions towards C. The claimant has failed to provide any link between AN's treatment of the claimant and his grievances or claims submitted to that date. AN acted in that meeting to try and find out what the claimant's grievances were about.

On 2 July 2019, Anand Nandha suspending the Claimant without his knowledge;

462. There was no intent to suspend the claimant without his knowledge. AN wrote to the claimant on the same day. The detriment was caused by an unreliable postal service not the respondents' actions.

On 10 August 2019, Anand Nandha failing to provide notes or interview the parties to the grievance;

463. The reason AN failed to interview the other individuals from the grievance was that the majority had left employment at the point at which he was in a position to investigate. The failure to take notes during the meeting he did have did not occur because of the protected acts. At most it amounts to a sloppy procedure by AN though we note that his outcome letter was very thorough.

On 25 November 2019, in the grievance outcome letter, Anand Nandha fabricating facts and not representing what was discussed or presented by the Claimant, specifically:

a. Ignoring the Second Respondent's outcome letter from October 2018 where he clearly speaks about the Claimant's PTSD.

b. Ignoring Meeting notes from 11 February 2019.

c. Ignoring an outcome letter dated 18 March 2019 speaking about PTSD

d. Ignoring doctor's certificates speaking about PTSD

e. Ignoring OH referral which showed intention to not provide reasonable adjustments;

f. Ignoring email where the Second Respondent denied the Claimant's condition

g. Ignoring notes from the meeting held on 6 March 2019 which clearly stated the meeting would be reconvened on 18 March 2019, when in fact an outcome was presented on 18 March 2019 and the Claimant was told to sign it;

h. Ignoring the three adjustments recommended by OH (none of which were implemented) and instead focusing on the one adjustment which was for the Claimant to work 3.5 days per week for 3 months and claiming that there was no plan to return to full time work;

i. Wrongly stating that the Claimant said that Dayo Abifarin was informed to convey the reasonable adjustments outcome letter to the Claimant. In fact the Claimant had asked Dayo Abifarin why personal communication marked private and confidential for the addressee only was in his possession, and in response Mr Abifarin had started to get aggressive with the Claimant and bully him to attend an informal meeting to discuss the reasonable adjustment outcome letter in breach of policy;

j. 34.10.10 refused to confirm to the Claimant when Gavin Locker and other individuals left the Respondent's employment and did not interview them;

464. We have not found any causative link between AN's outcome letter and its contents and the claimant's protected acts. The claimant left the original grievance meeting early and then refused to attend an attempted rescheduled meeting. AN considered all information he could access at that time. Any mistakes or misinterpretations were not caused or motivated by the claimant's protected acts. We conclude that AN tried to deal with the grievances fairly and reasonably.

On 12 July 2019, the Second Respondent failing to pay for study/exam leave for a PRINCE 2 course, stating it was not relevant to business, despite the business regularly recruiting project managers and requesting the qualification;

465. The decision to refuse the claimant paid leave was caused by first respondent's policy on paid study leave. The claimant's leave was not related to his role in any way. The refusal to pay him for his leave had nothing to do with his protected acts.

On 30 and 31 August 2019, at a leaving function for the Second Respondent, supervisor Roger White telling Dudley Higgins (who told the Claimant) that the Claimant had been fired, but it was not official yet;

466. We have found that this did not occur.

Deciding the outcome of the Claimant's grievance prior to his grievance hearing on 11 October 2019, and failing to conduct the grievance properly;

467. We have found that it is possible that the respondent pre-decided the claimant's grievance but not because of the claimant's protected acts but because the basis for his grievance was so untenable and it was so clear that payment for study leave in these circumstances fell outside the first respondent's policy.

Not allowing the Claimant's workplace colleague to participate during the grievance hearing on 11 October 2019;

468. We have found that he was allowed to participate.

On 10 March 2020, the Third Respondent holding a capability case conference in the absence of the Claimant, rather than rearranging the case conference once he was informed the Claimant would not be attending;

469. The decision to proceed with the meeting was made because the Claimant clearly indicated that he would not attend the meeting – not because he could not attend the meeting. In those circumstances there was no reason

to rearrange the meeting. The claimant could give no clear answer to the Tribunal's questions when they asked what difference another date would have made to the claimant and whether he would have attended had it been rearranged. There was nothing to suggest that the decision occurred because of the protected acts.

On 26 May 2020, advising the Claimant that he was being redeployed, contrary to the long term sickness absence policy;

470. The claimant was redeployed because KS had to make a decision regarding his ability to return to his role without the claimant's presence and without access to what he thought was relevant OH information. We were provided with no evidence to suggest that he made the decision because of the claimant's protected acts.

On 26 May 2020, wrongly applying the long term sickness absence policy to the Claimant, despite the Claimant not being sick;

471. This policy was applied because the claimant was absent from his role even if he was not off sick. It was the nearest relevant policy even if it did not fit perfectly. The claimant has provided no evidence to suggest that it was applied because of the claimant's protected acts.

From receipt of the OH report dated 20 September 2019 until the Claimant's dismissal 1 October 2020, failing to consider the Claimant's GP / specialist report and OH report dated 21 February 2019;

472. There was no specialist report in existence. The claimant refused KS access to the OH report dated 21 February 2019. Therefore any failure to consider it was caused by the claimant's actions.

From receipt of the OH report dated 20 September 2019 until the Claimant's dismissal 1 October 2020, the Third Respondent failing to follow OH advice that the Claimant was fit for his role;

473. The respondents did not fail to appreciate that the claimant was fit for his role. They considered however that OH recommendations for reasonable adjustments would not sufficiently offset the risk to the claimant of his PTSD being triggered. There is no evidence to suggest that this conclusion was reached because of the claimant's protected acts.

From receipt of the OH report dated 20 September 2019 until the Claimant's dismissal 1 October 2020, the Third Respondent failing to follow the reasonable adjustments process;

474. The respondent did follow its reasonable adjustments process. Even if we are wrong in that there is nothing to evidence that any failures in process were caused by the claimant's protected acts.

From receipt of the OH report dated 20 September 2019 until the Claimant's dismissal 1 October 2020, the Third Respondent failing to acknowledge the Claimant's disabling condition of depression, even though accepted by OH;

475. It is not clear what KS ought to have done by way of 'acknowledging' the claimant's depression or when the claimant says he ought to have had knowledge of it. We do not accept that there was any deliberate attempt, caused by the claimant's protected acts, to ignore the claimant's depression.

From receipt of the OH report dated 20 September 2019, the Third Respondent disregarded OH advice that the reasonable adjustments would result in a significant reduction of a confrontational situation and concluded without evidence that there was no reasonable adjustment that could be put in place for the Claimant;

421. Whilst we disagree with the reasonableness of part of the respondents' conclusions in this regard, we do not accept that the respondent disregarded the OH advice. They considered it and considered that the risk would be reduced. However they were aiming for a nil risk scenario and therefore did not consider that the adjustments advised were sufficient to offset the risk. In any event there is no evidence to suggest that the decision making process was because of the claimant's protected acts.

On 2 September 2020, inviting the Claimant to a fact-finding interview with a view to undertaking disciplinary proceedings against him, based on false allegations that he had engaged in other employment without prior permission from his manager;

422. The claimant was not disciplined. He was investigated and no action was taken. The reason behind the investigation was that it came to light that the claimant had taken on new employment and appeared not to have authority to do so. We have found that the respondent would investigate other colleagues' external work where they are aware of it and on occasion have granted retrospective permission therefore we have found no differential treatment between the claimant and his comparators. Whilst the information regarding the additional job came to light due to the tribunal proceedings, it was not caused by the fact that the claimant had made protected disclosures.

On 14 October 2020, the First Respondent unlawfully accessing and reading the Claimant's medical information without the Claimant's consent;

423. We find that the data breach at this point was entirely in advertent. The Data protection officer alerted the claimant to the breach and the ICO report confirmed that the breach was an error. We have been provided with no link between this inadvertent breach and the claimant's protected acts.

By way of letters to the Claimant dated 26 May 2020 and 15 October 2020, refusing to extend the period of medical redeployment in order to allow the Claimant to secure a train operator role;

424. The reason for the refusal to extend the redeployment period was that although the claimant had made it through to the next stage, this simply meant that the claimant was being added to a waiting list and a role was unlikely to be available for a considerable period of time and at least 12 months. The refusal to extend it further (it had been extended by 2 weeks for other roles) was not the claimant's protected acts.

On 1 October 2020, barring the Claimant from pursuing his train operator application by terminating his employment;

425. The respondent's motivation was as set out in the paragraph above regarding extension of the redeployment period for this role.

On 23 November 2020, failing to provide a note-taker at the Claimant's dismissal appeal hearing;

426. The reason there was no notetaker was the fact that this hearing occurred during the pandemic and Mr Conroy was unable to find a notetaker. He took notes himself. There was no link between this and the claimant's protected acts.

On 23 November 2020, the Chair and HR adviser at the Claimant's dismissal appeal hearing having a conflict of interest (the Chair having heard a grievance appeal from the Claimant years earlier and disregarded the evidence; and the HR adviser having been instrumental in putting the Claimant into redeployment).

427. Mr Conroy was a senior manager. The previous grievance had been many years earlier. There was no conflict of interest – managers can determine several grievances without being conflicted. He had not determined any earlier stage of the process about which he was now hearing the appeal. The claimant had not raised this concern at any stage in his appeal or previously. There was no evidence provided linking this to the claimant's protected disclosures.

Khalil Sarr at 14.01 seeking OH advice after placing the claimant in redeployment when he was meant to do so before making this decision (p1369).

428. We have accepted that this was a breach of the respondent's policy. We have also accepted that the reason KS acted in this way was that he had waited so long for the last report which still remained blocked by the claimant. He had no suggestion from the claimant that his health had changed and he had no indication that the claimant was going to cooperate at this point in time. There was no evidence provided to the Tribunal that this was caused by the claimant's protected acts.

Khalil Sarr on 11 June 2020, 1501 hours by refusing to make an OH referral for the claimant in order to get OH advice about the claimant (p1368)

476. We have concluded that KS' motivation in this regard was to avoid further delay because the claimant had refused to release his previous OH report and he saw no benefit in re-referring the claimant to OH. There was no evidence to suggest that KS' acted in this way because of the protected acts.

> *Khalil Sarr subjected the claimant to a detriment on 11/06/2020 1501 hours by insisting on pursuing my case when the respondent had stopped dealing with case conferences due to the pandemic. Claiming that my case had gone on too long and needs to be closed.*

477. Case conferences were only paused from March 2020 until May 2020 at the outset of the pandemic lockdowns. At the point at which remote working systems had been put in place then case conferences and management continued. None of KS' actions towards the claimant were motivated or caused by the protected acts.

478. In conclusion, the claimant has failed to demonstrate that any of the respondents' actions were caused by or influenced or motivated by the claimant's protected acts. The claimant, during the Tribunal hearing, did not seem to ascribe the protected disclosures as motive or the cause for the actions of the respondents either at all or with any consistency. He was reminded to put the possibility that they were the cause of the detriments to the relevant witnesses by Ms Ferber and this was done either by the claimant or by the Tribunal on his behalf with his agreement. As a general observation, the claimant provided us with little if any evidence whatsoever that suggested a causative link between the disclosures and the detriments. Although he was a litigant in person, claimants are well equipped to say what they think was behind the treatment they received. However the claimant did not articulate his victimization claim with any strength during the hearing. He seemed to consider that the fact of the disclosures, followed by the fact of the detriments occurring was sufficient but he did not take steps to evidence the causative link between them. The claimant's claims for victimization are therefore not upheld.

Unfair dismissal

479. With regard to capability, a reason will be a potentially fair reason for dismissal where it relates to the capability or qualifications of the employee for performing work of the kind for which he was employed to do (*section 98(2)(a)*) Employment Rights Act 1996 (ERA). Capability here means an employee's capability assessed by reference to skill, aptitude, health or any other physical or mental quality (*section 98(3)(a)*) ERA.

480. As well as showing that capability was the reason for dismissal, the employer will need to follow a fair procedure. The leading case on fairness in ill-health dismissals made clear that the employer should establish the true medical position and consult with the employee before deciding whether to dismiss (*East Lindsey District Council v Daubney [1977] ICR 566*). The EAT stated that:

"Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill-health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps be taken by the employer to discover the true medical position".

481. The following factors are likely to be relevant when considering the reasonableness of the decision to dismiss (*Lyncock v Cereal Packaging Ltd [1988] ICR 670*):

- The nature of the employee's illness.
- The prospects of the employee returning to work and the likelihood of the recurrence of the illness.
    - The need for the employer to have someone doing the work.
        - The effect of the absences on the rest of the workforce.
            - The extent to which the employee was made aware of the position.
    - The employee's length of service.

482. In *O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145* Underhill LJ made the following observations in relation to ill-health dismissals:

"*The argument "give me a little more time and I am sure I will recover" is easy to advance, but a time comes when an employer is entitled to some finality. That is all the more so where the employee had not been as co-operative as the employer had been entitled to expect about providing an up-to-date prognosis." (paragraph 36).*

….

"In principle the severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence must be a significant element in the balance that determines the point at which their dismissal becomes justified, and it is not unreasonable for a tribunal to expect some evidence on that subject. What kind of evidence is appropriate will depend on the case. Often, no doubt, it will be so obvious that the impact is very severe that a general statement to that effect will suffice; but sometimes it will be less evident, and the employer will need to give more particularised evidence of the kinds of difficulty that the absence is causing." (para 45).

483. The onus is on the employer to take reasonable steps to ascertain the medical position, rather than the onus being on the employee to volunteer medical information. In *Mitchell v Arkwood Plastics (Engineering) Ltd [1993] ICR 471* an employment tribunal erred when it found a dismissal fair on the basis that the employee had failed to volunteer a medical prognosis.

484. When investigating the medical position, an employer should be judged by the standards of the reasonable employer, not by the standards of whether it left no stone unturned. *BS v Dundee City Council [2013] CSIH 91*.

485. *DB Schenker Rail (UK) Ltd v Doolan [2010] UKEAT/0053/09*, held however that the decision to dismiss is a managerial one, not a medical one. While the views of experts will help the employer in coming to a decision, the experts should not dictate the outcome.

486. Where an employee refuses to co-operate with an employer's request to obtain medical information, the employer may dismiss fairly based on the evidence available to it. In *Elmbridge Housing Trust v O'Donoghue [2004] EWCA Civ 939* it was fair for the employer to dismiss after 15 weeks' absence where the employer had waited for eight weeks for the employee to consent to their obtaining medical evidence. Alternatively, the employee's refusal to co-operate with the employer (whether in enabling the employer to obtain appropriate medical reports or attend for medical examination) rise to a *contributory fault* reduction to compensation (*Slaughter v C Brewer & Sons Ltd [1990] IRLR 426*).

487. Consultation with the employee is central to the fairness of any dismissal for ill-health, as established in *East Lindsey District Council v Daubney*. In that case, the fact that the employee had not been consulted rendered the dismissal unfair. It was held as follows:

a. Discussion and consultation with the employee will often bring to light facts and circumstances of which the employer was unaware, which will throw new light on the problem.
b. The employee may wish to obtain his own medical evidence, which may result in the employer's medical advisers changing their opinion.
c. An injustice may be done if an employee is not consulted and given an opportunity to state his case.

488. This case is unusual for a capability dismissal to some extent as we have a situation where the medical evidence available to the respondent stated that the employee was fit to work subject to reasonable adjustments. That assessment was out of date though and the respondent did not attempt, at the time of dismissal, to re-refer the claimant to OH. That failure to re-refer was in breach of its own procedure.

489. The case law is clear that an employer ought to appraise itself of the up to date medical position prior to dismissal. However, in cases where an employee has refused to allow an up to date medical situation then an employer is entitled to make a decision based on the information available to it. *Elmbridge Housing Trust v O'Donoghue [2004] EWCA Civ 939*

490. In this case, the respondents' justification for failing to obtain up to date medical evidence has been that the claimant had previously failed to cooperate with the OH referral process because he refused access to his reports and because when asked he indicated that nothing had changed with regard to his health.

491. We have reminded ourselves that we must not substitute our own views as to what the respondent ought to have done but just assess what a reasonable employer would have done in the circumstances.

492. We have concluded earlier in this Judgment that it was reasonable for the respondents not to refer the claimant to OH before making the decision to place the claimant in redeployment because, at that point, the claimant was refusing to take part in the process at all and had unreasonably refused to attend a meeting with KS to discuss his situation.

493. Nevertheless, 12 weeks later, the claimant was engaging with both KS and the redeployment expert and he had been consistently engaging throughout the redeployment process. He was attending interviews and meetings. We accept that his answers regarding his health were not expansive but they were not wholly unreasonable in circumstances where the claimant's view and the understanding that the respondent had via OH was that the claimant was fit to work subject to adjustments. He was answering KS' questions when they were asked. At no point did KS ascertain if the claimant would be willing to go to OH again and disclose the report.

494. We do not consider, given that the claimant's job was at risk, that the respondent has established that it was reasonable for them to breach their own policy and fail to send the claimant to OH in circumstances where he was now engaging with the respondent's processes and managers and had been consistently for 12 weeks. There was no attempt at consulting with the claimant about the possibility of attending OH and explaining what the possible repercussions of that failure may be. Given that we had a clear example of another colleague who was signed as fit to return to work at the end of the redeployment process and was, as a result returned to his substantive role, it is not clear why KS felt able to completely ignore this step at this stage.

495. We understand and have deemed reasonable his decision to place the claimant in redeployment without one, but at the point of dismissal, in the face of renewed engagement from the claimant, we do not accept that it remained within the range of a reasonable employer for it to fail to even discuss an OH referral with the Claimant at this stage. The first respondent is a large employer with considerable resources. We consider that referring the claimant to OH at this stage was not even considered by KS at this point. He had concluded that the claimant could not do his role without putting himself at unnecessary risk 12 weeks' earlier and subsequently he made no further attempts to consider the position afresh once the redeployment exercise had finished.

496. He also failed to have a conversation with the claimant about a possible return to his substantive role or a possible new referral to OH or a risk assessment. He did not, in our view, properly consult with the claimant regarding the situation. That failure, at the point of dismissal, was outside the range of a reasonable investigation or process for an employer in all the circumstances. That is particularly the case when we have found that his failure to have the conversation or attempt the conversation that he wanted to have with the claimant before dismissing him in redeployment was discrimination arising out of the claimant's disabilities (see s15 Equality Act conclusions above).

497. As set out in the case of *Daubney*, many things could have arisen had KS attempted a consultation with the claimant at this stage. In particular, the level of adjustment necessary to, for example the hotspot requirements or the dual working situation could have been discussed and considered properly in light of the claimant's situation and in light of the possibility of a new OH referral.

498. We therefore consider that the respondent's process was not within the band of reasonable processes at establishing the correct position regarding the claimant's health or possible adjustments to the role. They had managed without the claimant in post for many months. We appreciate that this was an exercise in patience and the plea for just a bit more time is one often put forward in these circumstances. Nevertheless, the claimant was not in fact asking for just a little more time to get better, he was assuming that they would make a decision based on an up to date situation. Instead, the respondent relied on an OH report that was almost a year out of date and took no steps to gain an up to date picture from the Claimant's point of view about returning to his substantive role either.

499. We consider that the dismissal was also substantively unfair because it was based on an unfair investigation regarding the claimant's state of health. Whilst it is a different question and a different analysis must be carried out, the fact that we have concluded that the decision to dismiss the claimant was discrimination arising out his disability, also contributes to the substantive unfairness of the dismissal. It cannot be within the range of reasonable responses for an employer to allow discrimination to be part of their decision making process. Further, we cannot second guess what an OH specialist would have recommended with regard to the claimant's return to his substantive role given that it was so long since the last one. It is possible that any such report could have reduced the need for adjustments or changed the adjustments to something the respondent felt able to accommodate – particularly in conjunction with a conversation with the claimant given that he had, in the past worked without any reasonable adjustments despite the OH recommendations.

500. We make no findings here as to whether a 'Polkey' reduction ought to be made as we were not addressed on this matter in any detail by either side.

A 'Polkey' reduction is made if the Tribunal finds that the claimant's employment would have ended shortly in any event and therefore any damages arising form the dismissal ought to be limited to the amount of time it would have taken the respondent to dismiss the claimant fairly. Any decision regarding such a reduction will be made as part of our decision regarding remedy.

Wrongful Dismissal

501. The claimant claims that he ought to have been paid his benefits (namely his entitlement to free travel for him and one other) for the duration of what would have been his notice period. The claimant was dismissed and paid in lieu of notice. The respondents have submitted that they were entitled to do so under Clause 23 of the claimant's contract of employment. That reads as follows:

> **23 Ending your employment**
>
> **Your employment is permanent unless terminated in accordance with this clause subject always to the terms of Clause 7 above. If you wish to resign from CSEP you must give four weeks' notice in writing to your manager. CSEP will give you four weeks' notice if your employment is to be terminated within the first five years of your continuous employment. Once you have completed five years' continuous employment, your notice period will increase by one week for each year of service up to a maximum of twelve weeks' notice.**

502. There is no reference to the respondent having the right to pay in lieu of notice. Clause 7 describes the notice provision for the probation period. We were taken to no other clause or contractual document or policy of any sort that suggests that the respondent had the right to pay in lieu of notice. Therefore, the failure to all the claimant to work for the duration of the notice period is technically a breach of the claimant's contract and a breach of clause 23 above.

503. The claimant ought to be put in the position he would have been had the contract not been breached and terminate before the end of 11 weeks. This therefore means that he was entitled to free travel for the 11 week period from the date his employment was terminated.

504. We accept that he would not have been entitled to free travel thereafter as he had not competed the required 20 years' service which entitles employees to free travel after the termination of their employment.

505. We find that the claimant also ought to have been paid for any holiday that would have accrued during the notice period. The claimant has claimed for six unpaid bank holidays. We do not accept that this was an accurate

assessment of the loss he may have experienced due to the breach of contract. We did not understand the basis upon which he stated that there were 6 bank holiday days owing to him. The value of his breach of contract claim regarding holiday pay is limited to the amount of annual leave he would have accrued during the notice period. We uphold that claim.

Employment Judge Webster
Date: 14 April 2023

AGREED LIST OF ISSUES

JURISDICTION

1. Are any of the claimant's claims for disability discrimination out of time under s123 of the Equality Act 2010?

2. If so, in relation to each complaint:

    a. Was that complaint part of a continuing course of conduct?

    b. If not, would it be just and equitable for the Tribunal to extend time?

UNFAIR DISMISSAL

3. What was the reason for the Claimant's dismissal? The Respondents say the reason was capability. The Claimant says the reason was his disability.

4. Was the reason a potentially fair reason?

5. If it was, was it reasonable to dismiss the Claimant in all the circumstances of the case?

WRONGFUL DISMISSAL

6. To what sums was the Claimant entitled on dismissal? In particular:

    a. Was the Claimant paid the correct holiday pay on dismissal? He says he was not paid 6 accrued days' Bank Holiday pay.

    b. Was the Claimant paid his notice pay?

    c. Was the Claimant entitled to continuation of a free travel pass for him and a nominee during the notice period?

DISABILITY DISCRIMINATION

Disability

7. The Respondents accept that the Claimant was a disabled person within the meaning of the Equality Act 2010 by virtue of Post-Traumatic Stress Disorder.

8. The Respondents dispute that the Claimant was a disabled person within the meaning of the Equality Act 2010 by virtue of depression.

9. Was the Claimant a disabled person within the meaning of the Equality Act 2010 by virtue of depression?

10. Did the Respondents have knowledge of such disability?

11. Alternatively, could the Respondents reasonably have been expected to know that the Claimant was disabled as alleged?

Direct discrimination: Equality Act 2010 s13

12. Did the Respondents do any or all of the following:

12.1 Refusing to lift the Claimant's medical suspension following receipt of an Occupational Health report dated 20 September 2019;

12.2 From 7 October 2019, requiring the Claimant to call his staff manager every Monday at 10am;

12.3 Deciding the outcome of his grievance prior to his grievance hearing (namely, on 11 October 2019, during a break in the Claimant's grievance hearing, the Claimant alleges he overheard a discussion of the Claimant's request for payment during his period of study leave);

12.4 Not allowing the Claimant's workplace colleague to participate during the grievance hearing on 11 October 2019 contrary to the Claimant's statutory right to a fair grievance process;

12.5 On 10 March 2020, KS holding a capability case conference in the absence of the Claimant, rather than rearranging the case conference once he was informed the Claimant would not be attending;

12.6 On 26 May 2020 the Third Respondent:

12.6.1 disregarded OH advice dated 21 February 2019 and 20 September 2019, namely "it is possible that a confrontational situation with a non compliant passenger triggers a negative response". "This statement does not mean that a confrontational situation will trigger a negative response, however it is a possibility" and substituted his own view;

12.6.2 stated the Claimant could no longer carry out his role, contrary to OH reports dated 21 February 2019 and 20 September 2019;

12.6.3 stated there were no reasonable adjustments that could be put in place to reduce or remove the confrontational nature of the role, contrary to OH advice, namely OH advice stating "In my professional opinion, I believe the chance of a confrontational situation is likely to be significantly reduced if the recommendations can be accommodated";

12.6.4 failed to consider an OH report dated 21 February 2019, and failed to consider the Respondent's reasonable adjustments policy/guidance notes.

12.6.5 failed to consider the Claimant's specialist report/medical records which were not requested from Claimant's GP.

12.6.6 wilfully and purposely lied saying that the Claimant did not consent to him receiving the OH memo dated 21 February 2019 and his specialist report; and

12.6.7 placed the Claimant into medical redeployment.

12.7 On 1 October 2020 (dismissal date), refusing to extend the period of medical redeployment in order to allow the Claimant to secure a train operator role, refusing to return the Claimant to his substantive position or offering him alternative employment;

12.8 Using a document (disclosed by the Claimant to the Respondents in error) showing the Claimant was carrying out other work, as a reason for unfounded and baseless disciplinary proceedings against the Claimant from 2 September 2020; and

12.9 On 1 October 2020, dismissing the Claimant for capability

12.10 On or before 1 October 2020, failing to seek OH advice and guidance before dismissing on medical grounds.

12.11 In the dismissal letter dated 15 October 2020:

12.11.1 stating the Claimant's medical condition had not improved enough to return him to his substantive role;

12.11.2 the Third Respondent denying he had seen and was aware of the OH report dated 21 February 2019 and its recommendations;

12.11.3 the Third Respondent knowingly and purposely making spurious statements that the Claimant confirmed at a sickness review meeting on 18/9/2020 that there were no changes to his medical condition;

12.11.4 applying its long term sickness absence policy to the Claimant knowing it did not apply;

12.11.5 rejecting the Claimant for the Train Operator role by dismissing him (it was an internal vacancy)

12.11.6 stating there were no reasonable adjustments that could be made

12.12 Khalil Sarr on 11 June 2020, asking OH if claimant is fit or have any restrictions to being placed in redeployment without OH assessing the claimant. P 1369

12.13 Khalil Sarr on 4 September 202, stated to OH that claimants situation has not improved as he is still suffering from his condition. P 1375

12.14 Khalil Sarr on 10 September 2020 failing to inform claimant of the option to review his condition with OH as he had decided himself that the claimants condition had not improved. P 1380.

Additional Background Information: The claimant relies on actual comparator Germain Warsop who was put in redeployment 27 October 2015 as seen at page 1001-1002 of the bundle following OH advice which advised of restrictions 6 October 2015. The claimant also relies on comparator Germain Warsop as per page 1006 of the bundle. Respondent contacted OH with the comparator's knowledge.

13 Did any or all of those acts / omissions, if proved, amount to less favourable treatment?

14 If so, was it because of the Claimant's disability?

15 As regards to all allegations except 12.8, the Claimant relies on hypothetical comparators and actual comparators Jermain Warsop and David Jarrett. In respect of the allegation at 12.8, the following actual comparators: Dudley Higgins, Desmond Dallas, Sheldon Dean, "Amy from South West team 1", and Ochukho Achora.

Discrimination arising from disability: Equality Act 2010 s15

Was the Claimant treated unfavourably?

16 Did the Respondents do any or all of the following:

16.1 On 25 October 2018, the Second Respondent refusing to allow the Claimant to carry out his checks with a colleague for all except the first and last hour of his shift;

16.2 On 18 March 2019, the First Respondent refusing:

16.2.1 to agree that the Claimant would not be deployed in hotspots (volatile areas);

16.2.2 to provide a colleague to work with;

16.2.3 the Claimant's request to work reduced hours of 3½ days per week for three months;

16.3 On 2 July 2019, during a grievance meeting Anand Nandha:

16.3.1 showing micro aggression and bias;

16.3.2 insisting on dealing with two grievances at once;

16.4 On 2 July 2019, after the grievance meeting, suspending the Claimant from work without his knowledge;

16.5 From 20 September 2019 to 26 May 2020, refusing to implement the recommendations made by Occupational Health in a report dated 20 September 2019 and continuing to keep the Claimant on suspension. The recommendations were to allow the Claimant to undertake a mixture of single and dual check (timed) and to avoid deploying him in volatile areas.

16.6 From 14 October 2019 to 9 December 2019, refusing to answer the Claimant's telephone calls to the staff manager at 10am every Monday;

16.7 From 20 September 2019 (date of OH report), not providing any updates to the Claimant on his return to work, despite the Claimant asking for clarification on 7 October 2019;

16.8 On 10 March 2020, the Third Respondent holding a capability case conference in the absence of the Claimant, rather than rearranging the case conference once he was informed the Claimant would not be attending, contrary to the Respondent's Longer Term Absence Policy;

16.9 From 26 May 2020, the Third Respondent placing the Claimant into medical redeployment, on the basis that the Claimant could no longer carry out his substantive role, disregarding the contents of the OH reports dated 21 February 2019 and 20 September 2019. On 26 May 2020, in making its decision as regards medical redeployment, the Third Respondent based its decision on inaccurate facts in the following respects:

16.9.1 the Third Respondent stating that he made the decision as regards medical redeployment because the Claimant did not give him access to a specialist report or an OH report dated 21 February 2019, whereas in fact the specialist report was not requested and the Respondent had the requested OH report and knew its contents.

16.9.2 the Third Respondent stating that the Claimant could not do his role due to a possibility of a confrontational situation triggering his disability, which was contrary to the OH reports;

16.9.3 the Third Respondent stating that there were no reasonable adjustments that could be made to reduce or remove the confrontational nature of the job, whereas the Respondent failed to follow its reasonable adjustment policy/guidance notes and failed to consider what reasonable adjustments could be made.

16.10 On 1 October 2020, dismissing the Claimant for capability and, in the dismissal outcome letter dated 15 October 2020, basing its decision to dismiss on unfounded or incorrect grounds including:

16.10.1 the Respondents stating that the Claimant was not able to continue in his role because OH advised that it was possible that a confrontational situation with a non-compliant passenger could trigger the Claimant's condition, which the Claimant says is the Respondent manipulating and disregarding the OH advice;

16.10.2 the Respondents stating that there were no reasonable adjustments that could be made to allow the Claimant to return to his RPI role because OH advised that it was possible that a confrontational situation with a non-compliant passenger could trigger the Claimant's medical condition, which the Claimant says is the Respondent manipulating and disregarding OH advice.

16.10.3 The Respondents stating the Claimant's condition had not improved enough to allow a return to his substantive role.

16.11 Khalil Sarr on 11 June 2020 treated the claimant unfavourably by seeking OH advice on whether the claimant was fit for redeployment and restrictions after the decision to put the claimant in redeployment had already been made. (p1369)

16.12 Khalil Sarr on 11 June 2020, at 15.01 treated the claimant by refusing to make a referral to OH (p1368)

16.13 Khalil Sarr on 4 September 2020, at 12.11 treated the claimant unfavourably by diagnosing the claimant when not legally qualified stating 'His situation has not improved and the claimant is suffering from his condition." (1375)

17 Did any or all of those acts / omissions, if proved, amount to unfavourable treatment?

Reason for treatment

18 Was the unfavourable treatment because of something arising in consequence of the Claimant's disability? This gives rise to the following sub-issues.

19 What was the reason for each act of unfavourable treatment (using the same sub-paragraph numbering as in paragraph 19 above):

19.1 The Claimant says that as a result of his disabilities it arose that he suffered heightened anxiety at peak times giving rise to adverse difficulty to do his job as such he needed reasonable adjustments.

19.2 The Claimant says:

d. that it arose that he suffered panic attacks, poor concentration and inability to function as a result of his disabilities. As a result the Claimant could not work in hotspots/volatile areas;

e. that it arose that he required reasonable adjustments of working with a colleague as he experienced increased anxiety, lack of concentration and panic attacks as a result of his disability;

f. that it arose that he experienced significant fatigue as a result of his disability and was unable to work full-time hours.

19.3 The Claimant says:

19.3.1.1 that it arose that he experienced irritability, stress reactions and taking flight as a result of his disabilities;

19.3.1.2 that it arose that he suffered from loss of concentration and stress reactions as a result of his disabilities.

19.4 The Claimant says that he experienced panic attacks, stress reactions and took flight from a grievance hearing as a result of his disabilities.

19.5 The Claimant says that panic attacks, stress reaction and taking flight from a grievance meeting, and the subsequent OH report that the Claimant was fit for duty with reasonable adjustments, were as a result of his disabilities.

19.6 The Claimant says that it arose that he had panic attacks, stress reaction and took flight from the grievance hearing resulting in his suspension and the requirement to call the First Respondent every Monday at 10:00 hours. It further arose that the Claimant was deemed fit for duties with reasonable adjustments as a result of his disabilities.

19.7 The Claimant says that it arose that he had a panic attack, stress reaction and took flight which led to his suspension and OH referral and report; from that it also arose that the Claimant was fit for duty with reasonable adjustments because of his disabilities.

19.8 The Claimant says that it arose that prior to the time of the sickness absence case review he experienced a state of heightened panic attacks and significant anxiety as a result of his disabilities which meant he could not attend the meeting.

19.9 The Claimant says it arose that he had panic attacks, stress reaction and taking flight from the grievance hearing resulting in suspension until dismissal, OH referral and report resulting in him being deemed fit for duty with reasonable adjustments, and stating that it is possible that a confrontational situation with a non-compliant customer triggers a negative reaction in the Claimant. Further his state of heightened panic attacks and significant anxiety resulted in him not attending a case conference.

a. The Claimant says that it arose from the OH report dated 20 September 2019, that the Claimant was fit for duty with the reasonable adjustments recommended in the OH report from 2019. It also arose that the First Respondent wanted a specialist report of the Claimant's condition following the Claimant's panic attack, stress reaction and taking flight from the grievance hearing on 2 July 20219, due to his disabilities.

b. The Claimant says that it arose that **"It was possible for a confrontational situation with a non-compliant customer triggers a negative response",** also that the Claimant was fit for duty with reasonable adjustments as a result of the Claimant's disability.

c. The Claimant says that it arose that his panic attack, stress reaction and taking flight from grievance hearing resulted in his suspension then OH referral and report, where it then arose that the Claimant was fit for duty with reasonable adjustments due to his disabilities.

19.10 The Claimant says that it arose that he had panic attack, stress reaction and taking flight from a grievance hearing which led to his suspension until dismissal, and OH referral and report which stated the Claimant was fit for duty with reasonable adjustments, which resulted in redeployment unsuccessfully after which it arose that the Claimant was fit for duty with reasonable adjustments. "It was possible for a confrontational situation with a non-compliant customer causes a negative response", the claimant still had his condition, took medication, was awaiting other treatment options and the Respondents' diagnosis that the Claimant was not fit enough to return to his role were all due to claimants' disabilities.

a. The Claimant says that it arose that he had panic attacks, stress reaction and took flight from a grievance hearing which led to his suspension until dismissal and OH referral and report, which stated that as a result of his disability, the Claimant was fit for duty with reasonable adjustments. It also arose from the OH report that it was possible that a confrontational situation with a non-compliant customer triggers a negative response.

b. The Claimant says that it arose that he had panic attacks, stress reaction and took flight from a grievance which led to his suspension until dismissal and OH referral and report which said he was fit for duty with reasonable adjustments. It also arose from the OH report that a confrontational situation with a non-compliant customer triggers a negative response.

c. The Claimant says as **above at 19.10(b)** in addition to the Claimant confirming that his condition is still present, taking medication and waiting to start further treatment options.

19.11 It arose as a result of his disability the claimant required dual checking and not to be deployed in hotspots the claimant remained fit for work.

19.12 It arose that as a result of the claimant's disability the claimant required reasonable adjustments as per OH report 684-686.

19.13 It arose that the claimant takes medication, has undertaken counselling and is awaiting counselling for his condition. The claimant remained fit for his role.

20 For each of those reasons, did that amount to something arising in consequence of the Claimant's disability?

Justification

21 In respect of any act or omission which amounts to unfavourable treatment because of something arising in consequence of the Claimant's disability, what was the aim of that act or omission, and was such aim legitimate?

22 If so, was that act or omission a proportionate means of achieving that aim?

Disability related harassment: Equality Act 2010 s26

23 Did the Respondents do any or all of the following:

23.1 On 23 November 2018, 27 November 2018 and 3 December 2018, Dayo Abafarin and JB harassing and bullying the Claimant to attend an informal meeting about the Claimant's grievance, and starting disciplinary proceedings against the Claimant when he refused;

23.2 On 2 July 2019, during a grievance meeting, Anand Nandha showing micro aggression and intimidation towards the Claimant;

23.3 On 2 July 2019, following the grievance meeting, Anand Nandha suspending the Claimant from work without his knowledge;

23.4 On 30 and 31 August 2019, at a leaving function for the Second Respondent, supervisor Roger White telling Dudley Higgins (who told the Claimant) that the Claimant had been fired, but it was not official yet;

23.5 On 19 September 2019, the Second Respondent maliciously using authorised statutory leave that he authorised for the Claimant in a letter to OH to

paint a bad picture of the Claimant, despite the fact that the Claimant alleges that he has never triggered the absence or attendance policy;

23.6 On 22 October 2019, despite the Claimant informing Anand Nandha that he would not participate in the grievance process, Anand Nandha ignoring this and proceeding to produce a grievance outcome;

23.7 Anand Nandha failing to investigate the grievance or to produce any notes in respect of the Second Respondent, Mark Little, Dayo Obafarin or Gavin Locker, all of whom were involved in the grievance, which the Claimant says should have happened by 23 April 2019 or, at the latest by 10 August 2019;

23.8 Anand Nandha failing to interview Dayo Abifarin, which the Claimant says should have happened within 28 days of the grievance being lodged in November 2018, so by 28 December 2018, or by the latest 10 August 2019

23.9 On 10 March 2020, the Third Respondent holding a capability case conference in the absence of the Claimant, rather than rearranging the case conference once he was informed the Claimant would not be attending;

23.10 On 29 May 2020, the Claimant receiving an email notifying him that the capability case conference on 10 March 2020 had been held in his absence, the Third Respondent ignoring the Claimant's representations that there were health and safety reasons for him not attending the meeting, the Third Respondent lying by saying that the Claimant had not given any reason for not attending the meeting or contacting the Third Respondent, and the Third Respondent failing to re-arrange the meeting.

23.11 On 18 September 2020, the Third Respondent lying when he said that he had not seen the OH report dated 21 February 2019, and that that prevented him from making reasonable adjustments;

23.12 On 14 October 2020, the First Respondent unlawfully accessing and sharing the Claimant's medical information without the Claimant's consent;

23.13 On 15 October 2020, the Third Respondent lying when he said that the Claimant had confirmed there had been no changes to his medical condition;

23.14 On 15 October 2020, the Third Respondent lying when he said that the Claimant's medical condition had not improved enough to allow a return to work in the RPI role?

23.15 **Khalil Sarr, 11 June at 1401 hours contacting OH to access medical information about claimant without his knowledge or consent**

23.16 **Khalil Sarr 11 June 2020 at 15.10 hours, p1368 again contacting OH to access medical information about claimant without his knowledge or consent**

23.17 **Khalil Sarr on 4 June 2020 at 1211 hours stating to OH that the claimant was suffering from his condition.**

24 In respect of each of the above acts which is proved to have taken place, did that act amount to conduct related to the Claimant's disability?

25 If so, was that conduct unwanted by the Claimant?

26 If so, did that conduct have the purpose or effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

27 If so, was it reasonable for that conduct to have that effect?

Duty to make reasonable adjustments: Equality Act 2010 s21

28 Did the Respondent apply all or any of the following PCPs:

28.1 a policy that staff must single check and must arrange dual checking, in all circumstances, if needed;

28.2 a policy of deploying staff in hotspots and volatile areas;

28.3 a practice that staff must arrange dual checking in all circumstances themselves;

28.4 a policy that staff work full time hours;

28.5 a practice of making the grievance process a hostile environment;

28.6 a practice of dealing with multiple grievances at one time;

28.7 a practice of suspending staff from work and subjecting them to fit for duty assessment if they are deemed to have acted unreasonably at a grievance hearing;

28.8 arbitrary and prolonged suspension practices;

28.9 a practice of disregarding recommendations for reasonable adjustments made by Occupational Health;

28.10 a practice of failing to answer telephone calls required to be made by suspended staff at 10 a.m. on Mondays;

28.11 a practice of not providing suspended staff with updates or a timetable of their return to work;

28.12 practice of redeploying staff for periods of sickness absence;

28.13 a PCP of applying the First Respondent's longer term sickness absence policy;

28.14 a PCP of not applying the First Respondent's reasonable adjustments policy and reasonable adjustments;

28.15 a PCP of not obtaining a specialist report;

28.16 a PCP of not obtaining occupational health advice before dismissal;

28.17 a practice of deciding staff were not fit for role;

28.18 a PCP of restricting time in redeployment to 13 weeks;

28.19 a PCP of not offering employment to redeployed staff and instead requiring them to apply for roles.

29 In respect of each alleged PCP, if proved, did that PCP put the Claimant at a substantial disadvantage, in comparison with persons who are not disabled?

29.1 [Re PCP 28.1] The Claimant says that single checking at peak times heightened his state of anxiety substantially making it very difficult to communicate with customers, deal with conflict and resulting in being unable to function. The Claimant also says that his disabilities made it difficult for him to engage with others and he avoids it. The Claimant says that it would have been a reasonable adjustment for the First Respondent to restrict the Claimants' single checking activities to the first and last hour of the shift and arrange dual checking for the Claimant in-between.

29.2 [Re PCP 28.2] The Claimant says that working in hotspots/volatile areas resulted in him experiencing very bad thoughts and fear for his safety, impaired concentration, fatigue and inability to function. The Claimant says that it would have been a reasonable adjustment for the First Respondent to not deploy the Claimant in hotspots/volatile areas.

29.3 [Re PCP 28.3] The Claimant says that he was at a substantial disadvantage because he found it very difficult to engage with others as it made him very anxious so he avoided it. The Claimant says it would have been a reasonable adjustment for the First Respondent to arrange colleagues for the claimant to work with.

29.4 [Re PCP 28.4] The Claimant says he suffered fatigue made worse by exposure to hostilities on the job which prevented him from working full time hours. The Claimant says it would have been reasonable for the First Respondent to implement the Occupational Health recommendation that the Claimant work 3 ½ days per week with full pay for 3 months.

29.5 [Re PCP 28.5] The Claimant says he experiences stress and anxiety reactions as result of his disabilities which could see him take flight from a hostile

environment. The Claimant says that it would have been a reasonable adjustment for the First Respondent to be considerate and sensitive towards the Claimant, provide a support worker at the grievance or allow the Claimant to be accompanied by one.

29.6 [Re PCP 28.6] The Claimant says that he suffered confused thoughts and a lack of concentration which led to further stress reactions affecting his ability to deal with multiple grievances at once. The Claimant says that a reasonable adjustment was for the First Respondent to deal with each grievance individually and within the 28 days highlighted in its policy.

29.7 [Re PCP 28.7] The Claimant says that the prolonged suspension worsened his conditions with increased anxiety, constant fear of something bad happening to him and prolonged periods of low mood. The Claimant says that it was a reasonable adjustment for the First Respondent to return him to his role as he was fit for duty and implement Occupational Health recommendations or transfer the Claimant to another role.

29.8 [Re PCP 28.8] As above at 29.7.

29.9 [Re PCP 28.9] The Claimant says that his condition required him to have reasonable adjustments to do his role; the First Respondent not implementing reasonable adjustments put him at risk for dismissal. The Claimant says that it was reasonable for the First Respondent to implement Occupational Health recommendations or transfer the Claimant to another role as he was fit for duty.

29.10 [Re PCP 28.10] The Claimant says that the failure to answer or return his phone calls increased the Claimant’s anxiety, stress, panic attacks and generally made the Claimant’s condition worsen (given the Claimant was fit for duty and being prevented from returning by the First Respondent).

29.11 [Re PCP 28.11] The Claimant says that he experienced increased severe low moods, increased panic attacks, ruminations and fear of something bad happening to him as a result of the First Respondent's policy. The Claimant says that it would have been a reasonable adjustment for the First Respondent to return the Claimant to work as Occupational Health deemed him fit for duty and the Claimant stated that he was fit for duty.

29.12 [Re PCP 28.12] The Claimant's disabilities meant that he was more prone to be off work for longer periods which would more likely trigger the First Respondent's actions to redeploy him. The Claimant says that it was reasonable to follow Occupational Health advice that the Claimant was fit for duty and return him to work, the Claimant also says that it was reasonable for the First Respondent to not subject him to a longer term sickness absence process which did not apply as he was not sick but off work due to suspension or, where it found that the longer term sickness absence process was applicable, to follow it properly

and start at stage one which required the implementation of reasonable adjustments.

29.13 [Re PCP 28.13] The Claimant says that he was prone to be off work sick due to his disabilities for a longer period of time, triggering the First Respondent's longer term sickness absence procedures in the process ultimately leading to dismissal. The Claimant says it was reasonable for the First Respondent to apply its longer term sickness absence policy correctly; applicable to staff that were off work with illness not staff who were fit for duty, as was the Claimant, the Claimant says it was also reasonable for the First Respondent to allow him to return to work as he was fit to do so.

29.14 [Re PCP 28.14] The Claimant says that he required reasonable adjustments to do his role because of his disabilities and as such was substantially disadvantaged by the First Respondent not following a reasonable adjustment policy or implementing reasonable adjustments by way of dismissal. The Claimant says that it was reasonable for the First Respondent to follow its reasonable adjustment policy and to implement Occupational Health recommendations.

29.15 [Re PCP 28.15] The Claimant says that the Respondents not obtaining a specialist report put him at risk of dismissal as the Third Respondent made his own judgement about the Claimant's condition and its effect. The Claimant says that it was reasonable for the Respondents to seek the Claimant's consent, properly, to obtain a specialist report, the Claimant also says it was reasonable for the Third Respondent to follow medical guidance rather than make medical decisions where he had no medical qualifications to do so.

29.16 [Re PCP 28.16] The Claimant says that he was subjected to a dismissal because Occupational Health advice was that he was fit for duty with reasonable adjustments; in the Third Respondent's opinion there were no adjustments that could be made and also the Third Respondent edited OH's statement that "A confrontational situation with a non-compliant customer triggers a negative response." The Claimant says that it was reasonable for the First Respondent to return him to work as he was fit for duty, and implement OH recommendations, transfer the Claimant to another role, obtain up to date OH guidance to find out the true position as the report it relied on was out of date, more than a year old. It was also reasonable to obtain OH guidance prior to dismissal because the First Respondent's own policy required it to do so and it was also reasonable for the First Respondent to heed the Claimant's position that he was fit to return to work and it was reasonable for the Third Respondent to take OH advice in its full context as the opinion went on to clarify that it does not mean that it will happen but it is a possibility.

29.17 [Re PCP 28.17] the First Respondent's practice put the Claimant at a substantial disadvantage of being dismissed because of his disability and requiring reasonable adjustments to do his role. The Claimant says that it was reasonable for the First Respondent to obtain Occupational Health guidance on his fitness for duty and adhering to it, it was reasonable for the Third Respondent

not to make medical judgements where he was not qualified to do so, it was also reasonable for the First Respondent to follow a reasonable adjustment policy and it was also reasonable for the First Respondent to heed the Claimant's position that he was fit for duty.

29.18 [Re PCP 28.18] The Claimant says that he was substantially disadvantaged due to difficulties concentrating, fatigue, increased anxiety resulting in reduced capacity to take part in the recruitment campaign. The Claimant says that 13 weeks was not enough time to secure a job, as a result the threat of dismissal loomed over him. The Claimant says that it was reasonable for the First Respondent to transfer the Claimant to an alternative vacancy without the need to apply, extend the time in redeployment to allow the Claimant to secure the train operator role, allow the Claimant to apply for secondment opportunities.

29.19 [Re PCP 28.19] The Claimant says he was at risk of dismissal because he had limited time in redeployment in which to secure a job, as a result he had heightened anxiety, difficulties concentrating, fatigue and a reduced capacity. The Claimant says that it was reasonable for the First Respondent to transfer the Claimant to a suitable alternative vacancy instead of the Claimant going through the recruitment process.

29.20 [Re PCP 28.19] The Claimant says that he was at risk of dismissal because Occupational Health advice said that he was fit for duty with reasonable adjustments this put the Claimant at a substantial disadvantage if he did not obtain a role whilst in redeployment. The Claimant says that it was reasonable for the First Respondent to not dismiss the Claimant and to return him to his role, make reasonable adjustments and those recommended by OH for him to do his role or transfer the Claimant to an alternative role.

30 In respect of each alleged PCP, if proved, did the First Respondent know that the PCP put the Claimant at that disadvantage, in comparison with persons who are not disabled, in relation to employment by the First Respondent?

31 If not, could the First Respondent reasonably have been expected to know that the PCP put the Claimant at a substantial disadvantage, in comparison with persons who are not disabled, in relation to employment by the First Respondent?

32 If the First Respondent had actual or constructive knowledge of disadvantage, did the First Respondent take such steps as it was reasonable for it to have to take, to avoid that disadvantage? The steps relied upon by the Claimant are set out at paragraph 29 above.

Victimisation: Equality Act 2010 s27

33 The Claimant relies upon the following protected acts (together the "Protected Acts"):

33.1 His grievance dated 11 November 2018 (the "First Grievance");

33.2 His grievance dated 28 November 2018 (the "Second Grievance");

33.3 His grievance dated 22 March 2019 (the "Third Grievance");

33.4 His Employment Tribunal claim with case number 2300219/2019, dated 18 January 2019 (the "First Claim");

33.5 His Employment Tribunal claim with case number 2305504/2019, dated 15 December 2019 (the "Second Claim");

33.6 His email complaint about discrimination dated 13 January 2020; **[also relied upon for additional complaints below]**

33.7 Email 5 March 2020 (757)

33.8 His email complaint about discrimination dated 6 March 2020;

33.9 Email dated 5 May 2020; (755)

33.10 His email complaint about discrimination dated 8 July 2020; and

33.11 His Employment Tribunal claim with case number 2304788/2020, dated 24 August 2020 (the "Third Claim").

34 Did the Respondents do any or all of the following:

34.1 On 11 November 2018, not dealing with the First Grievance in line with policy, and not offering an appeal contrary to policy and ACAS Code of Practice;

34.2 On 28 November 2018, not dealing with the Second Grievance in line with policy, and not offering an appeal contrary to policy and ACAS Code of Practice;

34.3 On 18 March 2019, failing to implement the OH recommendation of (a) allowing the Claimant to undertake a mixture of single and dual checks (timed), (b) avoid deploying the Claimant in volatile areas and (c) working 3 and a half days per week for 3 months with pay protection.

34.4 On 22 March 2019, not dealing with the Third Grievance in line with policy, and not offering an appeal contrary to policy and ACAS Code of Practice;

34.5 On 2 July 2019, suspending the Claimant;

34.6 From 20 September 2019 (date of OH report) to his dismissal on 1 October 2020, preventing and delaying the Claimant's return to work;

34.7 On 2 July 2019, at a grievance hearing:

34.7.1 The Chair Anand Nandha failing to make reasonable adjustments;

34.7.2 Anand Nandha showing micro aggressive and obvious bias;

34.8 On 2 July 2019, Anand Nandha suspending the Claimant without his knowledge;

34.9 On 10 August 2019, Anand Nandha failing to provide notes or interview the parties to the grievance;

34.10 On 25 November 2019, in the grievance outcome letter, Anand Nandha fabricating facts and not representing what was discussed or presented by the Claimant, specifically:

34.10.1 Ignoring the Second Respondent's outcome letter from October 2018 where he clearly speaks about the Claimant's PTSD.

34.10.2 Ignoring Meeting notes from 11 February 2019.

34.10.3 Ignoring an outcome letter dated 18 March 2019 speaking about PTSD

34.10.4 Ignoring doctor's certificates speaking about PTSD

34.10.5 Ignoring OH referral which showed intention to not provide reasonable adjustments;

34.10.6 Ignoring email where the Second Respondent denied the Claimant's condition

34.10.7 Ignoring notes from the meeting held on 6 March 2019 which clearly stated the meeting would be reconvened on 18 March 2019, when in fact an outcome was presented on 18 March 2019 and the Claimant was told to sign it;

34.10.8 Ignoring the three adjustments recommended by OH (none of which were implemented) and instead focusing on the one adjustment which was for the Claimant to work 3.5 days per week for 3 months and claiming that there was no plan to return to full time work;

34.10.9 Wrongly stating that the Claimant said that Dayo Abifarin was informed to convey the reasonable adjustments outcome letter to the Claimant. In fact the Claimant had asked Dayo Abifarin why personal communication marked private and confidential for the addressee only was in his possession, and in response Mr Abifarin had started to get aggressive with the Claimant and bully him to attend an informal meeting to discuss the reasonable adjustment outcome letter in breach of policy;

34.10.10 refused to confirm to the Claimant when Gavin Locker and other individuals left the Respondent's employment and did not interview them;

34.11 On 12 July 2019, the Second Respondent failing to pay for study/exam leave for a PRINCE 2 course, stating it was not relevant to business, despite the business regularly recruiting project managers and requesting the qualification;

34.12 On 30 and 31 August 2019, at a leaving function for the Second Respondent, supervisor Roger White telling Dudley Higgins (who told the Claimant) that the Claimant had been fired, but it was not official yet;

34.13 Deciding the outcome of the Claimant's grievance prior to his grievance hearing on 11 October 2019, and failing to conduct the grievance properly;

34.14 Not allowing the Claimant's workplace colleague to participate during the grievance hearing on 11 October 2019;

34.15 On 10 March 2020, the Third Respondent holding a capability case conference in the absence of the Claimant, rather than rearranging the case conference once he was informed the Claimant would not be attending;

34.16 On 26 May 2020, advising the Claimant that he was being redeployed, contrary to the long term sickness absence policy;

34.17 On 26 May 2020, wrongly applying the long term sickness absence policy to the Claimant, despite the Claimant not being sick;

34.18 From receipt of the OH report dated 20 September 2019 until the Claimant's dismissal 1 October 2020, failing to consider the Claimant's GP / specialist report and OH report dated 21 February 2019;

34.19 From receipt of the OH report dated 20 September 2019 until the Claimant's dismissal 1 October 2020, the Third Respondent failing to follow OH advice that the Claimant was fit for his role;

34.20 From receipt of the OH report dated 20 September 2019 until the Claimant's dismissal 1 October 2020, the Third Respondent failing to follow the reasonable adjustments process;

34.21 From receipt of the OH report dated 20 September 2019 until the Claimant's dismissal 1 October 2020, the Third Respondent failing to acknowledge the Claimant's disabling condition of depression, even though accepted by OH;

34.22 From receipt of the OH report dated 20 September 2019, the Third Respondent disregarded OH advice that the reasonable adjustments would result

in a significant reduction of a confrontational situation and concluded without evidence that there was no reasonable adjustment that could be put in place for the Claimant;

34.23 On 2 September 2020, inviting the Claimant to a fact-finding interview with a view to undertaking disciplinary proceedings against him, based on false allegations that he had engaged in other employment without prior permission from his manager;

34.24 On 14 October 2020, the First Respondent unlawfully accessing and reading the Claimant's medical information without the Claimant's consent;

34.25 By way of letters to the Claimant dated 26 May 2020 and 15 October 2020, refusing to extend the period of medical redeployment in order to allow the Claimant to secure a train operator role;

34.26 On 1 October 2020, barring the Claimant from pursuing his train operator application by terminating his employment;

34.27 On 23 November 2020, failing to provide a note-taker at the Claimant's dismissal appeal hearing; and

34.28 On 23 November 2020, the Chair and HR adviser at the Claimant's dismissal appeal hearing having a conflict of interest (the Chair having heard a grievance appeal from the Claimant years earlier and disregarded the evidence; and the HR adviser having been instrumental in putting the Claimant into redeployment).

34.29 Khalil Sarr at 14.01 seeking OH advice after placing the claimant in redeployment when he was meant to do so before making this decision (p1369).

34.30 Khalil Sarr on 11 June 2020, 1501 hours by refusing to make an OH referral for the claimant in order to get OH advice about the claimant (p1368)

34.31 Khalil Sarr subjected the claimant to a detriment on 11/06/2020 1501 hours by insisting on pursuing my case when the respondent had stopped dealing with case conferences due to the pandemic. Claiming that my case had gone on too long and needs to be closed.

35 Did each such act, if proved, constitute a detriment to the Claimant?

36 In respect of each such detriment, did the Respondents subject the Claimant to it because he had done any of the Protected Acts?