Case Number: 3323452/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Alteparmakian	v	London Underground Limited

Heard at: Watford, in person

On: 29-31 August and 1 September 2023 and, in private, 24 October 2023

Before: Employment Judge Hyams

Members: Ms S Johnstone
Mr P Maclean

Representation:

For the claimant: Mr Nick Toms, of counsel
For the respondent: Mr S Liberadzki, of counsel

UNANIMOUS RESERVED JUDGMENT

1. The claimants' claims of (1) unfair dismissal within the meaning of section 98 of the Employment Rights Act 1996, contrary to section 94 of that Act, (2) unfavourable treatment within the meaning of section 15 of the Equality Act 2010 ("EqA 2010"), contrary to section 39(2)(c) and (d) of that Act, and (3) a failure to make a reasonable adjustment within the meaning of sections 20 and 21 of the EqA 2010, contrary to section 39)(5) of that Act, succeed.

2. There will be a remedy hearing on 30 and 31 January 2024.

REASONS

Introduction; the procedural history of their claims and the manner in which we dealt with an application made at the start of the trial before us for the amendment of the response to them

1 The claimants' claims in these proceedings relate to (1) the fact that he was dismissed by the respondent on 10 July 2021 from his employment as a train driver on the Piccadilly Line of the London Underground railway, and (2) the

dismissal of his appeal against the decision that he be so dismissed. The reason for the claimant's dismissal was his absence from work on account of sickness, which absence was caused by a claimed disability of lower back pain and facet joint arthritis. The claims were of

1.1 unfair dismissal within the meaning of section 98 of the Employment Rights Act 1996 ("ERA 1996"), contrary to section 94 of that Act,

1.2 unfavourable treatment within the meaning of section 15 of the Equality Act 2010 ("EqA 2010"), contrary to section 39(2)(c) and (d) of that Act, and

1.3 a failure to make a reasonable adjustment within the meaning of sections 20 and 21 of the EqA 2010, contrary to section 39(5) of that Act.

2 The claims were stated in a document headed "Grounds of Complaint" which was carefully written (in the name of Thompsons Solicitors) and stated the case in detail. The ET1 was presented on 8 December 2021. Early conciliation took place between 28 September and 8 November 2021. The claim was therefore in time in respect of any act occurring on or after 28 June 2021. The claims were responded to in a detailed set of grounds of resistance accompanying the ET3 response form. Those grounds were drafted in the name of Eversheds Sutherland (International) LLP, another firm of solicitors. The response to the claim of unfavourable treatment within the meaning of section 15 of the EqA 2010 was stated as a bald denial (in paragraph 24 of the grounds of resistance) and, in the following paragraph, number 25, that

> "If, which is denied, the Tribunal find that the Respondent's treatment of the Claimant amounts to discrimination, the Respondent will argue that such treatment was a proportionate means of achieving a legitimate aim, namely ensuring the safety and welfare of its customers and employees."

3 On 31 August 2022, there was a preliminary hearing. It was conducted by Employment Judge ("EJ") Tobin, by video. Mr Liberadzki attended that hearing on behalf of the respondent. Mr Toms did not, but the claimant was represented at the hearing by counsel. In paragraph 9 of his case management summary following that hearing, EJ Tobin said this under the heading "The list of issues":

> "The list of issues should set out the legal and factual disputes that the Tribunal will be asked to determine. It forms the basis of our decision-making. This often appears as a list or schedule of questions and assertions. The parties had prepared a list of issues, which was perfunctory and possibly wrong or inaccurate in some places. We discussed these in detail, and I made some recommendations in an attempt to narrow the issues in line with the over-riding objective."

4 Order number 2 of those made by EJ Tobin at that hearing required the claimant to draft a revised list of issues and send it to the respondent by 21 September

2022, and the respondent to respond to that list by 5 October 2022. Order 2.3 was in these terms:

> "Any dispute in respect of the issues to be determined by the Tribunal shall be resolved by the hearing judge at the commencement of this hearing."

5 The hearing was, on 12 April 2022, listed to be heard over 5 days, from 28 August to 1 September 2023, but as EJ Tobin recorded in paragraph 19 of his case management summary, the first of those days was a bank holiday. EJ Tobin did not relist the case, having decided that "both liability and remedy (if necessary) can – with proper preparation – be heard in 4-days, i.e. from Tuesday 29 August 2023 to Friday 1 September 2023, starting at 10am on day-1 or as soon as possible afterwards."

6 Witness statements on liability issues were ordered by EJ Tobin to be exchanged by 23 February 2023. The claimant's was signed on 17 July 2023, and those of the respondent's two witnesses were dated 30 June 2023. Those witnesses were Ms Tracey Simms, who at the time of giving evidence to us and at all material times was employed by the respondent as a Trains Operating Manager, and Mr Mike Smith, who was at the time of giving evidence to us employed by the respondent as "Head of Trade Union Engagement for Customer Operations". Mr Smith heard and dismissed the appeal of the claimant against the decision, made by Ms Simms, to dismiss him (the claimant). At the time of hearing that appeal, Mr Smith was the respondent's "Head Of Line Operations Piccadilly Line".

7 A list of issues which was stated to be agreed was put before us at the start of the hearing on 29 August 2023. It contained little about the claim of discrimination within the meaning of section 15 of the EqA 2010. The claimant's legal team put before us also a proposed amended list of issues. The changes were not major. We did not decide whether or not they should be accepted, as the list of issues was not going to be determinative, and we concluded that we should simply hear oral evidence and submissions and determine the claims by reference to the manner in which they were pressed by the end of the trial. That was because it was clear what the claims were, and because it was highly unlikely that any minor deviation from the agreed list of issues would be material or such as to make the hearing unfair.

8 However, the respondent, through Mr Liberadzki, sought to amend its response to the claim of discrimination within the meaning of section 15 of the EqA 2010. That would be by the addition of the words at the end of paragraph 25 of the grounds of resistance:

> "and/or the provision of train services to the public, at an appropriate cost".

9 In addition, the respondent sought to argue that the claimant's continued absence had led to such a disruption of the respondent's service on the Piccadilly Line that his dismissal was a proportionate means of achieving the legitimate aim of the offering of an effective service to the public (or words to that effect).

10 Those amendments were opposed by Mr Toms on behalf of the claimant. Before we adjourned the hearing to complete our reading of the witness statements and relevant documents in the hearing bundle before hearing oral evidence, we, through EJ Hyams, pointed out that neither of the respondent's witness statements referred in any detail to either (1) the impact of the cost of continuing to employ the claimant on the operations of the respondent or (2) the manner in which the respondent arranged for the provision of cover for train drivers who were absent on a long-term basis because of sickness.

11 The total of that which was said in those regards was in paragraph 25.5 of the witness statement of Ms Simms and paragraphs 20 and 27 of the witness statement of Mr Smith. Paragraph 25.5 was in these terms (with the only material words concerning operational factors underlined):

> "In relation to Mr Alteparmakin's appointment with the back specialist scheduled for 7 July 2021, Mr Alteparmakin had informed me that this was an initial consultation appointment. I had been provided with no information to reassure me that Mr Alteparmakin would begin to make a recovery after this consultation appointment. I needed to make a decision based on the information available to me and I was mindful that Mr Alteparmakin's absence had lasted for approximately 10 months and was not sustainable due to him being unable to conduct Train Operating since September 2020, <u>which put additional burden on resources within the depot and ultimately would have caused train cancellations because there were not enough spare drivers to cover all trains</u>. In my view, therefore, it was not proportionate to prolong terminating Mr Alteparmakin's employment in the hope that he would be recovered by 8 July 2021, or indeed that he would be provided with a treatment plan that had greater success than that which had already been recommended to him."

12 In fact, both parties' legal representatives had misspelt the claimant's name: it was as stated in the heading to this document, to which, by agreement with the parties after ascertaining from the claimant that it was the correct spelling, we formally changed the claimant's name.

13 In paragraph 20 of Mr Smith's witness statement, he said this.

> "It is important for LUL to ensure it is able to run trains to schedule. The way we work is that trains run to a timetable that schedules trains down to 15 second windows. We then schedule train operators to match the trains. It is not like other work environments, which may do regular shift hours and multiple people turn up at the beginning of one set shift. For train drivers, it is more difficult to share the burden of the work. Train Operators book on at 4:45am at irregular intervals, according to which depot and line they are on. Where a Train Operator is missing, we can allocate a cover duty operator to pick up the duty, if there is one available, or allocate a spare driver if their time matches, which they rarely do. The more likely scenario

> is that we have to cancel the respective train. Mr Alteparmakin's sustained period of absence would have had a significant, negative impact on our ability to provide the scheduled service."

14 That which Mr Smith said in paragraph 27 of his witness statement added nothing material. For the sake of completeness and convenience, however, we record that so far as material, this was said in it.

> "Mr Alteparmakin's absence was not sustainable for LUL and he had already been absent for approximately 10 months before his dismissal."

15 As EJ Hyams pointed out, that which was said in paragraph 20 of Mr Smith's witness statement related to short-term unforeseen absences, and those of the claimant were, plainly, long-term and therefore foreseeable. As for Ms Simms' evidence in paragraph 25.5 of her witness statement, it was a bald assertion without any detail to say why, if it was the case, a driver could not have been allocated on an ongoing basis to cover the claimant's absence in the same way that a driver would be allocated to cover a period of maternity leave.

16 As for the application to amend to add the words set out in paragraph 8 above, there was nothing in either of the respondent's witness statements about the cost to the respondent of the continued employment of the claimant. We ourselves had seen that the claimant had been receiving sick pay at the rate of his normal pay until his dismissal, and EJ Hyams explored with the parties on what basis that had occurred, i.e. whether it was the result of a discretion exercised by the respondent or whether it was as a result of a contractual entitlement of the claimant. However, the respondent's pay policy was not in the bundle, and it had to be sent to us by Mr Liberadzki once he had himself been sent it. He sent it to us at 13:15 on 29 August 2023.

17 In the event, after we had completed our reading and, at 2pm, resumed the hearing with the parties present, Mr Liberadzki said that the respondent was withdrawing its application to amend its response to include an allegation that it had dismissed the claimant in part because of the impact of his absence on the operation by the respondent of the Piccadilly Line, in that his continued absence from work would have led to cancellations of trains which would have been avoided if he had been dismissed, so that his dismissal was a proportionate means of achieving the legitimate aim of providing an effective service on that line.

18 As for the impact of the cost of continuing to employ the claimant, the parties agreed that the claimant's absence on account of sickness, at the end of which he was dismissed, had started on 11 September 2020. We ascertained with the assistance of both counsel that the claimant had had a contractual entitlement to 24 weeks' (full) pay in any one period of continuous sickness under the respondent's "Sick Pay" document which we were sent as described in paragraph 16 above, which was stated to be "guidance",

> "unless there are two or more spells not separated by at least three complete payroll weeks at work, in which case they will be linked and counted against sick pay entitlement".

19 We were then told by Mr Liberadzki that the fact that the claimant had been permitted to take more than three weeks of annual leave and paternity leave in one go during March 2021 meant that he was treated as having returned to work at that time and that by doing so he had acquired the right to a further period of 24 weeks' sick pay at the full rate. Thus, the respondent had treated the claimant during that period of leave as being "at work" for the purposes of the respondent's sick pay guidance.

20 In those circumstances, we decided that the only just way to permit the respondent to amend its response to the claim of unfavourable treatment within the meaning of section 15 of the EqA 2010 so that it was arguing that it was a proportionate means of achieving the claimed legitimate aim that it would be unduly costly to continue to employ the claimant, would be to do so on a limited basis only. We concluded that (1) it would be just to permit the respondent to argue that the claimant's dismissal was a proportionate means of achieving the legitimate aim of complying with the fiduciary duty of the respondent, as a body which could not survive without public money, owed to the public/the taxpayer, but (2) that point could be advanced only by reference to the respondent's sick pay guidance, taking it in isolation. That sick pay guidance might have given rise to a contractual entitlement on the part of the claimant to no more than 24 weeks' sick pay at the full rate, so that the (as the respondent put it) "resetting" of his entitlement to sick pay might not have been a contractual obligation of the respondent. However, if that resetting was the result of such an obligation, then the cost to the respondent of continuing to employ the claimant was limited to the cost of complying with that sick pay guidance.

21 During the hearing, however, we asked questions of both of the respondent's witnesses about the arrangements for covering driver absences, and Mr Toms told us his instructions (given by the trade union of which the claimant was a member) about those arrangements. We asked those questions because we could not understand why it was said that the respondent could not have employed a driver to cover the claimant's long-term sickness absence. It appeared from what we were told by Mr Smith that there was an agreement with the trade union of which the claimant was a member about the number of drivers who should be employed as a pool of drivers to cover absences, but that in addition to those "pool" drivers, drivers such as those who had not yet been allocated to a specific train line could be called on to cover unexpected absences. Mr Smith said that the respondent had in fact employed more than the agreed number of cover drivers. It was Ms Simms' evidence, with which Mr Smith agreed, that despite that availability of cover, there were cancellations which would have been avoided if the claimant had been dismissed and another driver had been employed in his place on a permanent basis. It seemed to us in the light of that evidence that there might have been reasons for the cancellations which had led Ms Simms to dismiss the claimant which had nothing to do with

the claimant's absence, but in any event that if the respondent had been precluded by an agreement with the trade union of which the claimant was a member from employing a replacement specifically for the claimant while he was absent from work because of sickness on a long-term basis, then the justification for such preclusion was not obvious and was certainly not evidenced before us.

22 We then canvassed with the parties the possibility of the respondent renewing its application to amend its response, and the hearing being adjourned (with the costs of the adjournment being borne by the respondent) so that the respondent could put before us further evidence to justify the assertion that the claimant's absence was the cause of avoidable cancellations of train services and the claimant could adduce evidence from one or more trade union officials to counter that further evidence of the respondent. The respondent did not then renew its application, and Mr Toms did not put to the respondent's witnesses the proposition that there were sufficient drivers to cover the claimant's absence, either at an additional cost to the respondent or without incurring such an additional cost.

The evidence which we heard

23 We heard oral evidence from the claimant and the respondent's two witnesses to whom we refer in paragraph 6 above. We had before us at the start of the hearing a bundle of documents which was (at 225 pages not including its index) commendably concise, but which did not have in it several material documents held by the respondent's occupational health department and (as stated above) the respondent's sick pay guidance. As a result, in addition that guidance, and several documents and emails which were found during the course of the hearing before us and sent to Mr Liberadzki and sent on by him, were before us in addition to the hearing bundle in its original form. Having heard that oral evidence and read that bundle and those documents, we made the following findings of fact.

The facts

Relevant events up to 7 April 2021

24 The claimant started to be employed by the respondent as a train driver on 4 July 2016. He was based at Arnos Grove depot on the Piccadilly line. He worked 36 hours per week and worked a mix of early, middle and late shifts. The first shift started at 4am and the latest finished at 1.30am.

25 The claimant's dismissal resulted from (as stated in paragraph 1 above) back pain. That pain led to him seeing a chiropractor on 4 December 2019. He was at that time taking Ibuprofen and Paracetamol to, as he put it in paragraph 5 of his witness statement, "ease the pain".

26 The claimant described what followed in paragraphs 6-17 of his witness statement. We set out the evidence in that passage in the next paragraph below.

We accepted the evidence in that passage with one exception, except to the extent that the documents which were disclosed during the course of the hearing before us undermined or contradicted the evidence in that passage. We did so because those documents were plainly contemporaneous and were in our judgment the most reliable evidence of what had occurred during the period to which that passage related, which was 11 September 2020 to 21 February 2021. That which we did not accept for a different reason (i.e. not because it was inconsistent with the contemporaneous documents) was that the claimant was not aware of online physiotherapy classes. That different reason was that (1) Mr Smith's evidence was that his own experience, and that of every other employee who had ever been afforded access to online resources provided by the respondent's occupational health department (to which, for short, it referred and we refer below, as "LUOH", which is short for London Underground Occupational Health), was that they were made aware of those resources by LUOH, and (2) we accepted that evidence. As a result, we concluded that the claimant was aware of the online physiotherapy classes to which he referred in paragraph 11 of his witness statement during the period from December 2020 to January 2021.

27 Paragraphs 6-17 of the claimant's witness statement were in these terms.

> '6. I went off sick as a result of my back pain / facet joint arthritis on 11 September 2020. This was because the pain was unbearable and I knew my mind wouldn't be able to concentrate on driving the train safely, knowing I am responsible for thousands of commuters' lives. Also, if I didn't follow the correct rules and procedures whilst driving the train due to my mind being focussed on my pain, I could lose my job or even face imprisonment depending on the severity of a potential error occurring. For example, if I wasn't concentrating and a customer jumped on the track and I didn't follow all protocols to try [to] stop the train.
>
> 7. On 17 September 2020, my GP referred me for physiotherapy and I was given some exercises to do, however they didn't help at the time. I was told that improvements may not occur instantly. I was discharged from their care on 3 November 2020 and was referred to a Rheumatologist and the Respondent's Occupational Health team ("LUOH") for physiotherapy. It was my own request to be referred to the LUOH to help me get back to work sooner. I felt that this should have been arranged by my manager not me and that the Respondent was showing little duty of care to me.
>
> 8. On 16 November 2020, I attended a telephone consultation with the LUOH physiotherapist, Alex Wheeler, during which I reported high levels of symptoms and reduced function (page 85). He confirmed that I was not fit for train operator duties. I was given exercises and stretches to do which I religiously did every day. This eased my pain in the short term.

9. On 30 November 2020, a further telephone review with Mr Wheeler confirmed that my symptoms remained unchanged and that I was still not fit for train operator duties (page 86). I had been fully committed to the rehabilitation as I had a heavily pregnant wife, a toddler and a new baby on the way. I desperately wanted to get better to help my wife whilst she was heavily pregnant and to be able to help look after our toddler and my newborn where I would be needed.

10. On 7 December 2020, I attended a video consultation with Mr Wheeler (page 87). He suggested that I undergo 5 further physiotherapy sessions over 8 weeks, as this was the predicted timeframe for recovery for someone with my symptoms. As I was still seeing no improvements, Mr Wheeler provided alternative advice and exercises and warned me of the potential causes of my worsening symptoms

11. I was never made aware of any online classes so was unable to engage fully with LUOH. If I had received information about the online classes, I would have engaged fully as I wanted to get back to work. Being at home was affecting my mental health and causing arguments between myself and my wife due to how I was feeling.

12. I only had one of the five physiotherapy sessions, which took place with Mr Wheeler on 30 December 2020. I cannot recall why I was not offered the extra sessions as promised. Mr Wheeler stated that my symptoms weren't improving due to multiple contributing factors. He also advised the Respondent that I would likely be unfit for duties until my specialist review at the end of January 2021.

13. I was prescribed Naproxen on 2 January 2021 by my GP. However, this caused me to suffer from migraines, so my GP advised me to take Nurofen instead of Naproxen when the pain was at its worst.

14. I attended a private rheumatology appointment on 27 January 2021. This was a referral via my GP. This ended up being a telephone conversation due to Covid. I was referred for blood tests and booked in for an MRI scan. I wasn't given a prognosis at this stage.

15. I also continued seeing a private chiropractor for acupuncture and deep tissue [sic], attending these more frequently from September 202[0] when I went once every two weeks. I was then advised to stop these appointments by the private chiropractor (MGM Clinics) until I had received a further diagnosis of my back from the MRI scan.

16. Neither the private treatments nor the LUOH treatments seemed to be effective at the time. Whilst there was there was [sic] some improvement on seeing the chiropractor, by the time I got home, the pain had come back which was extremely frustrating and saddening.

17. Mr Wheeler reviewed my case on 9 February 2021 (page 89). He noted that physiotherapy was no longer an appropriate treatment for me and recommended that I be referred to the Medical Advisory Service for a "fitness for present duties" assessment. As I had had no interaction with LUOH since 30 December 2020, I was unsure how they could come to this conclusion.'

28 We emphasise that while there were aspects of the claimant's oral evidence to us which we did not accept (such as that the was not particularly concerned at the prospect of the ending of his contractual sick pay), we did accept that the claimant's back pain was as he described it in that passage. We also found that the claimant was keen to return to work and was well-motivated, and that his back pain worried him greatly not least because he did not know at that time what was causing it and whether he would ever be relatively free from back pain.

29 The claimant then took paternity leave from 14-27 February 2021 and annual leave from 28 February 2021 to 3 April 2021, after which he returned to being on sick leave. As recorded in paragraph 20 above, the respondent treated him as having "reset" his sick pay entitlement and therefore as being entitled to a further period of 24 weeks' contractual sick pay.

30 On 6 April 2021, it was the claimant's unchallenged evidence, the claimant spoke on the telephone to a manager employed by the respondent, Ms Ayelet Davies, and asked if he could carry out alternative duties at work. She then said that she would speak to Ms Simms, who was the manager of the Arnos Grove depot at which the claimant was based. Ms Davies then wrote to the claimant on the next day, 7 April, stating (in the email at page 172 of the hearing bundle; any reference below to a page is, unless otherwise stated, to a page of that bundle) that the respondent was "unable to offer you Alternative Duties without having a Case Conference with you first and that would be arranged upon receiving advise [sic] from LUOH".

The respondent's documents entitled "Attendance at Work" and "Attendance at Work Support Pack"

31 That reference to a "Case Conference" was made because of the respondent's "Attendance at Work Procedure" of which there was a copy at pages 52-56. That document was supplemented by the respondent's "Attendance at Work Support Pack" of which there was a copy at pages 57-75.

32 Paragraph 5.2 of the Attendance at Work Procedure (at pages 54-55) concerned "Fitness for Work". All of it was material, but the following aspects of it were of particular importance here.

33 In the third bullet point under the heading "The manager will" in the opening section of paragraph 5.2, this was said:

"Arrange a case conference as early as possible (refer to 5.2.1) to:

- Step One - actively consider making reasonable adjustments (if required) – refer to 5.2.2;
- Step Two - actively pursue suitable alternative employment – refer to 5.2.3;
- Step Three - as a last resort, having fully considered the options in 5.2.2 and 5.2.3, consider termination of employment on medical grounds – refer to 5.2.4."

34 The purpose of the "Case Conference" was stated in subparagraph 5.2.1 as follows:

> "A case conference consists of the employee concerned, the employee's representative (if the employee chooses to be accompanied at the case conference by a Trades Union Representative/ fellow worker), the manager, and a representative from Human Resources. The case conference will produce an agreed written action plan that must be abided to by all parties. The employee's case will continue to be monitored by the case conference until it is mutually agreed that this is no longer necessary."

35 Paragraph 5.2.2 referred to "reasonable adjustments" in terms which were (we concluded) intended to reflect the effect of sections 20 and 21 of the EqA 2010. Paragraph 5.2.3 referred to "suitable alternative employment" in terms which were uncontroversial and to which we need say no more here. Paragraph 5.2.4 referred to the possibility of dismissing on "medical grounds" only "As a last resort, where all other options have been exhausted".

36 The Attendance Support Pack included this in relation to step one, concerning "reasonable adjustments" (page 68):

> "In returning to work, the employee may require temporary or permanent adjustments to their job in order to improve and maintain acceptable standards of attendance. If the employee has a disability that is within the scope of the Equality Act 2010, you must follow the Company's processes developed to ensure compliance with its provisions.
>
> It is the role of the Case Conference to consider the following options, seeking advice and guidance from LUOH where necessary:
>
> • Altering work location
> • Authorising time during the working day to attend counselling services provided by LUOH or LUOH approved external agencies
> • Training
> • Acquiring or modifying equipment
> • Restricting duties
> • Agreeing shift changes (including days of work and start/ finish times). Consideration must be given to the effect on other staff.
>
> This list is not exhaustive. Other adjustments may be considered."

37 In relation to "step 2" concerning "Suitable Alternative Employment (Medical Redeployment) on a permanent basis", the first three indented paragraphs were in the following terms.

> "- Where reasonable adjustments cannot be made, reasonable adjustments that are made do not satisfactorily improve the employee's attendance or LUOH confirm that an employee is no longer able to do his/ her job for medical reasons and is unlikely to become fit again in the foreseeable future, the Case Conference will consider the matter.
>
> - If appropriate, the employee will be given notice of termination of employment on medical grounds and advised of his/ her right of appeal. The employee will be entitled to be accompanied by a Trades Union Representative/ fellow worker at any meeting to discuss this matter.
>
> - If the employee wishes to remain in employment, the case conference will seek advice from LUOH regarding the employee's ability to do an alternative job. The employee's competences will be identified, in addition to the non-medical requirements for his/ her current grade."

38 The final indented paragraph of that section was in these terms:

> "Instances where the employee wants to remain employed, but all of the evidence indicates that this is not possible, should be handled with the utmost sensitivity. The case conference should consider the employee's emotional state and any impact in relation to decisions made (e.g. an employee may find it difficult to accept that he/ she will not be returning to work/ continue to be employed)."

39 Step 3, concerning "Termination of Employment on Medical Grounds", was dealt with on pages 70 and 71. The opening section, on page 70, was in these terms.

> "As a last resort, where all other options have been exhausted, the Case Conference will discuss termination of employment on medical grounds.
>
> The Case Conference will ensure that:
>
> • The case has been fully reviewed and all possible options have been considered – Steps One and Two have been exhausted.
>
> • The employee be allowed time to take on board this possible course of action and to discuss the matter with their partner and/or family.

- The case has been referred to LUOH and they have provided relevant details to support any decision. Medical reports from medical practitioners/ specialists/ consultants may need to be obtained (with assistance from LUOH).

- An ill-health pension estimate has been obtained prior to termination. The Data Protection Act (1998) provides for the employee to give his/ her permission to request this.

Following this discussion, the Case Conference will agree to disband where it is no longer necessary to continue to monitor the case. Separately, you will make your decision whether to terminate the individual's employment on medical grounds. If you decide not to terminate, the Case Conference will be reconvened to discuss next steps."

40 At the bottom of the page 70, it was said that if the "decision [was] to terminate the individual's employment on medical grounds", the employer had to "[a]rrange a convenient time to meet with the employee to terminate their employment" and, on the following page, page 71, it was said that at that meeting, the employee had to be told about the right to appeal against that decision. The penultimate bullet point in the section at the top of page 71 was in these words.

> "The employee should submit their appeal in writing to the appropriate senior manager. If the appeal is on the grounds of medical evidence, the senior manager will then consult with the Head of London Underground Occupational Health."

41 In the final section of that page, under the heading "The Appeal", it was said that "[t]he application of the Attendance at Work Procedure and the evidence upon which the decision to terminate employment was made, should be reviewed", and that "[a]dvice should be sought from the Head of LUOH as appropriate." The final bullet point on this page was this:

> "Upon considering the appeal, the senior manager may substitute whatever decision is deemed to be reasonable."

The assessment of an occupational health adviser employed by the respondent carried out on 16 April 2021

42 On 16 April 2021, an occupational health adviser by the name of Shola Babafemi "examined" the claimant by a telephone consultation. The resulting report was at pages 90-91. The referral for the consultation was disclosed to the claimant and put before us during the morning of Friday 1 September 2023. Among other things, this question was asked:

> "Would OH support medical termination if that is the course of action decided by the TOM ?"

43 "TOM" was short for Train Operations Manager which, in the circumstances, was Ms Simms.

44 On page 90, this was said under the heading "Occupational Health Opinion and Outcome":

> "Based on today's assessment, Mr Alteparmakian is currently not fit for work in any capacity. It is difficult to anticipate a return to work at this stage due to his current symptoms. He is awaiting a specialist appointment."

45 The question whether "OH [would] support medical termination" if that was the course of action decided by the TOM was answered in this way at the top of page 91:

> "Medical termination is not necessary at this time. His symptoms are expected to resolve with appropriate treatment."

46 The report concluded under the heading "Review":

> "I have not made any plans to review Mr Alteparmakian in Occupational Health, however, I have advised him to keep you up to date with his ongoing investigations and, if feasible from a business point of view, you may wish to rerefer him back to us once treatment is in place for his symptoms or he is reporting a significant improvement in his symptoms."

Subsequent events, up to and including the determination by Mr Smith of the claimant's appeal against his dismissal

47 There was then a case conference. It was held on 21 April 2021. It was the first case conference held since the claimant's sickness absence started on 11 September 2020. The respondent's notes of what was said at it were at pages 92-93. Those notes were not sent to the claimant or his representative (Mr Martin Moynihan) until 5 July 2021, in the circumstances which we describe in paragraph 65 below. While issue was taken with some parts of the notes, we did not see those issues as being of critical importance. Although they were by no means unimportant, we did not need to resolve those issues when determining the claimant's claims. That is in part because of the email to which we refer in the next paragraph below, which, to the extent that it differed from the content of the notes, was, we concluded, to be preferred.

48 The respondent had what it called a "Medical Assistance Programme" which it shortened to (as do we) "MAP". On 24 April 2021, Ms Simms sent the email at pages 96-97 to LUOH. Its terms were, we found, an accurate summary of the situation as Ms Simms understood it at that time, which was, we concluded, an accurate understanding given what the claimant had said two days previously. It was in these terms.

> "I received the attached report for Mr Alteparmakian, he advises me that you had told him that he may benefit from a referral via MAP's dependent on what the rheumatologist advises. I held a case conference with Mr Alteparmakian on 22.04.21 he advised me that continues to struggle to do day to day activities such as washing up and feeding his child; physiotherapy and chiropractor intervention has not assisted. Mr Alteparmakian does not take pain medication as this was not assisting and he remains in constant pain.
>
> Mr Alteparmakian has now been discharged from the care of the rheumatologist (see attached letter) it advises that lumbar disc L5/S1 is showing wear and tear and as Mr Alteparmakian has not found physiotherapy helpful he will be referred to an orthopaedic back specialist. Mr Alteparmakian reports that he awaits an appointment with the orthopaedic back specialist.
>
> Your OH adviser Shola Babafemi has advised 'I have asked Mr Alteparmakian to contact his GP to obtain copies of the recent MRI scan investigation and rheumatologist report. If these reports are sent to Occupational Health, they will be reviewed by a senior clinician to consider the option and eligibility of a referral via MAP'.
>
> May I please request that the attached is reviewed and if appropriate I will make the necessary MAP referral but I am unclear at this stage how this would look as it appears there is no confirmed treatment plan and some more investigatory work needs to be completed so I would appreciate some guidance in this regard."

49 We pause to note that in that email Ms Simms said that the claimant had found that physiotherapy "ha[d] not assisted" him, not that he had not "engaged" with the programme of physiotherapy which the respondent had offered. We record here too that one of the documents disclosed on Friday 1 September 2023 and put before us at 12:11pm was a set of records made by Mr Wheeler, which included this passage on its final page, under the heading "30.12.20":

> "encouraged to continue to engage with physio exs prior to review and possible further investigations
> advised no further appointment arranged due to limited uptake/changes with physio
> to complete scan and will provide advice following that if required
> likely to be something that will need to be managed in the long term".

50 We see that in that passage what the claimant was recorded to have been encouraged to do was to "continue to engage with physio", not simply to "engage with physio".

51 On 19 May 2021, the claimant was sent the respondent's pension fund administrator's estimate of his pension benefits in the event of being medically

retired, which was at page 99 and was sent under cover of the letter at page 98 to Ms Simms.

52 On 28 May 2021, Ms Simms wrote to Mr Babafemi the email at page 100 in these terms.

> "I trust my email finds you well? I am seeking some guidance on this employee who has remained off from duty since 11.09.20 with .lower back pain and has been diagnosed with 'lumber degenerative disease at L5/S1 and facet joint arthritis. The employee reports that he is unable to conduct general day to day activities such as wash up or feed his child.
>
> I understand that you are attempting to see if an Orthopaedic consultant appointment can be facilitated via MAP but to date I can see no progress in respect of this and the employee reports no change to his circumstances since his initial sickness commenced in September 20 ; in light of this please may I ask the following questions?
>
> i. What is the likely timescale of the employee returning to his full duties as a Train Operator ?
> ii. What is the likely timescale of the employee returning to some sort of duty?
>
> I am keen to progress this case as the employee has been off from work for some considerable time and there appears to be no definitive timescale of likely return."

53 Not having received a response to that email by 3 June 2021 and having found that Mr Babafemi was on leave until 7 June 2021, Ms Simms pressed for a response from (as she said in her email at page 104) "another adviser as it is getting urgent and I really want to hold a case conference with the employee". The query was put before Bruce Ormiston, another Occupational Health Adviser, who responded in the email of 3 June 2021 at page 103, which was in these terms.

> "Thanks for the email which has been forwarded to me as my colleague Shola is currently on annual leave.
>
> Thank you also for being available to discuss the case with me over the telephone.
>
> I told you that the MAP committee declined the request for support on 17.5.2021, the following outcome was given:
>
> > Employee appears to have non-specific back pain with no obvious rationale for surgical intervention. No case for private specialist review as this is unlikely to change the outcome or the impact on work. Employee is likely to benefit from pain management and rehabilitation

classes which we should offer however he has not engaged with these previously. Manager should be made aware that we are not able to give a time frame for recovery and a return to work would require a positive response to rehab.

To answer your specific questions:

(i) What is the likely timescale of the employee returning to his full duties as a Train Operator ? – as above it is difficult to provide an accurate timeframe here, please see the MAP comment above.

(ii) What is the likely timescale of the employee returning to some sort of duty? – again the same answer as above.

I hope this will be helpful?"

54 On 7 June 2021, the claimant (as recorded in the record of the respondent of contact with the claimant at pages 130-138; it was headed "Non-Attendance Case Record") informed Ms Simms that he had made several requests to the local hospital to see a back specialist, and that he now had an appointment to see one on 7 July 2021.

55 Ms Simms then held a further meeting with the claimant and Mr Moynihan on 21 June 2021. Again, the notes of that meeting were not sent out until 5 July 2021 in the circumstances described in paragraph 65 below. Again, the claimant took issue with parts of the notes which were sent out on 5 July 2021. Those notes were at pages 111-112 and, with corrections proposed by the claimant on (see paragraph 68 below) 16 July 2021, at pages 113-114. Again, we did not see those changes as being of critical importance. We therefore do not decide which proposed version of the notes was correct.

56 What is clear is that during the meeting, Ms Simms for the first time as far as the claimant was concerned asserted that he had not engaged "with pain management". (No issue was taken at any time by the claimant with the record of Ms Simms saying that.) Mr Moynihan then challenged that assertion, saying that he did not understand what was meant by saying that the claimant had not engaged with (according to Ms Simms) "treatment" and (according to the claimant) "LUOH". Neither of those words was of course a repetition of the words agreed by them to have been used by Ms Simms, which were "pain management".

57 During the meeting, Ms Simms then sent to the claimant and Mr Moynihan the email at page 103 the text of which we have set out in paragraph 53 above.

58 At the end of the meeting of 21 June 2021, Ms Simms announced that "the case conference [was] disbanded" and that she would "take all the information into consideration when arranging the next meeting". She said also that she would

be making "a decision" at that "next meeting using all information available to her at the time".

59 On 23 June 2021, Mr Wheeler sent Ms Simms the email at page 119, the main part of which was this paragraph.

> "Following on from our telephone conversation this morning, as part of his physiotherapy treatment, Mr Alteparmakian was referred to our virtual rehabilitation classes on (7/12/20), the aim of these classes being to improve function/mobility and reduce symptoms. According to my records he did not book onto the classes and, in line with our policy, was discharged after 2 months as he had not made contact with the physiotherapy department."

60 Ms Simms made her decision on 23 June 2021 as evidenced by the letter of that date at pages 115-116. In that letter she proposed to communicate the decision to the claimant on 1 July 2021 in a telephone conference call. That date was not convenient for the claimant and Mr Moynihan, so Ms Simms rearranged the conference call to take place on 5 July 2021.

61 The meeting (by telephone) was recorded by the respondent in the notes at pages 122-123. The note commenced:

> "TS explains that she has made a decision to terminate AA on medical grounds from 10 July. She explains her rationale (refer to termination letter)."

62 Issue was taken by the claimant and Mr Moynihan with the decision as recorded in the notes at pages 122-123, which ended thus:

> "SM [i.e. Shoaib Merchant, who was the Employee Relations Partner present] explains that all concerns should be raised at appeal."

63 Ms Simms' decision letter was dated 5 July 2021 and was at pages 124-129. It was clear that Ms Simms did not consult with the claimant on 5 July 2021: she simply informed him of her decision and that the reasons for it were stated in that letter. The reason given for the claimant's dismissal was "medical incapability". Among a number of things, this was said in the letter (at page 125):

> "You were also encouraged to attend weekly sessions and combine this with Online Classes. I am advised that you declined these classes, other employees have found these very effective in improving mobility and symptoms."

64 However, at the bottom of that page, this was said (possibly in contradiction of that passage):

> "At the case conference held on 22nd April 21 you advised that you had been to see a rheumatologist and have been referred to an orthopaedic consultant. You advised that you had been doing floor exercises which had not assisted."

65 Only during the meeting of 5 July 2021 by telephone did the claimant and Mr Moynihan say that they had not been sent copies of the notes of the meetings of 22 April 2021 and 21 June 2021. Ms Simms accepted when giving evidence before us that they had not before 5 July 2021 been sent to the claimant or Mr Moynihan and said that it had resulted from the note-taker not being the one who usually took notes for Ms Simms at disciplinary hearings, and the note-taker who actually took the notes not sending them to the claimant and Mr Moynihan. Those notes were sent to the claimant and Mr Moynihan after the meeting.

66 On 7 July 2021, the claimant saw a "Consultant Orthopaedic & Spinal Surgeon" employed by The Princess Alexandra Hospital NHS Trust, Mr A Gul, whose qualifications were given as "MS MRCS FRCS (Tr & Orth)". The record of the consultation was sent to the claimant by email on 9 July 2021. It was in a letter of that date, which was dictated but not signed by Ms G Dogan, whose job title was "Extended Scope Practitioner in Spinal Disorders". The whole of the letter was material. It was at pages 141-142. Its text was as follows.

> "Thank you for referring this very pleasant gentleman who is suffering from back pain. Mr Alteparmakian tells me that he has had mid and lower back pain. He normally works as a train driver and has been off work for the past 8 months. He has had some chiropractic treatment, including physiotherapy and was taken [sic] Naproxen for the pain which he has now stopped. He tells me that in the past few weeks his symptoms have improved markedly.
>
> He denies any bowel or bladder symptoms, gait disturbances or saddle anaesthesia. He tells me that he does wake up with some stiffness in the morning but this eases as the day goes on.
>
> On examination he presents with normal spine alignment in sagittal and coronal plane. He has good functional range of the lumbar spine which is pain free. Thoracic range of movement into lateral flexion and rotation reproduces some pain in the thoracic region. Neurological examination of the upper limbs and lower limbs is normal.
>
> He had lumbar and pelvis MRI scans taken in February 2021 have been reviewed by Mr Gul.
>
> These show early degenerative changes at L5/S1 which are age-related changes. However, there is no neurologically significant lesions identified.
>
> Mr Gul advises that these are normal age-related changes and he advises that the clinical and radiological findings do not show any reason for this gentleman to be medically retired.

> The treatment plan for Mr Alteparmakian would be for conservative management, for him to receive support with any necessary adaptations at work to achieve good posture and ergonomics to enable him to continue with his job and conservative treatment through back care advice and physiotherapy.
>
> As his MRI scan does not indicate any further intervention requires [sic] from our side he has been discharged from the spinal clinic.
>
> I can see that you have already investigated any inflammatory causes for his pain."

67 The claimant appealed on 9 July 2021 against the decision that he be dismissed. The letter was sent by Mr Ian Goodman, who was the "ASLEF Trains Functional Council" representative. The letter as sent was at page 140. The first ground of appeal (and there were 12) was this.

> "Ara has never been seen on person by LUOH and there was no up to date referral prior to the decision to terminate his employment. The last consultation with LUOH was a conversation over the phone in April. Therefore the assertion that he is 'not fit to return to work in any capacity' is false, based on outdated and inadequate medical evidence."

68 On 16 July 2021, Mr Moynihan sent the respondent's notes of the meetings of 22 April and 21 June 2021 back to Ms Simms, with the claimant's corrections. On 18 July 2021, Ms Simms replied, accepting that some of the corrections were apt but rejecting others.

69 On 27 July 2021, Mr Smith heard the claimant's appeal against the dismissal by Ms Simms of the claimant. There were notes of the appeal at pages 147-157. They were made by a note-taker who attended by telephone conference call, but the other persons present at the hearing were there in person. The hearing was recorded to have started at 13:00 and ended at 14:25. Mr Goodman's statement on behalf of the claimant was recorded in full. At page 149, it included this passage.

> "Driving a Piccadilly line train may not be something Ara can do at the moment, but he hopes and believes he could be able to in the future. There are other stocks that have more ergonomically friendly driver's seats that may help in giving him a quicker route back to train driving.
>
> As of now we believe, as does his specialist that he could safely take on an alternative role in the organisation. He should have had an up to date, ideally face to face consultation with LUOH before he was terminated where his current condition could have been properly considered.

> We feel he would have been able to show LUOH his ability to return in some capacity therefore at the very least an offer of redeployment should have been made, following which if no alternative, or no further improvement during redeployment that would allow a return to driving, either on the Picc or on a more modern stock, then the offer of a CSA role with protected earnings should have been made – subject to confirmation that he can undertake this role – until such time as he i[s] fit enough to resume being a driver.
>
> His medical termination should be cancelled.
>
> Ara should be referred to LUOH for a face to face assessment and then if adjustments can't be made to allow him to drive a train then redeployment and possibly a move to a protected earning CSA role pending further improvement in his condition."

70 During the appeal hearing, the claimant said this, as recorded on page 155:

> "I feel more confident now that I know my condition is not too serious and can improve in time and have started going for walks and doing whatever I can do to help."

71 Mr Smith's decision (which was, as stated in paragraph 6 above, to dismiss the appeal) was communicated in a letter dated 22 September 2021 of which there was a copy at pages 177-185. The letter ended (apart from a valedictory final paragraph) with this passage, at pages 184-185.

> 'Your back issue according to your notes started in December 2019 and according to your statement to me, in September 2020. Throughout your sickness, you reported in most weeks that there was no improvement to your condition. You received private treatment whilst your funds were in place, and you received treatment via LU during your sickness and our specialist there also reported little to no improvement in your condition. I find that you didn't fully engage in the treatment programme and my view is that this is due to your belief that without an "in person" treatment regime or examination, the benefits are minimal and this has become an entrenched position for you.
>
> It was our medical expert advice that you were not fit to resume work in any capacity nor was there a timescale in which you would be able to do so. Even if you had received immediate treatment, the advice was also that there would be a period of at least three months following this before you could come back to work, meaning that you would have been off for over a year. That is not a position that Tracey was able to sustain. I therefore find that Tracey did make a sound decision when terminating your employment on medical grounds.

> I appreciate that having a bad back can be debilitating and the fact that it then leads to you losing your job through an inability to work is a very scary position to be in. You told me that over the last week or so, your position had improved and although you couldn't return to train operating you felt that maybe you could return to another role with train operating an aspiration for the future. You referenced this with your specialist's letter. Having had such a long time off with little or no improvement, you will understand that I have to look at any rapid change in your condition with a degree of concern. Your specialist will not be party to the months of treatment engagement you have had and how your discussions with the physiotherapists and our OHA, led to the prognosis that it did. I also have to consider that when you saw your consultant, it was immediately after your employment had been terminated.
>
> As I have said, even at the appeal, you were not medically fit. I empathise fully with you regarding the loss of this employment, but my view is that such a rapid improvement in your condition in such a short time period, is completely out of context with what has happened for the last year and I feel that some of what you have told me has been motivated through fear of the position you find yourself in.'

72 As can be seen, Mr Smith did not before making that decision "consult with the Head of London Underground Occupational Health" as required by the respondent's "Attendance Support Pack", as recorded in paragraph 40 above.

73 In fact, even by the end of the hearing before us, by which time it appeared that all of the relevant occupational health records had been identified, there was no evidential basis for the assertion of Ms Simms, repeated by Mr Smith in the above passage, that "Even if [the claimant] had received immediate treatment, the advice was also that there would be a period of at least three months following this before [he] could come back to work".

74 We heard evidence from Ms Simms and Mr Smith about automatic trains which are used on the London Underground network, and about the fact that the Piccadilly line trains which the claimant drove had a requirement to keep one's hand pressing down a lever or "dead man's handle" all the time that the train is in motion. The automatic trains do not, they said, have such a handle, and the only time when those trains need to be driven manually is when they are moved into and out of a depot. However, the driver of an automatic train must be able to get onto and off the train when it is not at a platform, therefore having to climb up and down from it in a way which would be likely to be difficult if not potentially distinctly harmful to someone who has a vulnerable back. In addition, the driver of an automatic train must be able to gain access to and put on the track some heavy equipment in certain events. That equipment is stored beneath some seats in the automatic trains.

Relevant law

75 We referred ourselves (and, through EJ Hyams, the parties) to the case law referred to in paragraphs L[377]-[378] of *Harvey on Industrial Relations and Employment Law*, concerning justification of unfavourable treatment within the meaning of section 15 of the EqA 2010. EJ Hyams suggested that the decision of the National Industrial Relations Court in *Winterhalter Gastronom Ltd v Webb* [1973] ICR 245 might be of some assistance here, but in the end we concluded that it was not.

76 Both counsel put before us some admirably well-written and apt submissions. We are grateful to them both, and for the helpful manner in which they both acted throughout the hearing. For the sake of relative brevity, we do not refer here in full to the parties' submissions. We bore those submissions firmly in mind (including what was said in both sets of submissions about the applicable law) when analysing the facts as found by us.

77 The claimant's written closing submissions (that is to say, the final passages of those submissions) focused first on the claims of contraventions of the EqA 2010. The respondent's written closing submissions (both in their opening and in their closing passages) were stated first by reference to the claim of unfair dismissal. We were acutely conscious of the fact that the test for the determination of the claim of unfair dismissal was different from that which applied for the determination of the claims of discrimination within the meaning of section 15 of the EqA 2010 and of a failure to make a reasonable adjustment within the meaning of section 20 of that Act, because in deciding the latter claims, we were asking a different question, albeit that in doing so we had to keep the respondent's "workplace practices and business considerations" firmly in mind.

78 We emphasise that we accepted fully that we could not, or at least should not, put ourselves in the shoes of the respondent and decide what we would have done, and that instead we had to apply the "range of reasonable responses of a reasonable employer" test when deciding whether the claimant's dismissal was fair. We emphasise too that, as Mr Liberadzki submitted to us, the mere fact that an employer has not followed its own procedure in deciding that an employee should be dismissed will not in itself mean that the dismissal was unfair within the meaning of section 98(4) of the ERA 1996. That was despite the fact that, as Dillon LJ said in paragraph 20 of his judgment (with which McCowan and Nolan LJJ agreed) in *Stoker v Lancashire County Council* [1992] IRLR 75:

> "It might be the view that a reasonable employer could be expected to comply with the full requirements of the appeal procedure in its own disciplinary code."

79 We also bore in mind the factor that a claim of discrimination within the meaning of section 15 of the EqA 2010 (namely unfavourable treatment "because of something arising in consequence of" the claimant's disability which the respondent cannot show was "a proportionate means of achieving a legitimate aim") where there has been a failure to something which it is claimed would have been a reasonable adjustment within the meaning of section 20 of that Act is

likely to succeed if the adjustment is found to have been one which was within section 20 (i.e. here a step which it would have been reasonable to take to avoid the disadvantage caused to the claimant by his back condition). That factor was expressly acknowledged by Elias LJ in paragraph 26 of his judgment in *Griffiths v Secretary of State for Work and Pensions* [2016] IRLR 216.

Our conclusions, and our reasons for them

80 The claims all concerned the same series of events. The precise sequence of events was in our judgment of peripheral relevance only as far as all of the claims were concerned, and the question whether or not the respondent followed its own procedural guidance documents to the letter was by no means determinative of the claim of unfair dismissal.

81 However, we concluded that there was here a substantial failure by the respondent to comply with its own procedural guidance documents at the end of the events which culminated in the dismissal by Mr Smith of the claimant's appeal against his dismissal, and that that failure, in the circumstances, was such that the claimant's dismissal

81.1 was outside the range of reasonable responses of a reasonable employer so that it was unfair within the meaning of section 98(4) of the ERA 1996,

81.2 constituted unfavourable treatment within the meaning of section 15 of the EqA 2010, namely it was because of the claimant's absence from work, which arose because of the claimant's disability and was not a proportionate means of achieving a legitimate aim, and

81.3 occurred after a failure by the respondent to make an adjustment of the sort required by section 20 of the EqA 2010.

82 That substantial failure was Mr Smith's failure to "consult with the Head of London Underground Occupational Health" at all before deciding that the claimant's appeal against his dismissal should be dismissed. Our reasons for coming to those conclusions were as follows.

The claim of unfair dismissal

83 The word "consult" has a particular meaning in the law of employment, at least in so far as it relates to dismissals for redundancy. The word "consult" can best be seen as being at least in part drawn from public law cases, if only because the effect of a public law obligation to consult is applied in the case law concerning proposals to dismiss a number of employees at one time for redundancy. Thus, in his judgment in *R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price* [1994] IRLR 72, Glidewell LJ said this:

> "24 It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in *R v Gwent County Council ex parte Bryant*, reported, as far as I know, only at [1988] Crown Office Digest p.19, when he said:
>
> 'Fair consultation means:
> (a) consultation when the proposals are still at a formative stage;
> (b) adequate information on which to respond;
> (c) adequate time in which to respond;
> (d) conscientious consideration by an authority of the response to consultation.'
>
> 25 Another way of putting the point more shortly is that fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely."

84 While that passage concerned a specific statutory obligation to consult, it was in our judgment helpful in making clear what the word "consult" meant in the respondent's own procedural guidance as set out in paragraph 40 above. That in turn was because (1) the question whether there has been proper consultation is now (as recognised by the Employment Appeal Tribunal ("EAT") in *Langston v Cranfield University* [1998] IRLR 172) always in issue in a claim of unfair dismissal for redundancy, and (2) the obligation to consult is therefore a well-recognised one in the law of unfair dismissal. In any event, in our judgment, simply "running by" the head of LUOH the proposal to dismiss the claimant for medical reasons would not in our judgment have sufficed to comply with the respondent's own procedural guidance which envisaged consultation. Rather, in our judgment that which the respondent's own procedure required was that the claimant's case was put before the head of LUOH with all of the relevant information and documents. Not even the first of those things was done: Mr Smith did not even "run [the claimant's case, or situation] by" the head of LUOH, let alone consult the head of LUOH.

85 The documents which in our judgment should have been sent to the head of LUOH in order to consult that head, included the letter following the consultation of Mr Gul, the orthopaedic and spinal surgeon, the text of which we have set out in paragraph 66 above. Those documents would also have included Mr Babafemi's report at pages 90-91 to which we refer in paragraphs 42-46 above. Even though the latter said that at that time, as recorded in paragraph 44 above, namely based on that day's assessment, the claimant was "currently not fit for work in any capacity", Mr Babafemi also recorded in that document, as stated in paragraph 45 above, that

> "Medical termination is not necessary at this time. His symptoms are expected to resolve with appropriate treatment."

86 As for the letter of 9 July 2021 recording Mr Gul's assessment, the text of which we have set out in paragraph 66 above, the MRI scans which the claimant had himself obtained, i.e. at his own expense, in February 2021, showed "no neurologically significant lesions", or at least no such lesions were "identified" by Mr Gul, and it was Mr Gul's conclusion that

> "the clinical and radiological findings do not show any reason for this gentleman to be medically retired".

87 In addition, Mr Gul reported:

> "The treatment plan for Mr Alteparmakian would be for conservative management, for him to receive support with any necessary adaptations at work to achieve good posture and ergonomics to enable him to continue with his job and conservative treatment through back care advice and physiotherapy."

88 In addition, as recorded in paragraph 70 above, by 9 July 2021, the claimant had, for the first time, some authoritative medical advice to the effect that his back pain was not the result of a discernible medical condition, and he was now more able to be, and was, more confident than he had previously been about taking positive steps to overcome that pain.

89 The fact that those things were said in those documents meant that it was in our view outside the range of reasonable responses of a reasonable employer to fail to "consult with the Head of London Underground Occupational Health" before deciding that the claimant should be dismissed, even though the claimant himself acknowledged at the time of his appeal against his dismissal, as we record in paragraph 69 above, that he was not at that time able to drive a train.

90 We add that it may be the case that such consultation would not have led to a decision that the claimant should not be dismissed. Thus the claimant might have been dismissed despite such consultation. However, by analogy with the decision of the House of Lords in *Polkey v A E Dayton Services Ltd* [1988] AC 344, overruling the decision of the Court of Appeal in *W & J Wass Ltd v Binns* [1982] ICR 486, that is a question that is relevant to the compensation payable to the claimant, and not to the question whether the claimant's dismissal was unfair. In determining the compensation, however, the tribunal will need to take into account the analysis of the EAT in *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274. That analysis will require the tribunal to ask whether the respondent could fairly have dismissed the claimant, not simply whether it would have dismissed the claimant.

The claim of unlawful discrimination arising from a disability

91 As we say in paragraph 81.2 above, we concluded also that the dismissal of the claimant was unfavourable treatment because of something arising in

consequence of" the claimant's disability which the respondent could not show was "a proportionate means of achieving a legitimate aim". That was for the following reasons.

91.1 We accepted that maintaining, or at least not damaging, the claimant's own health and safety was a legitimate aim.

91.2 We also accepted that in principle saving the cost of continuing to employ the claimant if he could not continue to do any work for the respondent was a legitimate aim of the respondent.

91.3 However, in the circumstances to which we refer in paragraphs 84-88 above, Mr Smith's decision in effect that the claimant should be dismissed (i.e. by dismissing his appeal against Ms Simms' decision that he be dismissed) without having first sought a fully-informed and careful view from LUOH on the possibility of the claimant being helped to overcome his back pain by adopting the measures referred to in those paragraphs (for example by the claimant being permitted to return to work, if necessary in a supernumary capacity for a period of time, and being given ergonomic supporting equipment and advice and guidance with his posture) was in our judgment not a proportionate means of achieving that legitimate aim.

92 In addition, and separately, we concluded that Ms Simms' decision that the claimant should be dismissed was not a proportionate means of achieving a legitimate aim because her decision was made only two days before the claimant was due to see for the first time a specialist medical doctor in relation to his back condition, with the dismissal taking effect three days after the claimant had seen that doctor. In those circumstances, we concluded that the only proportionate way to act was to see what the doctor advised and then to ask LUOH to see the claimant in person and give further advice in the light of the specialist's opinion.

The claim of a failure to make a reasonable adjustment

93 Similarly, the failure to seek such a view before deciding finally that the claimant should be dismissed involved a failure to make a reasonable adjustment within the meaning of section 20 of that Act. That is for the following reasons.

93.1 The respondent applied a provision, criterion or practice within the meaning of section 20(1) by requiring its train drivers to attend work to do their jobs.

93.2 The claimant was put at a substantial disadvantage in that regard by reason of his back pain, in that he could not comply with that requirement.

93.3 It would in our judgment have been a reasonable adjustment to delay dismissing the claimant and during that period of delay to have sought a properly-informed view from LUOH, arrived at in the light of the letter of 9 July 2021 whose text we have set out in paragraph 66 above and in the light of a consultation in person with the claimant, on the potential for the

claimant to be assisted to return to work, eventually as a train driver but failing that in some other capacity. In this regard we bore in mind in particular the decision of the House of Lords in *Archibald v Fife Council* (2004) ICR 954.

94 For those reasons, all of the claimant's claims succeeded. At the end of the hearing with the parties on 1 September 2023, we discussed with them the possibility of the claim succeeding to any extent and the steps which would need to be taken in preparation for a remedy hearing, not least because the claimant is seeking an order for reinstatement. We then said that we would formulate some orders which we would communicate at the time of giving this judgment. We have done that in a separate case management record, which we have caused to be sent to the parties.

_____

Employment Judge Hyams

Date: 24 October 2023

SENT TO THE PARTIES ON

6 November 2023

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.....

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FOR THE TRIBUNAL OFFICE