EMPLOYMENT TRIBUNALS

Claimant:	**Ms Rosemary Charles**
Respondents:	**(1) London Underground Limited** **(2) Miss Alexandra Crook** **(3) Ms Anne-Marie Costigan**
Heard at:	**East London Hearing Centre**
On:	**14, 15, 16 November 2023 (with parties), 17 November 2023 (in chambers)**
Before:	**Employment Judge Barrett**
Members:	**Mrs C Clover** **Mr DJ Hurrell**

Representation

Claimant:	Mr O'Callaghan, counsel
Respondents:	Ms Ferber KC, counsel

JUDGMENT

The judgment of the Tribunal is that: -

1. **The Claimant's claims of direct and indirect sex and disability discrimination, discrimination arising from disability, failure to make reasonable adjustments and victimisation, and for breach of s.10 Employment Relations Act 1999, detriment for taking appropriate steps to protect from circumstances of serious and imminent danger and unauthorised deductions from wages, are not well-founded and are dismissed.**

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was by telephone. A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

Introduction

1. The Claimant, Ms Rosemary Charles, a Train Operator, presented her first claim (3203332/2021) on 10 May 2021 following early conciliation between 27 February and 10 April 2021. The claim was brought against the First Respondent. In her ET1 claim form, she raised complaints of direct sex and disability discrimination, indirect sex and disability discrimination, discrimination arising from disability, and failure to make reasonable adjustments.

2. On 18 June 2021, the Claimant presented her second claim (3204826/2021) raising complaints of victimisation and breach of the statutory right to be accompanied (s.10 Employment Relations Act 1999). That claim was brought against the First, Second and Third Respondents.

3. At a preliminary hearing on 23 November 2021, Employment Judge Siddall ordered that the first and second claims should be heard together and directed the Claimant to provide further particulars of her claims for sex discrimination, disability discrimination and victimisation. The Claimant provided further information in a document dated 23 February 2022.

4. On 20 April 2022, Employment Judge O'Brien conducted a preliminary hearing for the purpose of determining whether the Claimant was disabled, within the definition at s.6 Equality Act 2010, at the material times. The resulting judgment, send to the parties on 4 July 2022, found in favour of the Claimant.

5. On 28 March 2023, the Claimant presented her third claim (3200592/2023), which contained complaints of direct and indirect race, sex and disability discrimination, discrimination arising from disability, failure to make reasonable adjustments, victimisation, unlawful deduction from wages and detriment for raising health and safety concerns. The third claim was brought against the Second and Third Respondents. Regional Employment Judge Burgher directed that it be consolidated with the first and second claims.

6. At a telephone preliminary hearing conducted by Employment Judge Byrne on 25 July 2023, the issues in the claims were discussed and it was confirmed that the claims pursued were for direct discrimination (sex and/or disability); indirect discrimination (sex and/or disability); discrimination arising from disability; failure to make reasonable adjustments; victimisation; detriment for raising health and safety concerns; and unauthorised deductions from wages. The parties subsequently agreed a list of issues, which is appended to this judgment.

The hearing

7. The hearing was listed for 4 days. The parties attended for the first three days and the final day was used by the Tribunal for deliberations in chambers.

8. The Tribunal was provided with a 670-page bundle of documents and a helpful agreed chronology and cast list.

9. We heard evidence from the following witnesses:

    9.1. The Claimant;

9.2. Mr Darryn Miles, Train Operations Manager, who reviewed the Claimant's grievance;

9.3. Mr Tony Harris, Trains Manager, who interviewed the Claimant regarding an incident report;

9.4. The Second Respondent, Miss Alexandra Crook, Train Operations Manager, who investigated the Claimant's grievance and was involved in the management of her sickness absence and rota request.

10. The Respondent also supplied a written witness statement from the Third Respondent, Ms Anne-Marie Costigan, who was unable to attend the hearing due to ill-health. The Tribunal read her statement but placed lesser weight on it than would have been the case had the evidence been tested in cross-examination.

11. At the close of the evidence, the Respondents' counsel provided written closing submissions amplified in oral submissions, and the Claimant's counsel made oral closing submissions.

Findings of fact

The parties

12. The Claimant was employed by the First Respondent as a Train Guard from 4 September 1994. She became a Train Operator (driver) in 1996. The Second Respondent was at the relevant times a Train Operations Manager at the Claimant's depot, where she managed 180 Train Operators including the Claimant. The Third Respondent was at the material times an Employee Relations Partner. She provided HR support to the First Respondent.

The Claimant's disability

13. The Claimant has suffered from menorrhagia and polycystic ovary syndrome ('PCOS') since 2006. By a judgment sent to the parties on 4 July 2022 following a preliminary hearing on 20 April 2022, Employment Judge O'Brien determined that the Claimant was a disabled person by reason of these conditions.

Relevant policies and processes

14. The First Respondent provides its rules relating to Train Operators in its Rule Book 6. The Claimant received a paper copy of these rules from time to time whenever they were updated.

15. Section 2 of Rule Book 6 sets out the Train Operator's general responsibilities and train operations. This includes the following section:

'Physical needs relief

If you need a physical needs relief, you must contact the controller or the duty manager via radio, giving as much notice as possible.

When a physical needs relief is required at a terminus, you must tell either the controller, signaller or customer service supervisor/manager, as necessary.

After a physical needs relief, you must immediately report to the duty manager or customer service supervisor/manager, as necessary.'

16. This is the process followed when a driver needs to use the toilet. A toilet break notified in accordance with this section is referred to as a "*requested PNR".* A break taken without notification is called an *"unrequested PNR".* We were told that an unrequested PNR is classified as a staff error. Any unexplained delay over 2 minutes is automatically flagged to the Respondent's system as an incident for investigation. However, if a Train Operator called the controller after taking an unrequested PNR, before departing the station, with a good explanation, and there was no significant impact on the service, it was possible for the incident to be closed without further record of it being retained.

17. The First Respondent has two separate policies dealing with employee complaints, its Harassment and Bullying Procedure (sometimes referred to as H&B) and its Individual Grievance Procedure.

18. Under the Harassment and Bullying Procedure, harassment is defined as follows:

'unwanted conduct affecting the dignity of employees in the workplace. It may be related to age, sex, race, disability, religion, sexuality, nationality and may be persistent or an isolated incident. The conduct may be physical, verbal or non-verbal and has the purpose or effect of violating another person's dignity or creating an offensive, intimidating, hostile, degrading or humiliating environment.'

19. Bullying is defined as:

'offensive, intimidating, malicious or insulting behaviour, or an abuse or misuse of power or authority through means intended to undermine, humiliate or denigrate the recipient or which could be reasonably perceived by the recipient to be so intended.'

20. A claim of harassment or bullying is initially reviewed by an 'accredited manager', who has received training on the Equality Act 2010 including harassment, other types of discrimination and disability issues. The policy provides that:

'If in any doubt the decision as to whether a matter is harassment or bullying will be determined by an accredited manager after discussion with the complainant. Complaints that do not fall within the agreed definitions will be dealt with under the Individual Grievance Procedure.'

21. The role of the accredited manager is described in the policy and includes undertaking investigations and chairing disciplinary and appeal hearings. However, we were told that it was not necessary for an accredited manager to undertake every investigation into a complaint under the Harassment and Bullying Procedure; in some cases, the accredited manager will provide support and guidance to the investigating manager.

22. The Individual Grievance Procedure does not require the involvement of an accredited manager. It provides that:

'If during the meeting it becomes evident that the nature of the grievance involves harassment or bullying the matter will then be referred to the harassment and bullying procedure.'

The events of 4 December 2019

23. On 4 December 2019, the Claimant arrived at a terminus station at 15.16 and was due to depart at 15.24. She exited her cab and went to use the toilet in the staff depot. She returned to her cab, unberthed her train and departed at 15.30, six minutes late. She did not contact the controller by radio to request or explain the break.

24. The Respondents do not dispute that because of her medical conditions of PCOS and menorrhagia the Claimant unexpectedly and urgently needed to access toilet facilities. This caused her to rush from the cab into the staff depot once she had berthed her train. She was not able to contact the controller to request a PNR from the cab or on the way to the toilet because of the urgency of the situation.

25. However, the Respondents say that the Claimant could have called using her handheld radio on the way back from the toilet, or at the latest from her cab when she got back, before departing the station. Their case is that the Claimant did not do so because she had mistakenly understood that the onus was on the controller to contact her rather than the other way around.

26. The Claimant's evidence was that she had not kept her handheld radio with her because her bag was heavy and impeded her rushing to the toilet, and therefore she had dropped it behind the barrier to the public at the end of the train platform before running up the stairs into the staff depot. She said that when she came out of the toilet, she had expected the train signal to have been switched from green to red by the controller due to her absence from the train. When she saw the signal had been left green, she went to look for the Train Manager in his office (approximately 10 steps away). When she saw that he was not there, she hurried back to her cab and unberthed the train. She accepted that, in hindsight, she could have contacted the controller when she reached the cab but she believed it did not make any difference given the time that had elapsed. She expected that the controller or Duty Reliability Manager would contact her to check the reason for the delay, but this had not happened.

27. On consideration of the Claimant's evidence and the documentation later produced in the course of the Respondent's investigation into the incident (discussed further below), the Tribunal finds that the Claimant was aware of the obligation on her as the Train Operator to make contact with the controller in the situation that she had urgently needed a break to access toilet facilities. She received paper copies of Rule Book 6 as it was updated from time to time. She had been involved in a similar incident which had occurred in November 2019. We find that the Claimant did not call the controller after visiting the toilet because she saw the signal was green and therefore she did not need to contact the controller in order to request a green signal to leave the station. We conclude on the balance of probabilities that the Claimant preferred not to discuss the incident, as it related to her private medical conditions, and felt it was not operationally necessary to notify the controller, although she did know that there was a policy requirement to do so.

28. The delay in excess of two minutes was flagged on the First Respondent's system which generated the requirement for an Incident Reporting Form ('IRF') to be completed. This was done by Duty Reliability Manager John Gutteridge on 9 December 2019. By this time, the Claimant was on leave so Mr Gutteridge made

a preliminary report stating *"awaiting a memo form the train operator to explain the extra time to reverse".*

29. The memo request was passed to the Claimant on her return from leave and she completed her report on the incident on 8 January 2020. She wrote:

'… the train was in the platform for 10 mins due to the onset of several medical conditions that the company is fully aware of and so was unable to leave after 4 mins on this occasion. No enquiry was made by service control as to why that was at the time…'

The Claimant's meeting with Mr Harris on 21 January 2020 and his outcome letter

30. Mr Harris was tasked with reviewing the IRF and the Claimant's memo. He met with the Claimant on 21 January 2020 to discuss the incident. During the meeting, he asked the Claimant about the medical conditions she had mentioned in her memo but told her that it was up to her whether she wanted to say what it was. He also said that he was not aware what the medical conditions were. The Claimant made no comment in response to this enquiry. Mr Harris therefore knew from the Claimant's memo that she said her reason for taking an unrequested PNR was connected to her medical conditions but did not know what they were or why their symptoms might necessitate an urgent need to access toilet facilities. The Claimant did not ask Mr Harris to take any further steps to investigate her medical conditions, and he did not do so. We find the reason he did not was because he understood from the Claimant's lack of response in the meeting that she wished to keep the details of her medical conditions private and he respected that wish.

31. At the end of the meeting, the Claimant said words to the effect, "*I know the difference between a requested and an unrequested PNR and I'm not arguing with you putting it down as a staff error*"; she later included this in her note of the meeting.

32. Mr Harris wrote an outcome letter on the same day, which said:

'Outcome of staff error investigation

Delayed departure West Ruislip on 04/12/19 on Train 14 @ 15:24hrs was deemed to be a staff error.

Reasons: - You agreed that this Item was attributable to you in full. You did not advise anyone that you were having to deal with any issues prior to your arrival at West Ruislip or during the time you were at West Ruislip causing a subsequent 6 minute delay to the service.

Incident details

• Delayed departure West Ruislip E/B by 6 minutes 04/12/19, T14, 616 duty

Immediate cause

T/Op R Charles not advising Control room staff or anybody else that she would be delayed at West Ruislip.

Root (underlying) causes

T/Op Issues

Review of your performance and incident reports - past 2 years

(Note: - safety related and non-safety related errors must not be combined)

• I have checked through your incidents attributed to you in the past 2 years and you have a similar item on T63 where you were interviewed by TM Suant on 1 2 / 1 1 / 1 9 . Please be aware YOU MUST advise control room Staff prior or during any "issues" to prevent unnecessary delays.

Actions to prevent reoccurrence of errors

Following this recent incident and the review of your performance and incident reports, I believe that this letter of advice will be appropriate in this instance. In future please advise the line controller or a member of staff that you have issues you need to deal with (I and some of my colleagues are not aware of them) though you expressed to me that others are.

Your SAP and Competence Management System (CMS) records have been updated accordingly and you have been given a copy. Leytonstone has a responsibility to keep such errors to a minimum to avoid unnecessary disruption to the service we provide our customers. Please be advised that your performance will continue to be monitored and any future staff errors may result in further corrective or disciplinary action being taken against you.

A copy of this letter will be placed on your staff file.'

33. On the following day, the Claimant wrote to Mr Harris setting out a detailed account of their discussion and a list of numbered points that she wished to make in response to the letter he had issued. Essentially, she objected to the incident being recorded as a staff error on her part only because she felt that the controller had also been at fault for not making contact with her. She also suggested that Mr Harris could have accessed information about her medical condition in her 'P file' (personnel record). She concluded her email,

'I'm requesting this put in my p file please. This doesn't constitute a complaint for the company to deal with as it has been made clear this has been booked as a staff error.'

34. Mr Harris replied that evening, saying:

'Thank you for taking the time to produce the detailed notes which are accurately noted to a degree with some glaring omissions which I would be only be to happy to sit down with you and the device used to record them so we can fill in any gaps and put the conversation into context as well.'

35. The Claimant replied on the same evening:

'You are free to produce your own notes and recollections days after the interview and put it on file and add the alleged glaring omissions in the somewhat accurate notes to a degree in your file.

That is the version of events to put in my p file as requested.'

36. Mr Harris responded, *"I have",* by which he meant that he had made his own note of the meeting in the form of comments added to the Claimant's account. These comments added some additional detail, and Mr Harris remembered some of the

discussion having occurred in a different order, but there was no substantive dispute as to the content of their conversation.

The Claimant's grievance

37. On 18 February 2020, the Claimant submitted a grievance letter to the Second Respondent, headed *"LUL harassment, discrimination, victimisation & bullying policy complaint".* In it, she quoted from the Harassment and Bullying policy, including the definitions of harassment and bullying. She referred to her medical conditions of menorrhagia and PCOS and stated that they fell within the Equality Act 2010 definition of a disability. She alleged that Mr Harris' conduct amounted to direct or indirect disability discrimination and direct or indirect sex discrimination. She asked for her complaint to be investigated by an accredited manager under the Harassment and Bullying policy and for an opportunity to explain her complaint in further detail and to provide relevant supporting documentation. It was in accordance with the Claimant's general preference to keep her medical information as private as possible that she flagged that there was more information she wished to share with the accredited manager dealing with her complaint but did not include it in the grievance letter.

38. On 20 February 2020, the Second Respondent replied to the Claimant acknowledging her complaint and informing her that it had been referred to an accredited manager.

39. That accredited manager was Mr Miles. He reviewed the Claimant's letter of complaint and took the decision that it should not be dealt with under the Harassment and Bullying Procedure, but instead referred to the Individual Grievance Procedure. In an email the Second Respondent on 24 February 2020 he set out the policy definition of harassment, and went on:

> **'The complainant asserts that the behaviour ascribed to the respondent is due to their protected characteristic of sex and disability. The complainant does not elaborate in her complaint why she believes that she has been subjected to harassment, and having read the contents of her complaint, there isn't anything immediately obvious to me that supports this assertion. Therefore I do not believe that this complaint meets the definition of harassment.**
>
> **Considering the definition of bullying: [*policy definition included*]**
>
> **The complaint against the Trains Manager does not imply bullying, and there is nothing within the complaint that suggests that bullying behaviours have occurred. Therefore, I do not believe that this complaint meets the definition of bullying.**
>
> **I note that the complainant also raises concerns around discrimination as a result of her protected characteristics, namely sex and disability. In order to be discriminated against, a detriment needs to be suffered as a result of this protected characteristic. It is not apparent from the complaint that Ms Charles has been discriminated against and I cannot see evidence of her suffering detriment as a result of her protected characteristics. Therefore, I do not believe that this complaint meets the definition of discrimination.**
>
> **The complaint appears to have arisen following management action under the staff error process, and specifically Ms Charles taking a Physical Needs Relief, which was unrequested and resulted in a delay to customer service. From the**

submission sent to me, there is nothing contained within the complaint that implies harassment, bullying or discrimination. If the complainant is dissatisfied at how the staff error was investigated and disagrees with the outcome, it would be more appropriate to raise her complaint utilising the LU Individual Grievance Procedure.

If, as a result of this investigation into her grievance, behaviour that could be considered as falling under the Harassment and Bullying Policy is identified by the Investigating Manager, this matter should be referred back to an Accredited Manager.'

40. The Tribunal considers it was clear from the Claimant's grievance letter that she was making an allegation of disability and sex discrimination which on its face would fall within the Respondent's Harassment and Bullying policy. It follows that Mr Miles' assessment of her grievance letter was incorrect. We find that Mr Miles' reason for referring the matter to be dealt with under the grievance procedure was that he thought the information in the Claimant's letter was insufficient to substantiate her complaint. He did not ask the Claimant to provide the further information she had alluded to before conducting his assessment. Because he thought her complaint was weak on its face, he did not think carefully about the nature of the complaint. The cursory nature of his assessment was influenced by a lack of time to dedicate to his accredited manager role alongside his substantive job, and a belief that the Claimant would benefit from a quicker resolution if her complaint were dealt with as a grievance, which would not require further involvement from an accredited manager.

41. On the following day, 25 February 2020, the Second Respondent wrote to the Claimant to tell her of Mr Miles' decision. She wrote:

'The content of your complaint has been assessed by an accredited manager and following this has he has assessed this complaint as not meeting the H&B definition and has advised that the matter be progressed by way of the grievance procedure.

He adds the caveat that if in the event that the investigation into the grievance identifies evidence of behaviour that could be considered to fall under the definition of H&B then the matter should be referred back to an Accredited Manager at that stage.

I have enclosed a copy of this evaluation with this evaluation.'

42. She invited the Claimant to confirm whether she wished to meet to discuss her grievance or receive a written outcome.

43. On 22 March 220, the Second Respondent sent the Claimant a follow up letter asking her again whether she wished to meet. Thereafter, progress on the grievance stalled due to the onset of the Covid-19 pandemic and, in June 2020, the Claimant suffering a knee injury which necessitated a lengthy recovery period off work.

44. The Claimant commenced a phased return to work on 14 October 2020. On the same day, the Second Respondent sent her a letter inviting her to resume the grievance process.

The Second Respondent's grievance investigation and outcome letter

45. The Claimant attended an online grievance meeting with the Second Respondent on 18 November 2020, accompanied by her RMT representative Mr Mashud Ali. During the meeting, the Second Respondent asked about the Claimant's medical condition and the effect it had. The Claimant said that the First Respondent had paid for her diagnosis and on occasions when she had been off sick in the past, she had had to explain her conditions each time she returned to work. She thought Mr Harris should have made more of an effort to find out about them.

46. The Second Respondent asked, in particular, whether her medical condition would mean the Claimant needed the toilet more often. The Claimant said words to the effect that she had to "*deal with it when it occurs*". The Tribunal's understanding is that she was trying to communicate that the issue was not frequency of micturition but that she would at times need to access private facilities urgently and without warning to deal with her menorrhagia and symptoms of PCOS. However, this was not stated explicitly and the Claimant did not take the opportunity to provide any further details.

47. The Claimant's note of the grievance meeting records Mr Ali as saying that once aware of a medical condition the employer ought to seek further information, bearing in mind that employees may not wish to discuss their medical status directly with Train Managers. That statement is not included in the Second Respondent's note of the meeting. We accept that the Claimant's note was fuller in this regard and her representative did make a statement to that effect. We find that the Second Respondent could have asked more questions during the meeting to explore the link between the Claimant's medical conditions and her ability to request a PNR. Equally, the Claimant could have been more forthcoming and explained why she thought her medical conditions ought to be considered by way of explanation or mitigation for the delay on 4 December 2019.

48. After the meeting, the Second Respondent checked the Claimant's P file and saw her diagnoses (which were in any event contained in the grievance letter) but did not see recorded any details of her symptoms. She did not take any further steps to seek medical information. We find the reason the Second Respondent did not take further steps was because she felt she had provided the Claimant with a sufficient opportunity to substantiate her own grievance.

49. The Second Respondent provided her notes of the meeting to the Claimant and her representative by email of 20 November 2020. The Claimant added her amendments to the notes on 25 November 2020. The Second Respondent replied the following day, saying that she did not agree with all of the Claimant's amendments but that she would take them into account in her investigation and include them in the file.

50. On 4 December 2020, the Second Respondent sent her outcome letter in relation to the Claimant's grievance. She concluded that Mr Harris had correctly attributed the 4 December 2019 incident as a 'staff error'. She quoted from Rule Book 6 on the process for a physical needs relief and stated that "*The incident which took place on the 4th December 2019 was an unrequested PNR as and such under our polices is counted as a staff error*." She noted that the 21 January 2020 letter placed on the Claimant's file did not amount to a disciplinary warning and declined

to withdraw it. In a section of the outcome letter addressing the Claimant's medical conditions, she wrote:

'Medical Condition relating to the incident

You stated in your statement dated 18t February that TM Harris failed to access information relating to your medical condition or consult the TOM regarding your medical condition of menorrhagia and/ or polycystic ovary syndrome. You also stated the previous TOM Sara Henderson was aware of your condition. I have spoken to TM Harris regarding this and he was not aware of how your medical condition would have affected not being able to contact the controller to request a PNR which is what this staff error relates to.

I asked you in our meeting on the 18th November how your medical condition affected work and in particular if it made you require more toilet breaks and in my notes of the conversation you said that you had to deal with it at the particular time, but you didn't say how specifically it would affect PNRs.

I therefore cannot conclude how your medical condition would influence the outcome of the meeting on 21 January 2020. However, should you wish to speak to me about any reasonable adjustments you require, I'd be happy to speak to speak to you about this in a Reasonable Adjustment request meeting. I will invite you to this meeting within the next 14 days.'

51. It is evident from the outcome letter that the Second Respondent did not understand at the time that the Claimant's conditions might cause her to unexpectedly and urgently need to rush to use toilet facilities without having time to request a PNR in advance. However, we find that the Second Respondent had not simply disregarded the possibility of a causal link, but rather she considered the matter and concluded that she lacked sufficient information to show there was any such link. This was because the Claimant had been reluctant to provide fuller details of her symptoms or explain why they impacted on her ability to request a PNR.

Invitation to reasonable adjustments meeting

52. On the same day as the grievance outcome, the Second Respondent sent the Claimant a separate letter inviting her to a meeting to discuss reasonable adjustments in relation to her menorrhagia and PCOS. However, on 7 December 2020, the Claimant unfortunately re-sprained her knee and thereafter was not able to return to work until early July 2021. Therefore, the Second Respondent's proposal to discuss reasonable adjustments discussion was not taken up.

The Claimant's grievance appeal

53. The Claimant submitted an appeal against the grievance outcome to General Line Manager Dale Smith on 10 December 2020. Not having received an acknowledgement in response, she forwarded the appeal to the First Respondent's Director Nick Dent on 8 January 2021.

54. There was then a 4-month period of delay during which the Claimant heard nothing further. She made an early conciliation notification to ACAS on 27 February 2021 and received a certificate on 10 April 2021. She said in evidence, and we accept, that she was worried that she would be out of time to submit a Tribunal claim if she waited too long for her grievance appeal.

55. On 5 May 2021, Operational Improvement Support Manager Kristen Anthony wrote to the Claimant saying that after the Claimant had emailed Mr Dent, Mr Smith had looked for her appeal but had been unable to find her original email to him. Ms Anthony asked the Claimant if she wished to attend an appeal meeting by video call.

56. The Claimant replied on 18 May 2021 saying that the matter was subject to an Employment Tribunal claim and she did not want to risk prejudicing that through a grievance appeal. She submitted her ET1 on 10 May 2021, one month after the end of the early conciliation period.

Management of the Claimant's absence

57. Trains Manager Christophe Suant referred the Claimant to Occupational Health ('OH') in connection with her knee injury and sickness absence on 6 January 2021. The Claimant participated in a telephone consultation and the resulting OH report of 6 March 2021 advised that she was not fit for work with no predictable timescale for recovery.

58. On 23 March 2021, the Claimant attended a medical case conference with the Second Respondent, her representative Mr Ali, and a note-taker, Caroline Brown. The Second Respondent sent her an outcome letter on the same day recording the content of their discussion.

59. On 21 May 2021, a further OH report was supplied stating that the Claimant's GP records highlighted that she was gradually improving and there were positive prospects for her return to work but no definite timeframe.

60. Meanwhile, the Second Respondent was seeking to arrange a second medical case conference with the Claimant. The correspondence between them was as follows:

    60.1. On 12 April 2021, the Second Respondent wrote a letter to the Claimant inviting her to attend a medical case conference on 28 April 2021.

    60.2. The Claimant replied by email of 24 April 2021, proposing an alternative date of 3 May 2021 due to the non-availability of her trade union companion.

    60.3. The Second Respondent replied that 3 May 2021 was a bank holiday and she and the Third Respondent would not be available. She invited the Claimant to attend a medical case conference on 26 May 2021 instead.

    60.4. On 21 May 2021, the Claimant wrote to the Second Respondent that her trade union companion was on annual leave on 26 May 2021, and proposing an alternative date of 2 June 2021.

    60.5. The Second Respondent replied on the same day saying she could not do 2 June 2021 but suggesting 3 or 4 June 2021 instead.

    60.6. The Second Respondent then sent the Claimant a letter dated 27 May 2021, inviting the Claimant to a case conference on 7 June 2021.

    60.7. The Claimant replied by email of 31 May 2021, saying that her trade union companion was on a rest day on 7 June 2021, but that he would be

available at any time on 8 June 2021 and proposing that the case conference be held then.

60.8. The Second Respondent accordingly wrote a letter to the Claimant on 1 June 2021 inviting her to attend the case conference on 8 June 2021 in person at the Leytonstone Train Operations Manager's Office. The Claimant says this letter did not arrive at her home address.

60.9. The Second Respondent also emailed the Claimant sending her a link to attend an online meeting on 8 June 2021. However, she sent it to the Claimant's work email address in error. The Claimant was off sick and, in accordance with the Respondent's usual procedures, unable to access her work email from home. The email correspondence referred to above was otherwise sent to and from the Claimant's personal email address.

61. As a result of the invitation to the online meeting going astray, the Claimant missed the medical case conference on 8 June 2021. She was notified of the meeting after the event by Mr Ali and replied to him on the same day saying she had not received the invite. She then forwarded her email to the Second and Third Respondents, alerting them to the reason why she had missed the meeting.

62. On 9 June 2021, the Second Respondent, having consulted with the Third Respondent, sent a letter to the Claimant (also to her personal email) outlining the history of the correspondence and stating:

'This meeting has now been rearranged twice now and the new date for your case conference is 10:30 on Tuesday 15th June 2021 at Leytonstone TOM's Office, or via a team's call if that is your preference.

I need to make you aware this meeting will not be rearranged again, and it is within your interests to attend this meeting, so I can consider anything you wish to advise me of in connection with your ongoing health conditions, which have prevented you from doing your substantive role since 9th June 2020. If you fail to attend this rearranged meeting, I will make a decision on your ongoing absence from work as indicated in my letter to you of 1st June 2021 and advise you of any appropriate next steps via email communication.

The meeting is to discuss your ongoing medical condition of which resulted in you being sick from work from 09.06.2020-13.10.2020, you then returned to work on 14th October 2020, on reduced hours of initially 4 hours and platform pick up only as advised in the occupational health memo dated 30 September 2020 gradually increasingly this to 5 hours. On the 1st November 2020, you commenced a period of annual leave for 2 weeks and you then booked off sick again from 10.12.20 to date which all relates to the same right knee injury.

At the meeting you have the right to be accompanied by a Trades Union Representative or a Workplace Colleague. Your companion cannot be someone who is directly involved in this matter (e.g. a witness) or whose presence would prejudice the meeting. Someone employed by a different company within the TfL group (e.g. TfL, London Buses, London Rail etc.) does not count as a Workplace Colleague.

If you wish to be accompanied, please provide me with the name of your companion no later than three calendar days prior to the meeting. It is your responsibility to advise your companion of the date and time of the meeting.

Should your companion not be available to attend the meeting on the revised date or time, an alternative companion (as defined earlier) will need to be sought.

Anything that you tell me in connection with your medical condition will be taken into consideration when assessing your ability to perform your role of Train Operator or if consideration needs to be given as to whether it may be appropriate to consider either referring you to the Redeployment Unit or to consider terminating your employment on medical grounds.'

63. The Claimant says that in this letter, the Second Respondent failed to recognise her right to propose an alternative date for the medical case conference and to be accompanied by her chosen trade union representative. The Tribunal finds that the reason why the Second Respondent (in consultation with the Third Respondent) insisted that the date for the conference could not be further postponed, and that the Claimant would need to find an alternative companion if her chosen companion was not available, was because of the length of time it had taken to arrange the meeting. The Second Respondent had sought to make arrangements since 12 April 2021, it was now early June and she felt she could not allow the situation to continue indefinitely. The Tribunal notes however that the period of delay was not solely caused by the Claimant. Both parties' unavailability and communications going astray contributed to it.

64. On 11 June 2021, the Claimant emailed the Second Respondent stating that she had received neither the letter nor the email inviting her to the meeting on 8 June 2021. The Claimant sent a further email on 14 June 2021, saying that her chosen companion Mr Ali was unavailable on 15 June 2021 and that she had been given insufficient notice of this date. She asked for the medical case conference to be held on 22 June 2021 instead, or for the Second Respondent to propose an alternative date if she was not available on 22 June 2021. On 15 June 2021, the Claimant emailed the Second Respondent again asking for an update.

65. The Second Respondent replied by email on 15 June 2021 saying:

'I am very eager to meet with you to obtain an update from you and to discuss all options regarding your continuous non-attendance. With this in mind, please can you provide me with a specific date and time within 7 calendar days of the proposed meeting today (10:30 on 15th June 2021) which you and your chosen companion are available to meet. Please also confirm if you would prefer to meet in person or over Teams.'

66. In this email, the Second Respondent appears to have missed that the Claimant had already proposed a specific date and time within 7 calendar days, namely 22 June 2021. The Claimant replied on 16 June 2022, without making any further proposal but rather raising a concern that she had not been sent a Teams invite for the 15 June 2021 meeting. The Second Respondent wrote back on the same day, saying.

'As per my previous email yesterday, I am awaiting for you to supply an alternative date for you and your companion to be able to re-arrange the meeting.'

67. On 18 June 2021, the Claimant emailed the Second Respondent, reminding her that she had already proposed an alternative date of 22 June 2021. However, by this time Mr Ali had arranged to take a period of annual leave. The Claimant asked for the medical case conference to be delayed until after he got back on 5 July 2021.

68. On 22 June 2021, the Second Respondent decided to proceed without convening a second medical case conference. She wrote to the Claimant saying that due to the length of her absence and lack of timescale for a return to work, she would be referred to redeployment with immediate effect. She also referred the Claimant to OH.

69. The subsequent OH report on 28 June 2021 advised that the Claimant was fit to return to her substantive role. The Claimant returned to work in early July 2021.

70. The Claimant, together with Mr Ali, attended a medical case conference conducted by the Second Respondent on 29 July 2021 after she had returned to work. The Second Respondent suggested at the meeting that it could be a good opportunity to have a conversation about reasonable adjustments, as previously suggested on 4 December 2020. However, the Claimant and her representative said they needed notice to prepare for this.

71. On 25 August 2021, the Second Respondent emailed the Claimant asking her how she would like to proceed in relation to the reasonable adjustments matter. The Claimant did not reply. By this point, she had lost trust in the Second Respondent's ability to be impartial given that she had commenced Tribunal proceedings and named her as a respondent.

The Claimant's request not to work night shifts

72. On 19 October 2021, the Claimant emailed the Second Respondent with a request as follows:

> **'Allocated Night Duties (4/11/22 to 12/11/22)-Reasonable Adjustment Request**
>
> **As per a recent Employment Tribunal judgment I am a person with a disability as defined by the Equality Act 2010.**
>
> **Please be advised that the allocated night duties are detrimental for me in regard to the impact of the disability on my day to day activities.**
>
> **I am requesting that you agree a reasonable adjustment, (as defined by the Equality Act 2010 and related case law), to re-allocate me to early middle or late duties in place of the Night Duties currently allocated to me for the period Friday 4 November 2022 to Saturday 12 November 2022.**
>
> **Please inform me that I have been re-allocated to early, middle or late duties for the days that I am currently allocated night duties in the time period 4/11/22 to 12/11/22.**
>
> **Thank you for your time on this matter.**
>
> **Please acknowledge receipt of this email.'**

73. The Second Respondent replied to the Claimant the following day, saying:

> **'Thank you for your email.**
>
> **Please can you provide me with a bit more information to help me understand your request.**
>
> **Please can you explain what the underlying condition is, and what is the rationale as to why you find night shifts to be detrimental to this condition. Please can you**

also explain why this adjustment is required for only those particular 9 days, so I can fully understand your request.'

74. The Claimant wrote back on 26 October 2022. By this time, she found it frustrating that she had provided medical and witness evidence to the Respondents for the purpose of the preliminary hearing on disability, and yet was being asked to explain what her underlying condition was again by the Second Respondent. She replied to the Second Respondent's queries as follows:

'1. As per your enquiries - "Underlying condition":

As previously advised, I am a person with a disability medical condition (Menorrhagia/Polycystic Ovary Syndrome (POS) Disease).

2. As per your enquiries - "detrimental":

From my personal experience, managing the symptoms of my disability are more problematic for me as a human being during the hours of the night.

3. As per your enquiries - "explain why this adjustment is required for only ... ":

For the avoidance of doubt: as per my understanding, the only Night duties currently allocated to me and that I have been advised of, by LUL, at this time, in regard to my duties are the said and previously referenced Night duties from 4/11/22 to week ending 12/11/22.

As a point of information: As a LUL employee and as a Train Operator I have not undertaken Night Duties, per my records, since 1995.'

75. We were told that the night tube had started running on the Claimant's line in 2019, and then paused during the pandemic. This, combined with the periods she was on sick leave due to her knee injury, meant that she had not been rostered to work night shifts before.

76. The Second Respondent replied to the Claimant on 27 October 2022, saying:

'Thanks for your email with clarification below.

I would require some medical evidence as to what affect the night shifts would have on your condition before I can decide on this matter. Please can you kindly supply this.

In these cases, I would also seek LUOH's expert medical opinion on how your medical condition would affect your job role.

If you wish me to refer you for this to take place please can you kindly fill in the attached consent form and return to the Trains Managers.'

77. She attached to this email a form for recording consent to any OH report produced being shared with the employee's manager. The Second Respondent believed that she should not refer the Claimant to OH unless the Claimant consented to attended. She also gave evidence that she believed advance consent from the Claimant to share the resulting report was a requirement in order to make an OH referral. The Tribunal considers this latter belief to have been a misunderstanding on the Second Respondent's part, but not one that made a material difference to the chain of events. The Claimant did not say to

the Second Respondent that she thought advance consent to share the report was unnecessary or indicate that she was willing to be referred.

78. On 30 October 2021, the Claimant wrote to the Second Respondent, *"Please be advised that I have previously provided to your employer all relevant medical information in regard to my disability".* She referred to the Tribunal disability judgment and explained that she had provided her medical records, a disability impact statement, and answers under cross-examination on the nature of her medical conditions. She suggested that in the circumstances, the Second Respondent's request for further information may constitute disability discrimination or victimisation. She asked the Respondent to confirm by 3 November 2021 whether the requested adjustment had been granted.

79. The Second Respondent replied on 3 November 2021:

'As requested I am replying to your reiterated request to have your duties altered under a reasonable adjustment.

As previously stated, in these cases, I would seek LUOH's expert medical opinion on how your medical condition would affect your job role.

If you wish me to refer you for this to take place please can you kindly fill in the attached consent form and return to the Trains Managers.'

80. On 4 November 2021, the Claimant presented herself for work at 7am but was not given any work to do as she was not on the roster. She continued to attend without work during daytime shifts for the remainder of the period to 12 November 2021. She did not work her allocated night shifts. The Second Respondent notified her by letters dated 4 and 7 November 2021 that she would be marked as absent without pay as she had chosen not to work her rostered shifts. The First Respondent did not pay her during this period.

81. The Tribunal accepts on the balance of probabilities that the Claimant's conditions of menorrhagia and PCOS were more difficult to manage, with more intense symptoms, during the night. The preliminary hearing on disability status did not focus on whether symptoms varied at different times of day. The Claimant said in her disability impact statement that on occasions her sleep was disturbed by her symptoms. In the disability status judgment, Employment Judge O'Brien found that her sleep was disturbed twice a month on average when her sanitary products failed to protect her sufficiently. The Claimant told Employment Judge Byrne at the preliminary hearing on 25 July 2023 that her symptoms were intense at night and that during night shifts she had to walk a mile between stations due to a lack of public transport, which was not conducive to proper management of her condition. She gave evidence to the same effect at this hearing and further indicated that she knew night shifts would be problematic because she experienced more difficulty managing her symptoms when she worked 'dead early' shifts starting from 4.45am.

82. The Second Respondent was aware that the Claimant suffered from menorrhagia and PCOS. She also must have understood from the correspondence detailed about that the Claimant was saying that the symptoms of these conditions were more problematic during the night. Therefore, the Second Respondent was alive to the possibility that the Claimant might find it more difficult to manage night shifts.

83. However, the Tribunal finds that the Second Respondent did all that could reasonably be expected to find out whether there was a medical reason why the Claimant needed to be rostered onto day shifts only, by asking the Claimant to explain the problem and suggesting an OH referral.

84. The Second Respondent stated in evidence, and we accept, that had the Claimant been willing to be referred to OH then the Second Respondent would have ensured that she was rostered on day shifts only until OH advice could be obtained. She did not take this approach absent the Claimant's agreement to an OH referral because she felt the Claimant was being uncooperative and did not think it would be equitable to grant the Claimant's shift preference (which would have involved another driver covering the night shifts) unless the Claimant provided evidence to show there was a medical reason why this was required.

Submissions

85. It is unnecessary to set out in full the parties' submissions but we have taken into account and considered carefully all that was said to us both orally and in writing. Some of the points raised in final submissions are detailed where relevant in the discussion section below. In summary:

    85.1. For the Respondents, Ms Ferber KC submitted that the Claimant's counsel had not put to the Respondents' witnesses that they had done anything which amounted to direct discrimination. In relation to indirect discrimination, she said that there was no evidence from which the Tribunal could conclude that a group disadvantage was established; in particular, the circumstances in which the Claimant dropped the bag with her personal radio and ran to the staff facilities were fact-specific and personal to her. On the discrimination arising from disability claim, she invited us to find that the Claimant had not established the necessary links in the chain of causation. She took the Tribunal to case law (detailed below) on the relevance of the Claimant's cooperation with the Respondent in assessing the reasonableness of proposed adjustments. She further submitted in relation to the victimisation claim that the Respondents' witnesses had explained their reasons for the acts in question, and they had nothing to do with the Claimant having instituted Tribunal proceedings. With regard to the health and safety detriment claim, she disputed that the Claimant could have believed herself to be in circumstances of immediate danger.

    85.2. For the Claimant, Mr O'Callaghan disagreed that he had failed to put the case on direct discrimination. He suggested that the Claimant would have received a better level of understanding had she been a man with a medical need to take an unrequested PRN, and a male employee making a similar complaint would have had it investigated under the Harassment and Bullying policy. He submitted that there was a group and individual disadvantage for the purposes of the indirect discrimination claim caused by the requirement to notify the controller prior to or during a PNR, where this would be impossible in an 'incapacitation situation', resulting in a staff error, with the risk of future disciplinary action. On knowledge of disability, he submitted that the Second Respondent's evidence was unsatisfactory in light of the information that the Claimant had provided in the course of

their correspondence. Her request for the Claimant to supply further medical information was unnecessary because the shift pattern adjustment the Claimant sought was straightforward and easy to achieve. In relation to victimisation, he said that after the Claimant brought Tribunal proceedings, she was subjected to detriments including by the Second Respondent deciding not to allow her to propose an alternative date for her second medical case conference or have her first choice of companion if her trade union representative were unavailable. With regard to the health and safety complaint, he invited us to conclude that the Claimant took reasonable steps to protect herself from additional hazards that she faced at night.

The law

86. The legal principles considered by the Tribunal are as follow.

Burden of proof

87. The burden of proof provisions in relation to the Claimant's claims brought under the Equality Act 2010 ('EqA') are contained in s.136(1)-(3) EqA:

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

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

88. The effect of these provisions was summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 at [18]:

'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.[1] He explained the two stages of the process required by the statute as follows:

(1) At the first stage the Claimant must prove "a *prima facie* case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):

"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.

57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"

(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

[1] *Madarassy v Nomura International plc* [2007] ICR 867, CA

"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."

He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'

89. In *Royal Mail Group v Efobi* [2021] ICR 1263, the Supreme Court confirmed that a claimant is required to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an act of unlawful discrimination. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense. Where it was said that an adverse inference ought to have been drawn from a particular matter, the first step had to be to identify the precise inference which allegedly should have been drawn. Even if the inference is drawn, the question then arises as to whether it would, without more, have enabled the Tribunal properly to conclude that the burden of proof had shifted to the employer.

90. The Court of Appeal in *Anya v University of Oxford* [2001] ICR 847 at [2, 9, 11] held that the Tribunal should avoid adopting a 'fragmentary approach' and should consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

91. In *Hewage v Grampian Health Board* [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

92. Ms Ferber KC drew our attention to *Dziedziak v Future Electronics Ltd* EAT 0271/11 in relation to the interplay between s.136 and s.19 EqA, discussed under the victimisation subheading below.

Direct discrimination

93. Section13(1) EqA provides:

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.

94. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical comparator; and secondly going on to consider whether that treatment is because of the protected characteristic, here disability or sex.

95. In this case, the Claimant relies on a hypothetical comparator. The hypothetical comparator in relation to disability is someone without the Claimant's disability. In relation to sex, the hypothetical comparator is a man. In either case, there must be no material differences in the circumstances of the hypothetical comparator and the Claimant (s.23(1) EqA).

96. The appellate courts have made clear that it is open to Tribunals to address both stages by considering a single question: the 'reason why' the employer did the act or acts alleged to be discriminatory. Was it on the prohibited ground or was it for some other reason? This approach does not require the construction of a hypothetical comparator: see, for example, the comments of Underhill J in *Martin v Devonshires Solicitors* [2011] ICR 352 at [30].

97. It is sufficient that the protected characteristic had a 'significant influence' on the decision to act in the manner complained of; it need not be the sole ground for the decision (*Nagarajan v London Regional Transport* [2000] 1 AC 501).

98. The question whether the alleged discriminator acted 'because of' a protected characteristic is a question as to their reasons for acting as they did; the test is subjective (*Nagarajan v London Regional Transport* [2000] 1 AC 501, per Lord Nicholls). Lord Nicholls considered the distinction between the 'reason why' question from the ordinary test of causation in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065 at [29]:

> **'Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach…The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'**

99. The Court of Appeal in *Coyne v Home Office* [2000] ICR 1443 makes clear that the employer will not be guilty of discrimination if an inadequate response to a grievance was demonstrably unrelated to the relevant protected characteristic of the Claimant.

100. In a case where an employee who raises a grievance about (say) sex discrimination which is then, for reasons unrelated to his or her gender, mishandled, the mishandling is not discriminatory simply because the grievance concerned discrimination. It is not a 'but for' test; the Tribunal must scrutinise the motivation of the alleged discriminator (*Dunn v Secretary of State for Justice* [2019] IRLR 298, per Underhill LJ at [44]).

Indirect discrimination

101. Section 19 EqA provides:

> **19 Indirect discrimination**
>
> **(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
>
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—**
>
> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

102. The Equality and Human Rights Commission *Code of Practice on Employment (2011)* ('the Code of Practice') provides that a provision, criterion or practice ('PCP') "*should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A PCP may also include decisions to do something in the future, such as a policy or criterion that has not yet been applied, as well as a one-off or discretionary decision*". In *Ishola v Transport for London* [2020] ICR 1204, Simler LJ held at [35-36] that,

'however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address…all three words [provision, criterion and practice] carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again.'

103. It is possible to claim that a claimant is put to disadvantage by more than one PCP, relating to more than one protected characteristic: *Ministry of Defence v DeBique* [2010] IRLR 471. In that case, the claimant was disadvantaged as a woman and as a person of Vincentian national origin. The EAT recognised at [165] that discrimination is "*often a multi-faceted experience*" which cannot "*always be sensibly compartmentalised into discrete categories*".

104. Ascertaining whether there is indirect discrimination involves a comparative exercise; looking across all the people to whom the PCP is applied, sometimes described as the pool for comparison (*Essop v Home Office* [2017] 1 WLR 1343 at [41]). The EHRC's statutory Code of Practice provides at para 41 that "*In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively*". The pool selected should suitably test the discrimination alleged (*Grundy v British Airways* [2008] IRLR 74, per Sedley LJ at [27]).

105. Establishing whether a PCP creates a group disadvantage can be done looking at a variety of sources. The traditional approach of ascertaining disparate impact by reference to statistical information about a comparator pool is not obligatory under the EqA, although it remains a helpful tool (*Chief Constable of West Yorkshire Police v Homer* [2012] UKSC 15; [2012] ICR 704). In *Dobson v North Cumbria Integrated Care NHS Foundation Trust* [2021] ICR 1699, Choudhury J discussed at [56] the ways in which a group disadvantage may be evidenced:

'In summary, when considering whether there is group disadvantage in a claim of indirect discrimination, tribunals should bear in mind that particular disadvantage can be established in one of several ways, including the following.

(a) There may be statistical or other tangible evidence of disadvantage. However, the absence of such evidence should not usually result in the claim of indirect discrimination (and of group disadvantage in particular) being rejected in limine;

(b) Group disadvantage may be inferred from the fact that there is a particular disadvantage in the individual case. Whether or not that is so will depend on the facts, including the nature of the PCP and the disadvantage faced. Clearly, it may be more difficult to extrapolate from the particular to the general in this way when the disadvantage to the individual is because of a unique or highly unusual set of circumstances that may not be the same as those with whom the protected characteristic is shared;

(c) The disadvantage may be inherent in the PCP in question; and/or

(d) The disadvantage may be established having regard to matters, such as the child care disparity, of which judicial notice should be taken. Once again, whether or not that is so will depend on the nature of the PCP and how it relates to the matter in respect of which judicial notice is to be taken.'

106. In relation to the protected characteristic of sex, the group disadvantage must be established by comparing women to whom the PCP applied with men. In relation to disability, the group disadvantage must be established by comparing those with the same disability as the claimant, with those who do not have the disability. In either case, the comparator group not sharing the protected characteristic must in other respects be in materially similar circumstances (s.23(1) EqA).

107. In *Pendleton v Derbyshire County Council* [2016] IRLR 580, Eady J held that there is no requirement for a specific threshold of disadvantage. The term is "*apt to cover any disadvantage*".

108. Under s.136 EqA, claimants have the burden of showing the existence of a PCP causing the group and individual disadvantage, before the burden shifts to the employer to prove justification: *Dziedziak v Future Electronics Ltd* UKEAT/0270/11/ZT at [42].

109. An employer can show that a PCP is justified if it represents "*an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition*" - per Lord Balcombe in *Hampson v Department of Education and Science* [1989] ICR 179, 191, CA.

110. Conduct or treatment cannot amount to both direct and indirect discrimination, and so direct and indirect discrimination are analysed as alternative claims, following Lady Hale's guidance in *R (E) v JFS Governing Body* [2010] 2 AC 728 at [56-57].

Discrimination arising from disability

111. Section 15 EqA provides that:

(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.

112. In *Pnaiser v NHS England* [2016] IRLR 170 at [31], Simler P summarised the proper approach to a s.15 EqA claim as follows:

(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... 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...

(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... the causal link between the something that causes unfavourable treatment and the disability may include more than one link...

(e) ... 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) ...Weerasinghe ... 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.

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

113. If the two-stage test is satisfied by the Claimant, the burden moves to the Respondent to show that the treatment is a proportionate means of achieving a legitimate aim. As with justification in an indirect discrimination claim, this requires the Tribunal to undertake a balancing exercise. In *City of York Council v Grosset* [2018] ICR 1492, the Court of Appeal held at [54] that "*the test under section 15(1)(b) EqA is an objective one, according to which the ET must make its own assessment*…"

Failure to make reasonable adjustments

114. Section 20 EqA provides, insofar as relevant:

(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.

…

115. Section 21 EqA further provides:

(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.

116. The Code of Practice at para 6.16 emphasises that the purpose of the comparison with persons who are not disabled is to determine whether the disadvantage arises because of the disability and that, unlike direct or indirect discrimination, there is no requirement to identify a comparator or comparator group whose circumstances are materially similar to the disabled person's.

117. In relation to the employer's actual or constructive knowledge of the employee's disability, and of the disadvantage, sch.8, Part 3, para 20(1)(b) EqA provides that:

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

…

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

118. As for knowledge of disability, if the employer knew, or could reasonably be expected to have known, that the Claimant had an impairment, it does not matter that it had no precise diagnosis. It is, however, a requirement that the employer should know (actually or constructively) that the Claimant had an impairment the adverse effects of which were both substantial and long-term (*Wilcox v Birmingham CAB Services Ltd* [2011] EqLR 810).

119. The correct approach for the Tribunal in determining a reasonable adjustments claim is set out in *Environment Agency v Rowan* [2008] ICR 218 at [27] (the reference to sections are to sections of the Disability Discrimination Act 1995 "DDA"):

'In our opinion an employment tribunal considering a claim that an employer has discriminated against an employee pursuant to section 3A(2) of the Act by failing to comply with the section 4A duty must identify: (a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer, (c) the identity of non-disabled comparators (where appropriate) and (d) the nature and extent of the substantial disadvantage

suffered by the claimant. ... Unless the employment tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.'

120. The burden is on the Claimant to show the PCP, to demonstrate substantial disadvantage, and to make out a *prima facie* case that there is some apparently reasonable adjustment which could have been made (and that, on the face of it, there has been a breach of the duty): *Project Management Institute v Latif* [2007] IRLR 579 at [45] and [54].

121. A substantial disadvantage is one that is "more than minor or trivial"; whether such existed is a question of fact to be ascertained objectively: paragraph 6.15 of the Code of Practice.

122. The reasonableness of an adjustment falls to be assessed objectively by the Tribunal: *Morse v Wiltshire County Council* [1998] IRLR 352. The focus is on practical outcomes: *per* Langstaff P in *Royal Bank of Scotland v Ashton* [2011] ICR 632 at para 24:

'The focus is upon the practical result of the measures which can be taken. It is not – and it is an error – for the focus to be upon the process of reasoning by which a possible adjustment was considered. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reason.'

123. Although the legal burden is on the employer to make adjustments, the courts have recognised that what is "reasonable" will often entail a level of cooperation from the employee.

123.1. In the EAT case of *Callagan v Glasgow City Council* [2001] IRLR 724, the claimant, who suffered from stress and depression, was dismissed for taking repeated absences from work. A claim that the employer ought to have made the reasonable adjustment of allowing part-time working failed. The tribunal found that the claimant had never asked for part-time work, although it might have been considered as part of a dialogue had the claimant cooperated with his employer. The EAT held that the employer was under no duty to raise it of its own motion.

123.2. In *Bishun v Hertfordshire Probation Service* UKEAT/0123/11/DA, the respondent informed the claimant how to apply to the Access to Work scheme for support with dyslexia. The claimant's submission, on appeal, that the respondent had a duty to monitor the situation and ensure that support was provided, failed. The EAT referred to the proposition as "*highly dubious*".

Victimisation

124. Section 27 Equality Act 2010 provides:

(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.

125. A "detriment" exists if a reasonable employee would or might take the view that the treatment was in all the circumstances to his or her disadvantage: *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at [34].

126. As with direct discrimination, the necessary causal link is established if the protected act has a significant influence on the decision-maker's detrimental act.

Detriment for taking appropriate steps to protect from circumstances of serious and imminent danger

127. Section 44 of the Employment Rights Act 1996 ('ERA') provides, insofar as is relevant, that:

(1A) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer done on the ground that—

…

(b) in circumstances of danger which the worker reasonably believed to be serious and imminent, he or she took (or proposed to take) appropriate steps to protect himself or herself or other persons from the danger.

128. In *Rodgers v Leeds Laser Cutting* [2023] ICR 356, the Court of Appeal considered the equivalent protection against dismissal on grounds of leaving the workplace to avoid serious and imminent danger, in the context of the Covid-19 pandemic. The Court held (at [21]) that the correct approach is for the Tribunal to ask itself:

128.1. whether the employee believed that there were circumstances of serious and imminent danger at the workplace;

128.2. if so, whether that belief was reasonable;

128.3. if so, could they have averted that danger;

128.4. if not, whether they left to the workplace (or, in this case, took appropriate protective steps) because of the (perceived) serious and imminent danger;

128.5. if so, whether that was the reason for the dismissal (or, in this case, the detriment).

129. In relation to detriment claims, it is sufficient that it was part of the reason, in a sense that the claimant having taking said appropriate steps materially influenced the employer's decision to subject them to a detriment: *Fecitt v NHS Manchester* [2012] IRLR 64 at [45].

Unauthorised deductions from wages

130. Part 2, Ss.13 to 27B ERA set out the statutory basis for a claim of unauthorised deduction from wages.

131. An employer shall not make a deduction from wages of a worker employed by him, which are properly payable to the worker, unless the deduction is required or authorised to be made: by virtue of a statutory provision; a relevant provision of the worker's contract; or the worker has previously signified in writing his agreement or consent to the making of the deduction. Any agreement or consent authorising the deduction from wages to be made must be entered into before the event giving rise to the deduction.

132. 'Wages' for the purposes of Part II ERA is widely defined. It includes any fee, bonus, commission, holiday pay or other emolument referable to employment, and to statutory sick pay. A non-payment of wages is a 'deduction from wages' for the purposes of s.13; *Delaney v Staples* [1991] IRLR 112.

Conclusions

133. The Tribunal's conclusions follow the structure of the list of issues save that the allegations are rearranged chronologically under each head of claim and the jurisdictional issues are dealt with last.

Direct sex and disability discrimination

134. The Tribunal has made the following factual findings about the acts alleged to have amounted to direct discrimination:

134.1. The First Respondent, and in particular Mr Harris, did not decline to seek relevant medical information concerning the Claimant regarding events of 4 December 2019, as referenced in the letter dated 21 January 2020. Mr Harris asked the Claimant about her medical conditions and took her lack of response to indicate that she did not wish him to pursue this line of inquiry (see paragraph 30 above).

134.2. The First Respondent, and in particular Mr Harris, did send the letter dated 21 January 2020 as set out in paragraph 32 above. That letter contained the sections relied upon by the Claimant for the purposes of her direct discrimination claim, namely:

134.2.1. the relevant content under the heading of "*review of your performance incident reports*";

134.2.2. the relevant content under the heading of "*Actions to prevent re-occurrence of errors*"; and

134.2.3. the recording of the events of 4 December 2019 as a "*staff error*".

134.3. The First Respondent, and in particular Mr Miles, did decline on 25 February 2020 to investigate the Claimant's internal complaint under the Harassment and Bullying police.[2] He referred the complaint to be investigated under the grievance process instead (see paragraph 39 above).

134.4. The Second Respondent did not decline to seek relevant medical information concerning the Claimant regarding the events of 4 December 2019, as referenced in her grievance outcome letter dated 4 December 2020. She asked the Claimant for relevant medical information and looked at the Claimant's P file. We have found that she could have asked more questions of the Claimant during the grievance meeting to explore whether there was a link between the Claimant's medical conditions and her ability to request a PNR in advance (see paragraphs 45 to 48 above).

134.5. The Second Respondent did not disregard the information provided by the Claimant regarding the impact of her medical condition in relation to the events of 4 December 2019, as referenced in the grievance outcome letter dated 4 December 2020. The text of the letter is excerpted at paragraph 50 above and shows that the Second Respondent did address the limited information she had been provided with about the Claimant's medical conditions.

134.6. The Second Respondent did record the events of 4 December 2019 as a "staff error" in the grievance outcome letter on 4 December 2020.[3]

134.7. The Second Respondent did decline to allocate the Claimant to shifts other than night duties during 4 to 10 November 2022 inclusive despite the Claimant making such a request (see paragraphs 79-80 above).

135. Following the structure of the list of issues, we are next asked to consider, in relation to each allegation found to have occurred:

135.1. Was the Claimant treated less favourably than a hypothetical male comparator in materially similar circumstances would have been treated? Was the reason for the treatment her sex?

[2] This allegation is drawn from the document containing further information from the Claimant dated 23 February 2033 and the full allegation is: "*The Respondent declining (25/2/20) to investigate the Claimant's internal complaint (dated 19/2/20) as per the Respondent's Harassment & Bullying (Discrimination) policy*."

[3] We presume that the wording "by application" in the list of issues on this point refers to the grievance outcome letter dated 4 December 2020.

135.2. Was the Claimant treated less favourably that a hypothetical comparator without her disability but in materially similar circumstances been treated? Was the reason for the treatment her disability?

136. However, in relation to acts where we are able to make a positive finding as the reason or reasons why they were done, we have not found it necessary in every instance to construct and apply a hypothetical comparator (*Martin v Devonshires Solicitors*).

137. Taking in turn each of the factual allegations which we have found to have occurred:

137.1. In relation to the content of the letter of 21 January 2020 from Mr Harris to the Claimant, we conclude that a male comparator, or a comparator without the Claimant's disability, in similar circumstances would have been treated in the same way as the Claimant. In particular, in relation to the section of the letter headed "*review of your performance incident reports*", we heard and accepted evidence that a review would be undertaken of similar issues on file from the previous two years in any case where an incident such as this was investigated. It was therefore standard practice for Mr Harris to warn the Claimant that the letter of advice would be placed on her file and could be subject to future review, as he did under the heading "*Actions to prevent re-occurrence of errors*". It was also usual under the First Respondent's usual practice to record an unrequested PNR as a staff error. We do not have any evidential basis to find Mr Harris wrote this letter, or included the content objected to by the Claimant, because of sex or disability.

137.2. In relation to Mr Miles declining to investigate the complaint under the Harassment and Bullying policy, we have made findings that his reasons for acting as he did were because he considered the Claimant's complaint to be weak on its face and because of a lack of time to dedicate to his accredited manager role (see paragraph 40 above). We do not find that his actions were influenced by the Claimant's sex or her disability. It follows that he would not have treated a man or a person without the Claimant's disability making a similar complaint any differently.

137.3. Insofar as we have found that the Second Respondent could have done more to investigate the link between the Claimant's medical conditions and her unrequested PNR by asking the Claimant more questions during the course of the grievance investigation, we have for completeness considered whether this could have constituted direct discrimination. We do not have any evidential basis to find that the Second Respondent would have asked more questions if the complainant had been a man or a person without the Claimant's disability (for example, a person whose unrequested PNR was linked to a medical condition not amounting to a disability). We have found that the Second Respondent considered it was sufficient to discharge her duty to investigate the Claimant's grievance by acting on the limited information the Claimant had volunteered (see paragraph 48 above). We conclude that the Second Respondent conducted her grievance investigation in the way she did without being influenced by the Claimant's sex or disability.

137.4. The Second Respondent did not record the events of 4 December 2019 as a "*staff error*" in her grievance outcome letter because of the Claimant's sex or her disability. We have heard no evidence that could support an inference that the Second Respondent would have treated a man or non-disabled comparator in similar circumstances any differently. We conclude that the reason why the Second Respondent acted as she did was because the incident satisfied the definition of a staff error under the First Respondent's normal procedures.

137.5. We have found that the reason why the Second Respondent declined to reallocate the Claimant's rostered night shifts was because she felt the Claimant was being uncooperative and wanted to obtain medical evidence supporting the need for shift reallocation (see paragraph 84 above). Her reasons were not linked the Claimant being a woman or a disabled person. We conclude that the Second Respondent would have treated anyone seeking a shift reallocation without providing further supportive evidence upon request in the same way.

Indirect sex and disability discrimination

138. The Respondents accept that the following PCPs were applied to the Claimant:

138.1. In relation to PNRs:

138.1.1. that "the Claimant must advise Control Staff prior to or during any "issues" to prevent unnecessary delays";

138.1.2. that "the Claimant's performance will continue to be monitored and any future staff errors may result in further corrective or disciplinary action being taken against the Claimant";

138.1.3. the PCP set out at Section 2 of Rule Book 6 (the procedure for making contact in the event of a PNR).

138.2. That Train Operators are required to perform night duties as allocated.

139. It does not appear to be disputed that the Respondents did or would also apply the PCPs to persons who do not share the Claimant's protected characteristic of sex and/or disability.

140. Following the structure of the list of issues, we are next required to consider whether any of those PCPs put, or would put, persons with whom the Claimant shares her sex and/or disability at a particular disadvantage, when compared with persons who do not share those characteristics? Considering each of the disadvantages alleged by the Claimant in turn:

140.1. Did the PCPs put women and / or people with PCOS and menorrhagia, at an increased risk of further corrective or disciplinary action being taken against them? We have not been shown any evidence to suggest that women Train Operators would be more likely to find it difficult to comply with the First Respondent's PNR rules than men would. Neither were we shown evidence from which we could conclude that people with PCOS and menorrhagia would find it more difficult to comply and thus be put at risk of disciplinary action. We can infer that this group may, like the

Claimant, need to access bathroom facilities urgently, but we have no basis for finding it would be difficult for them to contact the controller during a break (i.e. on the way back after using the facilities). This would accord with the requirement to make contact *"prior to or during"* the PNR (in the wording of the 21 January 2020 letter) or "*giving as much notice as possible*" (in the wording of Rule Book 6). We have not seen any evidence to support a conclusion that women, or people with the Claimant's disabilities, would as a group be put at a risk of disciplinary action by the requirement to perform night duties.

140.2. Did the PCPs put women and / or people with PCOS and menorrhagia, at an increased risk of adverse personal, physical, emotional and health impact on them, by reason of their medical condition, if the PCP delayed their access to bathroom facilities? We considered that the PNR rules did not have the effect of delaying access to bathroom facilities because in an urgent situation it would be permissible to access facilities first and then make contact with control on the way back to the cab, and still comply with the rules. Therefore, we concluded that there is no group disadvantage established, either for women or people with the Claimant's disabilities. Neither did we hear evidence from which we could conclude that night working would result in delayed access to bathroom facilities, either for women or people with the Claimant's disabilities.

140.3. The Tribunal considered that the two substantial disadvantages suggested by the Claimant and recorded in the list of issues related more naturally to the PCPs concerning the PNR rules rather than the PCP relating to night working. For completeness, we discussed whether we had evidence from which we could conclude that a requirement to work night shifts would put women or persons with the Claimant's disabilities to a group disadvantage. We considered that we had no evidential basis for reaching such conclusions.

141. Given that we have reached a conclusion there was no group disadvantage, it is not strictly necessary for the Tribunal to determine whether any of the PCPs did or would put the Claimant to the same disadvantages. However, for completeness we note that while we do accept there was a causal link between the Claimant's own symptoms of PCOS and menorrhagia and her ability to request a PNR in advance, had she kept her personal radio with her then she would have been able to contact the controller during her break and complied with the PNR rules. Even if she had called as soon as she returned to her cab and explained why she had just taken a break, it is likely that either the incident would have been resolved at the time, or the letter subsequently placed on her file would have recorded relevant mitigation. The Claimant's access to bathroom facilities was not delayed by the imposition of the PNR rules. We have accepted that the Claimant's symptoms were more intense at night (see paragraph 81 above) which would have put her at some disadvantage in working night shifts, albeit not the pleaded disadvantages.

142. As we have concluded there was no group disadvantage, there is also strictly no need to determine whether the PCPs amounted to a proportionate means of achieving a legitimate aim, but the Tribunal has given consideration to this question. The Respondents say the legitimate aims were: ensuring operational

efficiency and maintaining a reliable train service schedule; ensuring passenger safety and security; and maintaining effective communication and coordination. The Claimant does not dispute that the aims were legitimate but argues that the PCPs were not proportionate measures to take in order to achieve the aims. If necessary, the Tribunal would conclude that the First Respondent's PNR rules (encompassing the three PCPs at paragraph138.1 above) were proportionate means of achieving the stated aims. When running underground services, even short delays can affect hundreds of passengers and have a knock-on effect on other aspects of the service. It is proportionate to ask Train Operators to advise of delays as soon as possible, and/or before or during any issues that arise, and to monitor their performance in that regard. It is also generally a proportionate measure to require Train Operators to perform night duties as allocated. It would not be proportionate to apply the latter requirement without any flexibility according to medical need (as the Second Respondent indicated would be the case where an OH referral was made).

Discrimination arising from disability

143. It is not disputed that the Claimant's disability caused her to need to immediately seek bathroom facilities without delay; this was 'something arising' from her disability.

144. We go on to consider whether the Respondents treated the Claimant unfavourably by doing the following things?:-

    144.1. In relation to PNRs:

        144.1.1. requiring the Claimant to advise Control Staff prior to or during any "issues" to prevent unnecessary delays";

        144.1.2. requiring the Claimant's performance to continue to be monitored, so that any future staff errors may result in further corrective or disciplinary action being taken against the Claimant;

        144.1.3. requiring the Claimant to comply with Section 2 of Rule Book 6 (the procedure for making contact in the event of a PNR).

    144.2. Declining to allocate the Claimant to shifts other than night duties during 4 to 10 November 2022 inclusive despite the Claimant making such a request.

145. The allegations relating to PNRs mirror the pleaded PCPs in the indirect discrimination claim. The Respondents do not dispute that these requirements were applied to the Claimant. They do however dispute that the application of the requirements amounted to unfavourable treatment. The Tribunal is prepared to accept that these matters were unfavourable treatment of the Claimant in the sense that she felt disadvantaged by the application of the PNR rules and the letter of 21 January 2021 being placed on her file was an outcome she did not want.

146. The Respondents agree that the Second Respondent declined to reallocate the night shifts that the Claimant was rostered to work in November 2022. The Tribunal finds this also amounted to unfavourable treatment, as the Claimant did

not want to work night shifts, and as a result of her not working the rostered shifts she lost pay.

147. The next question is whether there was a causal link between the 'something arising' and the unfavourable treatment.

147.1. Did the Respondents require the Claimant to comply with the PNR rules and monitor her performance in this regard because she had a need to immediately seek bathroom facilities without delay? The Tribunal concludes this link is not established. The PNR rules were applied to everyone and were not applied to the Claimant because of anything she did. We considered a potential link between the 21 January 2020 letter (which included the wording "*your performance will continue to be monitored*") and the Claimant's PNR on 4 December 2018, which was initially triggered by her need to access bathroom facilities. However, the Tribunal concludes that the 21 January 2020 letter was issued because the Claimant had failed to make contact with control at all – i.e., on her way back from the bathroom or on her return to the cab – and this was something different from and not caused by the Claimant's initial need to access the bathroom.

147.2. Did the Second Respondent decline to reallocate the Claimant's night duties because of the Claimant's need to immediately seek bathroom facilities without delay? The Tribunal concludes there is no evidential basis whatsoever for finding that the Second Respondent's decision-making in this regard was influenced by the Claimant having an urgent need to seek bathroom facilities.

148. As the necessary causal link is not established it is not necessary for the Tribunal to determine when the Respondents had actual or constructive knowledge of the Claimant's disability. Had it been necessary, we would have found that by the time the night shift request was made the Second Respondent knew or ought to have known that the Claimant was disabled; that was the conclusion of Employment Judge O'Brien's judgment sent to the parties on 22 July 2022. However, at the earlier time when the 4 December 2019 incident was investigated, the Respondents did not have the same degree of knowledge. It was known that the Claimant had long-term conditions, PCOS and menorrhagia. However, the Respondents did not have sufficient information about the impacts of those conditions to know that they amounted to a disability.

149. As the Tribunal has not found that the treatment in question was done because of something arising from disability, it is again not necessary to determine whether the treatment was a proportionate means of achieving a legitimate aim. The Respondents say the legitimate aims were: ensuring operational efficiency and maintaining a reliable train service schedule; ensuring passenger safety and security; and maintaining effective communication and coordination. Had the question arisen, the Tribunal would have concluded that the application of the First Respondent's PNR rules was proportionate given the importance of minimising delays to underground train services. Had the refusal to reallocate night shifts been done because of something arising from disability, the Tribunal would not have found that to be justified in pursuance of the stated aims. It would have been possible to reallocate the Claimant's night shifts without significant adverse impact on the Respondent's legitimate aims, given the possibility of

arranging cover. However, as the treatment was not done because of anything arising from the Claimant's disability, it does not need to be so justified.

Failure to make reasonable adjustments

150. The Claimant relies on the same PCPs as in relation to indirect discrimination, set out at paragraph 138 above, namely:

150.1. In relation to PNRs:

150.1.1. that "the Claimant must advise Control Staff prior to or during any "issues" to prevent unnecessary delays";

150.1.2. that "the Claimant's performance will continue to be monitored and any future staff errors may result in further corrective or disciplinary action being taken against the Claimant";

150.1.3. the PCP set out at Section 2 of Rule Book 6 (the procedure for making contact in the event of a PNR).

150.2. That Train Operators are required to perform night duties as allocated.

151. The Respondents accept that these PCPs were applied.

152. The Tribunal must therefore consider whether any of the PCPs put, or would put, the Claimant at a substantial disadvantage in relation to her disability in comparison with persons who are not disabled. Taking in turn each of the disadvantages which the Claimant alleges were caused to her:

152.1. Did the PCPs put the Claimant at an increased risk of loss of wages being taken against her? The Tribunal does not consider that the rules in relation to PNRs put the Claimant to this risk. In relation to the requirement to work night shifts, the Claimant did lose wages as a result of refusing to work her rostered night shifts in November 2022. However, we conclude that the loss of wages was not caused by the application of the PCP but rather because there was a breakdown in communication between the Claimant and the Second Respondent. If the Claimant had provided a fuller explanation of why her medical conditions made it more difficult for her to work night shifts or had agreed to be referred to OH for that question to be addressed, she would not have been required to work night shifts and would not have lost wages for that November period (see paragraph 84 above).

152.2. Did the PCPs put the Claimant at an increased risk of corrective or disciplinary action being taken against her? We conclude that they did not. In relation to the PNR requirements, the Claimant was able to comply with the rules and avoid corrective or disciplinary action by keeping her personal radio with her in future and contacting the controller as promptly as possible following any urgent bathroom visits. In relation to night shifts, the Claimant was not subject to or warned of disciplinary or corrective action at any point.

152.3. Did the PCPs put the Claimant at an increased risk of adverse personal, physical, emotional and health impact, by reason of her medical

condition, if the PCP delayed her access to bathroom facilities? We do not consider that the Claimant was placed at such a disadvantage. She was able to use bathroom facilities without any delay so long as she notified the controller promptly as soon as she was able to do so afterwards. We did not have any evidence to show that working night shifts would delay access to bathroom facilities.

153. As the Tribunal has concluded that the PCPs did not put the Claimant to a comparative substantial disadvantage, the duty to take reasonable steps to avoid a disadvantage did not arise. The Claimant has not asked the Tribunal to address any specific suggested steps.

154. The question of the Respondents' knowledge does not arise either, but for completeness we note that the Tribunal would if necessary have drawn the conclusions on knowledge of disability discussed at paragraph 148 above. The Respondents could not have known of a substantial disadvantage given that the Tribunal has not found that there was any.

Victimisation

155. It is accepted that the Claimant did a protected act when she presented her first claim (3203332/2021) on 10 May 2021.

156. In relation to the alleged detriments, the Respondents do not dispute that the first act alleged occurred, namely that the Second Respondent declined to allocate the Claimant to shifts other than night duties during 4 to 10 November 2022 inclusive despite the Claimant making such a request. We accept that this amounted to a detriment to the Claimant.

157. We therefore go on to consider whether the detriment was done because of the protected act, i.e. did the Second Respondent decline to reallocate the Claimant's shifts because the Claimant had instituted Tribunal proceedings? The Tribunal has found that the Second Respondent's reasons for declining the Claimant's shift reallocation request were that she felt the Claimant was being uncooperative and did not think it would be equitable to grant the Claimant's shift preference (requiring another driver to provide cover) unless the Claimant agreed to an OH referral or provided evidence to show there was a medical reason why this was required (see paragraph 84 above). We conclude that there is no evidential basis for the Tribunal to infer that the Second Respondent's decision was influenced by the Claimant's Tribunal claim. We could not discern any change in the Second Respondent's tone or attitude towards the Claimant before and after the Claimant presented her first claim, or indeed any of her claims.

158. The Claimant's counsel confirmed during the hearing that the second and third alleged detriments contained in the list of issues both relate to the letter from the Second Respondent to the Claimant dated 9 June 2021, which described at paragraph 62 above. The Claimant says that in this letter the Respondents declined to recognise in writing: (1) her statutory right to propose an alternative date for a medical case conference; and (2) her statutory right to accompaniment at the said medical case conference by the Claimant's chosen trade union representative. The letter does say that the medical case conference would not be rearranged again, and that if the Claimant's chosen representative were not to be available, she would need to seek an alternative companion. On balance,

the Tribunal does not consider these impugned parts of the letter amounted to a detriment to the Claimant in the sense described in *Shamoon.* It was not objectively reasonable for the Claimant to view this letter as putting her to a disadvantage when the Respondents were simply trying to make progress in managing her sickness absence after a prolonged delay without a meeting. If was not in the Claimant's interests to remain off work indefinitely without any progress made in this regard.

159. Had the 9 June 2021 letter amounted to a detriment, the Tribunal would not have found that it was caused by the protected act either. The reason why the Second Respondent, in consultation with the Third Respondent, drafted the letter as she did was because of the delays in convening a medical case conference leading up to that point (see paragraph 63 above). The matter was unrelated to the Claimant's Tribunal claim.

Claim under section 10 Employment Relations Act 1999

160. This claim was pleaded as having occurred by the Respondent/(s) declining to recognise in writing the Claimant's statutory right to choose a companion to accompany her to a medical case conference and to propose an alternative date for the conference due to the non-availability of her chosen companion. In closing submissions, the Claimant's counsel conceded that this claim could not succeed because there is no statutory right to have these matters recognised in writing. We consider the concession was appropriately made and therefore need say nothing further about this claim.

Detriment for taking appropriate steps to protect from circumstances of serious and imminent danger

161. In November 2022, did the Claimant reasonably believe that circumstances of danger existed which she reasonably believed to be serious and imminent? The Tribunal concludes that she did not. We have heard evidence that the Claimant's medical conditions could cause her to urgently need to access bathroom facilities, which was no doubt uncomfortable and embarrassing. We know from the disability status judgment that she suffered from discomfort and fatigue. However, the Claimant has not given evidence to the effect that her ability to drive a train was impacted or that her driving a train at night would create circumstances of serious and imminent danger. We would have expected, if the Claimant did believe that to be the case, that she would have raised it during the period in October to November 2022 when she was pursuing her request for shift reallocation. This would have been vital to flag to the First Respondent given the safety critical nature of her role and would have been a powerful factor in support of her reallocation request. She did not do so.

162. By not attending work during rostered night duties, but instead presenting herself for daytime duties, did the Claimant take appropriate steps to protect herself and/or other persons from the danger? The Tribunal considers that there were other steps which it would have been reasonable for the Claimant to take before resorting to refusal to attend her rostered shifts. It would have been appropriate to first agree to an OH referral and provide a fuller explanation as to why night work in particular would cause her difficulties.

163. It is not disputed that the First Respondent did not pay the Claimant wages for the period 4 to 10 November 2022. Did the First Respondent deduct wages from the Claimant because she took appropriate steps to protect from circumstances of serious and imminent danger? We conclude that the reason why the Claimant's wages were withheld was because she did not attend at the times when she was rostered to work. The Claimant was told that this would be the consequence of non-attendance. The detriment was not done for an unlawful reason in breach of s.44 ERA.

Unauthorised deduction from wages

164. Counsel were in agreement that the outcome of the Claimant's claim for wages for the period 4 to 10 November 2022 would depend on our conclusions in relation to her contention that the decision not to reallocate her night shifts was unlawful. Having found that that decision was lawful, this claim falls away. The Claimant's wages during the period 4 to 10 November 2022 were not properly payable because she had not attended her rostered shifts.

Jurisdiction

165. Counsel agreed that the question for the Tribunal in relation to jurisdiction was whether any matter occurring on or before 26 November 2020 (more than 3 months before the Claimant notified ACAS) had been brought in time, either because it formed part of an act of an act which continued after that date, or because time should be extended to consider it. As the Tribunal has not upheld the Claimant's claims on their merits, including claims relating to matters which occurred prior to the primary time limit, there is no need to determine the jurisdictional issue.

Employment Judge Barrett
Dated: 29 November 2023

Appendix: Agreed List of Issues

IN THE LONDON EAST

EMPLOYMENT TRIBUNAL

CASE NUMBERS: 3203332/2021,
3204826/2021 & 3200592/2023

ROSEMARY CHARLES

Claimant

and

(1) LONDON UNDERGROUND LIMITED

(2) ALEXANDRA COOK

(3) ANNE-MARIE COSTIGAN

Respondents

LIST OF ISSUES

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1. JURISDICTION

1.1 Which, if any, of the Claimant's victimisation and/or discrimination complaints are *prima facie* out of time, having regard to sections 123(1)(a) and 123(3) Equality Act 2010 ("EqA")?

1.2 If any of the claims for victimisation and/or discrimination are prima facie out of time can the Claimant show that there was *"conduct extending over a period"* which is to be treated as occurring at the end of that period under section 123(3) EqA?

1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.4 If not, does the tribunal nevertheless have jurisdiction to determine the complaint(s) on the basis that they were presented within such other period that the tribunal considers to be just and equitable pursuant to section 123(1)(b) EqA? The Tribunal will decide:

1.4.1 If applicable, why were the complaints not made to the Tribunal in time?

1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. DISABILITY

2.1 The Respondent was deemed to be a disabled person within the meaning of section 6 Equality Act 2010 by virtue of her menorrhaggia and Polycystic Ovary Syndrome, as per the Judgment of Employment Judge O'Brien dated 20 April 2022.

3. DIRECT DISCRIMINATION (SEX AND DISABILITY) – SECTION 13 EQUALITY ACT 2010

3.1 Did the Respondent do the following alleged acts/did the following acts occur:

3.1.1 decline to allocate the Claimant to shifts other than night duties during 4 to 10 November 2022 inclusive despite the Claimant making such a request;

3.1.2 decline on 25 February 2020 to investigate the Claimant's internal complaint;

3.1.3 the relevant content of the letter dated 21 January 2020 under the heading of "review of your performance incident reports";

3.1.4 the relevant content of the letter dated 21 January 2020, under the heading "Actions to prevent re-occurrence of errors";

3.1.5 decline to seek relevant medical information concerning the Claimant regarding the Train Operations (Train 14) events of 4 December 2019, as referenced in R1's letter dated 21 January 2020;

3.1.6 decline to seek relevant medical information concerning the Claimant regarding the Train Operations (Train 14) events of 4 December 2019, as referenced in R1's letter dated 4 December 2020;

3.1.7 disregard the information provided by the Claimant regarding the impact of her medical condition in regard to Train 14 events of 4 December 2019, as referenced in the First Respondent's letter dated 4 December 2020;

3.1.8 record the events of 4 December 2019 as a "staff error", as per the First Respondent's letter dated 21 January 2020;

3.1.9 record the events of 4 December 2019 as a "staff error" by application 4 December 2020.

3.2 If so, in each case, was the act done because of the Claimant's sex and/or disability?

3.3 The Claimant relies on a hypothetical comparator.

4. INDIRECT DISCRIMINATION (SEX AND DISABILITY) – SECTION 19 EQUALITY ACT 2010

4.1 Did the Respondent apply any of the following PCPs (Provision, Criterion or Practice):

4.1.1 that Train Operators are required to perform night duties as allocated;

4.1.2 that "the Claimant must advise Control Staff prior to or during any "issues" to prevent unnecessary delays";

4.1.3 that "the Claimant's performance will continue to be monitored and any future staff errors may result in further corrective or disciplinary action being taken against the Claimant";

4.1.4 the PCP set out at Section 2 of Rule Book 6 (the procedure for making contact in the event of a PNR (physical needs relief)).

4.2 If so, did the Respondents apply (or would it apply) any of those PCPs to persons who do not share the Claimant's protected characteristic of sex and/or disability?

4.3 Did any of those PCPs put, or would they put, persons with whom the Claimant shares her sex and/or disability at a particular disadvantage, when compared with persons who do not share those characteristics? The Claimant alleges the disadvantage(s) to be:

4.3.1 an increased risk of further corrective or disciplinary action being taken against them;

4.3.2 an increased risk of adverse personal, physical, emotional and health impact on them, by reason of their medical condition, if the PCP delayed their access to bathroom facilities.

4.4 Did any of those PCPs put, or would it put, the Claimant at that same disadvantage?

4.5 If so, was the application of any such PCP a proportionate means of achieving a legitimate aim?

The Respondent relies on legitimate aims including:

(i) *ensuring operational efficiency and maintaining a reliable train service schedule;*

(ii) *ensuring passenger safety and security;*

(iii) *maintaining effective communication and coordination.*

5. <u>DISCRIMINATION ARISING FROM DISABILITY – SECTION 15 EQUALITY ACT 2010</u>

5.1 Did the Respondent treat the Claimant unfavourably by doing the following:

5.1.1 declining to allocate the Claimant to shifts other than night duties during 4 to 10 November 2022 inclusive despite the Claimant making such a request;

5.1.2 requiring the Claimant to advise Control Staff prior to or during any "issues" to prevent unnecessary delays";

5.1.3 requiring the Claimant's performance to continue to be monitored, so that any future staff errors may result in further corrective or disciplinary action being taken against the Claimant;

5.1.4 requiring the Claimant to comply with Section 2 of Rule Book 6 (the procedure for making contact in the event of a PNR ("physical needs relief")?

5.2 Did those acts occur as alleged or at all? If so, was that because of something arising in consequence of the Claimant's disability? The Claimant alleges that the "something arising" was the need for her to immediately seek bathroom facilities without delay.

5.3 **Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was disabled at the material times – i.e. when the treatment occurred?**

5.4 **Can the Respondent show that its treatment was a proportionate means of achieving a legitimate aim?**

The Respondent relies on legitimate aims including:

(i) *ensuring operational efficiency and maintaining a reliable train service schedule;*

(ii) *ensuring passenger safety and security;*

(iii) *maintaining effective communication and coordination.*

6. <u>FAILURE TO MAKE REASONABLE ADJUSTMENTS – SECTIONS 20 & 21 EQUALITY ACT 2010</u>

6.1 Did the Respondent operate the following PCPs:

6.1.1 the Claimant/Train Operator is required to perform night duties as allocated;

6.1.2 that "the Claimant must advise Control Staff prior to or during any "issues" to prevent unnecessary delays";

6.1.3 that "the Claimant's performance will continue to be monitored and any future staff errors may result in further corrective or disciplinary action being taken against the Claimant";

6.1.4 the PCP set out at Section 2 of Rule Book 6 (the procedure for making contact in the event of a PNR (physical needs relief)?

6.2 Did the PCP relied on at put, or would it put, the Claimant at a substantial disadvantage in relation to her disability in comparison with persons who are not disabled. The Claimant alleges the disadvantage to be:

6.2.1 An increased risk of loss of wages being taken against her;

6.2.2 An increased risk of (further) corrective or disciplinary action being taken against her;

6.2.3 an increased risk of adverse personal, physical, emotional and health impact on the Claimant, by reason of her medical condition, if the PCP delayed her access to bathroom facilities;

6.3 If so, are there steps which it would have been reasonable for the Respondents to take to avoid the disadvantage(s)?

6.4 Did the Respondent know, or could it reasonably be expected to know:

6.4.1 that the Claimant was disabled; and

6.4.2 that PCPs above were likely to place the Claimant at risk of the substantial disadvantages alleged?

7. <u>VICTIMISATION – SECTION 27 EQUALITY ACT 2010</u>

7.1 **The Claimant did the protected act (not disputed) of bringing claim number 3203332/2021.**

7.2 **Did the Respondent do the following acts:**

7.2.1 Decline to allocate the Claimant to shifts other than night duties during 4 to 10 November 2022 inclusive despite the Claimant making such a request;

7.2.2 Decline to recognise in writing the Claimant's statutory right to propose an alternative date for a medical case conference?

7.2.3 Decline to recognise in writing the Claimant's statutory right to accompaniment at the said medical case conference by the Claimant's chosen trade union representative?

7.3 **If so, does each such act amount to a detriment?**

7.4 **If so, did the Respondent do each act because the Claimant had done the protected act?**

8. CLAIM UNDER SECTION 10 EMPLOYMENT RELATIONS ACT 1999

8.1 **Did the Respondent do the following:**

8.1.1 **Decline to recognise in writing the Claimant's right to propose an alternative date for a medical care conference due to non-availability of chosen trade union companion/workplace colleague?**

8.1.2 **Decline to recognise in writing the Claimant's statutory right to trade union companion/workplace colleague accompaniment at the said medical care conference by the Claimant's chosen trade union representative?**

8.2 **If so, did the above amount to a failure to comply with the provisions of Sections 10(2A) and 10(4) Employment Relations Act 1999.**

The Respondent asserts that Section 10 Employment Relations Act 1999 does not afford an employee a right to be informed in writing by their employer about the right to be accompanied or about the opportunity to propose an alternative date if their companion is not available. It simply requires the employer to comply with that right if it is exercised.

9. DETRIMENT FOR RAISING HEALTH AND SAFETY CONCERNS CONTRARY TO – SECTION 44(1A)(b) EMPLOYMENT RIGHTS ACT 1996

9.1 **Did the Claimant reasonably believe that circumstances of danger existed which she reasonably believed to be serious and imminent?** ***The Claimant avers that***

the circumstances of danger relate to the fact that safety critical incidents are more likely to occur during night duties and she is more likely to suffer the adverse effects of her disability at night time.

9.2 **Did the Claimant take steps to protect herself from the danger?** ***The Claimant avers that she turned u work only for early and late duties and did not attend work during night duties.***

9.3 Did the Respondent deduct wages from the Claimant between 4 November 2022 and 10 November 2022?

9.4 If so, did the Respondent deduct wages from the Claimant because she took steps to protect herself from the danger described at 9.1?

10. <u>UNLAWFUL DEDUCTION FROM WAGES</u>

10.1 **Did the Respondent deduct wages from the Claimant between 4 November 2022 and 10 November 2022?**

10.2 **Did the failure to pay the Claimant the sums claimed amount to an unlawful deduction or was it authorised by a statutory provision, relevant written contractual provision, or agreed to in writing by the Claimant in advance or was it an exempt deduction?**

The Respondent denies that the sums claimed by the Claimant were deduced as they were not properly payable.