EMPLOYMENT TRIBUNALS

Claimant: Mrs Charlotte Ferizolli

Respondent: London Underground Limited

Heard at: Watford Employment Tribunal **On:** 11- 15 December 2023

Before: Employment Judge Young
Non Legal Members: Mrs G Bhatt
Mr P Miller

Representation
Claimant: Litigant in person
Respondent: Ms Catherine Urquhart (Counsel)

JUDGMENT by Employment Judge Young having been sent to the parties on 25 January 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant is employed as a Train Operator. The Respondent is a Not for Profit Company that runs the London underground system. The Claimant applied for a role with the Respondent in 2017, however, was not offered a role until November 2019. The Claimant's employment as a Night Time Tube Train Operator started on 15 November 2019. The Claimant contacted ACAS on 20 May 2021. The ACAS early conciliation certificate was issued on 1 July 2019 and the Claimant presented her ET1 claim form on 7 July 2019 whilst still employed by the Respondent.

Issues & Claims

2. The Claimant brings the following claims. Direct discrimination on the grounds of sex, disability and race, indirect discrimination on the grounds of disability, harassment related to sex and disability, discrimination arising from disability and reasonable adjustments.

3. The issues were agreed at the preliminary hearing on 22 April & 1 June 2022 by Employment Judge Douse. The agreed issues between the parties which the Employment Tribunal have to determine are as follows:

4. The issues:

Time limits / limitation issues

4.1 Were all of the Claimant's complaints presented within the time limits set out in [sections 123(1)(a) & (b) of the Equality Act 2010 ("EqA")?

4.2 Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a "just and equitable" basis; when the treatment complained about occurred; etc.

Disability

4.3 Was the Claimant a disabled person in accordance with the Equality Act 2010 ("EqA") at all relevant times because of the following condition (s):?

4.3.1 Dyslexia,
4.3.2 Autism,
4.3.3 Depression,
4.3.4 Anxiety

Section 13, Equality Act 2010: direct discrimination because of disability

4.4 Has /the Respondent subjected the Claimant to the following treatment:

4.4.1 Delayed the start of her full-time contract in/around May/June 2021

4.5 Was that treatment "less favourable treatment," i.e., did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The Claimant relies on the following comparators - 'Waz' and/or hypothetical comparators.

4.6 If so, was this because of the Claimant's disability and/or because of the protected characteristic of disability more generally?

Section 13, Equality Act 2010: direct discrimination because of sex

4.7 Has /the Respondent subjected the Claimant to the following treatment:

4.7.1 A male worker at the Northumberland Park depot kicking her train in May 2020, when ~~she made a mistake~~ putting the train into the depot

4.8 Was that treatment "less favourable treatment," i.e., did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The Claimant relies on hypothetical comparators.

4.9 If so, was this because of the Claimant's sex and/or because of the protected characteristic of sex more generally?

Section 13, Equality Act 2010: direct discrimination because of race

4.10 Has /the Respondent subjected the Claimant to the following treatment:

4.10.1 A black male worker at the Northumberland Park depot, in May 2020, accusing her of getting him mixed up with another black male worker

4.11 Was that treatment "less favourable treatment," i.e., did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The Claimant relies on hypothetical comparators.

4.12 If so, was this because of the Claimant's race and/or because of the protected characteristic of race more generally?

Section 15, Equality Act 2010: discrimination arising from disability

4.13 Did the following thing(s) arise in consequence of the Claimant's disability:

4.13.1 Taking the medication 'Sertraline'

4.14 Did the Respondent treat the Claimant unfavourably as follows:

4.14.1 In April 2021, her manager 'Sara' instructing that she was unable to drive, thereby ending her secondment?

4.15 Did the Respondent treat the Claimant unfavourably in any of those ways?

4.16 If so, has the Respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

4.17 Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability?

Section 19, Equality Act 2010: indirect disability discrimination

4.18 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP(s):

4.18.1 Having no formal method to raise queries, in particular between February 2020 and November 2021, about unexpected work events, instead directing informal learning through colleagues in the canteen

4.19 Did the Respondent apply the PCP(s) to the Claimant at any relevant time?

4.20 Did the Respondent apply (or would the Respondent have applied) the PCP(s) to persons with whom the Claimant does not share the characteristic?

4.21 Did the PCP(s) put persons with whom the Claimant shares the characteristic, at one or more particular disadvantages when compared with persons with whom the Claimant does not share the characteristic, in that:

4.21.1 She found it difficult work/learn within the informal setting

4.22 Did the PCP(s) put the Claimant at that/those disadvantage(s) at any relevant time?

4.23 If so, has the Respondent shown the PCP(s) to be a proportionate means of achieving a legitimate aim?

Sections 20 & 21 Equality Act 2010: Reasonable adjustments

4.24 Did the Respondent not know and could it not reasonably have been expected to know the Claimant was a disabled person?

4.25 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP(s):

4.25.1 Requiring initial training assessments in December 2019 to be completed within a set time

4.25.2 Having an inflexible format for initial practical training in January/February 2020

4.25.3 Not having a 'Manoeuvre booklet' at the time of the initial practical training in January/February 2020

4.25.4 Requiring staff to know/recognise all immediate night tube colleagues in February 2020

4.25.5 Requiring secondment hours in February 2021 to be completed as driving hours

4.25.6 Requiring two thirds of a duty to be comprised of journeys between Brixton and Walthamstow, and one third staff shuttles

4.26 Did any such PCP put the Claimant at a substantial disadvantage in relation
to a relevant matter in comparison with persons who are not disabled at any relevant time, in that:

4.26.1 She could not process information at the same speed
4.26.2 She could not process information in the same way
4.26.3 She was prevented from completing driving hours at that time
4.26.4 The start to her driving was delayed as she would not within 10 minutes of a toilet (as recommended by her medical professionals) on the Walthamstow to Brixton routes

4.27 If so, did the Respondent know or could it reasonably have been expected to know the Claimant was likely to be placed at any such disadvantage?

4.28 If so, were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? The burden of proof does not lie on the Claimant; however, it is helpful to know what steps the Claimant alleges should have been taken and they are identified as follows:

4.28.1 Allowing additional time to complete the initial training assessments
4.28.2 Providing pre-reading ahead of the initial practical training
4.28.3 Creating and providing a 'Manoeuvre booklet' before or during the initial practical training
4.28.4 Providing a 'Defective in service' before or during the initial practical training
4.28.5 Providing a photo board with names and/or name badges
4.28.6 Transferring secondment hours to customer service hours
4.28.7 Allowing the whole duty to be comprised of staff shuttles

4.29 If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?

Section 26, Equality Act 2010: harassment related to sex

4.30 Did the Respondent engage in conduct as follows:

4.30.1 A driver (name unknown) saying to the Claimant "Sit down woman," on 21 February 2021 at the Walthamstow step-back office

4.30.2 A male worker at the Northumberland Park depot making comments about the Claimant's shorts including "put them away" from May 2020 onwards

4.30.3 In September 2021 at the Northumberland depot, a trainer 'Muj' told the Claimant that women love their child more than a father, because they give birth through pain, in response to her saying "learning hurts me".

4.31 If so was that conduct unwanted?

4.32 If so, did it relate to the protected characteristic of sex?

4.33 Did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant's dignity

or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Section 26, Equality Act 2010: harassment related to disability

4.34 Did the Respondent engage in conduct as follows:

4.34.1 A Duty Reliability Manager (name unknown) telling the Claimant on 21 February 2021, that when DRMs see her name they try to avoid her

4.34.2 During refresher training at the Northumberland Park depot, in June/July 2021, the trainer 'Muj' made comments including "I can't say anything because you might come back and say I said wood, when instead it was metal."

4.35 If so was that conduct unwanted?

4.36 If so, did it relate to the protected characteristic of disability?

4.37 Did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Section 19, Equality Act 2010: Indirect Sex Discrimination

4.38 A PCP is a provision, criterion or practice. Did the Respondent have the following PCPs:

4.38.1 not investigating a matter unless there was more than one complaint about it.

4.39 Did the Respondent apply the PCP to the Claimant at any relevant time?

4.40 Did the Respondent apply (or would the Respondent have applied) the PCPs to persons with whom the Claimant does not share the characteristics?

4.41 did the PCPS put persons with whom the Claimant shared the characteristics, at one or more particular disadvantages when compared with persons with whom the Claimant does not share that characteristic, in that:

4.41.1 her complaint about the cold temperature in the female portacabin was less likely to be investigated.

Hearing

5. The hearing was held over 5 days at Watford Employment Tribunal. The documents were checked at the start of the hearing. The Tribunal had the following documents: Agreed bundle of 480 pages, an Opening note from Ms Urquhart on behalf of the Respondent. Witness statements from Ms Sara Henderson (Train Operations Manager), Mr Nick Dent (Director of Customer Operations), Mr Ibe (Head of Line Operations for the Victoria and

Bakerloo Lines) from the Respondent. The Claimant provided a witness statement however the statement did not contain evidence of the Claimant's claim and so the Claimant's further and better particulars at page 34-46 of the agreed bundle was added as a supplemental witness statement with the Respondent's agreement.

6. We heard sworn evidence from the Claimant, Ms Henderson and Mr Dent. Mr Ibe did not attend and as such we did not attach weight to his statement.

7. The Claimant represented herself and the Respondent was represented by Ms Catherine Urquhart of counsel. The Claimant asked to be referred to by her maiden name of Ms Gearing, which we did.

8. When determining the issues in the case on day 1, Monday 11 December 2023, the Claimant explained that she was not saying that she made a mistake in respect of issue 4.7. The Respondent accepted that this was the position. We therefore crossed out the reference to the Claimant having made a mistake. During cross examination of the Claimant on day 2 of the hearing, the Claimant withdrew issue 4.30.2 A male worker at the Northumberland Park depot making comments about the Claimant's shorts including "put them away" from May 2020 onwards.

9. Only Ms Urquhart provided written submissions. Ms Urquhart's oral submissions went over her written submissions and mentioned the fact that the Claimant raised a number of allegations for the first time in her evidence which put the Respondent as some disadvantage. The Claimant said that she did not have any submissions to make, and that everything was said and done. She was handing over her case to the Tribunal to make their conclusions. We considered the Respondent's written & oral submissions and what the Claimant had to say.

Findings of Fact

10. We carefully considered all the evidence including the oral evidence and the documentary evidence to which we were referred. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence and considered relevant. The Tribunal's findings are made on a balance of probabilities. All reference to page numbers in square brackets are a reference to the page numbers in the agreed bundle.

11. In 2017 the Claimant applied for a role at the Respondent. As part of that process the Claimant had to pass the Respondent's requirements regarding fitness to operate a train. The Claimant said that she provided her full medical history to the Respondent as part of that process and was interviewed by Dr Kutyreva, the Respondent's Occupational Health advisor on 3 occasions. The Claimant said she never received the Occupational Health Unit ('OHU') reports on her. The Tribunal notes that the Claimant never asked for the OHU reports at any time. The Respondent said that it did not have the Claimant's full

medical history or any medical history about the Claimant as part of the recruitment process because there was a 2 ½ year gap from the Claimant providing the information and the Claimant being recruited. The Tribunal accepts the Respondent's explanation as to why they do not have any prior medical information on the Claimant. The Claimant raised a grievance later in her employment and appealed the outcome of that grievance. In the Claimant's appeal document [299-308] she mentioned her full medical history [299]. However, the Claimant did not mention the OHU interviews in the document. The Claimant said that she did mention to the Respondent throughout the grievance process that she had a disability of depression & anxiety, however there was no record of this anywhere in the documents provided to the Employment Tribunal. We find that the Claimant did not tell the Respondent about her depression & anxiety as part of the recruitment process. The Claimant did not tell the Respondent about her depression at any time before issuing her ET1 claim form.

12. By letter dated 8 November 2019, the Claimant was offered the role of Night Time Train operator working part time 16 hours per week on Friday and Saturdays on the Victoria Line. The Claimant's employment in this role commenced on 15 November 2019. The Claimant made an application for the role of working out of Seven Sisters depot and Brixton depot.

13. On 16 November 2019, the Claimant completed a 'Learning Needs Briefing Trainee Sign Off' document [138] and was encouraged to speak to the trainer on a 1:1 basis to discuss what support she and her other colleagues might need. The Claimant noted in the Learning Needs Briefing Trainee Sign Off' document that she had dyslexia requiring extra time, handout and notes/rote learning. She also added that she had ASD and social impairment/fatigue and that she 'won't always get jokes/tenuous links [138].

14. However, the box on the learning needs form that referred to "agreed adjustments" was left empty. The form was signed off by the Claimant and the trainer on 16 November 2019, Allen Foster. The Claimant said that a copy of the document was not given to her to keep with her.

15. On 18 November 2019, the Claimant started her night time train operator training. The Claimant's training was made up of both theoretical training and practical training. In respect of the theoretical training the Claimant said she received the requisite pre reading. However, the Claimant said in respect of the practical training she did not receive any pre reading. The Claimant said that she should have been provided with a manoeuvre booklet before the initial practical training. The Claimant also said she should have received a defective in service before or during initial practical training. However, when it was put to the Claimant that she agreed that she was ready to take the final assessment without these documents, the Claimant admitted this and said that it was because the assessment was practical, there was no need for pre reading because the only way to learn to drive was to drive. We find that the Claimant was given the necessary pre reading to ensure that she was ready and able to take her assessments and the Claimant did not provide any evidence of any disadvantage to her.

16. The Claimant said that although she set out the reasonable adjustments she

needed to be implemented, they were not applied to her. In respect of the reasonable adjustments concerning training requirements, the Claimant qualified as a Train Operator on 10 February 2020 when she completed the road test. The Claimant passed with distinction. We find that in respect of any reasonable adjustments not carried out by the Respondent, the Respondent had to have decided not to carry out those reasonable adjustments by 10 February 2020. However, the Claimant did not agree any reasonable adjustments with the Respondent. The Respondent said that it was during the final assessments, the Claimant became upset as she said her needs had not been considered. The trainer L. Radley confirmed that at the start of week 3 of the Claimant's training (2 December 2019) that the Claimant had verbally mentioned that she had an issue with reading and writing. Mr Radley offered the Claimant some help and assistance via a discussion, but also advised that he needed the Claimant to identify exactly what her needs were formally, so they (Skills Development) could make a plan on how to assist the Claimant. The Claimant did not mention any reasonable adjustments until 9 December 2019. The Claimant was asked with her colleagues taking the assessment if she had any issues before the assessment started, however, the Claimant did not mention anything until the end of the assessment when the Claimant requested more time at that point.

17. The trainer and Skills Development Business Partner (Les Moody), paused the Claimant's assessment, offered the Claimant 1:1 support. The Claimant was allowed to resume her assessment with an extra added 25% time as part of a reasonable adjustment due to the nature of her learning needs. The Claimant completed and passed all training at Ashfield House, without any re-sits and scored the following: Fire – 100%; Track – 96%; R&P – 89%. In the Claimant's timeline which formed part of her grievance, the Claimant accepted that she asked for more time at the end of the assessment, and she was given it [290] We find that the Claimant was given an extra 25 % of time for her exam, the Claimant did not ask for any more time. The Respondent knew of the Claimant's need for extra time from the Claimant's training needs document and the Claimant was provided with the extra time when it was required.

18. In March 2020 due to lockdown, the night tube was suspended. On 15 May 2020 the Claimant was offered a secondment to day time duties 3 days a week [141-142] for 12 weeks from 17 May- 8 August 2020. On 25 June 2020, the Claimant wrote to her line manager Mr Thomas Naughton that she was fatigued and could not work 5 days a week [211-212] and whether she could reduce her hours to 4 days, as she was still required to work Friday and Saturday nights although not through the night as required by night tube duty.

19. On a day in May 2020, the Claimant said that a black male kicked her train. The Claimant's evidence was that the male showed a thumbs up. The reason for the male's thumbs up was to hitch a ride. The Claimant did not know that was what the thumbs up meant, so she returned the thumbs up. The male driver kicked the train to get the Claimant's attention to stop the train so that he could hitch a lift. The Claimant accepted that this could be the explanation for the thumbs up. We find that the reason why the male driver kicked the train was because he wanted to catch the Claimant's attention to stop the train so that he could get a lift. The Claimant did not mention this incident in her grievance [216] or grievance timeline. The Claimant was a member of the

union at this time and gave evidence that she was asked by the union to tell them if she had any problems but then she said she hit a brick wall. The Claimant did leave the union in July 2020. We find that the Claimant did not mention the matter because she was not upset by the matter.

20. The Claimant said that she was unable to identify the male by name because he would not give her his name. The Claimant said she remembered him, because he was the person who always called out her shorts. The Claimant said that he responded that she was confusing him with another black male driver. The Claimant said that he was gaslighting her and only said this to her because she was white. The Claimant said both incidents regarding the kicking of the train and the gaslighting happened on the same day, which we accept.

21. The Claimant said that there was a requirement to recognise all immediate night tube colleagues in February 2020, but accepted in evidence that she was being sensitive in respect of this issue and that it did not have anything to do with any of her disabilities. Ms Henderson gave evidence she also struggled to remember the name of colleagues and there was no requirement for staff to recognise all immediate night tube colleagues in February 2020. We find that there was no requirement to recognise any staff and none of the Claimant's disabilities had any effect on her ability to recognise staff.

22. On 4 July 2020, [145] the Claimant emailed Mr Naughton who was her line manager at that time to request that there be consistent communications from Duty Reliability Managers ('DRMs'). Mr Naughton responded the same day, commending the Claimant on her suggestion and agreeing to pass on the Claimant's suggestions. Mr Naughton also suggested that the Claimant could speak to some of the Train Operations Manager team to help build the Claimant's confidence and gave pointers of where the Claimant could find information to help her. We find that Mr Naughton did not ignore the Claimant's queries and provided a formal method for the Claimant to raise queries, between February 2020 and December 2020 about unexpected work events. Mr Naughton did not direct the Claimant to learn informally through colleagues in the canteen.

23. The Claimant raised a grievance on 11 July 2020 about requesting her secondment be extended by 4 weeks to compensate for the lost day per week that the Claimant had off as a reasonable adjustment [287].

24. On 19 July 2020, the Claimant was offered a further extension on her secondment for the same number of hours of 36 which amounted to 4 days [149-150]. The extension lasted 9 August until 31 October 2020.

25. Following the Claimant's complaint about fatigue, the Claimant was referred to Occupational Health ('OH') and spoke to Dr Kutyreva on 23 July 2020. At that appointment, the Claimant told Dr Kutyreva that she had no problems with sleeping, mood or concentration. [153]

26. Mr Naughton having considered OH advice, changed the Claimant's secondment terms to 2 days a week.

27. On 9 October 2020, the Claimant was offered a further extension on the

secondment until 23 January 2021, which required her to work 36 hours [160-162]

28. Mr Naughton left the Respondent in December 2020 and Ms Henderson took over the Claimant's line management.

29. The Claimant's secondment contract renewed on 15 January 2021 for 12 weeks from 23 January-17 April 2021 [165-167]. This was a voluntary arrangement; the Claimant was not obliged to take up the contract, the Claimant signed the contract on 16 January 2021. It was a term of the secondment contract that *"The secondment may be ended prior to the stated end date, by the Employee or Substantive Manager, for reasons including but not limited to the following: ….. • Employee unable to fulfil the terms of the secondment for any reason."* [166]

30. On 23 January 2021, the Claimant sent Ms Henderson an email [168] in which she complained that feedback was only available when something went wrong, that learning information was available but was not shared with those in relevant operational positions. The focus of the Claimant's concerns was around how the lack of learning affected customers, and that prevention was better than cure. The Claimant wanted formal and consistent feedback in real time. The Claimant also attached a photo to her email that she said was "*the reality faced within the current night tube service"* [169]. The photo attached was explained by the Claimant as her trying to sleep on the floor of one of the depots when carrying out night tube duty [220]. The Claimant said in evidence that she was happy with how Ms Henderson resolved this email. She said that she and Ms Henderson worked over a period of time to resolve this issue and that she was taken seriously at a certain point before November 2021 as the Respondent understood how she worked so she received the support she was looking for. We accept Ms Henderson's evidence that the issues that the Claimant raised were to do with the Claimant's lack of confidence as a new Train Operator. The Claimant accepted in evidence that she did not actually have any difficulties but would have liked to have done things better. We find that Ms Henderson provided the Claimant with formal methods to raise her queries between January 2021- November 2021. We find that all the issues that the Claimant raised were to do with the Claimant's lack of confidence and were dealt with by Ms Henderson. The Claimant did not identify any issues that she raised that were not dealt with by Ms Henderson.

31. On 27 January 2021, Ms Henderson was advised by George Garnish, Trains Manager at Seven Sisters, that the Claimant had submitted a memo to the desk advising that she might not be able to work that weekend *"owing to the sedentary nature of the shifts which are causing avoidable health implications"* [172]. The Claimant attended her GP the following day on 28 January 2021 and obtained a fit note which said that the Claimant would be fit for amended duties if *"…avoid night shifts and sedentary shifts to aid with recovery of physical and mental symptoms".* The fit note stated that the Claimant would be off work from 28 January until 24 February 2021. [173]

32. Following receipt of the Claimant's memo and fit note [173], Ms Henderson held a case conference with the Claimant on 2 February 2021 [182-184]. At the case conference, the Claimant raised for the first time that she found the

conditions in the depot to be too cold and that it was making her ill [175]. Ms Henderson said there had been no reported issue of it being too cold. The Claimant said that she caught hypothermia in September 2020. However, when the Claimant gave evidence she said that the reference to hypothermia in September was a mistake and that it was only January 2021 she experienced hypothermia. However, when putting that to Ms Henderson the Claimant accepted that she was mistaken. The Claimant said in evidence that she was told by Ms Henderson that in respect of health and safety complaints, there needed to be more than one complaint for it to be investigated. Ms Henderson denied telling the Claimant this. We accept Ms Henderson's evidence on this point. Ms Henderson said that in response to the Claimant's complaint about the cold in the portacabin she discussed the issue with the Claimant in the case conference and told the Claimant that there was heating in the Depots. She explained there was a switch to activate the heating which goes off after a certain amount of time, so that empty spaces aren't being heated unnecessarily. The Claimant explained in the case conference that the heating would go off when she fell asleep, and it would then get cold. The Claimant was told that she shouldn't be sleeping on the job, and that she was paid to be at work. Mr Dent confirmed that this was the case. In any event once OH approved the Claimant's suggestion of using a sleeping bag, Ms Henderson agreed to this solution.

33. We find that the Claimant made one complaint about being cold in the portacabin on 2 February 2020 and this was investigated and dealt with by Ms Henderson.

34. The Claimant also in the case conference said that there were issues with her training, and she did not feel that sufficient information was shared with her following operational incidents. The Claimant mentioned that she historically had mental health issues which is why she left her previous role to find something less stressful. The Claimant said that the reason why the night tube duties were more sedentary than day duties was because during day duties there was more structure, and the Claimant was able to change ends at the end of the line. Ms Henderson did not accept the Claimant's explanation as to why she could do day duties but not night duties. Alternatives were discussed for example the Claimant not to carry out her night tube duty but return the trains to their stable as her duty the first thing the next morning compromising of her shift. Ms Henderson considered that this option was not operationally feasible. It was not practical for the Claimant to leave her shift during down time and then come back later as she could be prevented from returning to work and this would delay the trains. The Claimant proposed in evidence for the first time that she could have stabled the train the night before and someone else return the train to service the following morning and that would have been a reasonable adjustment. Ms Henderson gave evidence that the same number of Train Operators were needed for the number of trains stabled the night before and in the morning otherwise a Train Operator was not being used efficiently as a Train Operator.

35. We accept Ms Henderson's evidence that every time she sent the Claimant the case conference letter in the email with the letter attached she said to the Claimant if the Claimant had any issues or wanted to amend the record of the meeting she should let her know.

36. At this time, the Claimant said that she was not off sick, but was fit to work with amended duties. We find that the Claimant was off sick as she had a sick note which said she was not fit for night time duty due to hypothermia and joint pains [173]. The Claimant said that she did not know if she was being paid for the period of 27 January-28 February 2021. Ms Henderson said that the Claimant was paid full pay for both her night tube hours and reduced secondment hours of 3 days as previously agreed by Mr Naughton even though she was not working those hours. We accept Ms Henderson's evidence on this point.

37. As agreed in the meeting on 2 February 2021, the Claimant was referred to OH to identify any reasonable adjustments to allow the Claimant to continue in her contractual role of Night Tube Train Operator.

38. By letter dated 14 February 2021 [185- 187], the Claimant was invited to attend the second case conference. The second case conference took place on 3 March 2021.

39. The Claimant said on 21 February 2021 a number of incidents took place. Firstly, the Claimant said that she was diligently trying to find my train for pick up only to be told by a male driver to "Sit down woman." The Claimant said in her further and better particulars that she did not know the driver's name. Furthermore, the Claimant could not provide any explanation as to why she remembered that the matter took place on 21 February 2021. The Claimant's evidence was that 21 February 2021 was memorable for her because the shorthand was written as 21/02/21.

40. We find that the incident did not happen, the Claimant would have mentioned it in her 12 January 2022 email if it happened as she said it happened as it would have been an example of misogynistic behaviour.

41. Secondly the Claimant said on the same day 21 February 2021 that an unknown Duty Reliability Manager told the Claimant on 21 February 2021, that when DRMs see her name they try to avoid her. The Claimant said that the reason why the DRM said it to her was related to her autism. The Claimant was unable to name the DRM. However, in the grievance appeal the Claimant mentioned the incident but said that it happened in August/ September 2021 [306]. We find that there was no reason why the Claimant would not be able to identify the DRM if what she says happened did indeed happen. We find the Claimant's evidence unreliable on this point because of the large difference in the dates relied upon.

42. By letter dated 24 February 2021, Ms Henderson confirmed that the Claimant's secondment duties would be suspended [187] from 28 February 2021. By email dated 25 February 2021, the Claimant challenged this suspension arguing that her secondment should not be suspended before she saw OH and the second case conference took place. The Claimant said that she expected to recover in full of her hypothermia in order to carry out her night tube duties. [188] Ms Henderson explained that the Claimant's secondment driving duties were dependent on the Claimant's contractual night time role, without the night time role there could be no secondment. Ms Henderson's view was that the secondment hours during the day time were more sedentary

than the night time duty as at least during the down time the Claimant could move around more. Whilst the secondment hours were the Claimant being contained in the cab of the train where there was little room to move around. If the Claimant was signed off night time duty because of its sedentary nature, then it was not possible that the Claimant could be fit for secondment driving duty which was more sedentary in nature. The Claimant disagreed and said that secondment driving duty was more active than night time duty and was not sedentary, however the Tribunal did not find the Claimant's explanation credible. We find that the secondment duty was sedentary in nature. We also find that if the Claimant was not fit for sedentary duties then she could not do her night time role or her secondment role as both included sedentary duties and we accept Ms Henderson's position on this point as entirely reasonable and accurate. We find that the reason why Ms Henderson prevented the Claimant from doing driving duties under her secondment was because she was not fit for sedentary work due to her need to recover from hypothermia and joint pains as recommended by the Claimant's GP.

43. The Claimant attended a OH appointment on 26 February 2021. Dr Kutyreva reported on 26 February 2021 that the Claimant's hypothermia needed to be investigated with her GP as it may not be hypothermia. That the Claimant was having bowel problems and that those were being investigated [189-191]. Dr Kutyreva advised that the Claimant was fit to carry out sedentary and night tube duty as long as here was adjustments allowing the Claimant easy access to a toilet to deal with the Claimant's bowel issues with waits for the toilet no longer than 15 minutes. Dr Kutyreva did not make a reference to the Claimant's depression or anxiety but did recommend SSRIs in respect of the Claimant's bowel problems, with the caveat that the Claimant would not be permitted to carry out Train Operator work for a period of 6 weeks whilst taking SSRIs and there are no side effects. The Claimant accepted in evidence that it was her bowel condition that caused the restrictions preventing her from driving. She said that the bowel condition was because of unmanaged mental health issues" and "depression and anxiety which goes hand in hand with IBS.

44. The Claimant attended the second case conference on 3 March 2021 [192-193]. On attending the second case conference, the Claimant said that she felt better and could attend her night duties with a sleeping bag to deal with the cold. Ms Henderson said that once OH had signed off on this solution then she would permit the Claimant to return to night time duty. The Claimant told Ms Henderson that her bowel condition could be caused by stress. Ms Henderson explained that it was not possible to put the Claimant back on driving duty where there was no guarantee that the Claimant would have access to a toilet within 15 mins. The Claimant was offered station duty as alternative duties. In evidence Ms Henderson said that she would never put anyone with a condition that required regular access to toilet on driving duty and that was why she sent the Claimant the 24 February 2021 letter suspending the Claimant's secondment. At the time, the Claimant did not want station duty as she was concerned about meeting former colleagues. However, Ms Henderson pointed out that the Claimant had previously applied for station duty. Ms Henderson agreed to contact HR to seek advice as to whether station duty would be appropriate alternative duties for the Claimant. Ms Henderson informed the Claimant that she had spoken to the employee relations partner in HR and that the Claimant would commence station duty at Victoria Station. The Claimant

was paid her contractual salary of 16 hours during the period she carried out station duty. We find that from 26 February-8 June 2021 the Claimant was prevented from driving duty because the Respondent could not guarantee easy access to toilets within 10-15 minutes as a reasonable adjustment and the Claimant could not driver a train without this adjustment.

45. The Claimant started taking sertraline (an SSRI) on 5 March 2021. The Respondent's procedures state *"Station Staff taking a particular type of antidepressant medication (Selective Serotonin Re-uptake Inhibitors) may be able to resume their full duties after 6 weeks with OH advice."* [108]. Whilst the procedure referred to station staff, we accept Ms Henderson's evidence that this policy equally applied to Train Operator staff for safety critical reasons. The Claimant would not be permitted to work on trains for at least 6 weeks whilst side effects of sertraline if any were observed [108]. We accept Ms Henderson's evidence that the Claimant's role was a safety critical one [198] and the Claimant was permitted to take up full time driving from 13 June 2021 once she had been cleared fit to drive by OH.

46. We find that the reason why the Claimant did not drive the trains from 28 January to 24 February 2020 was because she was signed off because of hypothermia and joint pains and unable to carryout night time duty and sedentary duties. The Claimant's secondment term was due to end on 17 April 2021 and did so. Ms Henderson explained that the Claimant's secondment was not renewed because she was not fit to carry out her contractual role on 17 April because the Respondent could not put the Claimant on trains to drive as it could not guarantee that she had easy access to a toilet. Mr Dent explained that the suggestions that the Claimant had put forward which included carrying out a third of her role as a staff shuttle driver, full time work as staff shuttle driver, using physical needs relief ('PNR') in order to take toilet breaks when needed were not workable. Mr Dent said that driving shuttles only is not a standalone role, staff shuttles are incorporated into other drivers' roles and it would not be enough work for a standalone role nor could it be arranged that way. They are a small part of the driver's role and supplemental to the role. The primary role of a Train Operator is to drive trains for customers. For the first time the Claimant mentioned that she thought that she should have been allowed to work only shuttling staff to and from stations as a reasonable adjustment in her further and better particulars document point 2.8.1 [41]. Mr Dent gave evidence that the Claimant mentioned this in the appeal however there is no note of this in the appeal. We find that it was not mentioned until November 2021 by which time the Claimant was working in a full time role and there was no need to make the adjustment at that point. Staff shuttle runs could not have stood as a full time role as there was not enough to work and it could have been arranged as a stand-alone role.

47. The other option mentioned by the Claimant of PNR related to physical needs relief. Ms Henderson said that PNR and was used only in emergencies and in the 3 years she had worked on the Victoria line she had no recollection of it being used. It was not something that could be used regularly as it would cause delay. There weren't toilets on every platform, and it would take 3-4 minutes to use staff toilets. Mr Dent said there was no policy on PNR, it would not be reasonable and therefore not a reasonable adjustment and it was not in the interests of customers. We find that the PNR was not a reasonable option as

it would have resulted in unreasonable delay to trains because the Claimant would not have been able to use a toilet in less than 3 or 4 minutes which would have backed up a number of trains. It could not be used on a regular basis. The Claimant mentioned plan b but did not say what that plan b included. We find that "plan b" was not reasonable as there was no evidence as to what it was.

48. On 27 May 2021, the Claimant was able to attend OH with Dr Kutyreva. On the same day, Dr Kutyreva produced a OH report dated 27 May 2021 [468-470]. The OH report stated that the Claimant was fit to carry out Train Operator duties. The Claimant had been stable for 6 weeks. Dr Kutyreva stated in the report that *"Charlotte has subsequently been working on stations on alternative duties and has started taking SSRI medication to treat the flare ups"* [468] We find that the Respondent understood the Claimant to be taking SSRI medication because of her bowel condition.

49. In Dr Kutyreva's OH report dated 27 May 2021 [468] the Claimant confirmed that she no longer had any issues with her sleep and had not taken any Zopiclone since March 2021 when she took it for one week. Dr Kutyreva said that the Claimant's *"bowel condition has remarkably improved*" and that it was no longer a barrier to Train Operator work [468]. In evidence, the Claimant said that she was dealing with her bowel condition and managing it. She did not give any evidence of any further flare ups, accidents, or incidents that she experienced after the report. Dr Kutyreva clarified in the report that the Claimant did not need any reasonable adjustments except in relation to the Claimant's dyslexia. [469]

50. Ms Henderson said that once she had the OH report on 8 June 2021 that determined that the Claimant was now fit to drive and her bowel condition had cleared up, it took a few days to schedule the Claimant back to driving duties. The Claimant started driving again on 13 June 2021 and her full time contract was implemented. We accept Ms Henderson's evidence; we find it was reasonable to have a few days of delay before the Claimant started driving trains again under the full time contract that had been offered on 10 May 2021.

51. The Claimant said that as a result of the termination of her secondment she suffered a financial detriment. The Claimant calculates that the highest pay she received for the hours worked on the secondment are the financial detriment experienced when the secondment ended.

52. By letter dated 7 May 2021 the Claimant was invited to apply for a full time role [192-197]. The letter invited the Claimant to indicate whether she agreed to a grade consolidation that would result in a full time role. The letter also said *"If you are not available to work, then it will take effect on a date to be confirmed once you become available. If you wish to change grade but would be unable to do so on 16th May 2021 due to personal circumstances such as other work commitments or caring arrangements that you need to change, please discuss this with your manager."* [193]

53. On 10 May 2021, Ms Henderson told the Claimant that she could not progress the Claimant's application because she was not currently fit for full time duty. The starting date for the full time role was 16 May 2021. The reason why the

Claimant's application for a full time Train Operator role was delayed was because the Claimant had not been signed off as well enough to do her nighttime role without reasonable adjustments of easy access to toilets and so Ms Henderson's evidence was that she could not sign the Claimant as fit to start a driving role.

54. The Claimant said that the start of her full time contract should not have been delayed. The Claimant gave evidence that Waz another Train Operator started his full time contract a year before she did even though he applied in the same recruitment drive.

55. We accept Ms Henderson's evidence that Waseem was Waz to whom the Claimant was referring, was a Train Operator who was made permanent and full-time over a year before the Claimant. Ms Henderson's evidence was that recruitment offers were made on the basis of scoring. Thus, the higher you score the higher upon of the offer list you are. Waz must have scored higher than the Claimant to get a role before she did. This meant Waz was a longer serving employee than the Claimant and so would be ahead of the Claimant in the queue for vacancies due to the Respondent's policy of prioritising length of service in respect of the allocation of vacancies for full time roles of this nature. The Claimant did not provide any evidence to contradict Ms Henderson's evidence, which was based upon Ms Henderson's experience with the Respondent. We found Ms Henderson to be an honest witness and credible on this point, we therefore accept Ms Henderson's evidence.

56. By email dated 20 May 2021 [252], the Claimant submitted her grievance [216]. On 23 June 2021, the Claimant attended a grievance hearing with Mr Ibe, Head of Line Operations for the Bakerloo & Victoria Lines. At the grievance meeting the Claimant did not mention any alternatives or reasonable adjustments that should be made for her to return to driving. [274-281]

57. The Claimant appealed the outcome of the grievance by letter dated 11 November 2021. The Claimant attended the appeal meeting on 8 December 2021 [314-318]. The Claimant's appeal was heard by Mr Dent, Director of Customer Relations. Mr Dent did not uphold the Claimant's grievance by letter 11 February 2022. [321- 324]

58. On 23 June 2020, the Claimant's GP reported "*You had an issue at work in 1st May and then noticed a dip in your mood since. You are more tearful recently. You have felt like this since 2009 intermittently, you have had CBT in the past. You have taken citalopram for up to 6 months says no benefit. No DSH/SI"* [465]

59. On 24 June 2020, the Claimant reported to her GP she didn't "feel you need to start on one [SSRIs] anyway. The GP reported that the Claimant said she was "feeling more positive already as have decided to go part time which is a relief for [her] [she].. getting more sleep" [464]

60. On 26 September 2020, the Claimant was diagnosed with hypothermia [464] and in January 2021 [173].

61. On 28 January 2021, the Claimant told her GP that she had a history of anxiety

and depression. The Claimant said her mood was worsened by work and her condition, but felt it was not any worse than usual and *"dips for a few days sometimes, but nothing I am not used to and can manage easily".*[462]

62. At the GP on 5 March 2021, the GP diagnosed generalised anxiety disorder and prescribed SSRIs, sertraline. The Claimant said that she had a history of dyslexia panic attacks and was emotional. The Claimant described anxiety as affecting sleep since October 2020. [461]

63. On 1 April 2021, the Claimant reported to her GP "*fleeting thoughts of DHS/suicide"*, [460] but also said she would not act on her thoughts. The Claimant revealed that she had contact with her friends. The Claimant said this was when she had CBT counselling [242].

64. On 3 April 2021, the Claimant told her GP that she knew "this is a flash/short term crisis" [459]. On 26 April 2021, the Claimant reported depression and anxiety with panic attacks to her GP. The GP said their impression was *"mixed anxiety and depressive disorder."* The Claimant had been having CBT privately and was experiencing insomnia and so was prescribed a short course of Zopiclone by the GP [460].

65. On 25 June 2021, the Claimant reported to her GP that she was still not sleeping and waking up early. The GP suggested sleep hygiene habits and off the counter sleep remedies. The GP did not prescribe any sleep medication [458]. The GP did mention that the Claimant had *"Occasional thoughts of suicide and self-harm Currently in therapy to help resolve this."* [458].

66. In her email dated 11 May 2021 the Claimant said, *"Although suicide is a daily pervasive thought for me, I fortunately am in remission for that not let any policy or person(s), representative of company, circumvent me from a meaningful existence and from helping others."* [207]

67. At the case conference on 3 June 2021 [267-269], the Claimant was asked what reasonable adjustments she would like to be made. The Claimant said that she felt having a mentor and a dedicated point of contact would be helpful. She had in mind that this should be someone to whom she could speak after an incident to go through the detail with them. Ms Henderson made arrangements to implement this proposal and told the Claimant to leave her number with a Trains Manager so that they could call her back. The Claimant also had access to Instructor Operators and to Ms Henderson if she wanted to raise anything.

68. Dr Kutyreva also mentions in the report that *"it would appear that her relationship with TfL is also the cause of some stress and anxiety*" in reference to the Claimant. She also records *"Charlotte has been dealing with Anxiety issues and bowel problems"* [468] and *"she was commenced on Sertraline to support both her conditions - the anxiety and the bowel issues."* [468]

69. In December 2021 [397] the Claimant told her GP *"You would like a repeat prescription of sertraline you are taking 50mg OD, hoping to come off in March you are getting on well with this and wish to continue you are not having any*

s.e/ negative effects of the medication you have noticed it has helped your panic attacks you are also getting hypnotherapy you have no suicidal thoughts/acts you have no self-harming thoughts/act."

70. The Claimant said that she did not say she was hoping to come off the sertraline in December 2021 but that the GP said that she should come off after a year. We find that there is no record of this in the Claimant's GP notes which we would expect if the GP did say this to the Claimant. We find the Claimant's explanation not credible, and we find that the Claimant did say she was getting on well and wanted to come off the sertraline as she did not need it anymore as she was not experiencing depressive episodes.

71. In March 2022, the Claimant was still taking sertraline [396] and in April 2022 the Claimant became pregnant [395] which was why she was then keen to come off Sertraline.

72. The Claimant's GP records refer to the Claimant's diagnosis regarding anxiety and or depression as anxiety and depression disorder on 23/06/20 [414] generalised anxiety disorder on 05/03/21 [461], depressive disorder on 01/04/21 [460] and mixed anxiety disorder on 26/04/21 [459]. The Claimant's disability student's allowance form also refers to a diagnosis of Mixed anxiety and depressive disorder diagnosed 26 January 2018, history of generalized anxiety since 2017 [364]. However, this form was completed on 6 September 2021. We find that the form does not say what the Claimant's condition was between February 2021- July 2021 except to say that the Claimant was having private counselling in April 2021. The Claimant's Disabled Students' Allowances Needs Assessment Report [366] relies upon evidence from May 2019 [369]. We find that the report does not provide evidence that covers the period of February 2021- July 2021.

73. The Claimant did not mention any impacts on her day to day activities except her sleep and bowel condition to her GP in the records. The Claimant admitted in evidence that everyone has sleepless nights. The Claimant's sleeplessness was attributed to a number of things i.e., the Claimant's bunion [407 & 439], abdominal abnormality [411] possibly sertraline [404] and anxiety [461]. The Claimant provided no evidence as to how her insomnia impacted her day to day life. The only example the Claimant gave of her sleep being affected was when she was told that her secondment would end on 28 February 2021. The Claimant was reported to be sleeping better on 26 April 2021 [402]. The GP recorded *"Depression, and anxiety, with panic attacking on going treatment Feeling better after she managed to sleep well more recently - wakes up at 0630 or so which is better than before".* [402] On 25 June 2021, the Claimant's GP records that the Claimant said that she was *"still not sleeping, waking up early …. You are waking up at around 4am Try to get into bed around 10-11pm, drifts off to sleep within the hour"* [400].

74. The Claimant's evidence was that her bowel condition increased in respect of accidents, however, the GP notes record that on 21 October 2020 [407] the Claimant said that the bowel problems were increasing in February 2020 [416]. However, there was no diagnosis that it was related to the Claimant's anxiety. The Claimant did not give any time period of when it increased or dates of any incidents. The Claimant admitted that there was no reference to depression &

anxiety in her learning needs document and that she did not tell the Respondent about her depression & anxiety when she started work because it was a new start. We find the Claimant did not mention depression & anxiety to her employer because she was not experiencing any depression & anxiety symptoms at the start of her employment.

75. On 1-2 June 2021, the Claimant attended refresher training with Mujahid Khokhar ('Muj') and Jennifer Lebrun who were the trainers on the course prior to resuming her train operating duties [262-266]. The Claimant said that on the first day of the training the trainers did not know anything about her disabilities and that she had to tell them. The Claimant said she found this distressing. The Claimant said that Muj said to her "I can't say anything because you might come back and say I said wood, when instead it was metal." The next day the Claimant said it was better and the trainers made the appropriate adjustments. The Claimant mentioned the incident in the appeal meeting, which records that the Claimant said the IOP who is Muj "*became almost obstructive by saying if he was to teach me wood, I would come back in a month's time and say it had been metal*." [277] This was not the same as what the Claimant alleges in her evidence of what Muj said to her. Furthermore, in the appeal meeting the Claimant said "I am not trying to blame them" for the comment. It is notable that the following day the Claimant had a case conference with Ms Henderson and did not mention the incident at all. Muj and Jennifer gave contemporaneous accounts of what happened in the training on 2 June 2021 [262-263] and 7 June 2021 [265-266], neither mentioned the alleged comment. We find that Muj did not say to the Claimant "I can't say anything because you might come back and say I said wood, when instead it was metal."

76. The Claimant was aware of her employment rights and gave evidence that she did not find out about the time limits until she contacted ACAS in May 2021. The Claimant was a member of a trade union in 2020 but left the trade union in July 2020. The Claimant explained that the union would ask her about her problems, but she said that she felt she was facing a brick wall. However, the Claimant admitted that she did not investigate any time limits. She said that the reason she did not bring a claim at the time was because it would mean going it alone.

The Law

Time limits

77. Section 123, Equality Act 2010 ('EqA') contains the provision on time limits applicable to discrimination claims, it states:

> *"(1) [Subject to [[section 140B]]] proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
> *(b) such other period as the employment tribunal thinks just and equitable [……]*
>
> *(3) For the purposes of this section—*

(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

78. Section 140B EqA states:

"(1) This section applies where a time limit is set by section 123(1)(a) or 129(3) or (4).

….

(2) In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and
(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section

(3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.
(4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section."

79. When exercising their discretion to allow out-of-time claims to proceed, Tribunals may also have regard to the checklist contained in Section 33 of the Limitation Act 1980 (as adapted by the Employment Appeal Tribunal ('EAT') in British Coal Corporation v Keeble and ors [1997] IRLR 336.

80. Keeble takes the Section 33 factors listed as: considering the prejudice that each party would suffer if the claim were allowed or not, and to have regard to all the circumstances of the case — in particular, (a). the length of, and reasons for, the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued as cooperated with any requests for information; (d) the promptness with

which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the Claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

81. In Department of Constitutional Affairs v Jones [2008] IRLR 128, the Court of Appeal ('CA') emphasised that these factors are a 'valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases, and tribunals do not need to consider all the factors in each and every case.

82. Although a Tribunal is not obliged to go through every factor in the Keeble list, a Tribunal will make an error of law if a significant factor is left out of account: London Borough of Southwark v Afolabi [2003] ICR 800, CA.

83. A Tribunal considering whether it is just and equitable to extend time is liable to err if it focuses solely on whether the Claimant ought to have submitted his or her claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the Respondent on the one hand and to the Claimant on the other.

84. In the more recent decision of Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, the Court of Appeal warned tribunals not to take the Keeble factors as the starting point for the Tribunal's approach to the just & equitable extension. The best approach for a Tribunal in exercising the discretion is to assess all the factors in the particular case that it considers relevant including in particular the length of and the reasons for the delay.

85. The Court of Appeal decision of Kingston upon Hull City Council v Matuszowicz 2009 ICR 1170, CA provides guidance as to when time runs in relation to the omission of an act, as is the case in most reasonable adjustment cases. The Court of Appeal said, in claims where there was no deliberate failure to comply with the section 20 Equality Act 2010 duty and the omission was due to lack of diligence or competence or any reason other than conscious refusal, the employer is to be treated as having decided upon the omission either when the employer does something inconsistent with doing the omitted act or the Tribunal are required to consider what period the employer might have reasonably been expected to have do the omitted act if it was going to be done.

Disability

86. Disability is defined under Section 6 of the EqA as:

"(1) A person (P) has a disability if— (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

87. When deciding at which point in time the Claimant is disabled, the Tribunal is to look at the time of the alleged discriminatory act: Cruickshank v Vaw Motorcast Ltd [2002] I.C.R. 729. 52.

88. It is for the Claimant to prove that she is disabled, that is to show, on the

balance of probabilities, that she satisfies all four elements, that is that: a) she has a mental or physical impairment, b) the impairment affects his ability to carry out normal day-to-day activities, c) the adverse condition is substantial, and d) that the adverse condition is long term.

89. In J v DLA Piper UK LLP [2010] ICR 2010 Underhill J (President, as he then was) suggested that although it was still good practice for the Tribunal to state a conclusion separately on the question of impairment, there will generally be no need to actually consider the 'impairment condition' in detail: *"In many or most cases it will be easier (and is entirely legitimate) for the tribunal to ask first whether the Claimant's ability to carry out normal day-to-day activities has been adversely affected on a long- term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from an impairment which has produced that adverse effect. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve the difficult medical issues*." (paragraph 40)

90. The EHRC Code of Practice on Employment, at paragraph 7 of Appendix 1, puts it succinctly "*What it is important to consider is the effect of the impairment, not the cause."*

91. In Aderemi v London and South Eastern Railway Ltd 2013 ICR 591, EAT, the EAT furnish guidance as to the Tribunal's role in applying the words of the statute. The EAT state: *"14. It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is on adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial," it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other."*

Reasonable adjustments

92. The duty to make reasonable adjustments is set out in sections 20 – 21 EqA 2010, and in Schedule 8 (dealing with reasonable adjustments in the workplace).

93. The pertinent parts of Section 20 say: -

"(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." The second and third requirements of section 20 EqA are not relied on this case.

94. Section 21 EqA establishes that a failure to comply with the first requirement is a failure to comply with a duty to make reasonable adjustments.

95. Therefore, the duty does not apply if the employer did not know, and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the disadvantage in question by the PCP (Schedule 8 paragraph 20) (see Wilcox v Birmingham CAB 2011 EqLR 810)

96. In the case of Secretary of State for Work and Pensions (Job Centre Plus) v Higgins [2013]UKEAT/0579/12 the EAT held at paragraphs 29 and 31 of HHJ David Richardson's judgment that the Tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, (3) the nature and extent of the substantial disadvantage suffered by the employee, and (4) identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage.

97. The statutory duty is for the Respondent to take such steps as are reasonable, in all the circumstances of the case, for it to have to take in order to avoid the disadvantage. The test of "reasonableness" therefore imports an objective standard (see Smith v Churchills Stairlifts plc [2005] EWCA 1220.)

Unfavourable treatment because of something arising in consequence of disability

98. Section 15 EqA states:

"(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 have reasonably been expected to know, that B had the disability."

99. The correct approach when determining section 15 EqA claims is set out in the EAT decision of Pnaiser v NHS England and others UKEAT/0137/15/LA at paragraph 31.

100. The approach is summarised as follows:

a. The Tribunal must identify whether there was unfavourable treatment and by whom – no question of comparison arises;

b. The Tribunal must determine the cause of the treatment, which involves examination of conscious or unconscious thought processes. There may be more than one reason but the "something" must have a significant or more than trivial influence so as to amount to an effective reason for the unfavourable treatment;

c. Motive is irrelevant when considering the reason for treatment;

d. The Tribunal must determine whether the reason is "something arising in consequence of disability"; the causal link between the something that causes unfavourable treatment and disability may include more than one link – a question of fact to be assessed robustly;

e. The more links in the chain between disability and the reason for treatment, the harder it is likely to be able to establish the requisite connection as a matter of fact;

f. This stage of the causation test involves objective questions and does not depend on thought processes of the alleged discriminator;

g. Knowledge is required of the disability only, section 15 (2) EQA 2010 does not extend to requirement of knowledge that the "something" leading to unfavourable treatment is a consequence of disability;

101. In the EAT case of Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305, Langstaff P, summarises the approach as, *"[t]he current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something," and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages."*

Justification defence under section 15 EqA

102. In the case of discrimination arising out of disability, it is the treatment which needs to be justified.

103. Although it is worth noting that unlike section 19 EqA where knowledge of the disability is not a necessary component, knowledge of the disability is a requirement to justify section 15 discrimination arising from disability claim.

The Burden of Proof in Discrimination cases

104. Proving and finding discrimination is always difficult because it involves making a finding about a person's state of mind and why she or he has acted in a certain way towards another, in circumstances where she or he may not even

be conscious of the underlying reason and will in any event be determined to explain her or his motives or reasons for what she/he has done in a way which does not involve discrimination.

105. The burden of proof is set out at Section 136 EqA. The relevant part of section 136 EqA says: -

(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…"

106. It is for the Claimant to prove the primary facts from which a reasonable Tribunal could properly conclude from all the evidence before it, in the absence of any other explanation, that there has been a contravention of the Equality Act. If a Claimant does not prove such facts she will fail – a mere feeling that there has been unlawful discrimination, harassment or victimisation is not enough.

107. Once the Claimant has shown these primary facts then the burden shifts to the Respondent and discrimination is presumed unless the Respondent can show otherwise. Could conclude means "a reasonable Tribunal could properly conclude from all the evidence."

108. As set out above, at the first stage the Claimant must prove "a prima facie case." Each case is fact specific, and it is necessary to have regard to the totality of the evidence when drawing inferences. Once the burden of proof has shifted, it is the second stage and is for the Respondent to show that the relevant protected characteristic played no part whatsoever in its motivation for doing the act complained of.

109. It is, however, not necessary in every case for the Tribunal to specifically identify a two-stage process. There is nothing wrong in principle in the Tribunal focusing on the issue of the reason why. As the Employment Appeal Tribunal pointed out in Laing v Manchester City Council [2006] IRLR 748 *"If the tribunal acts on the principle that the burden of proof may have shifted and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever".*

110. This approach to the burden of proof has been confirmed by the Court of Appeal in Ayodele v City Link and another [2017] EWCA Civ 1913.

Direct discrimination

111. Section 13 EqA sets out the statutory position in respect of claims for direct discrimination because of disability, sex or race.

"(1) person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B."

112. The comments of the Court of Appeal in Madarassy v Nomura International plc [2007] EWCA 33, albeit a sex discrimination case under the pre Equality Act 2010, Sex Discrimination Act 1975, are still very much applicable to direct discrimination under the Equality Act 2010. Mummery LJ giving judgment says at paragraph 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."*

113. It can be appropriate for a Tribunal to consider in a direct discrimination case, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the Claimant was treated as she was. (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285)

Indirect Discrimination

114. Section 19 EqA sets out the statutory provision in respect of indirect discrimination as:

"(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.

(3) The relevant protected characteristics are—

[…]

disability;"

115. Baroness Hale in Essop v Home Office; Naeem v Secretary of State for Justice [2017] UKSC 27, [2017] IRLR 558, provides helpful guidance in approaching indirect discrimination claims which can be summarised as:

(1) indirect discrimination does not require an explanation of why a particular PCP puts one group at a disadvantage when compared with another.

(2) indirect discrimination does not require a causal link between the less favourable treatment and the protected characteristic (being concerned with 'hidden barriers which are not easy to spot').

(3) The reasons why one group may find it harder to comply with a PCP are many and various; they and the PCP itself are ultimately 'but-for' causes (in that if they are removed the problem is solved).

(4) There is no requirement that every member of the group sharing the protected characteristic be at a disadvantage – in Essop some BME/older employees will have passed the assessment, just as some women chess players will have done well in scoring.

(5) The factual disparity of impact (without the need for establishing its reason) can be established by statistical evidence (as the SDA 1995 and the RRA 1976 had made clear on their wording).

(6) It is always open to the Respondent to show that its PCP is justified. This is an essential part of the action for indirect discrimination, which should not be underplayed by Tribunals; it involves no stigma or shame on the employer relying on it as a defence.

Harassment

116. Section 26, EqA 2010 sets out the legislative framework for harassment:

"(1) A person (A) harasses another (B) if—

a. A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of—

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B […..]

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

(b) the other circumstances of the case;

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

(5) The relevant protected characteristics are— …disability;… sex;"

117. In Richmond Pharmacology v Dhaliwal [2009] ICR 724 the EAT stressed that the Tribunal should identify the three elements that must be satisfied to find an employer liable for harassment: (a) Did the employer engage in unwanted conduct, (b) Did the conduct in question have the purpose or effect of violating the employee's dignity or creating an adverse environment for him/her, (c) Was that conduct on the grounds of the employee's protected characteristic?

118. In a case of harassment, a decision of fact must be sensitive to all the circumstances. Context is all-important. The fact the conduct is not directed at the Claimant herself is a relevant consideration, although this does not necessarily prevent conduct amounting to harassment and will not do so in many cases.

119. Richmond Pharmacology v Dhaliwal confirmed that not every comment that is slanted towards a person's protected characteristic constitutes violation of a person's dignity etc. Tribunals must not encourage a culture of hypersensitivity by imposing liability on every unfortunate phrase.

120. Mrs Justice Slade's comments on how a Tribunal should approach the words "related to the protected characteristic" are helpful in the EAT decision of Bakkali v Greater Manchester (South) t/a Stage Coach Manchester [2018] IRLR 906, [2018] ICR 1481 (EAT). She says, whilst it is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a Claimant – "related to" such a characteristic includes a wider category of conduct and as such requires a broader enquiry when making a decision. (See paragraph 31 (Slade J presiding)

121. Tribunals must not devalue the significance of the meaning of the words used in the statute (i.e., intimidating, hostile, degrading etc.). They are an important control to prevent trivial acts causing minor upset being caught in the concept of harassment. Being upset is far from attracting the epithets required to constitute harassment. It is not enough for an individual to feel uncomfortable to be said to have had their dignity violated or the necessary environment created. (Grant v Land Registry [2011] IRLR 748).

122. Considering whether there has been harassment includes both a subjective and objective element. Underhill J in Pemberton v Inwood [2018] EWCA Civ 564 summarised the position as follows: *"In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))"*

123. Section 212(1) EqA says "*detriment does not, subject to subsection (5) include conduct which amounts to harassment."*

124. Section 212 EqA means that an action that is complained of must be either direct discrimination or harassment, but it cannot be both. It must be one or

the other. This is because the definition of detriment excludes conduct which amounts to harassment.

Analysis and conclusions

125. In respect of the following determinations of the Tribunal, we have only drawn conclusions in relation to positive findings made in respect of allegations. If we have found that an event or PCP did not occur we have not made any further determinations of issues that are dependent on the existence of an event or PCP.

Issue 4.3: Was the Claimant disabled at all relevant times because of the conditions of depression and or anxiety?

126. It was accepted by the Respondent that the Claimant was disabled in respect of her dyslexia and autism and that the Respondent had knowledge of these disabilities at the relevant time. In considering whether the Claimant has proved that she had a disability of depression & anxiety, the Tribunal considered all the relevant evidence in respect of the issue provided by the Claimant in the bundle and the Claimant's oral evidence and witness statement. The Tribunal noted that the Claimant was given multiple opportunities by the Tribunal and the Respondent solicitors to provide further evidence of the effect on the Claimant's day to day activities, to no avail. The Tribunal found the evidence provided to be severely lacking in demonstrating that the Claimant fulfilled the criteria set out in section 6 EqA.

127. We considered first whether the Claimant had a mental impairment of depression & anxiety. We conclude that the Claimant's GP references to depressive disorder and or generalised anxiety disorder coupled with the Claimant undertaking CBT and counselling lead us to determine that the Claimant did have a mental impairment of depression & anxiety.

128. However, we do not conclude that the Claimant's mental impairment of depression & anxiety had a substantial adverse effect on the Claimant's ability to carry out day-to-day activities.

129. We consider that the effect of the mental impairments (either together or in isolation) on the Claimant's ability to carry out day-to-day activities was not more than minor or trivial. The Claimant's sick note dated 28 January 2021 was for hypothermia and Joint pains. There was no evidence that the Claimant was off work any time because of depression & anxiety so the Claimant did not take any time off in respect of these mental impairments. The only matter mentioned that would have affected the Claimant's day to day activities was the Claimant's experience of insomnia. However, there were a number of reasons for the Claimant's insomnia that were mentioned i.e. Claimant's bunion, sertraline. Whilst anxiety was mentioned as a possible reason, depression was not. Furthermore, the GP records demonstrate that the Claimant only appeared to be waking up earlier than she wanted to but would drift off back to sleep within the hour and so sleep disturbance did not appear to be significant. The Claimant was not losing sleep every night but on occasion. By May 2021, the Claimant said she was sleeping well and there was no insomnia and she only used Zopiclone for one week. The Claimant did

not provide any evidence of her insomnia affecting any day to day activities. It appeared to us that the Claimant's loss of sleep was trivial. There was no diagnosis from the GP regarding the Claimant's bowel problems as being related to anxiety, it is OH that believed that the problems were related to the Claimant's anxiety not the Claimant's GP. In any event the Claimant's bowel issues remarkably improved, with the Claimant reporting no accidents at any particular time or incidents from May 2021. The Claimant's flare up was only from February- May 2021. It is in those circumstances that the Tribunal concludes that there were no substantial impacts to the Claimant's day to day activities.

130. Even if the Tribunal is wrong about the effect on the Claimant's day to day activities, whilst it appears that the Claimant has had depression and anxiety historically, there was no evidence of any episodes of depression & anxiety that lasted 12 months or were likely to last 12 months in respect of the Claimant's allegations of discrimination. The Claimant only referred to one incident of depression & anxiety when she found that her secondment was to be suspended. The Claimant's flare up of her bowel condition even if related to anxiety was only from February- May 2021, which is significantly less than 12 months. There was no evidence that it was likely to flare up again or has flared up again. The Claimant expressed that she no longer needed sertraline in December 2021 which was only 9 months after she started taking it. Although the Claimant continued to take sertraline the Claimant said that she was well. The Claimant stopped taking sertraline in April 2022 due to pregnancy but did not provide any evidence to suggest that she experienced depressive or anxiety episodes whilst not being on it.

Knowledge of disability

131. In any event, at no point did the Claimant tell the Respondent that she had depression. It is the case that the OH report mentioned anxiety as a condition for the first time in the 27 May 2021 report, which the Respondent did not get until 8 June 2021. Dr Kutyreva also said that there were no reasonable adjustments medically required. We conclude therefore that although the Claimant did have a mental impairment in respect of depression & anxiety, the Respondent did not and could not have known of the Claimant's disability in respect of anxiety until 8 June 2021 and depression until the Claimant made her claim on 8 July 2021. Both dates post-date the Claimant's claims for discrimination. Even then the Claimant only mentions that she takes anti-depressants to cope with work. Until this point the Respondent understood the Claimant to be taking anti-depressants in respect of her bowel problems.

Are the claims that predate 21 February 2021 in time and if not should time be extended?

132. The Claimant did not plead neither did she argue that any of the acts which were out of time were continuing acts. Issues 4.7.1, 4.10.1 were one off act that the Claimant said happened on the same day in May 2020 and are 8 months out of time. In respect of issues 4.41.1.the Claimant first mentioned this on 2 February 2021 and so this is 19 days out of time. In respect of 4.28.1, 4.28.2, 4.28.3, 4.28.4 these are also out of time as reasonable adjustments because the Claimant said that they should have taken place before the

training started or during training and the Claimant finished her training on 10 February 2020. In applying the test in Matusowicz in respect of the Claimant's reasonable adjustment claim, the Respondent decision to not implement the reasonable adjustments the Claimant complained of was therefore 10 February 2020.

133. Dealing with all claims out of time we considered whether it was just and equitable to extend time. We concluded it was not. Ms Urquhart submitted that the Respondent was prevented from investigating matters that the Claimant did not raise with the Respondent at the time and due to their historic nature it would not be just and equitable to extend time. The Claimant did not do any research in to time limits in respect of her claim, she was a member of the union at the time in respect of the direct discrimination claims in May 2020 so could have sought advice and received support to bring the claims. There was no reason why the Claimant did not bring the claims in time, there was nothing preventing her. In those circumstances, the Tribunal considers that there is real prejudice to the Respondent if time was extended, the Claimant has not shifted the burden that it is just and equitable to extend time. The Tribunal does not exercise its discretion to extend time and the complaints in respect of issues 4.7.1, 4.10.1, 4.28.1, 4.28.2, 4.28.3, 4.28.4 are outside the Tribunal's jurisdiction and are dismissed.

Direct discrimination on the grounds of disability (Section 13 Equality Act 2010)

Issue 4.4.1: Delayed the start of her full-time contract in/around May/June 2021 because of the Claimant's disability

134. The Claimant's full time contract was delayed from 16 May- 13 June 2021, we conclude this was not less favourable treatment as compared to Waz. Waz was not an appropriate comparator as his circumstances were materially difference to the Claimant as he scored higher on the recruitment tests and so was offered the Train Operator role a year before the Claimant. His seniority was the reason why he would be offered a full time role before the Claimant. However, the reason for the delay was because the Respondent could not provide easy access to toilets due to the Claimant's bowel condition and that was not related to the Claimant's disabilities and because it took time to be able to schedule the Claimant. We accepted Ms Henderson's explanation and there were no findings of fact upon which we could infer that the reason for this delay was because of any the Claimant's disabilities. We concluded that it was not. The Claimant's complaint of direct discrimination by reason of disability is unfounded and is dismissed.

Direct discrimination on the grounds of sex (Section 13 Equality Act 2010)

135. The Tribunal determined that the Claimant's complaint under issue 4.7 was out of time and therefore outside of the Tribunal's jurisdiction. The Claimant's complaint of direct sex discrimination is dismissed.

Direct discrimination on the grounds of race (Section 13 Equality Act 2010)

136. The Tribunal determined that the Claimant's complaint under issue 4.10 was out of time and therefore outside of the Tribunal's jurisdiction. The Claimant's complaint of direct race discrimination is dismissed.

Issue 4.13: Discrimination arising from disability (section 15, Equality Act 2010)

137. The Claimant said that she was subjected to unfavourable treatment of Ms Henderson's instruction that she could not drive in April 2021 because she was taking sertraline. The Claimant said that the taking of sertraline was because of her disabilities of autism, depression & anxiety.

138. The Claimant was taking sertraline in respect of her bowel condition possibly linked to her anxiety but in no way linked to the Claimant's autism. The Claimant's anxiety was not a disability and so in those circumstances there was no discrimination arising from the disability. Even if we are wrong that the Claimant does have a disability in respect of depression & anxiety. The Claimant said her taking sertraline was the something arising. The Claimant did not start taking sertraline until 5 March 2021. Ms Henderson suspended the secondment on 28 February 2021 which was before the Claimant started taking sertraline. In those circumstances, the decision could not have been related to the Claimant taking Sertraline. Furthermore, Ms Henderson did not instruct the Claimant that she was unable to drive in April 2021, thereby ending the Claimant's secondment and so there was no unfavourable treatment as the Claimant described.

139. Even if the Tribunal took Ms Henderson's decision to instruct the Claimant she was unable to drive as the non-renewal of the secondment contract from 17 April 2021, the reason for the non-renewal was in no related in any way to the Claimant taking sertraline. Ms Henderson's reason for not renewing the contract again was because she could not guarantee the Claimant easy access to toilets and the Claimant needed to see OH to sign her off as fit to drive without easy access to toilets, in order to allow the Claimant to continue driving under her contract or secondment.

Issue 4.18.1: Indirect discrimination: section 19, Equality Act 2010 on the grounds of disability

140. The Claimant said because of her disability of autism that she was at a disadvantage because the PCP of having no formal method to raise queries, in particular between February 2020 and November 2021, about unexpected work events, instead she was directed to informal learning through colleagues in the canteen. This was the PCP that was applied to her. The Claimant said that she found it difficult to learn in an informal setting. We have found that the Claimant did have formal methods to raise queries between February 2020 and November 2021 about unexpected work events and did in fact raise queries in this time period with her line managers. The formal method was to raise the matter with her line manager. The Claimant raised an issue with her line manager Mr Naughton in July 2020 and another issue with Ms Henderson in January 2021 and at the various case conferences. We therefore conclude that there was not a PCP of no formal method to raise queries, in particular

between February 2020 and November 2021, about unexpected work events, instead being directed to informal learning through colleagues in the canteen and it was not applied to the Claimant at the relevant time.

141. Furthermore, the Claimant did not provide any evidence of difficulties she actually experienced in the alleged informal setting. What the Claimant said, and we accepted was that she would have liked to have done things better but accepted that what she did was not wrong and so we conclude that the Claimant did not suffer a disadvantage.

Issue 4.38-Indirect discrimination: section 19, Equality Act 2010 on the grounds of sex

142. The Claimant said that because of her sex that she was at a disadvantage that because the Respondent had a PCP of not investigating a matter unless there was more than one complaint about it. We conclude that the Respondent did not have a PCP of not investigating a complaint unless there was more than one complaint about it because we do not accept that the Claimant was told this. So, this PCP was not applied to the Claimant at the relevant time. In any event the Claimant was not subjected to a disadvantage of her complaint about the cold temperature in the female portacabin being less likely to be investigated because her complaint was investigated.

Reasonable adjustments (section 20 & 21 Equality Act 2010)

4.25.4: Requiring staff to know/recognise all immediate night tube colleagues in February 2020

143. The Claimant admitted that the requirement for staff to know/recognise all immediate night tube colleagues in February 2020 had nothing to do with any of her disabilities and so we conclude that no duty to make reasonable adjustments arose. In any event we found there was no requirement by the Respondent to know/recognise all immediate night tube colleagues in February 2020, we therefore conclude the Respondent did not have this PCP. The Claimant's complaint of failure to make reasonable adjustments is unfounded and is dismissed.

4.25.5: Requiring secondment hours in February 2021 to be completed as driving hours

144. The Claimant said that the requirement for the secondment hours in February 2021 being completed as driving hours disadvantaged her because of her depression & anxiety. However, depression & anxiety are not disabilities, so the Claimant's claim fails as no duty to make reasonable adjustments arises. However, if we are wrong about that, and there was a requirement for the Claimant's secondment hours in February 2021 to be completed as driving hours, however, there was no duty on the Respondent to make a reasonable adjustment because the Claimant was not put at a disadvantage in relation to her disabilities. The Claimant said that she was disadvantaged because she was prevented from completing driving hours. However, the reason she was prevented from completing driving hours was because she experienced hypothermia and had joint pains and needed to recover, that had nothing to do

with any of the Claimant's disabilities.

4.25.6: Requiring two thirds of a duty to be comprised of journeys between Brixton and Walthamstow, and one third staff shuttles

145. The Claimant said that the requirement for two thirds of a duty to be comprised of journeys between Brixton and Walthamstow, and one third staff shuttles disadvantaged her because of her depression & anxiety. However, depression & anxiety are not disabilities, so the Claimant's complaint fails as no duty to make reasonable adjustments arises.

146. But if we are wrong about that we conclude there was no requirement for two thirds of a duty to be comprised of journeys between Brixton and Walthamstow, and one third staff shuttles as the duty of staff shuttles was incorporated into drivers' roles, there was no minimum amount of how many staff shuttles a driver would do, the staff shuttle duty was supplemental to the Train Operator's role. As there was no requirement for two thirds of a duty to be comprised of journeys between Brixton and Walthamstow, and one third staff shuttles there was no duty upon the Respondent to make reasonable adjustments. The Claimant's complaint of failure to make reasonable adjustments is unfounded and is dismissed.

Issue 4.28.5 providing photo board with names and or name badges

147. The Claimant admitted that this had nothing to do with her disabilities. In those circumstances, we conclude that the complaint fails as the Claimant did not suffer any disadvantage because of her disability. The Claimant's complaint of failure to make reasonable adjustments is unfounded and is dismissed.

Issue 4.26.4 did any of the PCPS put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time

148. None of the PCP's the Claimant has relied upon put the Claimant at a substantial disadvantage in any of the ways listed in issue 4.26. We conclude that the Claimant did not suffer the listed disadvantages as a result of any of the PCPs under issue 4.25.

Harassment (section 26, Equality Act 2010) on the grounds of Sex

Issue 4.30.1 A driver (name unknown) saying to the Claimant "Sit down woman," on 21 February 2021 at the Walthamstow step-back office

149. We have found that the incident did not happen as the Claimant has alleged and so there can be no harassment under section 26 Equality Act 2010. The Claimant's complaint of harassment related to her sex is unfounded and is dismissed.

Issue 4.30.3 In September 2021 at the Northumberland depot, a trainer 'Muj' told the Claimant that women love their child more than a father, because they give birth through pain, in response to her saying "learning hurts me".

150. The Claimant withdrew this issue and so it is dismissed.

Harassment (section 26, Equality Act 2010) on the grounds of disability

Issues 4.34.1 A Duty Reliability Manager (name unknown) telling the Claimant on 21 February 2021, that when DRMs see her name they try to avoid her

151. We found that this incident did not happen and so there can be no harassment under section 26 Equality Act 2010. The Claimant's complaint of harassment related to her disability is unfounded and is dismissed.

Issues 4.34.2 During refresher training at the Northumberland Park depot, in June/July 2021, the trainer 'Muj' made comments including "I can't say anything because you might come back and say I said wood, when instead it was metal."

152. We found that this incident did not happen and so there can be no harassment under section 26 Equality Act 2010. The Claimant's complaint of harassment related to her disability is unfounded and is dismissed.

Employment Judge Young

Dated: 26 February 2024

REASONS SENT TO THE PARTIES ON

28 February 2024

FOR THE TRIBUNAL OFFICE

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