EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr. G. R. Salietti	**v**	**London Underground Limited**

Heard at: Watford by CVP
On: 29, 30, 31 January 2024, 1 February 2024.
In private on 2 February 2024 and 12 February 2024.

Before: Employment Judge S. Matthews
Mr. A. Hutchings
Ms. P. Alford

Appearances
For the Claimant: In person
For the Respondent: Miss S. Tharoo (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1. The claimant's complaint of failure to make reasonable adjustments succeeds in respect of the failure to offer the claimant a part time coverage administrator role.

2. The claimant's complaint of discrimination arising from disability succeeds.

3. The claimant's complaint of unfair dismissal is well-founded and succeeds.

4. The claimant's complaint of direct discrimination on the grounds of disability is not upheld and is dismissed.

REASONS

Introduction

1. The respondent operates the London Underground network. It employed the claimant as a train operator from 9 May 2016. The respondent dismissed the claimant for the stated reason of capability, following a sickness absence procedure. His employment terminated, with pay in lieu of notice, on 25 September 2021. Following a period of ACAS conciliation from 10

December 2021 to 23 January 2022 the claimant issued proceedings on 18 February 2022.

2. This case is about whether the respondent's decision to dismiss the claimant was unfair and whether the respondent discriminated against the claimant on the grounds of disability. The respondent accepts that the claimant was a person with a disability (Long Covid) under the provisions of the Equality Act 2010 from 30 March 2021.

3. The Tribunal heard witness evidence from the claimant and from 3 witnesses on behalf of the respondent. The witnesses for the respondent were:

   - Deborah Bowen: Redeployment Manager
   - Stephen Read: Train Operations Manager (the dismissing Manager)
   - Margaret Waite: Head of Line Operations on the Northern Line (the appeal Manager)

4. All witnesses provided written statements in advance, and the Tribunal took time to read them. Each witness was asked questions about the evidence contained in their statements. References in brackets preceded by the witnesses' initials (AB/XY) are references to the paragraphs in their statements. Paragraphs in the claimant's statement are referred to as (Cl/XY)

5. The Tribunal also received documentary evidence in the form of a bundle and a supplementary bundle. Documents were added to the supplementary bundle during the hearing. By the end of the hearing the first bundle consisted of 1604 pages and the supplementary bundle consisted of 53 pages. References to numbers in brackets are references to the pages in the main bundle; in the case of the supplementary bundle the reference is (sup XY).

6. The Tribunal stated at the outset of the hearing that it would only read those documents to which it was taken in evidence.

Procedural background

7. Preliminary hearings took place on 2 February 2023 (102) and 29 November 2023 (158).

8. At the hearing on 29 November 2023 Employment Judge Codd heard the claimant's application to amend his claim to include a claim for discretionary sick pay after contractual entitlement had expired (162). The application was refused.

Adjustments

9. The hearing was held by CVP as an adjustment to take into account the claimant's disability. At the beginning of the hearing the Tribunal asked the

claimant what further adjustments would assist him to participate in the hearing. The claimant indicated that he required regular breaks. He was informed about the breaks the Tribunal would ordinarily take and told that he could ask for extra breaks at any time. The claimant said that he may need low lighting in his room and sometimes he may need to close his eyes, which the Tribunal allowed.

Preliminary matters

10. There had been extensive correspondence between the parties prior to the hearing about various case management and disclosure issues which we considered at the outset of the hearing.

11. The claimant applied to amend the List of Issues. This was allowed to the extent that it related to the failure to put the claimant on furlough in August 2020 (issue 8b) and to record that the claimant sought a 'part time' role as a reasonable adjustment (issue 15a).

12. The claimant also applied to strike out the respondent's case or to postpone the hearing on the grounds of late disclosure and late compliance with the direction to provide a bundle. The claimant explained that he had not had time to update his witness statement with the documents' page numbers because he had received the bundle so late. The Tribunal declined to strike out the respondent's case or to postpone the hearing. While disappointed to note that the respondent had not complied with the direction on time, it considered that the prejudice the claimant asserted could be dealt with by allowing extra time and making allowances during the hearing for the claimant to find the documents referred to in his statement.

13. Full reasons for those decisions were given orally at the time and are not repeated here.

14. The Tribunal made a number of further case management decisions during the hearing regarding late disclosure of documents by the respondent. Reasons were given orally at the time. The Tribunal was concerned that relevant documents were not disclosed by the respondent until very late in the proceedings; in one case at the beginning of day 4 of the hearing. Late disclosure leads to delays and potential prejudice to the other party, particularly when the other party is unrepresented. The Tribunal carefully considered whether there was prejudice to the claimant owing to the late disclosure and concluded that there was not or that it could be dealt with by allowing extra time.

15. The hearing was initially listed for 5 days. The Tribunal informed the parties that it would hear evidence on liability first and then deal with remedy if the claimant was successful in respect of any of his complaints. The evidence on liability was to include evidence relating to whether there should be a 'Polkey reduction' (issue 21 to 23). Counsel for the respondent confirmed that the respondent was not pursuing the contention that the claimant

contributed to his own dismissal and the List of Issues was amended accordingly.

16. In the event oral evidence and submissions were not completed until the end of day 4. The Tribunal carried out deliberations on day 5 and an extra day of deliberations was arranged on 12 February 2024, making 7 days in total. A remedy hearing has been listed for 2 days on 24 and 25 June 2024.

Issues

17. The Issues to be determined, as finalised at the beginning of the hearing, are as follows:

Unfair dismissal

18. What was the reason or principal reason for the claimant's dismissal? Was it a justifiable reason within section 98(2) ERA 1996? The respondent relies on capability.

19. If the reason is found to be capability, in the circumstances (including the size and administrative resources of the respondent's undertaking) did the respondent act reasonably, having regard to equity and section 98(4) ERA 1996, in treating that as a sufficient reason for dismissing the claimant? The Tribunal will usually decide in particular whether:

    (a) The respondent adequately investigated the claimant's health issues and gave the claimant an adequate opportunity to be considered for alternative roles.

    (b) Whether dismissal was within the range of reasonable responses.

Discrimination

Jurisdiction

20. Was the claim form submitted more than 3 months less a day after some of the conduct complained of (taking into account any 'stop the clock days' as a result of ACAS Early Conciliation)?

21. If so, did that conduct form part of a chain of continuous conduct which ended within 3 months less a day of the claim form being submitted?

22. If not, would it be just and equitable for the Tribunal to hear that part of the claim which relates to the conduct which occurred more than 3 months less a day before the claim was submitted?

Disability

23. The respondent concedes that the claimant was disabled within the meaning of section 6 of the Equality Act 2010 by reason of Long Covid.

24. Did the respondent know, or could it have been reasonably expected to know, that the claimant was disabled at the relevant time(s)? The respondent accepts that it had knowledge from 30 March 2021.

Direct discrimination (section 13)

25. Has the respondent treated the claimant less favourably than it treated or would treat others? The claimant relies on the following less favourable treatment:

    (a) By terminating his employment on 25 September 2021.

    (b) By not placing him on furlough from August 2020

26. Who are the claimant's comparators (actual or hypothetical), whose circumstances must be materially the same as the claimant's?

27. The claimant relies on the following actual comparators:

    (a) 'Harry' from High Barnet who was put on stations as a CSA2 when he had broken his foot and could not walk, and had to sit down all the time, but who was not dismissed by the Respondent.

    (b) 'Georgia' a Train Operator based at East Finchley, who the claimant says had a large amount of sickness, but who was not dismissed by the Respondent. The respondent does not accept that Georgia is a relevant comparator.

28. Was the reason for the treatment the Claimant's disability?

Failure to Make Reasonable Adjustments (section 20 and 21 EqA 2010)

29. Did the respondent apply a PCP to the Claimant, namely: a. Requesting that disabled employees carry out their usual contractual duties.

30. Did that PCP put a disabled person and specifically the claimant at a substantial disadvantage, when compared to non-disabled persons.

The claimant relies on his dismissal as the substantial disadvantage.

31. If the claimant is found to have been at a substantial disadvantage in comparison to non-disabled persons, did the respondent know, or could the respondent reasonably be expected to have known, that the claimant was likely to be at a substantial disadvantage compared to non-disabled persons?

32. If so, did the respondent take steps to avoid the disadvantage? The claimant contends that the respondent should have taken the following steps:

    (a) Assigning and/or redeploying the claimant a part time scheduler role with a phased return to work;

    (b) Assigning and/or redeploying the claimant a customer service role with reduced hours (part time), in accordance with the OH recommendations.

33. If the respondent failed to take such steps, would these steps have

    (a) removed any substantial disadvantage suffered by the Claimant; and

    (b) been proportionate and reasonable in the circumstances?

    (c) If so, did the respondent fail to make any reasonable adjustments and accordingly breach its duty under ss.20-21 EqA?

Discrimination arising from Disability

34. Did the respondent treat the claimant unfavourably because of something arising in consequence of their disability.

35. The claimant relies on the following as 'something arising' from:-

    35.1 Being unable to carry out his substantive role.

36. The unfavourable treatment relied upon is:

    36.1 Dismissal.

37. If the respondent did treat the claimant unfavourably due to something arising from the claimant's disability, was it a proportionate means of achieving a legitimate aim. The respondent relies on the following legitimate aims:

    (a) effectively managing staff absence to reduce the negative effect staff absence can have on the Respondent's ongoing operations, including the respondent's train service;

    (b) ensuring that the Respondent operates a fair and consistent absence management policy.

Polkey

38. Would the claimant have been fairly dismissed anyway if a fair procedure had been followed on grounds of capability and/or for some other

substantial reason? If so, on what date would the claimant have been dismissed?

39. If the claimant would have been dismissed by the respondent, would such a dismissal have been fair in all the circumstances?

40. What reduction if any should be made to the claimant's compensatory award on the basis of a potentially fair future dismissal?

Facts

41. This Judgment does not seek to address every point about which the parties have disagreed. It only deals with the points which are relevant to the issues that the Tribunal must consider in order to decide if the claim succeeds or fails. If a particular point has not been mentioned it does not mean that the Tribunal has overlooked it, it is simply because it is not relevant to the issues.

Background

42. The claimant commenced employment with the respondent as a part time train operator on 9 May 2016. In January 2018 he changed his hours to full time. In April 2018 he commenced a job share, and his hours reduced to part time again (3 days a week). His terms and conditions are set out in the original offer letter and contract (326-337).

43. The respondent operates the London underground network. We heard evidence from Margaret Waite (MW), Head of Line Operations on the Northern Line, that the respondent employs approximately 30,000 people. The claimant worked in the operations team which included station staff and train operators. That team comprised about 10,000 people.

44. The claimant was a conscientious employee with an excellent sickness record. He took only 4 or 5 days off sick in total between May 2016 and April 2020. He received a certificate for 100% attendance in 2018 (339).

45. On 23 March 2020 the Prime Minister announced the first lockdown in the UK, ordering people to 'stay at home'. The claimant continued to work as a key worker, until unfortunately he contracted Covid on 6 April 2020.

Start of sick absence

46. On 6 April 2020 the claimant commenced sickness absence. He was subsequently diagnosed with post Covid syndrome on 28 February 2021 (cl/7).

47. The claimant had 24 weeks' entitlement to sick pay (183). The first 3 weeks were special leave which was put in place due to Covid. It is not clear from the evidence we heard whether the 3 weeks' special leave was included within the 24 weeks' entitlement. It is not relevant to the issues we need to

decide to make a finding on this and we decline to do so. We simply note that the claimant had not taken the full 24 weeks when he commenced annual leave on 9 August 2020.

48. The claimant took his accrued annual leave from 9 August 2020 to 1 November 2020.

49. The Tribunal found that the reason that he took his annual leave at that time was that he was advised to do so by Sam, assistant to Stephen Read (SR), Train Operations Manager. In his statement the claimant says (Cl/58):

> "On the 5th/6th of August the AG1, Sam, she runs the administration at the depot, called me. She said that this that my sick pay was coming to an end. She said that I needed to take all my outstanding annual leave, which was 14 weeks. That will take me to the 31st October and if I wasn't fit by then, then to take sick leave again. I told a work colleague about this."

50. SR approved the claimant using his annual leave as he explains in his statement (SR/14):

> "Mr Salietti's absence from 9 August to 1 November was treated as annual leave, as agreed by me (page 406). This was in the hope that a further period of paid leave would enable him to regain enough fitness to return to work."

51. The claimant did not understand why he needed to take annual leave when he was ill but he did what he was advised to do (410). SR maintained in evidence that the claimant benefitted; by taking annual leave (and therefore being treated as back at work) the sick pay 'clock' re set after 3 weeks (183).

52. The Tribunal accept that the claimant benefitted financially by taking some annual leave but note that the claimant only needed to 'return to work' for 3 weeks to re set the clock (183). On the advice of Sam he took all his outstanding weeks of annual leave, some 13 weeks.

53. At the time SR approved the annual leave the Occupational Health report (400-401) stated that the claimant was 'not fit for work in any capacity'. As such the claimant could have claimed the time off as sickness rather than take annual leave (541), although we accept this would not have been beneficial to the claimant from a financial point of view.

54. The claimant is aggrieved that he was not furloughed from August 2020 (issue 8b) as that would have meant he did not need to use his annual leave. The respondent maintains the claimant did not meet the criteria for furlough at the relevant times (380-381); the claimant maintains that he was eligible (411, 413, 477). That dispute is not relevant to the issues we need to decide, and we have deliberately decided not to resolve that conflict. Although the claimant claims that the failure to place him on furlough in August 2020 was direct discrimination, we find that he was not a disabled

person at that time (paragraph 175 below) and the complaint fails on that basis.

Occupational Health reports July 2020 and November 2020

55. On 14 July 2020 the claimant attended his first Occupational Health (OH) assessment by telephone (400-401). It concluded:

> 'Following today's assessment, Mr Ribo Salietti is not fit for work in any capacity.I decided to write to his GP to find out more information about his medical condition and the investigation plans going forward. I will make arrangements to review Mr Ribo Salietti in 4 weeks' time and update you on his progress.'

56. The Tribunal was not taken to any evidence of the GP being contacted. No review took place 4 weeks later. The next OH assessment took place on 3 November 2020 (371). That OH report was not included in the bundle. Respondent's Counsel obtained a copy of it during the hearing, but the parties agreed not to include it in the bundle.

57. The claimant provided Consent forms for release of his medical records in November 2020 (502) and February 2021 (59). No medical reports or records were obtained other than the report of Mr. Hillman on 28 February 2021 referred to at paragraph 62 below.

Absence procedure 11 February 2021 to 10 May 2021

58. The respondent's procedure for dealing with sickness absence is contained in the Attendance at Work procedure which provides as follows, (emphasis added) (234-235):

> " 5.2. Fitness for work:
>
> Arrange a case conference **as early as possible** to (refer to 5.2.1) to:
> (5.2.1)– ' **Step One - actively consider making reasonable adjustments (if required) –** refer to 5.2.2;
> Step Two - actively pursue suitable alternative employment – refer to 5.2.3;
> Step Three - as a last resort, having fully considered the options in 5.2.2 and 5.2.3, consider termination of employment on medical grounds – refer to 5.2.4.'
> ....
> 5.2.1 Case Conference
> The case conference will produce **an agreed written action plan** that must be abided to by all parties. The employee's case will continue to be monitored by the case conference until it is mutually agreed that this is no longer necessary."

59. It was not until 11 Feb 2021 that the claimant had his first case conference with SR (483). SR's explanation for not initiating the process 'as early as possible' was that he was trying to protect the claimant from entering the

process, which would lead to 'decisions' having to be made which may be adverse to the claimant. He was aiming to give the claimant a chance to get better before initiating the process.

60. The case conference took place remotely. The claimant was still very unwell, and it is agreed by the parties that he was not fit for any type of work at that time. There were no adjustments under step one of the procedure that would enable him to return to his substantive role.

61. No action plan or minutes of the meeting were sent to the claimant following the meeting. He received SR's notes of the meeting (490-491) for the first time during disclosure in these proceedings. The claimant challenges the accuracy of the notes; they state that he suffers from asthma which is incorrect. The claimant told SR about the treatments he was paying for privately and the difficulty in obtaining NHS appointments. He was unable to give a prognosis for his recovery.

62. On 28 February 2021 (506) the respondent obtained a report from the claimant's treating doctor, Toby Hillman, Consultant of Respiratory Medicine, University College London Hospitals. Mr. Hillman gave the following opinion regarding the prognosis:

> "The prognosis of patients with Post-COVID Syndrome has been notoriously hard to estimate. Our service has seen improvements in some patients within 3 months of their index illness, and others, such as Mr Ribo have symptoms that last a lot longer.
>
> As time goes on, it is possible that Mr Ribo will enter into a chronic fatigue state, and treatment would be aimed at improving his self-management of fatigue and functional capacity."

63. Although this report appears in the bundle of documents it is not referred to in any of the subsequent OH reports.

64. The next OH report dated 30 March 2021 (521-522) concluded that the claimant was not fit to return to work in any capacity within the next three months. In response to a specific question about whether he was fit to work on stations as a Customer Service Assistant (CSA2) the clinician answered 'No'. In response to a question about reasonable adjustments the clinician stated 'N/A at present' and stated that a slow phased return to work can be considered and discussed at review.

65. Although the clinician asked for a further review to be arranged in 3 months' time a further assessment did not take place until September 2021.

66. On 24 March 2021 SR sent the claimant an invitation to a second meeting to discuss his medical condition (518-519). The meeting took place on 8 April 2021. There are no minutes or action plan from this meeting. SR has been unable to locate any notes relating to the meeting (SR/32). SR did not have the OH report dated 30 March 2021 at the time of the meeting. The claimant sent him a copy immediately after the meeting.

67. The claimant's recollection of the meeting is set out in his statement (Cl/135-138). There was a discussion about the possibility of extending his sick pay. The claimant said that 'failing that' he would like to be assigned to the redeployment unit rather than go on to statutory sick pay.

68. SR agreed to see if he could get an extension of sick pay but maintained that it was not his decision. It was also agreed that the option of assigning the claimant to the redeployment unit would be considered. The decision could not be made at that meeting as the Employee Relations Partner (ERP) was not in attendance (SR/32).

69. Referral to the redeployment unit was intended to explore whether the claimant could be redeployed in an area of the business outside his current role (545):

> "The role of the redeployment unit is to provide advice on:
>
> - CV workshops – advice and assistance with CV compilation;
> - Potential opportunities within the company in view of medical restrictions;
> - Competence workshops – to assist with applications and interviews;
> - Interview techniques (one on one) and assistance prior to any interviews attended;
> - Letter Writing."

70. The claimant would have preferred an extension to his sick pay but failing that he was prepared to be assigned to the redeployment unit because he was aware that his sick pay was coming to an end. In oral evidence he said 'I just knew that I needed more time and medical redeployment would give me another 13 weeks. Now with the benefit of hindsight I know that I did not get better, but I was on Facebook forums and some individuals were suddenly getting better in two or three weeks or a month later. Every individual is different'.

71. SR sent an email regarding sick pay to the relevant manager following the meeting (528):

> "The Train Operator is coming to the end of his sick pay. I am looking to request an extension to his pay for four weeks maximum. The Train Operator has upcoming appointments with specialists in late April / early May where he hopes to have further information to aid his recovery. He is currently diagnosed with Long Covid. A follow up case conference has already been scheduled for the 26th April whereby we will be discussing redeployment based upon the information in the Occ Health report."

72. On 13 April 2021 the response was (1568):

> "As I briefly referred to in our conversation just now, in this instance this man would be one of those we would look to continue to extend sick pay for and could do this for a further 15 weeks before we move to medical redeployment. This is in line with the commitment we made at TfL level for others whose sick pay was due to expire."

73. The claimant was not informed of this option. After 4 weeks' sick pay extension he was moved to the redeployment unit.

74. SR explained his reasons for referring the claimant to the redeployment unit in his statement (SR/35):

> "I did consider whether it was appropriate to terminate Mr Salietti's employment at this point. I think it would reasonably have been open for me to do so at that point given that the LUOH advice was that he was not fit for any work within a 3 month period and he had by this point been absent for over 12 months. However, given the unprecedented circumstances of the pandemic and the fact that Long covid was such a new and little understood condition, and the fact that Mr Salietti seemed to be making some progress in his recovery, I wanted to offer him every opportunity to continue his employment. I therefore considered it was appropriate to refer him to our Redeployment Unit. Mr Salietti and his representative readily agreed with that proposal, which I had already discussed with him. He was grateful that this would mean his pay would continue and the decision was in agreement with his union representative."

75. The Tribunal find that SR did not consider any options at this stage other than termination or redeployment. At this time he could have exercised his discretion to extend the claimant's sick pay further but he decided not to do so.

76. On 26 April 2021 a further short meeting took place between SR and the claimant. His union representative was present. Minutes of the meeting were not sent to the claimant at the time and the claimant only saw the notes relating to it (532) on disclosure. It was recorded that the claimant had improved since February. This appears inconsistent with the OH report but SR said in evidence that he felt the claimant was 'heading in the right direction'. They agreed they would reconvene in a couple of weeks' time as the ERP was still not available and the claimant could not be assigned to redeployment unless they were there (SR/35). Sick pay was extended until the next meeting (SR/35).

77. On 10 May 2021 a short meeting took place (542). The claimant was referred to redeployment from 11 May 2021. A 'return to work' meeting took place on the same date (539-541). This appears inconsistent with SR's letter referring him for redeployment which noted that the OH report said that he was unfit to return to work in any capacity in less than 3 months (543).

78. The Tribunal's view is that assigning the claimant to the redeployment unit was not an appropriate decision at a time when the claimant was still unwell. By then SR was in receipt of the OH report dated 30 March 2021 which stated that it was unlikely that the claimant would be fit to resume work, in any capacity, in less than 3 months.

Redeployment

79. The claimant was assigned to Deborah Bowen (DB) (Redeployment Manager) for a period of 13 weeks. He asked to work 3 days a week which was agreed (619). He did nearly 30 online training courses during his period of redeployment (Cl/187). DB referred to this as 'a vast array of courses' (626).

80. On 2 July 2021 DB sent the claimant details of roles that were being advertised (624). She said it was not necessary for the claimant to apply for them, but it would 'open a conversation about what type of role we could be looking for if you were unable to go back to your substantive role'. She made no reference to reasonable adjustments, even though it is accepted by the respondent that they were aware that the claimant had a disability by that date.

81. No suggestions of specific roles were put forward until 3 August 2021 when DB told the claimant about a coverage administrator role that he had been 'skills matched to' (627). This is the 'scheduler role' referred to in the list of issues (DB/17). The claimant did a SAP test required for the role on the same day, which he passed (Cl/219).

82. The subsequent job advertisement for the role stated (802-804):

> " Location: Southwark, London / Working from home
> Secondment opportunity for 6 months (with a view to permency) sic
> ....
> Job Purpose:
> To arrange coverage, plan rosters in advance, liaising with managers and staff...."

83. DB's evidence was that the vacancy was for a 6 month secondment and they needed to get someone signed up and trained quickly (DB/24). The advertisement however says that it may become permanent. There were 2 jobs, one was filled on 16 August 2021; the second vacancy was not filled until January 2022 (DB/28.2).

84. DB discussed the role on 10 August 2021 with the hiring manager. It was suggested that the training for the role may need to be on-site. DB noted that the claimant would like to have a conversation with the hiring manager to see if the training could be done online (629). The hiring manager did not give evidence; he no longer works for the respondent.

85. The extent of training required for the role was not explored. DB said in oral evidence that we 'did not get that far'. In terms of discussing reasonable adjustments DB also said, 'we did not get that far'. In evidence she was only able to set out her 'understanding' which was that the role required on-site training which could not be done online and that it would take up to 3 months of being supervised before the claimant would be 'up and running'.

86. On 13 August 2021 the claimant decided to decline the role. He sent an email to the hiring manager stating that he would not be able to work full

time without a phased return to work (572). In the Tribunal's view that was entirely understandable. He had been working part time before he became unwell, and he was clearly not well enough to work full time in August 2021.

87. On 30 August 2021 the claimant sent an email to DB asking her if it would be possible for her to contact the hiring manager and see if he could accommodate a phased return to work (579).

88. In oral evidence DB expressed some frustration at this request. She had tried to get the claimant to talk direct to the hiring manager and expressed regret that he had not done so. She said that would have enabled him to explain his situation and that people on the scheme have to be 'motivated'. She said, 'it was not my place to discuss his illness, it was better for him to speak to him and explain more detail'.

89. DB explained in oral evidence that she found it 'awkward' to re-approach the hiring manager because she wished the claimant would speak to him direct. She sent an email on 1 September 2021 saying that she had an 'unusual request'; the claimant had asked about a phased return to work (632).

90. The reply from the hiring manager was (632):

> "Are you able to provide more details around why William would require a phased return to work? I'm unsure how this will work as the initial part of the secondment will be training which requires full time before William was able to work alone."

91. DB subsequently told the claimant that the training needed to be full time (Cl/226) (DB/26).

92. On 6 September 2021 she replied to the hiring manager to say (633):

> "I have spoken with William, he explained that approximately after about 2 hours of working his body becomes exhausted and he needs to rest. I asked him what does phased return to work looks like for him and he advised that he was thinking of 3 days a week and 2 hours a day for the 1st week and then building his time up. I explained that the training requires him to be available full time to start with. I think he understood."

<u>Meetings with SR during redeployment process</u>

93. The respondent's procedure required meetings with the claimant's manager (SR) to take place while the claimant was in the redeployment unit. SR's letter to the claimant dated 10 May 2021 set out the process (emphasis added) (538):

> "I will need you to attend meetings with me **in weeks four, eight and eleven**, **followed by a case conference in week 13 of your period within the redeployment unit. The first three meetings** will be to review your medical condition and your progress with finding suitable alternative employment. **The**

> **case conference will be to review your continuing employment with the company if no permanent position has been secured**."

94. Although the procedure envisages 3 meetings in total before the case conference in week 13, only 2 meetings took place, on 22 June and 13 August 2021. The meetings took place remotely. At the first meeting the claimant reported that redeployment was going well and that he was feeling better (553). At the second meeting the claimant told SR about the job that had been discussed in redeployment which could not accommodate a phased return (574).

95. On 6 September 2021 the claimant's time in the redeployment unit was due to come to an end, but it was extended by 2 weeks to allow an OH assessment to take place.

Final Occupational Health Assessment

96. The final OH assessment took place by telephone on 16 September 2021 (593-595). The clinician had not seen the previous OH reports or any medical records. The clinician concluded that the claimant was not fit for his substantive duties. The Tribunal finds the remainder of the report to be vague and contradictory. When asked about the Customer Service Assistant role (CSA2) the clinician states:

> 'As outlined above he is fit for restricted duties on reduced hours. This would be applicable in any role, including that of the CSA2, provided that the adjustments that he required can be accommodated for such a role'.

97. Under 'Outcome' she records 'Unfit for role-temporary'. Under 'Opinion' she records 'fit for restricted duties only'. She states that the claimant will need regular breaks and reduced hours and these are likely to be required in the longer term rather than a phased return to work. In terms of prognosis she writes:

> 'it is very difficult to give you an indication of timeframes for the restrictions above; however, bearing in mind that his symptoms have been ongoing since last year it seems unrealistic to expect improvement in the near future. The rate of recovery here has been very slow, and it is therefore likely that the restrictions above will be required in the longer term.'

98. There is then an addendum at the end of the report, dated the day after the appointment, stating that the claimant had been in touch by email with further details of his daily routine. She writes:

> 'On the basis of this more complete information [the claimant] is unlikely to fit for work (sic). He now states that his symptoms have not changed much at all since last year and this being the case, it seems unlikely that changes can be expected in the foreseeable future'.

99. The claimant was not satisfied with the contents of the OH report and told SR of his concern that the clinician 'had not read up on his case and was unaware of previous reports' (597).

Events following the period in redeployment

100. The claimant's last day in the redeployment unit was 20 September 2021. The final case conference meeting took place on 22 September 2021.

101. The Tribunal heard evidence about the respondent's internal procedures following redeployment. An agreement for operational staff made with trade unions in 1992 (171-199) makes reference to employees being referred back to their line manager for 3 months after redeployment and, if there is a 'realistic prospect' of another role being found, allowing a further month. DB and SR indicated in oral evidence that they were unaware of the agreement, and it was not their understanding of the Attendance at Work Procedure and redeployment process. They rely on guidance on the respondent's intranet which they say enables the respondent to terminate employment in the final case conference meeting. The guidance on the intranet they referred to was not in the bundle at the beginning of the hearing and was only provided on day 4 of the hearing (sup50-53).

102. Margaret Waite (MW) (Head of Line Operations on the Northern Line) gave evidence in which she said that the 1992 agreement sets out the principles on which the policy and guidance are based. The policy has been updated since 1992 and employees are now referred to the redeployment unit for 3 months. The 3 month period is therefore still in place but the employee obtains more specific help during the 3 months than envisaged in 1992.

103. The Tribunal makes no finding on whether the current policy and practices accord with the 1992 agreement; that is not an issue that the Tribunal needs to decide in order to resolve the dispute in this case. The Tribunal restricts its findings to the procedure that was followed in the claimant's case. It accepts that the respondent did not need to wait another 3 months before the final case conference meeting, in order to comply with the current Attendance at Work procedure and guidance.

104. The Attendance at Work Procedure provides that as a last resort the case conference will permit termination on medical grounds (249) (emphasis added):

> 'The Case Conference will ensure that:
> The case has been fully reviewed and all possible options have been considered – Steps One and Two have been exhausted.
> The employee be allowed time to take on board this possible course of action and to discuss the matter with their partner and/or family.
> The case has been referred to LUOH and they have provided relevant details to support any decision. **Medical reports from medical practitioners/ specialists/ consultants may need to be obtained (with assistance from LUOH).**

> An ill-health pension estimate has been obtained prior to termination. The Data Protection Act (1998) provides for the employee to give his/ her permission to request this.
> ***Following this discussion, the Case Conference will agree to disband where it is no longer necessary to continue to monitor the case. Separately, you will make your decision whether to terminate the individual's employment on medical grounds. If you decide not to terminate, the Case Conference will be reconvened to discuss next steps.***
> If your decision is to terminate the individual's employment on medical grounds, you will:
> ***Arrange a convenient time to meet with the employee to terminate their employment. You will send a letter to the employee, stating the reasons for the meeting.***
> Confirm to the employee that he/ she is entitled to be accompanied at this meeting by a trades union representative/ fellow worker of their choice (should the employee choose to be accompanied). '

105. The claimant and SR attended the meeting on 22 September 2021 in person. The ERP and union representative attended remotely. As set out at paragraph 99 above the claimant stated that he was not satisfied with the OH report and asked for the meeting to be adjourned until a doctor from OH could discuss test results that were available since his last OH assessment (600). The union representative asked if there was a job the claimant could do from home for a few hours a week, pointing out that the claimant had progressed from a stage where he was bed bound to being able to attend the meeting (597-600).

106. SR decided to terminate the claimant's employment after a short break during the case conference meeting (597-599). Although the extract from the procedure at paragraph 104 above suggests a separate meeting should be held after the discussion about the employee's health, SR maintained that this was not the case. He considers he was entitled to terminate the claimant's employment at that meeting, notice having been given that it was a possible outcome (sup52).

107. SR's statement explains his reasons for his decision to dismiss the claimant. It is consistent with the oral evidence he gave and the letter he sent to the claimant confirming his dismissal (603-606) (SR/58-59) (emphasis added):

> "I explained to Mr Salietti that unfortunately I had made the decision to terminate his employment on medical grounds with immediate effect, with payment in lieu of notice**. There was no doubt that Mr Salietti was not fit for his substantive role either now or in the foreseeable future. Despite a period in Redeployment with the assistance of dedicated staff, Mr Salietti had not been successful in finding alternative employment.**
>
> As to the CSA2 duties, it was clear that Mr Salietti would not be able to perform that role without very significant adjustments to those duties (particularly in relation to not spending time walking/ on his feet), most likely over the long term, to an extent which was simply unsustainable. CSA2 positions are only available in Central London stations, there were not CSA2 positions available in quieter stations where it might have been more possible to accommodate some seated duties.

> As to the request for work that could be done by Mr Salietti a few hours a week from home**, there was no such work available in our depot/area/station.** The vast majority of the roles available in the depot are operational roles that require presence in the station. **Some managerial duties can be done from home, but Mr Salietti is not at a managerial grade. We have one administrative role in the depot, but that role was not vacant.** It was not appropriate to create a vacancy that did not arise, and Mr Salietti had spent more than 13 weeks in Redeployment seeking any suitable vacancy group wide and had been unsuccessful."

108. SR based his decision on the fact that the claimant had been unable to do his substantive role since April 2020 and would not be able to do so in the foreseeable future. He did not consider adjustments or an alternative role other than a CSA2 post or roles within the operations area of the business. He did not consider managerial duties because the claimant was not at managerial grade. He referred to the claimant not being 'successful' in finding alternative employment in the redeployment unit. He did not consider extending the claimant's time in redeployment even though the internal policy allowed it (50). He did not consider it his responsibility to take any further steps to consider alternative roles. The Tribunal accept that in such a large organisation he may not have been aware of roles that may be available and suitable for the claimant. However DB, in the redeployment unit, also failed to specifically address the reasonable adjustments that would assist the claimant, instead stating that he needed to be pro-active in finding a role. This meant that no-one in the organisation took responsibility for considering reasonable adjustments.

109. In oral evidence SR explained that he did not extend sick pay because he had already extended it, then sent the claimant into redeployment for 13 weeks and then extended it by another two weeks. He felt that he had done enough.

110. SR considered he had enough medical evidence to make the decision and did not consider obtaining further evidence.

Appeal

111. The claimant appealed the decision, and his appeal was heard remotely by Margaret Waite, Head of Line Operations on the Northern Line, on 14 October 2021. MW gave evidence that her role as appeal officer was to check that the Attendance at Work Procedure had been followed and to see whether anything had changed since the meeting. She considered that it was up to the claimant to bring any relevant medical evidence to the meeting.

112. Minutes of the meeting were not sent to the claimant (CI/382). Notes in the bundle (658-659) indicate that the claimant's union representative asked the respondent to consider a longer term plan that would allow the claimant to work from home on restricted hours to give the claimant an opportunity to build up his strength. MW concluded the meeting by saying that she would review the medical evidence and come to a decision in the next 2 weeks.

113. Following the meeting the claimant was concerned that he had not been able to give MW a prognosis when asked in the meeting. He sent her an email dated 18 October 2021 with a list of treating doctors stating (660-662):

> "I would get the reports for you but as there are so many and some of them have been amended and some that were supposed to be amended weren't, there was also cross of emails for others with amendments that weren't put in their report and other reports I don't have. So it might be simpler at this stage of my dismissal process to grant my permission for LUOH to contact Toby Hillman head of the UCLH long covid clinic and William Man specialist that I was referred to from the RBH to give you an overview of all tests and doctors reports from 30th March 2021 till the 17th September 2021. They might also be able to give you a prognosis for my condition, as you asked for one during the appeal meeting and I really can't give you one. I'm under the care of their clinic and they are two of the leading doctors in the UK dealing with long haulers so they will have a better idea and be able to give you an estimate based on their latest findings with other patients and on the results from all my tests."

114. MW decided not to seek any further medical evidence and on 1 November 2021 she wrote to the claimant to say that the appeal was not upheld (665-667). She wrote (emphasis added):

> 'In coming to this decision I referred to the medical advice that had previously been given by OH (16th September 2021) that stated that **you are not fit for your substantive role at this time and there is no prognosis for when you will be fit.** You yourself confirmed that this was the case and there had been no change since this advice was given when we met. It was proposed that you could do restricted duties on restricted hours at home, as a Train Operator it is not possible to provide you with restricted duties or reasonable adjustments for your role that would allow this, the role in itself requires attendance at work and the ability to do safety critical work. **You have been through our internal redeployment process which was the opportunity for you to find alternative work within the company which would allow you to do something else that meets your needs. Unfortunately, you were unable to find an alternative suitable role.'**

115. The Tribunal find that she based her decision on the claimant's inability to do his substantive role and did not consider reasonable adjustments in terms of an alternative role. She considered it was the claimant's responsibility to find a suitable alternative role in redeployment. She considered she had enough medical evidence and concluded that there was no prognosis as to when he would be fit. She did not consider alternatives other than dismissal.

116. She justifies her decision on the grounds of the impact of his absence on the business (MW/27):

> "His continuing absence has an impact on the wider business area in the sense that someone else has to cover his duties. Whilst our duty roster builds in some additional resource to cover absences, there are often circumstances in which we have insufficient cover (this is particularly given that we have an agreement with the Trade Union that we cannot offer overtime to Train Operators). Every cover slot used to cover Mr Salietti's absence means that we may not have cover staff

> available to release for unexpected absence or incidents on the line. Ultimately if there is no cover available, we may end up having to delay or cancel train services with the resulting impact on passenger dissatisfaction and overcrowding in stations. Mr Salietti's non-availability for over 17 months would have contributed to regular train cancellations. We simply could not allow the situation to continue indefinitely. We have to ensure that we have sufficient resourcing to maintain a safe and efficient passenger service to the travelling public."

117. The Tribunal was not taken to any documentary evidence indicating that the claimant's absence had led to insufficient cover on the duty roster or train cancellations. The respondent did not explain how terminating his employment when they did rectified the alleged situation. If he had been moved to an alternative role his non availability as a train operator would not have had the impact claimed by MW.

Comparators

118. In respect of his direct discrimination claim the claimant relies on 2 comparators. The first is a train operator with a tendon or ligament injury affecting his right leg (SR/70). The second is an expectant mother (SR/71).

119. In both cases the Tribunal find that the suggested comparators had conditions which were expected to affect them for a finite period. In the claimant's case the period of time for which he would suffer from Long Covid was unknown. The respondent says that was the reason for the difference in treatment (SR/71-73). In respect of the expectant mother the reason for the difference in treatment included the health and safety of the mother and unborn child (SR/78).

120. They were both given alternative duties within the operations department; the first as a CSA2, where he was allowed to sit down (SR/72) and the second within the office to undertake temporary alternative duties, when a specific vacancy did not exist.

Law

121. The claimant brings complaints of unfair dismissal and discrimination. The complaints fall to be considered under the Employment Rights Act (ERA) 1996 and the Equality Act (EA) 2010. This section of our Reasons first sets out the relevant law under the ERA 1996 and EA 2010.

Disability

122. Disability is a protected characteristic under sections 4 and 6 EA 2010. The respondent accepts that the claimant had a disability from 30 March 2021.

123. The definition supplemented by Schedule 1 of the Act requires the condition to have a substantial and long-term effect on the ability to carry out normal day to day activities. Long term is defined as 'at least 12 months' or 'likely to be 12 months'. Knowledge of the disability is not limited to actual knowledge

but extends to constructive knowledge (i.e. what the employer ought reasonably to have known).

Reasonable Adjustments (s.20 and 21 Equality Act 2010)

124. Section 20 (so far as relevant) states:

> (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 (of which only the first is relevant here)
>
> (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.
>
> ...

125. Section 21 states:

> (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
>
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

126. The EHRC Code of Practice says that transferring a disabled worker to fill an existing vacancy is a step which it might be reasonable for employers to have to take as a reasonable adjustment (paragraph 6.33). It gives the following example:

> *'An employer should consider whether a suitable alternative post is available for a worker who becomes disabled (or whose disability worsens), where no reasonable adjustment would enable the worker to continue doing the current job. Such a post might also involve retraining or other reasonable adjustments such as equipment for the new post or transfer to a position on a higher grade.'*

127. The leading authority on reasonable adjustments and redeployment, **Archibald v Fife Council [2004] ICR 954**, concerns a claim brought by a local authority employee who had become unable to carry out manual duties owing to the onset of a disability but who was unable to secure an office-based role through the council's interview processes. Explaining the duty to make reasonable adjustments, Lady Hale said in paragraphs 67 to 70:

> *" ... to the extent that the duty to make reasonable adjustments requires it, the employer is not only permitted but obliged to treat a disabled person more favourably than others.*
> *. ...[the duty] is capable of including the step of transferring a disabled person from a post she can no longer do to a post which she can do, provided that this is a reasonable step for the employer to have to take.*

This will depend upon all the circumstances of the case… There is no law against discriminating against people with a background in manual work, but it might be reasonable for an employer to have to take that difficulty into account when considering the transfer of a disabled worker who could no longer do that type of work. I only say "might" because it depends upon all the circumstances of the case..."

Discrimination arising from disability (s.15 Equality Act 2010)

128. Section 15 Equality Act 2010 provides:

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

129. Three elements must be made out in order for the claimant to succeed in a section 15 claim:

i) There must be unfavourable treatment. No comparison is required.

ii) There must be 'something' that arises 'in consequence of the claimant's disability.'

iii) The unfavourable treatment must be because of (i.e. caused by) the 'something' that arises in consequence of the disability. This involves a consideration of the thought processes of the putative discriminator in order to determine whether the something arising in consequence of the disability operated on the mind of the alleged discriminator, whether consciously or subconsciously, at least to a significant extent.

130. When considering an employer's defence pursuant to section 15(1)(b) the question as to whether an aim is "legitimate" is a question of fact for the tribunal. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business, but it has to make its own judgment, based upon a fair and detailed analysis of the working practices and business considerations involved.

Direct disability discrimination (s.13 Equality Act 2010)

131. Direct discrimination is defined in section 13(1) as follows:

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

132. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies. The effect of section 23 is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical comparator. Further, as the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including **Amnesty International v Ahmed [2009] IRLR 884**, in most cases the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator.

Burden of proof in complaints under the Equality Act 2010

133. Sections 136(2) and (3) provide for a shifting burden of proof:

> "(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) This does not apply if A shows that A did not contravene the provision.'

134. This means that if there are facts from which the Tribunal could properly and fairly conclude that there has been unlawful discrimination, the burden of proof shifts to the respondent.

135. In a complaint of failure to make reasonable adjustments, for the burden to shift, the claimant must demonstrate that there is a PCP causing a substantial disadvantage and evidence of some apparently reasonable adjustment that could have been made (**Project Management Institute v Latif 2007 IRLR 579, EAT).** Where the burden shifts to the respondent, the respondent must then prove on the balance of probabilities that the respondent did not fail to make reasonable adjustments.

136. In a complaint of discrimination arising from disability, the claimant must show that they have a disability and have been treated unfavorably by the employer. It is also for the claimant to show that 'something' arose as a consequence of their disability and that there are facts from which it could be inferred that this 'something' was the reason for the unfavourable treatment. Where the burden shifts to the respondent the respondent can defend the claim by showing that the treatment was a proportionate means of achieving a legitimate aim.

137. The respondent is expected to produce 'cogent evidence' to discharge the burden of proof. If there is a prima facie case and the explanation for that treatment is unsatisfactory or inadequate, then the Tribunal must make a finding of discrimination.

138. In a complaint of direct discrimination, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

Unfair dismissal

139. Section 98 of the Employment Rights Act 1996 provides:

> '(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) The reason (or, if more than one, the principal reason) for the dismissal; and
> (b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it –
>
> (a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;
>
> .....
> (3) In subsection (2)(a) –
>
> (a) 'Capability', in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality;....

140. If the reason established by the employer is a potentially fair reason under section 98(1)(a) or (b) the tribunal must then determine the question of fairness in accordance with section 98(4):

> '(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.'

141. The Tribunal must determine whether the employer's actions fell within the range of reasonable responses open to a reasonable employer in the circumstances (**Iceland Frozen Foods Limited v Jones [1983] ICR 17** (approved by the Court of Appeal in **Post Office v Foley, HSBC Bank plc**

(formerly Midland Bank plc) v Madden [2000] IRLR 827)). The Tribunal must not substitute its decision for that of the employer.

142. The role of the Tribunal under section 98(4) in a case concerning long term sickness absence is derived from two decisions of the EAT in the 1970s: **Spencer v Paragon Wallpapers Limited [1976] IRLR 373** and **East Lindsey District Council v Daubney [1977] IRLR 181.** A summary of the approach can be found in the decision of the Court of Session in **BS v Dundee City Council [2014] IRLR 131.** There are three main issues in these cases:

    (a) The Tribunal must consider whether it is reasonable to expect the employer to wait any longer for the employee to return to work;

    (b) An employer acting reasonably will consult the employee to see what his views are;

    (c) An employer acting reasonably obtains medical advice on the employee's position, the prognosis and when a return to work is likely. This does not necessarily involve an obligation to obtain specialist advice.

143. Ultimately the question in these cases is whether the employer acted reasonably in concluding in the light of the position of the employee and the medical evidence that it could not wait any longer for the employee to return to work.

144. Applying **Polkey v AE Dayton Services Ltd [1987] UKHL 8; Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40;**and **Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604** the Tribunal can reduce an award of damages on the basis that if the employer had acted fairly the claimant would have been dismissed in any event at or around the same time.

Unfair dismissal and disability

145. In cases where disability and unfair dismissal claims are being pursued in parallel, Tribunals should delineate their findings in respect of each claim, recognising that different tests need to be applied, although often the Tribunal will come to the same conclusion.

146. In the case of **O'Brien v Bolton St Catherine's Academy 2017 ICR 737 CA** Lord Justice Underhill explained this as follows:

> 'I accept that the language in which the two tests is expressed is different and that in the public law context a "reasonableness review" may be significantly less stringent than a proportionality assessment (though the nature and extent of the difference remains much debated). But it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law. Fortunately I see no reason why that should be so. On the one hand, it is well established that in an

> appropriate context a proportionality test can, and should, accommodate a substantial degree of respect for the judgment of the decision-taker as to his reasonable needs (provided he has acted rationally and responsibly), while insisting that the tribunal is responsible for striking the ultimate balance; and I see good reason for such an approach in the case of the employment relationship. On the other, I repeat — what is sometimes insufficiently appreciated — that the need to recognise that there may sometimes be circumstances where both dismissal and "non-dismissal" are reasonable responses does not reduce the task of the tribunal under S.98(4) to one of "quasi-Wednesbury" review… Thus, in this context, I very much doubt whether the two tests should lead to different results.'

Jurisdiction/ time limits

147. The time limit for Equality Act claims, subject to the ACAS conciliation provisions, appears in section 123 as follows:

> '(1) Proceedings on a complaint within section 120 may not be brought after the end of –
>
> (a) the period of three 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.'

Submissions

148. The claimant and Counsel for the respondent both made oral submissions which are not repeated here but which we have taken into account when reaching our decision.

Conclusions

149. We applied the legal principles to our findings of fact to reach our conclusions in respect of the issues we had to decide. We have addressed the issues in a different order, starting by considering the complaints of failure to make reasonable adjustments, then discrimination arising from disability, then direct discrimination and finally unfair dismissal.

Disability

150. The respondent accepts that the claimant had a disability (Long-Covid) from 30 March 2021. We find that the date when the respondent knew or ought to have known that the claimant had a disability was 11 February 2021 when the claimant attended a meeting with SR to update him on his condition (paragraph 37 above). It ought to have been clear at that time that the condition was likely to last 12 months.

Failure to make Reasonable adjustments

151. The provision, criterion or practice (PCP) relied on by the claimant is the respondent's requirement that employees carry out their usual contractual duties.

152. We find that the respondent had this PCP and it put the claimant at a particular disadvantage in comparison to people who are not disabled. His condition, Long Covid, meant that he was unable to safely drive trains. The respondent knew that the claimant was likely to be placed at that substantial disadvantage by the PCP as the occupational health reports set out the claimant's impairments and restrictions.

153. Our conclusions mean that the respondent was under a duty to take reasonable steps to avoid the substantial disadvantage to the claimant which arose from the PCP.

154. We accept that there was no adjustment which the respondent could have reasonably put in place on a permanent basis to address the claimant's inability to carry out his usual contractual duties.

155. The claimant says the respondent could have:

    155.1 Assigned and/or redeployed the claimant a part time scheduler role (ie. the coverage administrator role) with a phased return to work.

    155.2 Assigned and/or redeployed the claimant a customer service role with reduced hours (part time), in accordance with OH recommendations.

156. These adjustments would have removed the disadvantage to the claimant of facing dismissal because of being unable to perform his substantive role.

157. Transferring an employee to another role when they become unable to perform their role is an example of a reasonable adjustment included in the EHRC Code of Practice.

158. We accept that the CSA2 role was not suitable for the claimant. This would involve standing for a large part of the day and the claimant's health did not allow this. Although the inability to stand could have been accommodated on a short term basis this was not viable in the longer term.

159. However, it would have been reasonable to have transferred the claimant on a part time basis to the coverage administrator role or another role where he could sit down. This would have meant the claimant would not have been dismissed when he was.

160. The respondent has failed to satisfy us that it was not reasonable to have offered the claimant the coverage administrator role. We specifically identify the following reasons why it would have been reasonable to offer the claimant the role:

    a) The claimant was capable of carrying out the coverage administrator role, having been skills matched to it and passed the SAP test.

    b) The claimant turned the role down because it was full time, which we found was a reasonable decision bearing in mind his health and the fact that he had previously worked part time.

    c) No consideration was given to whether the role could be part time or carried out as a job share and no evidence was put forward as to why that could not be the case.

    d) The respondent could reasonably have attempted to find a way for the claimant to carry out the training for the role. The respondent said the training needed to be full time and take place on site but did not produce evidence to persuade us this was the case. The advertisement said the job could be done from home. The respondent failed to investigate the options properly or at all, not even establishing what was involved in the training or how long it would take.

    e) The role was still available in January 2022; filling the role was not time critical and allowances could have been made for the claimant to train and to work part time.

161. The respondent has also failed to satisfy us that it was unable to find the claimant another role where the claimant could work part time from home. The respondent put the onus on the claimant to find a job while in the redeployment department. No documentary evidence has been put forward with regard to the number of vacancies in the organisation and, on a balance of probabilities, the Tribunal does not accept that an organisation employing approximately 30,000 people, many of whom were working from home during the Covid pandemic, was unable to find any suitable alternative employment for the claimant.

162. The final case conference and appeal hearing was a ‘rubber stamp’ exercise, in that neither SR or MW considered again the coverage administrator role or any other roles that may be suitable for the claimant; they simply relied on the fact that the claimant had not been successful in obtaining a role while in the redeployment department.

163. We therefore find that there was a failure to make reasonable adjustments.

164. The claimant issued proceedings on 18 February 2022, and taking into account the conciliation period, anything that happened before 11 September 2021 is outside the time limit. The reasonable adjustment could have been made at any time during the redeployment period up until the appeal on 14 October 2021. The coverage administrator role remained vacant until January 2022. The claimant was within the primary time limit for bringing his claim.

165. The complaint for failure to make reasonable adjustments therefore succeeds.

Discrimination arising from disability.

166. The claimant was dismissed by the respondent. This amounts to unfavourable treatment.

167. The unfavourable treatment was because of something arising in consequence of the claimant's disability. The claimant was unable to work in his substantive role because of long Covid, in that he was unable to safely operate trains. He required an alternative role which the respondent maintains could not be accommodated. This was the material reason for his dismissal.

168. We have found that transfer to an alternative role was a reasonable adjustment. If that had been carried out the claimant would not have been dismissed.

169. The respondent says that dismissal was a proportionate means of achieving a legitimate aim, namely:

    a) effectively managing staff absence to reduce the negative effect staff absence can have on the Respondent's ongoing operations, including the respondent's train service;

    b) ensuring that the respondent operates a fair and consistent absence management policy.

170. The Tribunal accepts that these are legitimate aims. The Tribunal is required to carry out a balancing exercise by weighing the respondent's justification against the discriminatory impact, considering whether the means are appropriate with a view to achieving the aim in question, and are necessary to that end.

171. We heard no evidence to persuade us that dismissing the claimant enabled the respondent to achieve these aims. Although MW says in her statement that his continued absence made coverage of other absences difficult and caused trains to be cancelled, we have not seen or heard any cogent evidence in support of that statement. Moreover, moving the claimant to a different role would mean that he was not included in the headcount of train

operators. The respondent has not explained how dismissing the claimant achieved the aim of operating a fair and consistent absence management policy.

172. We have concluded that the dismissal of the claimant was not proportionate. There was a less discriminatory way than dismissal to address the claimant's inability to perform his substantive role, which was to find him an alternative role.

173. The complaint of discrimination arising from disability therefore succeeds.

Direct discrimination

174. The claimant claims he was treated less favourably than actual or hypothetical comparators in that he was dismissed and not placed on furlough in August 2020.

175. In respect of furlough we have found that the claimant did not have a disability at the relevant time and that complaint fails. In any event the claim was made outside the statutory time limit.

176. We have considered the 'reason why' the decision maker (SR) dismissed the claimant. The reason was that it was unlikely that the claimant would be able to return to his substantive role. The prognosis was very uncertain. In the case of the comparators there was a strong likelihood that they would be able to do so.

177. We are satisfied that the respondent has discharged the burden of proof; the claimant was treated less favourably because it was unlikely he would be able to return to his substantive role and not because of his disability.

178. The Tribunal therefore does not uphold the claimant's complaint of direct discrimination.

Unfair dismissal

179. The reason for the claimant's dismissal was capability. This is a potentially fair reason for dismissal.

180. We need to consider whether in the circumstances (including the size and administrative resources of the organisation) the respondent acted reasonably or unreasonably in treating capability as a sufficient reason for dismissing the claimant.

181. The issues identify that the Tribunal will usually need to decide in particular whether a) the respondent adequately investigated the claimant's health issues and gave the claimant an adequate opportunity to be considered for alternative roles and b) whether dismissal was within the range of reasonable responses.

182. The Tribunal bear in mind that the legal test under ERA 1996 is different to the test under section 15 EA 2010.

183. The Tribunal must not substitute its own views with regard to whether the dismissal was within the range of reasonable responses.

184. The respondent failed to follow its own internal procedure by failing to prepare action plans following the case conference meetings. The respondent even failed to produce minutes. The respondent only held 2 meetings before the final meeting rather than 3. We find that the respondent adopted a 'tick box' approach to these meetings and to the subsequent appeal. A reasonable employer would have adopted a more open minded approach and given greater consideration to whether dismissal was appropriate.

185. The respondent was heavily influenced by the fact that the claimant had been unable to carry out his substantive role since April 2020 (some 17 months) and the lack of a clear prognosis. We accept that these are valid factors. We have balanced these factors against other factors when considering the range of reasonable responses test.

186. The claimant informed the respondent that he did not agree with the OH report on which they relied when making their decision. The Tribunal finds the report to be contradictory and unsatisfactory. We find that, notwithstanding the length of absence, a reasonable employer would not have relied on the OH report and would have obtained evidence from the claimant's treating consultant regarding prognosis and ability to do a part time role.

187. There was also the probability of an alternative suitable role, which was not properly investigated. A reasonable employer would have made further enquiries about training for the coverage administrator role and looked for other alternative roles before deciding on dismissal. It would have been reasonable to wait longer after the meeting on 22 September 2021 to carry out these enquiries, particularly in view of the discretion to extend sick pay or time in redeployment, and taking into account that the claimant had taken a great deal of his annual leave when he had in fact been unwell.

188. For these reasons, we have concluded that the decision to dismiss the claimant fell outside the range of reasonable responses and was unfair.

189. If the respondent had properly considered other roles we find, on the balance of probabilities, the respondent would have found a role the claimant could perform from home, for 2 hours a day, 3 days a week. We take into account that he managed to complete nearly 30 training courses in redeployment, working 3 days a week.

190. We make no deduction for Polkey as we have found that the respondent could have found the claimant another role. We did not hear evidence on whether the claimant would have been medically capable of performing a

role over the longer term or increasing his hours; that will be considered at the remedy hearing.

Summary

191. The claimant's complaints of failure to make reasonable adjustments, discrimination arising from disability and unfair dismissal are upheld. The complaint of direct discrimination on the grounds of disability is dismissed.

192. The matter will now be listed for a remedy hearing to decide compensation for the complaints which have been upheld.

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Employment Judge S Matthews

Dated: 4 March 2024

Sent to the parties on:

4 March 2024

For the Tribunal:

Recording and Transcription
Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/