EMPLOYMENT TRIBUNALS

Claimant: **Ms S Gritton**

Respondent: **London Underground Limited**

Heard at: **East London Hearing Centre**

On: **21, 22, 23, 27 June & 26 July 2023**

Before: **Employment Judge B Beyzade**
Members: **Miss S Harwood**
Mr S Woodhouse

Representation
Claimant: Miss S Bewley (Counsel)
Respondent: Miss C Urquhart (Counsel)

JUDGMENT having been sent to the parties on 24 August 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Introduction

1 The claimant presented a complaint of unfair dismissal on 01 July 2022 which the respondent resisted.

2 On 4 November 2022, the claimant filed Amended Particulars of Claim, further particularising her claims. On 15 November 2022 Employment Judge Moor gave permission to amend the claim in respect of paragraphs 1-20 of the Amended Particulars of Claim and sought the respondent's view on paragraphs 21 onwards of the Amended Particulars of Claim. The application was unopposed, and so on 6 December 2022 Employment Judge Moor granted the amendment in respect of paragraphs 21 onwards of the Amended Particulars of Claim.

3 At a Preliminary Hearing (Case Management) that took place on 16 December 2022, Employment Judge S Knight (due to an error of transcription of Employment Judge Moore's order) gave permission to the claimant (to the extent that the claim had not already been amended and by consent) to amend her claim to include the entirety of the amended particulars of claim, such that the claimant's complaints in respect of unfair dismissal, discrimination arising from disability, direct sex discrimination and breach of

contract (notice pay) and wrongful dismissal set out in the Employment Judge's orders could proceed.

4 In addition in the Case Management Orders issued to parties on 20 December 2022 Employment Judge Knight set out the agreed List of Issues below the Case Summary (as discussed at the Preliminary Hearing) that required to be determined by the Tribunal. The agreed List of Issues included issues relating to both jurisdiction: time bar and substantive matters. Pursuant to paragraph 5 of the Case Management Orders, parties were requested to write to the Tribunal if they believed the list of issues were wrong or incomplete by 23 December 2022, in the absence of which the list of issues would be treated as final (unless the Tribunal decided otherwise). Neither party had sent correspondence to the Tribunal to indicate that the agreed List of Issues recorded in the orders of Employment Judge Knight were wrong or incomplete.

5 The respondent resisted the claimant's amended complaints by way of an Amended Response dated 20 February 2022.

6 The Final Hearing in this case took place on the following dates; 21, 22, 23, 27 June 2023 and 26 July 2023. This was a hearing conducted in person at the London East Employment Tribunal.

7 Initially, the Tribunal were provided with a copy of a Hearing Bundle which consisted of 599 pages, which had been agreed by the parties prior to the Final Hearing. In addition, by consent, the Tribunal gave permission for additional pages (pages 600 to 607) to be added to the Hearing Bundle.

8 It was agreed that the issues relating to liability and if appropriate remedy would be investigated and determined by the Tribunal during this Hearing.

9 The parties agreed on a List of Issues for the Tribunal in advance of the Final Hearing. Having discussed those issues with the parties' representatives, at the outset of the hearing, the parties' representatives were advised that the Tribunal would investigate and record the following issues as falling to be determined, both parties being in agreement with these:

Jurisdiction: time bar

1. Has the Claimant brought the discrimination claims in time (allowing for any early conciliation process time limit extension)?

2. If not, are there any grounds on which it would be just and equitable to extend time?

Disability discrimination

Disability s.6 Equality Act 2010

3. Was the Claimant a disabled person as defined in Section 6 of the Equality Act 2010 at the relevant time or times. Specifically:

(1) Did the Claimant suffer from a physical or mental impairment? The Claimant alleges that she suffered from Post-Traumatic Stress Disorder ("PTSD"), anxiety and depression.

(2) If so, did that impairment have a substantial and long-term effect on the Claimant's ability to carry our normal day to day activities in the relevant time or times?

The Claimant states she began to suffer symptoms on 19 November 2017. The Claimant states that it affects her ability to carry out the activities as outlined at paragraph 30 of the amended Particulars of Claim.

The Respondent accepts that the Claimant was a disabled person by virtue of anxiety and depression but not by virtue of PTSD. The Respondent accepts it had knowledge of the Claimant's disability of anxiety and depression at all material times.

Discrimination arising from disability

4. The Claimant alleges the Respondent treated her unfavourably by dismissing her on 5 April 2022.

5. With reference to the alleged unfavourable treatment:

(1) Did the Respondent treat the Claimant unfavourably because of something arising in consequence of the Claimant's disability, contrary to Section 15 of the Equality Act 2010?

The Claimant alleges that the 'something' arising in consequence of her disability is that she momentarily lost concentration causing her to unknowingly open doors on the wrong side of the tube train. As she was unaware, in consequence of disability, she was unable to report this.

(2) If so, did the Respondent know, or ought the Respondent reasonably to have known, at the relevant time(s), that the Claimant was a disabled person?
The Claimant says that her Occupational Health reports will show who referred her to Occupational Health due to disability. In particular, James Harris and the Claimant's manager at Leytonstone, Woicezc, had knowledge of her disability.

(3) If so, was the Respondent's treatment of the Claimant a proportionate means of achieving a legitimate aim?

The Respondent's legitimate aim is to ensure the health and safety of its staff, customers and passengers. (Added 21 June 2023).

Sex discrimination

6. The Claimant alleges that her dismissal on 5 April 2022 amounted to less favourable treatment, and that such treatment was on the grounds of her sex.

7. Are the following real comparators, whose circumstances the Claimant alleges the are not materially different to the Claimant's own, the appropriate comparators?

   (1) The four individuals she raised via her representative Ian Goodman on 21 April 2022 after her appeal hearing.

   (2) A fifth male train driver who had a similar or worse incident to her.

8. Did the Respondent discriminate against the Claimant on the grounds of her sex contrary to Section 13 of the Equality Act 2010? In particular:

   (1) With reference to the alleged acts or omissions listed above, did the Respondent carry out such acts or omissions and, if so, did the Respondent in so doing treat the Claimant less favourably than others?

   (2) If yes, was the reason for the less favourable treatment due to the protected characteristic as alleged by the Claimant in terms of Section 4 of the Equality Act 2010?

Unfair dismissal

9. What was the reason for dismissal? The Respondent says the reason for dismissal was related to the Claimant's conduct. The Claimant's position is that there was a discriminatory motive.

10. Did the Respondent have a genuine and reasonable belief that the Claimant committed an act of misconduct? Respondent says yes. Claimant does not accept her acts were misconduct.

11. Did the Respondent conduct a reasonable investigation? Respondent says yes. Claimant says no.

12. Did the Respondent follow a fair and reasonable procedure? Respondent says yes. Claimant says no.

13. Was the decision to dismiss the Claimant within the range of reasonable responses open to a reasonable employer? Respondent says yes. Claimant says no.

14. In considering the range of reasonable responses the Tribunal will in particular consider whether the Respondent treated the Claimant inconsistently. She relies upon the same 5 comparators outlined in the sex discrimination section above.

Wrongful dismissal and breach of contract (notice pay)

15. Did the Claimant commit an act of gross misconduct being a repudiatory breach of her employment contract entitling the Respondent to dismiss her without notice? The Respondent says the act of gross misconduct was: at 11:42am on 6th January 2022, on a Westbound train at Holborn, the Claimant

overrode the train circuit system and opened the doors on the wrong side, then closed the doors and departed the station without reporting the incident to the service controller. This is contrary to the code of conduct and the Respondent's operational procedures.

16. Does the Respondent owe the Claimant notice pay?

Remedy

17. What financial loss, if any, has the Claimant suffered as a result of any unlawful act? Such considerations are to include the principles enunciated in the cases of *Chagger* and *Polkey*.

18. Did the Claimant mitigate her loss?

19. What award, if any, should be made for injury to feelings?

20. Did the Respondent breach the ACAS Code? The Claimant relies on paragraphs 4 (consistency) and paragraphs 18 – 25 (deciding on appropriate action) of the ACAS Code.

21. If so, was such failure to follow the ACAS Code reasonable in all the circumstances?

22. If not, would it be just and equitable for the Tribunal to increase or decrease any award?

23. In relation to the unfair dismissal claim only, should any award be reduced due to the Claimant's own conduct?

24. In relation to the unfair dismissal claim only should the Claimant be reinstated or re-engaged?

10 The claimant's representative indicated the claimant's position was that any issues relating to time limits and jurisdiction had been addressed by Employment Judge Moor and Employment Judge Knight in their previous orders. The respondent's representative did not agree with this and submitted that time limits and jurisdiction points remained a live issue (and that the Tribunal was required to determine these issues in accordance with the agreed List of Issues). It was agreed that parties' representatives will make submissions on the point raised by the claimant's representative at the conclusion of the hearing, which will be considered by the Tribunal thereafter (it was also agreed that the Tribunal would hear any evidence and submissions regarding time limits and jurisdiction at the same time [that it hears any evidence relating to liability and remedy]).

11 The claimant's representative further advised that the respondent's witness statements did not set out the basis for the respondent's justification defence. Following discussion with parties' representatives, it was agreed that, if appropriate, the claimant's representative will deal with this matter in the claimant's submissions and the respondent's representative respond to any points raised in their submissions.

12 Parties' representatives agreed to work to a timetable to ensure that the evidence and submissions could be completed within the allocated hearing dates. The claimant's representative requested that as a reasonable adjustment, the claimant be permitted to take additional breaks as may be needed. By consent, the Tribunal directed that the claimant could request additional breaks at any time during the hearing as may be required. We were not requested to make (and the Tribunal considered it was not necessary to make) any further or additional reasonable adjustments.

13 The claimant gave evidence on her own behalf, and she produced a written witness statement.

14 Mr Amir Suleman (Area Manager) and Mr Dale Smith (whose role was Head of Line Operations on the Central Line at the material time) gave evidence on behalf of the respondent, both of whom produced written witness statements.

15 The Tribunal were provided with a copy of an agreed cast list and chronology at the outset of the Final Hearing.

16 Miss S Bewley, Counsel, represented the claimant during the Final Hearing and Miss C Urquhart, Counsel, represented the respondent.

17 The Tribunal were provided with written representations by both the claimant's representative and the respondent's representative. In addition to these, both parties' representatives supplemented those representations by way of oral submissions.

18 We reminded parties' representatives of the need to work together in order to achieve the overriding objective set out in Rule 2 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The parties' representatives co-operated, as appropriate, which ensured that the evidence and submissions could be completed within the time allocated.

Findings of Fact

19 We have not sought to set out every detail of evidence which we heard nor to resolve every difference between the parties, but only those which appear to us to be material. Our material findings, relevant to the issues before us for judicial determination, based on the balance of probability, are set out below, in a way that it is proportionate to the complexity and importance of the relevant issues before the Tribunal.

20 On the basis of the evidence heard from the claimant and the respondent's witnesses before us over the course of this Final Hearing and the various documents in the agreed file of documents provided to us, so far as spoken to in evidence and that we were referred to, the Tribunal has found the following essential facts established:

Background

21 The claimant was employed by the respondent between 17 July 2011 and 05 April 2022 as a Train Operator.

22 The respondent, London Underground Limited, whose registered office is at 5 Endeavour Square, Stratford, London, E20 1JN, at all material times, operated the London Underground network.

Incident on 6 January 2022

23 On 06 January 2022, the claimant attended work at Leytonstone Underground Station (Central Line) at 7:26am. She was due to work as a spare that day. This refers to an individual who would effectively be on call but present at the relevant station, so they are ready to work when necessary (when they are allocated to a train).
24 The claimant was assigned to London Underground Central Line Train numbered 055 to Ealing Broadway (and back) and that train was due to leave Leytonstone Station at 11:01am that day.

25 The train was in automatic operation and it arrived at Holborn Station Westbound at 11:40:38.

26 When the claimant was arriving at Holborn Station within the train travelling towards Ealing Broadway, the platform was on the left-hand side and the wall was on the right. The platform was busy at the time. The platform for the previous six stations were all on the right-hand side. Stratford Station had platforms on both sides (the claimant had experienced an issue with the doors of the train she was driving at Stratford Station).

27 According to the download dated 14 January 2022, the timings relating to the incident on the relevant day and what happened were as follows:

11:40:37 - Train 055 is fully berthed in the platform
11:40:38 Train arrives at Holborn Station
11:40:41 - Doors can be seen as fully open
11:40:42 - Passengers can be seen as boarding and alighting
11:41:05 - The Platform Train Interface can be seen as clear
11:42:15 - Train doors can be seen as closing
11:42:18 - All outside door indicating lights can be seen extinguishing
11:42:21 - Train 055 departs the platform

It was reported that cameras 005 & 006 were the only two cameras which gave a part image of inside the doors. However due to the customer loading in the visible carriages it was not possible to see any movement of the doors on the incorrect side.

28 Moreover, as per the train download:

11:40:38 Train arrives at Holborn Station
11:40:38 Operator open side 2 (this is incorrect side for Westbound Holborn)
11:40:59 Close door side 1 pressed (wrong side)
11:41:12 Close door side 1 pressed again (trying to get pilot light but closing wrong side)
11:41:45 - Platform side door interlock bypass switch operated
11:41:45 – Operator open side 1 (wrong side opened up)
11:41:46 - Platform side interlock switch normal position
11:41:46 - Receive doors not closed within 20 seconds warning (because side 2 is still open)
11:41:48 - Close side 1 pressed

11:42:11 - Close side 2 pressed (all doors are now closed)
11:42:20 - Auto driving commenced.

29 Thereafter, at 11:42:21 train 055 departed from the platform and the claimant continued to drive the train.

30 A customer made a complaint shortly after he left train 055 (at 11:44:14) at Tottenham Court Road Station. The customer provided a witness statement dated 7 January 2022. Within their complaint, the customer stated:

> "On Thursday 6th January 2022 at around 10:45am, I boarded a Westbound tube train from Wanstead, I was heading to Tottenham Court Road. The first station on the journey was Leytonstone.
> …
> At the train's arrival at Holborn, passengers alighted and boarded. The train was relatively busy and I was stood in the double doors on the furthest side from the platform. Two other passengers were also stood close by these doors.
> As the train was ready for departure the usual beeping noise sounded to indicate doors were about to close. The doors failed to close and an announcement was made by a female requesting passengers to move away from the doors. A further beeping noise was made and again the doors failed to close. A third attempt was made to close the doors and to my great surprise the doors where I was standing opened. The doors opened fully and were fully open for about 3 seconds. At this time all the doors were open, both on the platform side and on the offside side of the train against the tunnel wall. The health and safety issues here are obvious, suffice to say that had I been leaning against the doors I could have fallen out of the train. I do not know the location of the live rail. I cannot comment as to whether any other doors on the train opened in the same manner.
>
> A brief conversation was had with the 2 passengers nearby and I explained I was getting off the train at the next stop and that I would report the incident. I got off the train at Tottenham Court Road and for evidential purpose I took a photograph of the rear of the train as it left the platform. The exact time on the platform clock was 11 44 : 14. The train number was 55. This is not clear on the photograph I took, however I made an original note on my newspaper which I have retained. I can exhibit formally exhibit the photograph and original note if necessary.
> On my arrival at Tottenham Court Road I reported the incident to the station manager Mr Cameron Williams."

31 Thereafter, the claimant was relieved of her duties at White City Station.

Initial Investigation

32 The claimant provided a handwritten statement dated 6 January 2022 explaining her account of events (see pages 122-123 of the Hearing Bundle). She set out her personal circumstances including in relation of the death of her mother which she struggled to deal with and in respect of finishing work to go and see her grandson. The claimant also stated:

> "I tried to close the doors but nothing was happening on my CCTV and all I could hear was the door chimes. I made a PA and just asked passengers not to obstruct the doors and tried again.
>
> I then got up and placed my hand on the mushroom and opened my cab door and had my fingers on the door opening button but as far as I recall I didn't push them as I realised it was the wrong side. ~~I closed the cab~~ and the doors didn't open … made a PA to advise passengers I was closing the doors and continued."

33 At the time of the incident the claimant's mind was pre-occupied with personal issues. The claimant stated, "It only occurred to me when I spoke to the TM at White City conducting a welfare check what had happened."

34 Mr Adriano Direnzo, Duty Reliability Manager, conducted a fact-finding interview with the claimant on 6 January 2022. The content of that interview can be summarised as follows:

a) The claimant stated, "I got up and put my right hand on the mushroom and pushed it. Then opened the cab door whilst facing the back panel and then put my fingers on the door open buttons and looked out the cab. At this point looking down the train I realised I was in the process of opening the doors on the wrong side. But whilst looking down the side of the train I did not see the doors open as I believe I had not pushed the door open buttons on the panel nearest the cab door I had just opened. I then shut the cab door and made a PA to say I was closing the doors. I then returned to my driving seat and used the left-hand door closed button on the front panel to close the doors."

b) In answer to Mr Direnzo's question in relation to her thought process and decision making that led the claimant to use the CSDE override at Holborn Station, the claimant replied: "I believe by using the CSDE the emergency door open process I can open the doors on the whole train and then close them again".

c) The claimant was also asked by Mr Direnzo on the date in question whether she could recall what panel she used to open the doors when she utilised the CSDE. The claimant replied: "I went to use the back panel."

d) In terms of describing the procedure to follow if the doors were open on the wrong side of the train she said: "contact the Service Controller and await further instructions." She confirmed that the correct procedure for this was contained in the respondent's rule book.

e) She also confirmed that she did not contact the Service Controller on the day in question.

35 The respondent's rule book which was referred to during that meeting (a copy of which was provided to us in the Hearing Bundle) dated November 2021 starts at page 118 of the Hearing Bundle. Section 14 of the respondent's rule book is titled "wrong side door opening". The rule book describes that if a train driver opens the train doors on the wrong side of their train, in error, they must:

- Immediately close the doors
- Tell the controller

- Request traction current to be switched off (for the line or lines concerned)
- Sound the train whistle to activate the attention of station staff
- Open the doors on the platform side of your train
- Try to find out if any customers have fallen from the train

Further investigation

36 The claimant was stood down from her normal duties in order to enable the respondent to conduct an investigation and a letter was sent to her confirming this (see pages 135 – 136 of the Hearing Bundle). The claimant was provided with the contact details of the respondent's Employee Assistance Service.

37 An interview took place with the claimant, which was conducted by Mr Christophe Suant, Trains Manager – Leytonstone Train Crew Depot on 11 January 2022. The claimant (accompanied by Mark Wheeler) gave the following account of events that morning: "SG: I got up and showered, found a lump. Left home and got to Mile End and there was no service. Rang Christian to let him know that I was going to be late. I got to work at 7:26 and signed on. Officially my book-on was 7:24, I had a laugh and a joke with Christian who said he would not ask for a memo."

38 The claimant described her recollection of her actions whilst operating train 055 whilst she was berthed at Holborn Westbound in the following terms: "I opened the doors and people got off – between 30 and 60 seconds, I forgot where I was for a moment. I was pushing the door close buttons but the doors were not shutting. I made a PA asking people to not obstruct the doors. I panicked, I opened the cab door and pushed the mushroom and my fingers were on the open buttons. I realised I was on the wrong side. I do not recall opening the doors, I shut my cab door and made a PA. I panicked a little bit – loads of things going on in my brain,"

39 The claimant was referred to the download which showed that the train doors opened on side 1, the side 2 doors were already open and that the side 1 doors were opened on the wrong side, and she was asked for an explanation of this. The claimant stated: "I have no recollection of doing it, I really don't." The claimant also referred to other personal circumstances, including the following: "There is stuff going on with my kids' money. I have paid loads of money for a solicitor and still nothing. The lump has scared me, from wanting to die to not wanting to die and finding a lump." Mr Suant took the claimant through the procedure that was followed on the day in question and the claimant was asked if she accidentally opened the saloon doors on train 055 at Holborn Westbound. The claimant replied: "Not that I am aware of Chris, honestly, I would have called it in straight away." The claimant also confirmed that she did not contact the controller at the time, and she confirmed that no incidents occurred at the previous two stations – Chancery Lane and St Paul's.

40 She was asked by Mr Suant: "The door open buttons on the back panel had to be pushed in, they cannot be opened by laying your hand over them. Did you push them in accidentally?" The claimant replied: "Not that I recollect, no. If I had known that I had done that I would have called it in straight away."

41 A Train Safety Test Certificate was completed on 12 January 2022 in terms of the particulars of actions taken and defects found on the test and work orders raised by depot staff, this stated that:

> "The train was initially taken out of service at Ruislip on 06/01/2022 but was subsequently released because the depot staff believed that the train operator had commanded the wrong side doors to open, causing the incident.
> It later transpired that there had been a misunderstanding, and that the train operator did not recall using the correct side door enable bypass and pressing the activate buttons on the wrong side (side 1).
> Due to this, the train was then removed from service and quarantined at Hainault on 12/01/2022 where door irregularity testing was completed under W/O 14928253.
> On the 11/01/2022 the train's ATO controller was replaced to address a history of RX and TX antenna issues associated to the correct side door enable control (W/O 14927117).
> The door irreg testing revealed no faults with the train systems and the TDS download shows the CSDE bypass and activate buttons being operated on side 1 at Holborn at 11:41:45 06/01/2022."

42 This also stated "furthermore, testing of the door circuits has proved that the train was operating within its design parameters and that the doors on side 1 (wrong side) could not open un-commanded. Fifteen minutes prior to the incident the download shows that whilst at Stratford, where both side doors are required to open, the platform side door interlock bypass was required to open side 1. This was likely due to an issue with the correct side door enable on side 1, which the unit had a history of. This issue was addressed and the ATO Antennas and the ATO Controller were subsequently replaced. Although this does not change the outcome of the investigation, it could have contributed to the train operator's confusion when at Holborn."

43 In terms of follow-up action, the report stated:

> "As a follow up action, a simple series of cab functions including door activate on either side using the correct side door enable by pass were carried out, and this will then be compared against the TDS download once this becomes available for further evidence as it will confirm that the download is an accurate reflection of the actions performed in the cab. A priority 2 work order 14929851 has been raised for this to be completed within three days.
> Implications for the fleet (if any) – No
> Implications for other fleets (if any) – No"

44 An Incident Reporting Form was completed on 14 January 2022 by Mr Direnzo.

45 A further fact-finding meeting took place on 21 January 2022 between the claimant, the claimant's Union Representative and Mr Suant. The claimant mentioned during that meeting that she experienced problems with the doors at Stratford Station and she had to use the mushroom button to open the doors. When asked why she did not raise this before, she said that she had forgotten about it.

46 Mr Suant prepared an investigation report, and a copy of the summary and recommendations are at pages 171 – 172 of the Hearing Bundle. The report referred to "Rule breaking for personal benefits." He commented in relation to Holborn Station, "Holborn Central Line Westbound Platform has had multiple incidents of 'wrong side door opening,' the configuration of the platform is such that its stations proceeding and following Holborn Westbound trains berth on side 1 of the train, at Holborn it differs as the

platform was on side 2 of the train. As such the training received by new train operators of instructor operators at this location especially highlights this potential area for close attention and the procedure for wrong side opening is emphasised."

47 Furthermore, it was stated that, "This is a very serious case involving a serious staff error that could have resulted in serious injury or death, with this in mind this case needs to be referred to Company disciplinary panel."

Company disciplinary interview

48 A letter was sent to the claimant dated 24 January 2022 advising her that Mr Suant had decided to refer the matter to a company disciplinary interview ("CDI").

49 We were referred to a copy of Mr Suant's CDI Brief Report with appendices at pages 117-178 of the Hearing Bundle.

50 A letter dated 9 February 2022 was sent to the claimant from Mr Suant detailing the allegation of Gross Misconduct and inviting the claimant to attend a CDI meeting (see pages 175-178 of the Hearing Bundle).

51 A CDI meeting was scheduled on 22 February 2022 and the claimant was advised that she had the right to present relevant evidence and to be accompanied by a Trade Union Representative or a colleague at the meeting.

52 The claimant provided a character reference from her former police sergeant by email dated 24 February 2022.

53 The CDI meeting took place on 2 March 2022. The first Chair was Mr Amir Suleman, Area Manager and the second Chair was Ms Tracey Simms, Train Operations Manager (and Shoaib Merchant was also in attendance). The claimant attended the meeting and she was accompanied by Mr Ian Goodman. A copy of the notes of the meeting with the claimant's tracked changes appears at pages 203-222 of the Hearing Bundle.

54 The claimant read her statement during the meeting (which was to be added to the appendices), and during the course of reading her statement, the notes record that the claimant was tearful. The claimant was overwhelmed and the meeting was adjourned in order to provide the claimant with a break. During the meeting the claimant referred to her personal circumstances, it was said that she quickly put her hands up at work and went through the DATS process (and received counselling).

55 The claimant described that in July 2021 problems started in terms of inheritance relating to her mother's Estate and that the claimant's stress and anxiety culminated in her going into management because she was feeling suicidal and needed help. It was also described that the claimant started counselling and the claimant's doctor wanted to place her back onto anti-depressants, but she preferred not to take these.

56 On the day of the incident, it was stated that the claimant woke up to find a lump under her arm (due to her family medical history, the claimant was concerned about this). It was further explained that the claimant worked as a spare that day and she spent three to four hours thinking about her mother, the inheritance matter, and the lump under her arm. In addition, after the incident, the claimant consulted her GP and agreed to be

prescribed anti-depressants. The record of the meeting states “Sam told the doctor what had happened at work and the doctor said it could all be explained by the stress and anxiety she was going through. I have a note from the doctor which I will leave with you.”

57 It was also said that for the seven stations before Holborn Station, the doors are on the right, so there could be an auto pilot effect if a train driver is not fully concentrating.

58 Later in the meeting, Tracey Simms stated (at page 199 of the Hearing Bundle) “So its fair for me to conclude there’s no confusion in the depot, no confusion as you get the train, get to Holborn, open the train doors, loads of confusion, close the train doors, confusion goes, you carry on.” The claimant replied “I’m not saying it went straightway. I refocused my mindset. I told myself to concentrate on what I was doing. One thing is, I’ve gone back to counselling as well.”

59 Amir Suleman added “So just to check: you’ve operated the CSDE and you don’t know you’ve pressed the wrong side. Your fingers have covered the button but you don’t know you’ve pressed it. So when you sit back down, why would you then close the doors if you didn’t know you’d opened them?” In reply to the claimant’s request for clarification, Amir Suleman stated, “you’ve opened the doors on the wrong side. You say you didn’t know you’d done that. But then you press the close button on that side.” The claimant responded, “I was pressing buttons on the back panel.”

60 Towards the end of the meeting the claimant explained that she has had therapy as well as counselling and that “With hindsight, I shouldn’t have gone to work. I did because I wanted to keep working to not worry about what was going on at home.”

61 Mr Goodman stated that he will be sending four comparator cases following the meeting.

62 The claimant had consulted her General Practitioner on 28 January 2022. A copy of the notes from that consultation are provided at page 181 of the Hearing Bundle. The consultation records that the claimant “has a history of anxiety and depression and PTSD. Has an incident at work and has no recollection of it and may lose job. She is a train driver, opened the door and then suddenly got confused and did not know where she was opening the door on the wrong side – only lasted one minute. She is under a lot of stress, lost both parents within twelve weeks in 2018 and struggling with those issues.” The comment that the doctor recorded includes, “I have explained to PT that her episode is very likely due to extreme stress and anxiety – as she has not been able to have closure since her parents have passed away.”

63 By email correspondence dated 4 March 2022 Mr Goodman, the claimant’s Trade Union Representative sent to Mr Suleman, the four comparator cases that he had mentioned during the CDI meeting (we note that that Mr Goodman’s initial email stated that two comparators were included in that email and that the other two comparators were sent separately).

<u>Outcome of disciplinary process</u>

64 The claimant was sent a letter dated 5 April 2022 informing her of the outcome of the disciplinary process namely that the claimant would be summarily dismissed (see pages 230-234 of the Hearing Bundle). In that letter, the claimant was advised “the panel

understands Sam was confused and suffered a loss of clear memory of the incident, however this is highly concerning." It was also noted that "a sudden high level of confusion is not plausible given it only happened when an incident occurred and given Sam was spare on the day with more time to use for personal relief than usual."

65 The letter also stated that this was a serious matter, that it was correctly a misconduct charge and that they considered a full range of outcomes including dismissal, suspended dismissal, and a final written warning. It was acknowledged that the claimant was facing challenges in her personal life. However, it was found that the incident materialised in a severe breach of the respondent's rules and procedures. It was stated that there was a process to be followed after wrong side door opening and to continue driving without following this process could cause fatalities and serious repercussions for the respondent as a whole. The letter advised that the panel had determined that the claimant would be dismissed from the date of the dismissal outcome letter. In support of the decision to dismiss the claimant, the letter stated that:

> "In making this decision we considered that:
> - Although you stated you were not aware you were unfit, the panel do not believe this is acceptable in excusing not being proactive to admit fitness concerns to the trains manager when booking on or during relief time whilst you were spare.
> - You did not follow the correct wrong side door opening procedure failing to prove the platform and notice the wall in front of you on the side you operated the door open button.
> - You did not admit fault or seek to correct the problem at any stage which is a core part of the operational errors process.
> - You refer responsibility for this error to confusion and the panel did not feel there was a sense of remorse."

66 The claimant was provided with a right of appeal which required to be presented within 7 calendar days.

<u>Claimant's appeal</u>

67 Mr Goodman sent a letter of appeal on behalf of the claimant dated 6 April 2022. That letter stated:

> "On behalf of Sam I am formally writing to appeal the decision to dismiss her yesterday.
>
> We believe that this decision is incorrect in respect of the severity of the sentence, the lack of leniency shown and misdirection when considering the mitigation put forward and the interpretation of what was said during questioning.
>
> As you will appreciate a holding the appeal as soon as possible would be beneficial and appreciated by all.
>
> Please let me know the time and location for the meeting as soon as you can."

68 Mr Suant provided a statement addressed to the appeal panel dated 11 April 2022, a copy of which appears at pages 241 and 242 of the Hearing Bundle.

69 On 14 April 2022, Mr Dale Smith, Head of Line Operations sent an email to the claimant requesting her attendance at a CDI appeal hearing on 20 April 2022.

70 The appeal meeting took place on 20 April 2022, which was chaired by Mr Smith, who was accompanied by Shoaib Merchant, Employee Relations Partner and Kristen Anthony, Notetaker. The claimant attended the appeal meeting along with her Union Representative, Mr Goodman. The notes of that meeting can be found at pages 243 – 247 of the Hearing Bundle. At page 247, the notes record as follows "Ian stated that there are comparator cases in the past where train operators have knowingly opened the doors on the wrong side and not reported it and they still have a job. Sam has been dismissed and we believe this to be wrong. Dale asked for those comparator cases to be sent over to him. Ian said he would do this."

71 Mr Goodman sent an email to Mr Smith dated 21 April 2022 attaching two comparators and advising that two further comparators would follow in the next email. He stated:

> "Whilst they are not exactly like Sam's incident all of them involved a train being moved after an unsafe door incident without it being reported.
> "As discussed yesterday, I honestly believe that Sam did not realise that the doors had been opened on the wrong side and if she had known she would definitely would have reported it. I believe that dismissal is too severe a sanction and I would hope that you can lessen the punishment after reconsidering the case."

The first email appears at page 247a, and the second email appears at page 247b of the Hearing Bundle.

72 Mr Suleman sent an email to Mr Smith on 4 May 2022 providing details of the comparators that he considered (see page 248 of the Hearing Bundle). He said that he understood that the appealing party did not feel that they were taken into consideration, and he further stated: "In summary, the cases show a clear reason to follow the CSDE procedure in line with policy (no pilot lights, door irregularity) whereas in Sam's case, this is not consistent."

73 Mr Smith sent a letter to the claimant dated 11 May 2022 advising her of the outcome of the CDI appeal hearing which she attended on 20 April 2022, a copy of which can be found at pages 249 to 252 of Hearing Bundle. He set out his findings under the section headed "Misdirection." He stated: "You made the point that you had not been seen by a manager for a Return-to-Work Interview (RTWI) after taking unpaid leave for Sunday 2 January 2022, it is important to note that according to our attendance at work policy a RTWI is only required after a period of sickness. I agree with the CDI panel who made the point that the onus was on you to declare any concerns regarding your fitness for duty."

74 In addition to the claimant raising the point of her previous good record, in respect of comparators, he noted that the claimant provided comparator cases where train operators had not been dismissed for similar incidents. He stated that he would refer to the sanction in his summary. He then provided a summary of his reasoning, and he stated that he considered all the evidence, points of clarification and mitigation.

75 He further stated: “The critical element of this incident was not that you had made a mistake in opening the doors on the wrong side, it was your subsequent failure to report this to the controller prior to moving your train. Had you done so, then you would not have been referred to a CDI on a gross misconduct charge.” He also said that it was fortunate that nobody was hurt because of the claimant’s negligence. He further stated that he must consider that the claimant’s failure to report the incident prior to moving the train could have been the difference in preventing a fatality had a customer fallen out of the train.

76 In respect of the sanction he explained that he considered the claimant’s personal circumstances and the impact that this dismissal will have on her personal life, and accordingly, he reviewed a wide range of comparable cases.

77 He recorded that he did not believe that the claimant had been completely honest with respect to her description of events in relation to the incident (he referred to the claimant’s position that she opened the cab door and that she was completely unaware that she opened the train doors on the non-platform side).

78 He noted that there was a serious breach of the respondent’s safety procedures which could have resulted in serious injuries or fatalities. He stated his conclusion thus:

> “It is my conclusion that regrading is not an appropriate sanction in your case as your failure to report a serious safety incident or admit to your actions in the subsequent investigation has resulted in a breach of trust. The implied duty of trust and confidence is fundamental to any role within London Underground and I believe that could not be trusted in another role within the organisation.”

79 Accordingly, Mr Smith considered regrading and he said that it was not appropriate because of the claimant’s failure to report a serious safety incident or admit to her actions in the subsequent investigation, he concluded that the claimant could not be trusted in another role within the organisation.

80 He stated that he understood the significant impact on the claimant personally and that he did not believe that a sanction short of dismissal was an option.

81 He therefore dismissed the claimant’s appeal and he confirmed the claimant’s summary dismissal.

Comparator details

82 We considered the details relating to the individuals (and their circumstances) relied on by the claimant as comparators. Details of four of the claimant’s comparators were provided by the claimant’s union representative during the respondent’s disciplinary process, whereas the details relating to the fifth comparator were not furnished at the relevant time. Both Mr Suleman and Mr Smith took account of the circumstances relating to the four comparators put forward on behalf of the claimant prior to making the decision relating to the claimant’s dismissal and the appeal outcome respectively (referred to above).

Comparator 1

83 We considered the details and the circumstances relating to first comparator that the claimant relies upon. The first comparator's outcome letter was dated 5 August 2021 and the charge against him was seemingly similar, although this involved an incident at Moorgate Station Southbound (platform 8). It is recorded that there is no platform for the train driver to step onto at Moorgate Station. This meant that there may be issues conducting the CSDE process. There were also issues that were identified with a download report. It was concluded that the employee had shown genuine remorse and comparative information was referred to as a guide. Comparator 1 had an excellent employment record and they had personal issues at the relevant time. Although he received a summary dismissal sanction, this was suspended for a period of 12 months.

Comparator 2

84 The incident relating to second comparator relied on by the claimant took place on 13 October 2002. The charge related to a breach of the respondent's previous rules of procedure which took place at Sloan Square Station. The second comparator put forward by the claimant made one attempt to contact the Line Controller via radio (different technology was in use at that time), which was unsuccessful. The Line Controller was later notified, arranged for a track search to be carried out and nothing was found. A final caution/formal caution was given to Comparator 2, valid for 104 weeks along with training and ongoing monitoring.

Comparator 3

85 The incident relating to the third comparator relied on by the claimant occurred on 9 December 2002, and it related to a train berthed in West Ham Station Westbound Platform. A customer complaint had been made. The charge related to a breach of the respondent's previous rules of procedure. The driver stated that he was unaware of the wrong side door opening. In terms of the first instance disciplinary outcome, the panel was satisfied that the driver's train were involved. Although the conclusion noted that water ingress may cause doors to open un-commanded, no specific defects were found for train doors to open or close of their own volition. The charge was found proven and the employee was summarily dismissed.

86 That decision was overturned by the Appeal Officer who substituted the decision with a suspended dismissal for a period of two years. There were criticisms levelled in terms of the train investigation. In conclusion, it was stated that: "While the balance of probability is that it was the train being driven by [name of the third comparator relied on by the claimant is redacted] and that he is aware of the incident, we cannot be completely certain. This uncertainty is compounded by [name of the third comparator relied on by the claimant is redacted] otherwise excellent performance and safety record over many years." The train driver's excellent safety record was considered, and the Appeal Officer concluded that they were sure that given his previous record, this person will have no difficulty meeting the respondent's requirements.

Comparator 4

87 On 21 May 2010, it was alleged that the fourth comparator relied on by the claimant was in charge of a train at Edgware Road Station Westbound, re-opened the train doors while the train was in motion and failed to report this to the Service Controller. The record of the disciplinary interview which took place on 22 July 2010 records, "Having admitted that he thought that he had heard a door closing, he should have informed the Service Controller before moving the train. However, he failed to do this and therefore continued

on his W/B journey. He went onto add that he had forgotten to make a PA announcement prior to closing the train doors, so as the train started to pull out of the platform, he operated the doors "open" buttons on the consul, to instigate the Digital Voice Announcement (DVA) in order to prompt customers to the destination of the train."

88 Thereafter it is stated that "Station Supervisor Taylor was interviewed by DSM Odelli from Edgware Road. He stated that at the time he was dealing with posters on platform 3 whilst CSA was despatching T76. He heard a noise and looking around saw T76 moving out of the platform with the doors open. It came to a halt with the last car in the platform. He tried to use the connect radio to the Service Controller, but got no response. He stated that he tried to check that nobody had fallen from the train and felt satisfied that the track was clear. He noticed that the train doors had closed and then gave a green handlamp signal to the Train Operator. A statement of this interview was obtained. (Appx "J) In addition, S/S Taylor submitted a memo (Appx "K) CSA Kamiro was interviewed by DMT Waite from Edgware Road. He stated that he saw T76 move off and slowed down as the doors opened. The train then stopped with the last car in the platform. He was unable to see the Train Operator due to the curve in the track. The train remained in the platform area for about 30 seconds before the doors closed and moved away. A statement of this interview was obtained (Appx "L"). In addition, CSA Kamiro submitted a memo (Appx "M")."

89 He was given a summary dismissal suspended for 52 weeks. At page 299 of the Hearing Bundle in the report dated 5 August 2010, it is stated: "The panel acknowledge that you have admitted pressing the button to reopen the doors and failed to subsequently notify the Service Controller." It was also noted in the following terms: "We also note that [name of the fourth comparator relied on by the claimant is redacted] feels he has let himself, people he works with and the company down."

90 As indicated above, Mr Goodman had provided four comparators for consideration during the respondent's disciplinary process. We have considered the documentation in the Hearing Bundle relating to those comparators and we set out relevant details relating to those comparators above.

Comparator 5

91 We were also provided with evidence in relation to the circumstances concerning a fifth comparator relied upon by the claimant (who was not put forward by Mr Goodman or the claimant during the respondent's internal disciplinary process). In relation to the fifth comparator relied on by the claimant, on 5 September 2021 between Newbury Park Sidings and Newbury Park Station the driver had both sets of doors open along the entire train and he drove without a pilot light. Passengers boarded the train in which the wrong side doors were open and an empty wheelchair fell onto the track. In the description of events, it states that:

> "On Sunday 5th September 2021 you were doing duty 618. This duty books on at 12:17 at Leytonstone Train Crew Accommodation and is allocated Train 060 at 12:24 at Leytonstone (Eastbound). At 12:24 as part of your duty you drove to Newbury Park, detrained the train with the assistance of Station staff and drove the train into Newbury Park Sidings to reverse. (Appendix E).

At approximately 12:44 you changed ends of train 60 and entered the West Bound Cab at approximately 12:47 and you operated the passenger saloon doors on both sides as you noticed that the saloons were hot and it was a warm day and you were attempting to lower the temperature in the saloon for the customers by letting air flow. This is not an approved procedure on the Central Line and a bulletin has subsequently been issued to prevent a reoccurrence of this. (Appendix B)

At 12:47 Shut Signal NEP6356 was due to clear for you however it remained at Danger. After approximately 2 minutes, you contacted the signaller to inform them of this and the signal was subsequently cleared soon after as per the transcript (Appendix F) and (Appendix P)

Between approximately 12:49 and 12:52 you attempted to move the train but obtained no effort from the motors. You carried out your checks (trying for break release and Auxiliary Reset in CM and RM). This was in line with the Central Line information 2020 (Appendix S). At approximately 12:53 you obtained some forward movement which you incorrectly identify as being "sluggish" because of an earlier message of dragging brakes on the DTS on the Eastbound Trip. However, as the doors are still open and the Door Close Visual is not proved, the movement is due to Train 60 moving due to gravity under the gradient as per the train download (Appendix G)

At approximately 12:54 you call the controller as you are leaving Newbury Park Sidings and report Sluggish Movement of Train 60. At approximately 12:55 you berth in the platform with the doors open on both sides of the train. Whilst the train is berthed in the platform with both sets of doors open customers obtain access to the train with the Wrong Sides Doors open. During this time customers boarded the train and an empty customer wheelchair rolls onto the adjacent East Bound Track. At approximately 12:55 on the radio call the Controller identifies you have your doors open on the platform side and you check out the trackside cab door and see your doors are open on the wrong side, place a Mayday call to the controller informing them of the doors being open on the wrong side. You followed the correct procedure for Wrong Side Door Opening, in that you closed the doors and requested traction current be switched off. The Wrong Side Doors are closed at 12:57. You are instructed to remain in the cab whilst the item is retrieved. (Appendix F)

At Newbury Park you were relieved by a colleague as the DRM conducted a welfare check and a Drugs and Alcohol test. The test was completed at 15:16 and was witnessed by Trains Manager Joseph Thomas. This was a negative result to both tests. (Appendix H)

An EIRF was completed by Duty Reliability Manager Edmond Bristow. (Appendix I).

A memo was requested from you by Duty Reliability Manager Edmond Bristow (Appendix J) were you stated that you had forgotten you had opened your doors in Newbury Park Sidings, and you thought the reason the train was sluggish was due to the earlier dragging brakes and you had sunshine in the cab hindering you noticing the pilot light not being illuminated. After Edmond Bristow received your memo, he issued you with a stand down letter (Appendix K)."

92 The panel concluded that this was a situation that arose due to a very genuine error brought about by a unique set of circumstances, and the train driver was issued with a corrective action plan in order to address his knowledge gap (before he would be returned to train driving duties) [see pages 313-316 of the Hearing Bundle].

93 In comparator 5's outcome letter dated 18 November 2021; it was stated:

"CDI Panel Comment:

The panel acknowledge and appreciate your honesty throughout both the investigation and disciplinary hearing. You have admitted to the charge and have taken full responsibility for your actions on the day.

You have confirmed to the panel that the distractions had caused you to momentarily forget that you had opened the saloon doors whilst in the sidings, we appreciate that calling the signaller etc had resulted in you becoming distracted and wishing to depart on time had obtained forward movement albeit sluggish.

We note that the train (with doors open) had commenced moving with gravity under the gradient, which we accept was not known by you or others and this has been confirmed by the Duty Reliability Manager conducting a test."

94 We noted that the decision relating to the fifth comparator relied on by the claimant was made by Ms Tracey Simms (who was co-Chair at the claimant's disciplinary hearing) and Ms Aisha Zareen (second chair). Shoaib Merchant was the respondent's ERP representative who provided support during the process (who also provided support during the claimant's disciplinary process).

Remedy - Mitigation

95 The claimant sets out her evidence with regards to mitigation in relation to remedy at paragraphs 45 – 47 of her witness statement (which was not challenged). Those paragraphs state as follows:

> "45. I have not found a new job since being dismissed, I use all the tools online to look for work and I have applied for positions which suit my skills but yet no joy, I have provided a list of the jobs I applied for up until 7 March 2023 via the Universal Credits online job portal [329 to 330]. I am still looking for jobs and I hope to find something that I am going to stay at until retirement, as I had hoped to with the Respondent, as I do not want to flit between jobs.
>
> 46. I have a work coach at the job centre, and I have just joined the restart to work scheme which is run by the government.
>
> 47. I also receive universal credits totalling £284.67 a month; however, this has been lower and higher than this between 12 July 2022 and 12 October 2022 [331]."

The claimant's health

96 The claimant went to see her GP on 28 January 2022, and she was prescribed Sertraline (which she described as anti-depressant medication). The claimant explained that she has continued to struggle with her mental health. She experiences anxiety issues at interviews. The claimant has developed coping mechanisms including cognitive therapy. She does not tell her children as she feels ashamed and feels that she is letting them down. The claimant also avoids them for a day or two in order to compose herself.

ACAS Early Conciliation and the claimant's Tribunal Claim

97 The claimant started ACAS Early Conciliation on 7 June 2022. The claimant's ACAS Early Conciliation Certificate was issued on 29 June 2022.

98 The claimant's Employment Tribunal claim was presented on 1 July 2022, with assistance from the claimant's Trade Union Representative.

99 The claimant was informed by her Trade Union representative that he may be able to find her a solicitor in July 2022.

100 The claimant's Trade Union representative did not put the claimant in touch with any solicitors. The claimant started to search for a solicitor herself from September/October 2022. The claimant found a solicitor (who was unable to assist her), so she had to find another solicitor.

101 The claimant's application to amend her claim to include complaints of breach of contract and wrongful dismissal (notice pay), discrimination arising from disability, and direct sex discrimination was made on 4 November 2022. In terms of the claimant's letter of application, there was no reference in that letter to issues of jurisdiction or the statutory time limit.

102 On 15 November 2022 Employment Judge Moor gave permission to amend the claim in respect of paragraphs 1-20 of the Amended Particulars of Claim and sought the respondent's view on paragraphs 21 onwards of the Amended Particulars of Claim. The application was unopposed, and so on 6 December 2022 Employment Judge Moor granted the amendment in respect of paragraphs 21 onwards of the Amended Particulars of Claim. Due to an error of transcription of Employment Judge Moor's order, for the avoidance of doubt, and with the respondent's consent, Employment Judge Knight granted the amendment and directed that the claimant's claim proceed in respect of all heads of claim set out in the Case Management Orders issued to parties on 20 December 2022.

103 In addition, an agreed List of Issues was set out within the Case Summary of those Case Management Orders (including but not limited to issues as to whether the claimant brought the discrimination claims in time and if not whether there are any grounds on which it would be just and equitable to extend time). Parties were directed to write to the Tribunal by 23 December 2022 if they thought that the List of Issues was wrong or incomplete and if they did not do so, parties were advised that the List of Issues would be treated as final unless the Tribunal decided otherwise. Neither party sent any correspondence to the Tribunal to object to the jurisdiction: time bar issues forming part of the agreed List of Issues.

Observations

104 On the documents and oral evidence presented, the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the List of Issues:

105 The standard of proof is on the balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur. Facts may be proven by direct

evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).

106 Although the claimant said she was confused when the relevant incident occurred on 6 January 2022, this matter was not referenced in her handwritten statement (which was made on the same day as the incident). The claimant referred to personal issues that were on her mind just prior to the incident and she was not concentrating on her job. We were not satisfied on the evidence that there was any connection between the claimant's ability to concentrate on the day of the incident and her anxiety and depression. There is no medical evidence (or otherwise) to show that the claimant had a propensity to temporarily lose concentration to the extent she could not recall what she has done (or to temporarily lose concentration and to regain it). She did not consult her GP after the incident until 28 January 2022. We accept that the claimant's mind was pre-occupied with personal issues, but we did not accept that the claimant was in a state of confusion on the day of the incident (6 January 2022) or that there was any connection between the claimant's ability to concentrate on the day of the incident and her anxiety and depression. The fact that the claimant's mind was pre-occupied with personal issues may have led to a certain amount of panic at the relevant time when the incident occurred.

107 As there was reference to the medical note from the claimant's doctor being provided within the 2 March 2022 meeting notes that we were referred to, we considered that it is likely that this was provided (during the meeting on 2 March 2022). It was stated during the meeting that they were to be labelled as 'Appendix W' (see page 208 of the Hearing Bundle). There was no evidence that the respondent attempted to follow up after the meeting in order to obtain a copy of the notes (a follow up might have been expected if they had not been provided as they were supposed to be).

108 During the CDI meeting on 2 March 2022 the claimant was tearful, and her trade Union Representative provided a summary of the claimant's recent mental health and personal matters. The account was rather detailed and included mention of stress and anxiety and the claimant experiencing suicidal thoughts. Mr Goodman makes reference to the claimant's consultation with her doctor. Having regard to this (and the terms of the doctor's note), it is not clear why the respondent did not pause the meeting or take any steps to investigate this matter further.

109 Notwithstanding the claimant's mitigation, Mr Suleman formed the view that the claimant's conduct on 6 January 2022 was an extremely serious issue and it gave rise to grave public safety concerns. We had regard to the disciplinary findings set out in the outcome letter. Mr Dale supported this conclusion and he referred to the serious risks in terms of public safety created by the situation. We accepted that in the circumstances there was a reasonable basis upon which to conclude that there could have been a serious injury or at worse a fatality.

110 Comparators were provided by the claimant's Trade Union representative by email after the disciplinary hearing and there was no attempt to discuss these or any investigatory findings in respect thereof prior to Mr Suleman reaching his decision. There was no reference to or attempt to carry out any detailed analysis in relation to the four comparators put forward by Mr Goodman. The comparators were not referenced in the initial letter of appeal, additionally they were not provided to the Appeal Officer prior to the appeal meeting, and they were forwarded to him after the meeting by Mr Goodman. The

Appeal Officer thereafter also failed to attempt to discuss the comparators with the claimant or any investigatory findings in respect of them with the claimant.

111 Although there was reference to Mr Smith having considered the comparators, he did not provide details of those comparators or any detailed analysis in respect of these. In addition, he appears to reach a conclusion on the claimant's personal circumstances and truthfulness, without having explored or investigated the claimant's health (as referenced above) and mitigation in respect thereof in any or any sufficient detail.

112 In any event, we considered the comparators put forward by the claimant. Although there were some similarities, there were clearly material differences between the comparators' individual circumstances and the circumstances relating to the claimant's conduct on 06 January 2022. In all instances the respondent was presented with circumstances in which a train driver created a serious safety risk. However, each incident involving each train driver was highly fact sensitive. In respect of the four individual comparators relied upon by the claimant, we were satisfied that the respondent considered the specific facts relating each train driver including any mitigating circumstances (which ultimately meant that the train driver in question was not dismissed).

113 During the claimant's oral evidence, the claimant said that Mr Suant had told her that he did not want the matter to proceed to a disciplinary hearing and that Alex Crook had influenced his decision. This was after Mr Smith had pointed out in his evidence the apparent contradiction between Mr Suant concluding in his report that the matter relating to the incident on 06 January 2022 should proceed to a disciplinary hearing and his later appeal statement (see pages 241-242 of the Hearing Bundle). The claimant's oral evidence in terms of the alleged influence of Alex Crook on Mr Suant was not referred to by the claimant or her Trade Union Representative during the respondent's internal disciplinary process and it was not contained within the claimant's witness statement. We did not accept the claimant's reason for not including this matter in her witness statement. The respondent's representative points out that neither Alex Crook nor Mr Suant are in a position to provide evidence in response due to the manner in which the claimant adduced the evidence. It was not clear to us why Mr Suant was not called to give evidence about his investigation report and his later appeal statement. The respondent's representative points out that they did not call him as his investigation had not been challenged, and he did not ultimately decide to dismiss the claimant (and that the claimant could have called him to give evidence on this point but chose not to). Having considered all the evidence, we did not accept the claimant's evidence in relation to of the alleged influence of Alex Crook on Mr Suant. On the documents we were referred to, we considered that Mr Suant's decision to refer the claimant to a disciplinary hearing, clearly, had a reasonable basis.

114 Apart from brief references within the evidence which we were taken to, the Tribunal were not referred to any sufficient evidence in respect of the claimant's PTSD. There was no formal diagnosis or medical report provided to the Tribunal. This was, however, noted by the claimant's GP and within the Occupational Health Report, to which we were referred. However, notwithstanding brief references in those documents, there was an absence of details of any diagnosis, and an absence of information in terms of the impact of the claimant's PTSD on her day-to-day activities. This made it very difficult for us to understand the basis upon which the claimant contended that her condition of PTSD amounted to a disability (or indeed, in terms of the respondent's state of knowledge of the same). We also found that there was insufficient evidence of the claimant's PTSD in the

claimant's witness statement in terms of whether this amounted to a disability pursuant to section 6 of the Equality Act 2010 (or in terms of the respondent's state of knowledge of the same).

115 We have set out below our conclusions in respect of the respondent's justification in terms of the claimant's discrimination arising from disability complaint and the explanation provided in their witness evidence. We considered in terms of our conclusions that the respondent's witness evidence in respect of this matter was credible and consistent (and supported by contemporaneous documentation and the documents before the Tribunal).

116 We did not find that there was any good reason (or any reason) provided in the claimant's witness statement in terms of why the claimant's disability discrimination and sex discrimination complaints were not included in the Claim Form dated 01 July 2022. The claimant was supported by a Trade Union Representative during the respondent's disciplinary process (who also supported then claimant in terms of preparing the claimant's Tribunal claim including in relation to preparation of the ET1 Form). The claimant did not make any allegations of discrimination arising from disability and sex discrimination during the disciplinary hearing or at the appeal hearing.

The Law

117 To those facts the Tribunal applied the law:

Unfair dismissal

118 Section 94 of the Employment Rights Act 1996 ("the ERA") provides that an employee has the right not to be unfairly dismissed. It is for the respondent to show the reason (or principal reason if more than one) for the dismissal (s98(1)(a) the ERA). That the employee committed misconduct is one of the permissible reasons for a fair dismissal (section 98(1)(b) and (2)(c) the ERA). Where dismissal is asserted to be for misconduct the employer must show that what is being asserted is true i.e. that the employee has in fact committed misconduct.

119 Where the employer relies on conduct as the fair reason for dismissal, it is for the employer to show that misconduct was the reason for dismissal. According to the Employment Appeal Tribunal ("EAT") in British Home Stores v Burchell [1980] ICR 303 the employer must show:

> (i) It believed the employee was guilty of misconduct;
> (ii) It had in mind reasonable grounds upon which to sustain that belief; and
> (iii) At the stage at which that belief was formed on those grounds, at any rate the final stage at which the belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

120 In Ilea v Gravett [1988] IRLR 487 the EAT considered the Burchell principles and held that those principles require an employer to prove, on the balance of probabilities that he believed, again on the balance of probabilities, that the employee was guilty of misconduct and that in all the circumstances based upon the knowledge of and after consideration of sufficient relevant facts and factors he could reasonably do so. In relation to whether the employer could reasonably believe in the guilt, there are an infinite variety

of facts that can arise. At one extreme there will be cases where the employee is virtually caught in the act and at the other extreme the issue is one of pure inference. As the scale moves more towards the latter, the matter arising from inference, the amount of investigation and inquiry will increase. It may be that after hearing the employee further investigation ought reasonably to be made. The question is whether a reasonable employer could have reached the conclusion on the available relevant evidence.

121 In that case the EAT upheld the Tribunal's decision which found that the employer had not investigated the matter sufficiently and therefore did not have before them all the relevant facts and factors upon which they could reasonably have reached the genuine belief they held. The sufficiency of the relevant evidence and the reasonableness of the conclusion are inextricably entwined.

122 The amount of investigation needed will vary from case to case. In RSPB v Croucher [1984] IRLR 425 the EAT held that where dishonest conduct is admitted there is very little by way of investigation needed since there is little doubt as to whether or not the misconduct occurred.

123 The employer need not have conclusive evidence of misconduct but a genuine and reasonable belief, reasonably tested. The burden of proof is on the employer to show a fair reason, but the second stage of reasonableness is a neutral burden. The Tribunal must be satisfied that the employer acted fairly and reasonably in all the circumstances in dismissing for that reason, taking account of the size and resources of the employer, equity, and the substantial merits of the case.

124 If satisfied of the reason for dismissal, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) the ERA).

125 What a Tribunal must decide is not what it would have done but whether the employer acted reasonably; *Grundy (Teddington) Ltd v Willis HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] ICR 1283*. It should be recognised that different employers may reasonably react in different ways, and it is unfair where the conduct or decision making fell outside the range of reasonable responses. The question is not whether a reasonable employer would dismiss but whether the decision fell within the range of responses open to a reasonable employer taking account of the fact different employers can equally reasonably reach different decisions. This applies both to the decision to dismiss and the procedure adopted.

126 In applying s98(4) the ERA the Tribunal must not substitute its own view for the matter for that of the employer but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

127 Mr Justice Browne-Wilkinson in his judgement in *Iceland Frozen Foods Ltd v Jones [1983] ICR 17*, in the EAT, summarised the law. The approach the Tribunal must adopt is as follows:

> "The starting out should always be the words of section 98(4) themselves. In applying the section, a Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Tribunal) consider the dismissal to be fair
> In judging the reasonableness of the employer's conduct, a Tribunal must not substitute its decision as to what was the right course to adopt
> In many (though not all) cases there is a band of reasonable responses to the employee's conduct in which the employer acting reasonably may take one view, another quite reasonably take another. The function of the Tribunal, as an industrial jury, is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which the reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, it is falls outside the band it is unfair."

128 In terms of procedural fairness, the (then) House of Lords in Polkey v AE Dayton Services Ltd [1988] ICR 142 firmly established that procedural fairness is highly relevant to the reasonableness test under section 98(4).

129 Where an employer fails to take appropriate procedural steps, the Tribunal is not permitted to ask in applying the reasonableness test whether it would have made any difference if the right procedure had been followed. If there is a failure to carry out a fair procedure, the dismissal will not be rendered fair because it did not affect the ultimate outcome; however, any compensation may be reduced. Lord Bridge set out in this case the procedural steps which an employer in the great majority of cases will be necessary for an employer to take to be considered to have acted reasonably in dismissing: "in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation."

130 A Tribunal in assessing the fairness of a dismissal should avoid substituting what it considers necessary and instead consider what a reasonable employer would do, applying the statutory test, to ensure the employer had reasonable grounds to sustain the belief in the employee's guilt after as much investigation as was reasonable was carried out. In Ulsterbus v Henderson [1989] IRLR 251 the Northern Irish Court of Appeal found that a Tribunal was wrong to find that in certain circumstances a reasonable employer would carry out a quasi-judicial investigation with confrontation of witnesses and cross examination of witnesses. In that case a careful and thorough investigation had been carried out and the appeal that took place involved a "most meticulous review of all the evidence" and considered whether there was any possibility that a mistake had been made. The court emphasised that the employer need only satisfy the Tribunal that they had reasonable grounds for their beliefs.

131 Where there are defects in a disciplinary procedure, these should be analysed in the context in which they occurred. The EAT emphasised in Fuller v Lloyds Bank [1991] IRLR 336 that where there is a procedural defect, the question to be answered is whether the procedure amounted to a fair process. A dismissal will normally be unfair where there was a defect of such seriousness that the procedure itself was unfair or where the result of the defect taken overall was unfair. In considering the procedure, a Tribunal should apply the range of reasonable responses test and not what it would have done (see Sainsburys v Hitt [2003] IRLR 23).

132 In Babapulle v Ealing [2013] IRLR 854 it was emphasised that a finding of gross misconduct does not automatically justify dismissal since mitigating factors should be taken into account and the employer must act reasonably. Length of service can be taken into account (Strouthous v London Underground [2004] IRLR 636).

133 In considering a claim for unfair dismissal by reason of conduct, the Tribunal is required to consider the terms of the ACAS Code of Practice on Disciplinary and Grievance matters. This sets out what a reasonable employer would normally do when considering dismissal by reason of conduct. This includes conducting the necessary investigations, inviting the employee to a meeting, conducting a fair meeting, issuing an outcome letter, and allowing an appeal.

134 The reasonableness of the decision to dismiss is scrutinised at the time of the final decision to dismiss – at the conclusion of the appeal process (West Midland v Tipton [1986] ICR 192). This was confirmed in Taylor v OCS [2006] IRLR 613 where the Court of Appeal emphasised that there is no rule of law that only a rehearing upon appeal is capable of curing earlier defects (and that a mere review never is). The Tribunal should consider the disciplinary process as a whole and apply the statutory test and consider the fairness of the whole disciplinary process. If there was a defect in the process, subsequent proceedings should be carefully considered. The statutory test should be considered in the round.

135 The Tribunal also considered the EAT's decision in Khan v Stripestar Ltd UKEATS/0022/15/SM. The Honourable Lady Wise held in that case that there are no limitations on the nature and extent of the deficiencies in a first stage disciplinary procedure that can be cured by a thorough and effective appeal. It was confirmed that the Employment Judge was correct in concluding that a lack of credibility on the part of a witness who had conducted a disciplinary hearing that was disregarded as procedurally and substantively unfair did not inevitably render the whole dismissal unfair.

Orders for reinstatement and reengagement

136 The Tribunal may make an order for reinstatement under section 113 of the ERA (in accordance with section 114 of the ERA).

137 Alternatively, the Tribunal may make an order for re-engagement under section 113 of the ERA (in accordance with section 115 of the ERA).

138 Section 116 of the ERA states:

> "(1)In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—
>
> (a)whether the complainant wishes to be reinstated,
>
> (b)whether it is practicable for the employer to comply with an order for reinstatement, and
>
> (c)where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.
>
> (2)If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.

(3)In so doing the tribunal shall take into account—

(a)any wish expressed by the complainant as to the nature of the order to be made,

(b)whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and

(c)where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms."

139 Practicability is considered in two stages; first on a provisional basis at the time of making the order; second on a conclusive basis if the employer fails to comply with the order. At this second stage the burden is on the employer to prove impracticability. Practicability is a question of fact for the Tribunal, not a matter of whether the employer's views fall within a band of reasonable responses. However, where the barrier to practicability is said to be a lack of trust and confidence in an employee (for example because of the employee's dishonesty), the Tribunal need only consider whether that belief is genuinely held and based on rational grounds (Kelly v PGA European Tour [2021] EWCA Civ 559). The cause of the loss of trust need not be the conduct that resulted in dismissal and extend to matters of which the employer were unaware during the individual's employment. It is also based on the specific employer whether than the hypothetical reasonable employer.

140 We also considered the guidance in the cases of Keable v LB Hammersmith and Fulham [2021] EA-2019-000733 and Coleman v Magnet Joinery Ltd [1985] ICR 46.

Compensation

141 An award of compensation is the most common result in unfair dismissal cases. It is assessed under two heads; the basic award and the compensatory award (see the ERA section 118).

The basic award

142 The provisions relating to the basic award are contained in the ERA sections 119 to 122 and in section 126. Such an award is, save in the case of very young employees, calculated in the same way as a statutory redundancy payment. The formula provides for the payment of a tax-free sum based on the number of full years' service the employee has before dismissal. The employee receives half a week, a week's or a week and a half's gross pay for each full year of service dependent on their age in that year. The amount of reckonable service is limited to 20 years so the highest possible multiple (which would be age dependent) is 30 weeks' pay. A week's pay is subject to a statutory maximum which, at the time of the claimant's dismissal stood at £544 (see the ERA section 227).

143 The Tribunal has limited power to reduce a basic award. It can do so where an employee has unreasonably refused an offer of reinstatement (section 122(1) of the ERA) but that does not apply in this case. Furthermore section 122(2) of the ERA states "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

144 A Tribunal is entitled to consider any conduct of the employee in this context and not simply matters known at the time of dismissal, but the employee must in some sense be culpable or blameworthy in respect of the conduct to justify a deduction (see Langston v Department for Business Enterprise and Regulatory Reform [2009] UKEAT/0534).

The compensatory award

145 The provisions relating to the compensatory award are contained in the ERA sections 123, 124, 124A and 126. The basic principles underlying the calculation of compensation are described in section 123(1) & (2) as follows:

> "123. Compensatory award
> (1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
> (2) The loss referred to in subsection (1) shall be taken to include—
> (a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
> (b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal."

146 Section 123 (6) of the ERA states:

> "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

Calculating loss

147 A compensatory award is intended to compensate for loss actually suffered and not to penalise the employer for its actions (see Optimum Group Services plc v Muir [2013] IRLR 339). The relevant questions are: whether the loss was occasioned or caused by the dismissal; whether it is attributable to the conduct of the employer; and whether it is just and equitable to award compensation. This final requirement is an overriding one imposed by the statute, so in some cases, despite proof of substantial losses, there may be no or a reduced award of compensation because it is not just and equitable to award more (see W Devis & Sons Limited v Atkins [1977] IRLR 314). An example might be where dishonest conduct by a dismissed employee during employment is only discovered after his or her dismissal.

148 In Dunnachie v Kingston Upon Hull City Council [2004] IRLR 727 the House of Lords confirmed that an award for injury to feelings was not available under the ERA s 123(1) which does not permit the recovery of non-economic losses (such as general damages for personal injury). Permissible heads of loss include: past and future loss of earnings, loss of pension and fringe benefits, expenses incurred in looking for other work, and accrued statutory notice, and compensation for loss of statutory rights. This last head of loss reflects the fact that the dismissed employee will have to work for 2 years in new

employment to reacquire the right not to be unfairly dismissed and will have to "re-earn" their minimum statutory notice period; the award is generally for a conventional amount somewhere in the region of £300.00 - £500.00.

149 In determining the amount of an employee's loss, the Tribunal must decide what would have happened but for the unfair dismissal. The probable consequence in some cases would have been no dismissal but for the unfairness and in others the probability is that the employee would have been dismissed in any event. In the former case losses will be open-ended (subject to it being just and equitable to award them and the statutory cap); in the latter losses will be limited to the period in which a fair process would have been completed and, in some instances, may be nothing at all (see Credit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604). Inevitably, as the assessment is of events which did not occur, it requires the Tribunal to exercise its judgment based on the inferences it is reasonable to draw from the primary facts. We consider this in more detail in the following paragraphs.

Mitigation

150 An employee who has been unfairly dismissed is under the same duty to mitigate his losses as all claimants in any civil proceedings. The duty to mitigate only arises after the dismissal and it requires the employee to take reasonable (and not all possible) steps to reduce his losses to the lowest reasonable amount. The burden of proving a failure by a claimant to mitigate lies on the respondent (see Wilding v British Telecommunications plc [2002] ICR 79 and Cooper Contracting Limited v Lindsey [2015] UKEAT/0184). In Singh v Glass Express Midlands Limited [2018] UKEAT/0071, HHJ Eady QC (as she then was) gave the following guidance on the correct approach to the question of mitigation:

a. The burden of proof is on the wrongdoer; a claimant does not have

   to prove they have mitigated their loss.

b. It is not some broad assessment on which the burden of proof is neutral; if evidence as to mitigation is not put before the ET by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works; providing information is the task of the employer.

c. What has to be proved is that the claimant acted unreasonably; the claimant does not have to show that what they did was reasonable.

d. There is a difference between acting reasonably and not acting unreasonably.

e. What is reasonable or unreasonable is a matter of fact.

f. That question is to be determined taking into account the views and wishes of the claimant as one of the circumstances, but it is the Tribunal's assessment of reasonableness – and not the claimant's – that counts.

g. The Tribunal is not to apply too demanding a standard to the victim; after all, they are the victim of a wrong and are not to be put on trial as if the losses were their fault; the central cause is the act of the wrongdoer.

h. The test may be summarised by saying that it is for the wrongdoer to show that the claimant acted unreasonably in failing to mitigate.

i. In cases in which it might be perfectly reasonable for a claimant to have taken on a better paid job, that fact does not necessarily satisfy the test; it would be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but is not, in itself, sufficient.

Polkey principle

151 It is difficult in some cases to be certain whether the dismissal would have occurred had the employer acted fairly. Classically this problem arises in circumstances where the employer has failed to act fairly because it has failed to apply certain procedural safeguards which might, had they been applied, have led to the employee retaining their job. Prior to the decision in Polkey v AE Dayton Services Ltd [1987] IRLR 503 HL, the courts took the view that, if on the balance of possibilities the dismissal would have occurred, then the dismissal should be held to be fair; the House of Lords in Polkey held that this was not good law. Lord Bridge indicated, however, that the chances of whether or not the employee would have been retained must be taken into account when calculating the compensation to be paid to the employee. Accordingly, if the prospects of the employee having kept their job had proper procedures been complied with were slender, then there would be a significant reduction in compensation: this is sometimes referred to as “the Polkey reduction” or simply as “Polkey.”

152 Tribunals are required to take a common-sense approach when assessing whether a Polkey reduction is appropriate and the amount of any such reduction (Software 2000 Limited v Andrews [2007] IRLR 568); the nature of the exercise is necessarily “broad brush” (Beatt v Croydon Health Services NHS Trust [2017] IRLR 274); and the assessment is of what the actual employer would have done had matters been dealt with fairly not how a hypothetical fair employer would have acted (Hill v Governing Body of Great Tey Primary School [2013] IRLR 274).

153 In Ms N Brown v Castlerock Group Ltd [2022] EAT 5 the employee who was employed as a field care worker had been dismissed following allegations that she stole money from a client. The Tribunal found that the dismissal was unfair due to a number of procedural errors (in particular there should have been an adjournment of a final disciplinary hearing). However the Tribunal concluded that the employee was not entitled to any compensation because applying Polkey, if a fair procedure had been followed it was inevitable that she would have been dismissed and/or the compensatory award was reduced by 100% pursuant to section 123(6) of ERA. The Tribunal also dismissed the employee’s claim for wrongful dismissal on the basis that she had committed an act of gross misconduct which justified her summary dismissal. The EAT dismissed the appeal and found that the Employment Judge was entitled to set compensation at nil both under Polkey and section 123(6) of the ERA and to reject the claim for wrongful dismissal.

154 The basic award cannot be reduced under Polkey (unless it is an exceptionally rare case where such a (fair) dismissal might have taken place virtually contemporaneously with the unfair dismissal which actually occurred [Grantchester Construction (Eastern) Ltd v Attrill UKEAT/0327/12/LA, at paragraph 19]. In terms of the basic award, the statutory test per section 122(2) of the ERA (referred to above) is whether any of the employee's conduct before the dismissal was such that it would be just and equitable to reduce or further reduce the award to any extent.

Contributory fault

155 The ERA Section 123(6) says as follows: "123(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

156 This section requires the Tribunal to decide whether the employee contributed to his own dismissal, not simply to its unfairness (for example where an employer fails to establish a potentially fair reason for dismissal or adopts an unfair procedure). The employee's conduct need not be the sole, principal or even the main cause of her dismissal as the words "to any extent" are deliberately broad (see Carmelli Bakeries Limited v Benali [2012] UKEAT/0616). That said, the conduct must be "culpable or blameworthy" and not simply some matter of personality or disposition or unhelpfulness on the part of the employee in dealing with the disciplinary process in which he has become involved (see Bell v The Governing Body of Grampian Primary School [2007] All ER (D) 148).

157 The Tribunal may take a very broad view of the relevant circumstances when determining the extent of contributory fault (see Gibson v British Transport Docks Board [1982] IRLR 228). The Tribunal cannot take into account an employee's conduct of which the employer was unaware at the time of dismissal (although this may be relevant to the "just and equitable" condition); the employer's own conduct or that of a third party (unless an agent of the employee); or conduct not contributing to the dismissal. It is open to a Tribunal to make a finding of 100% contributory fault, although EAT authority has suggested that this would be a rare case and clear reasons should be provided showing why no compensation is being awarded (Steen v ASP Packaging Limited [2014] ICR 56). In that case it was stated that the Tribunal should address the following:

(i) It must identify the conduct which is said to give rise to possible contributory fault,
(ii) having identified that it must ask whether that conduct is blameworthy,
(iii) The Tribunal must ask for the purposes of section 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent, and
(iv) To what extent the award should be reduced and to what extent it is just and equitable to reduce it.

Breach of contract/wrongful dismissal

158 The Tribunal has jurisdiction over a claim of breach of contract by virtue of the Employment Tribunals (Extension of Jurisdiction) (England and Wales) Order 1994.The

respondent did not give notice to the claimant. It has the onus of proving that it was entitled to not give notice on account of the repudiatory breach of contract by the claimant. The standard of proof in that regard is the balance of probabilities. If the respondent does not discharge the onus the claimant succeeds in her claim for breach of contract. These principles were confirmed, if that be needed, in the EAT in Hovis Ltd v Louton EA-2020-00973.

159 We considered that wrongful dismissal is a claim for breach of contract specifically for failure to provide the proper notice provided by statute or the contract (if more). An employer does not however have to give notice if the employee is in fundamental breach of contract. This is a breach of contract that goes to the heart of the contract so that the employer should not be bound by its obligations under the contract including the requirement for notice. The Tribunal must come to its own view about the claimant's conduct for the purposes of wrongful dismissal claim and must take care not to take those findings into account when deciding whether the dismissal was unfair.

160 An entitlement to a minimum period of notice is established in section 86 of the 1996 Act and is for one week of notice for each year of continuous employment up to a maximum of 12 weeks, although a contract of employment may provide for a longer notice period.

161 Wrongful dismissal is dismissal in breach of contract. Fairness is not an issue. The sole question is whether the terms of the contract, which can be express or implied, have been breached by the employer. The employee will have a claim in damages if the employer, in dismissing them, breached the contract and caused them loss.

162 Dismissing an employee without notice may be justified where the employee has committed a repudiatory breach of contract. An employer has a choice whether to accept the repudiatory breach or whether to affirm the contract. Where the employer decides to terminate the contract, then they have accepted the repudiatory breach by the employee. The question of what level of misconduct is required for an employee's behaviour to amount to a repudiatory breach is a question of fact for the court or tribunal.

163 The classic exposition of the concept of repudiatory breach of an employment contract was by Lord Evershed in Laws v London Chronicle (Indicator Newspapers Limited) [1959] 285 at 287 where he set the question out as being "whether the conduct complained of is such as to show the servant has disregarded the essential conditions of the contract of service".

164 More recently, this was put in another way, namely whether the conduct "so undermines the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment" – Neary v Dean of Westminster [1999] IRLR 288.

Section 13 of the Equality Act 2010

Direct sex discrimination

165 Further, direct discrimination is defined at Section 13(1) of the EqA 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." The protected characteristic of sex is listed at section 4 of the EqA (as defined in section 11).

166 The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies: "On a comparison of cases for the purposes of section 13, 14, 19 or 19A there must be no material difference between the circumstances relating to each case."

167 The effect of section 23 of the EqA as a whole 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 person.
168 Further, as the EAT and appellate courts have emphasised in a number of cases, including Amnesty International v Ahmed [2009] IRLR 884, in most cases where the conduct in question is not overtly related to [the protected characteristic], the real question is the "reason why" the decision maker acted as he or she did.

169 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.

170 The basic question in a direct discrimination case is: what are the grounds or reasons for the treatment complained of? In Amnesty International v Ahmed [2009] IRLR 884 the EAT recognised two different approaches from two House of Lords authorities - (i) in James v Eastleigh Borough Council [1990] IRLR 288 and (ii) in Nagarajan v London Regional Transport [1999] IRLR 572. In some cases, such as James, the grounds or reason for the treatment complained of is inherent in the act itself.

171 In other cases, such as Nagarajan, the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15.

172 The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions) – as explained in the Court of Appeal case of Anya v University of Oxford [2001] IRLR 377.

173 In Glasgow City Council v Zafar [1998] IRLR 36, also a House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. He must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

174 Thus the reason for the treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the treatment to amount to an effective cause of it. In "reason why" cases the matter is dispositive upon determination of the alleged discriminator's state of mind. In "criterion cases" there is no need to consider the alleged discriminator's state of mind when the treatment complained of is caused by

the application of a criterion which is inherently or indissociably discriminatory (R (on the application of E) v Governing Body of Jewish Free School and another [2009] UKSC 15).

175 In Shamoon v Chief Constable of the RUC 2003 IRLR 285, Lord Nichols said that a Tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

176 Direct discrimination may be intentional or it may be subconscious (based upon stereotypical assumptions). The Tribunal must consider the conscious or subconscious mental processes which caused the employer to act. This is not necessarily a question of motive or purpose and is not restricted to considering 'but for' the protected characteristic would the treatment have occurred (see Shamoon).

S. 6 Equality Act 2010 definition of disability

177 Disability is one of the protected characteristics identified in Section 4 of the EqA. It is further defined in Section 6(1) of the EqA: "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-today activities." Section 212(1) defines "substantial" as meaning "more than minor or trivial"; while Schedule 1, paragraph 2, further defines "long-term effects".

178 The effect of an impairment is long-term if – (a) it has lasted for at least 12 months; (b) it is likely to last for at least 12 months, or (c) it is likely to last for the rest of the life of the person affected. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur. The word "likely" has been interpreted by the House of Lords to mean "could well happen": SCA Packaging Ltd v Boyle [2009] IRLR 746.

179 The time at which to assess the disability is the date of the alleged discriminatory act (Richmond Adult Community College v McDougall [2008] ICR 431 (para 24) and Cruickshank v VAW Motorcast Ltd 2002 ICR 729, EAT). In Goodwin-v-Patent Office [1999] IRLR 4, the EAT gave detailed guidance as to the approach which ought to be taken in determining the issue of disability. A purposive approach to the legislation should be taken.

180 A Tribunal ought to remember that, just because a person can undertake day-to-day activities with difficulty, that does not mean that there was not a substantial impairment. The focus ought to be on what the claimant cannot do or could only do with difficulty and the effect of medication ought to be ignored for the purposes of the assessment.

181 It is not always possible or necessary to label a condition, or collection of conditions. The statutory language always had to be borne in mind; if the condition caused an impairment which was more than minor or trivial, however it had been labelled, that

would ordinarily suffice. In the case of mental impairments, however, the value of informed medical evidence should not be underestimated.

182 Appendix 1 to the EHRC Code of Practice of Employment states that there is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment and not the cause: Ministry of Defence v Hay [2008] ICR 1247.

183 In Aderemi v London and South Eastern Railway Limited [2013] ICR 591, the EAT held that the Tribunal "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."

184 An impairment can vary in its effects over time, and it is a matter for the Tribunal, having regard to all the evidence, to consider whether it has been established that there has been a substantial adverse effect over the relevant period (Sullivan v Bury Street Capital Ltd UKEAT/0317/19/BA).

185 Likelihood of the effect lasting 12 months or more is to be assessed at the time of the alleged contravention as confirmed by the Court of Appeal in All Answers Ltd v W & R [2021] EWCA Civ 606 at paragraph 26: "The question, therefore, is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months. That is what the Court of Appeal decided in McDougall v Richmond Adult Community College: see per Pill LJ (with whom Sedley LJ agreed) at paragraphs 22 to 25 and Rimer LJ at paragraphs 30-35. That case involved the question of whether the effect of an impairment was likely to recur within the meaning of the predecessor to paragraph 2(2) of Schedule 1 to the 2010 Act. The same analysis must, however, apply to the interpretation of the phrase "likely to last at least 12 months" in paragraph 2(1)(b) of the Schedule. We note that that interpretation is consistent with paragraph C4 of the guidance issued by the Secretary of State under section 6(5) of the 2010 Act which states that in assessing the likelihood of an effect lasting for 12 months "account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood"."

186 The definition of discrimination arising from disability in EqA is as follows:

> "Section 15 Discrimination arising from disability
> (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."

187 Guidance as to how to apply the test under section 15 was given in Pnaiser v NHS England [2016] IRLR 170, EAT:-

a. Was there unfavourable treatment and by whom?
b. What caused the treatment, or what was the reason for it?
c. Was the cause/reason 'something' arising in consequence of the claimant's disability? This stage of the test involves an objective question and does not depend on the thought processes of the alleged discriminator.
d. The knowledge requirement is as to the disability itself, not extending to the 'something' that led to unfavourable treatment.

Something arising

188 The EAT held in Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893: The "something arising" did not need to be the sole or principal cause of the treatment, but required to be at least an effective cause, or have a significant influence on, the treatment. The EAT considered in in terms of the Tribunal's reasoning:

"Firstly, it appeared to consider that it was necessary for the Claimant's disability to be the cause of the Respondent's action in order for her claim to succeed. Secondly, it made a contrast between the cause of the action and a background circumstance. This leaves out of account a third logical possibility, which, it seems to me, is present on the looser language of section 15(1); i.e. a significant influence on the unfavourable treatment, or a cause which is not the main or the sole cause, but is nonetheless an effective cause of the unfavourable treatment."

189 The process applicable under a section 15 claim was explained by the EAT in Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305:
"The 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."

190 In City of York Council v Grosset [2018] IRLR 746, Lord Justice Sales held that "it is not possible to spell out of section 15(1)(a) a … requirement, that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant 'something' arose in consequence of B's disability".

191 The EAT held in Sheikholeslami v University of Edinburgh [2018] IRLR 1090 that: "the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination

of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the 'something' was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."

192 In iForce Ltd v Wood UKEAT/0167/18 the EAT held that there could be a series of links but required that there was some connection between the something and the disability.

193 In Dunn v Secretary of State for Justice [2019] IRLR 298 the Court of Appeal considered within the background law to that case that "It is a condition of liability for disability discrimination both under section 13 and under section 15 that the complainant should have been treated in the manner complained *because of* either (under section 13) his or her disability or (under section 15) the "something" which arises in consequence of that disability. " This will typically involve establishing that the disability or relevant related factor operated on the mind of the putative discriminator, as part of his conscious or unconscious mental processes. This is not, in this context, the same as examining 'motive'.

194 In Robinson v Department of Work and Pensions [2020] EWCA Civ 859, the Court of Appeal held it is not enough that but for their disability an employee would not have been in a position where they were treated unfavourably – the unfavourable treatment must be because of the something which arises out of the disability.

In consequence of disability

195 Paragraph 5.9 of the Equality and Human Rights Commission Equality Act 2010 Code of Practice states "The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet."

Unfavourable treatment

196 In Williams v Trustees of Swansea University Pension and Assurance Scheme [2017] IRLR 882 the Court of Appeal did not disturb the EAT's analysis, in that case, that the word "unfavourable" was to be contrasted with less favourable, the former implying no comparison, the latter requiring it. That was undisturbed by the Supreme Court when it later considered the case. The Equality and Human Rights Commission Equality Act 2010 Code of Practice states at paragraph 5.7 that the phrase means that the disabled person "must have been put at a disadvantage." Reference to the measurement against an objective sense of that which is adverse as compared to that which is beneficial was made in T-System Ltd v Lewis UKEAT/0042/15.

197 In the Williams case, Lord Carnwath stated at paragraph 27: "Since I am substantially in agreement with the reasoning of the Court of Appeal, I can express my conclusions shortly, without I hope disrespect to Ms Crasnow's carefully developed submissions. I agree with her that in most cases (including the present) little is likely to be

gained by seeking to draw narrow distinctions between the word “unfavourably” in section 15 and analogous concepts such as “disadvantage” or “detriment” found in other provisions, nor between an objective and a “subjective/objective” approach. While the passages in the Code of Practice to which she draws attention cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section.”

198 An employer also has a defence to a claim under s 15 if it can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim. If the aim is legitimate, the Tribunal must consider whether the means used to achieve it correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question and are necessary to that end: Stott v Ralli Ltd (EA-2019-000772-VP) at [79]. Assessing proportionality involves an objective balancing of the discriminatory effect of the treatment on the employee and the reasonable needs of the party responsible for the treatment: Hampson v Department of Education and Science [1989] ICR 179, CA and other cases summarized recently in Department of Work and Pensions v Boyers (UKEAT/0282/19/AT) at [29] per Matthew Gullick (sitting as Deputy High Court Judge). The test is an objective one, not a range of reasonable responses test (Stott, ibid, at [80]).

199 In terms of justification, the EAT in *MacCulloch v ICI [2008] IRLR 846* set out four principles to be applied by the Tribunal. These have since been approved by the Court of Appeal in *Lockwood v DWP [2013] IRLR 941*:-

> "(1) The burden of proof is on the Respondent to establish justification: see Starmer v British Airways [2005] IRLR 862 at [31].
> (2) The classic test was set out in Bilka-Kaufhaus GmbH v Weber 15 Von Hartz (case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must “correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end” (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to “necessary” means “reasonably necessary”: see Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31. 25
> (3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].
> (4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no “range of reasonable response” test in this context: Hardys & Hansons plc v Lax [2005] IRLR 726, CA."

200 The Supreme Court confirmed in Homer v Chief Constable West Yorkshire Police [2012] ICR 704 at [22] that “to be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so.”

201 Pill LJ in Hardy & Hansons Plc v Lax [2005] ICR 1565 at [32]: “It must be objectively justifiable (Barry v Midland Bank plc [1999] ICR 859) and I accept that the word “necessary” used in Bilka-Kaufaus [1987] ICR 110 is to be qualified by the word “reasonably”. That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word “reasonably” reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. 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, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary.”

202 In Hensman v Ministry of Defence [2014] UKEAT/0067/14/DM, Singh J referred to the above passage and stressed at [44] that in applying this approach the Tribunal, “must have regard to the business needs of the employer.”

203 In Blackburn and anor v Chief Constable of West Midlands Police 2009 IRLR 135, Court of Appeal in the context of an equal pay claim, Lord Justice Maurice Kay said at paragraph 25: “In this as in any similar case the focus must be on the aim of the employer. It is abundantly clear from the guidance that the Secretary of State approved a structure which envisaged 'local schemes being tailored to the requirements of local circumstances'. The considered view in the West Midlands Police, expressed through the Chief Constable, was that 24/7 working should be rewarded. In my judgment, that was both rational and within the parameters of the national structure. The fact that some other police forces may have adopted schemes that had no or less disparate impact is nothing to the point. I accept Miss Slade's submission that it is other means of achieving the employer's legitimate aim which are relevant not the means of achieving different aims. In Kutz-Bauer v Freie und Hansestadt Hamburg [2003] IRLR 368 (at paragraph 51) the Court of Justice referred to the need to take into account: 'the possibility of achieving by other means the aims pursued by the provisions in question' (emphasis added).”

204 Paragraph 5.12 of the Equality Act 2010 Code of Practice states: “It is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on mere generalisations.”

<u>What is proportionate?</u>

205 Paragraph 5.11 of the Equality Act 2010 Code of Practice states: “Unfavourable treatment will not amount to discrimination arising from disability if the employer can show that the treatment is a ‘proportionate means of achieving a legitimate aim’. This ‘objective justification’ test is explained in detail in paragraphs 4.25 to 4.32.”

206 Paragraphs 4.30 and 4.31 of the Equality Act 2010 Code of Practice states:
4.30 Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An Employment Tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer’s reasons for applying it, taking into account all the relevant facts.
4.31 Although not defined by the Act, the term ‘proportionate’ is taken from EU Directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law

views treatment as proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. But 'necessary' does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."

Respondent's Knowledge

207 There is a defence to the claims under sections 15 if the employer did not know and proves that it could not reasonably be expected to know, that the employee was disabled. Guidance on these issues was given in IPC Media Ltd v Millar [2013] IRLR 707 that it is necessary to determine who the alleged discriminator was (i.e. whose mind is in issue and who, in an appropriate case, becomes 'A' in sub-s (2)). It was subsequently held by the EAT that the knowledge of one element of the organisation (e.g. HR or Occupational Health) is not automatically to be imputed to the manager actually taking action against the employee; if that manager lacks the requisite knowledge, sub-s (2) may operate: Gallop v Newport City Council [2016] IRLR 395, Reynolds v CLFIS (UK) Ltd [2015] IRLR 562. In Pnaiser v NHS England [2016] IRLR 170 the EAT gave further guidance that the knowledge required was of the disability, not the "something". The Equality and Human Rights Commission Equality Act 2010 Code of Practice at paragraphs 5.13 – 5.19 also provides guidance on what matters might be sufficient to amount to knowledge or imputed knowledge (that which the employer ought reasonably to know) in this regard.

Burden of proof

208 The burden of proof provisions in relation to discrimination claims are found in Section 136 of the EqA. Section 136(2) of the EqA provides that "(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."

209 However, Section 136(3) of the EqA goes on to provide that: "But subsection (2) does not apply if A shows that A did not contravene the provision.

210 Finally, in terms of Section 136(6), a reference to "the court" includes a reference to an Employment Tribunal.

211 The burden of proof is considered in two stages. Giving the judgment of the Court of Appeal in Igen Limited v Wong [2005] ICR 931 (CA), Peter Gibson LJ said in paragraph 17:"The statutory amendments clearly require the employment tribunal to go through a two-stage process if the complaint of the complainant is to be upheld. The first stage requires the complainant to prove facts from which the tribunal could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld."

212 The Court of Appeal, in Igen Limited v Wong, also set out the position with regard to the drawing of inferences in discrimination cases.

213 It is unusual to have direct evidence as to the reason for the treatment (discrimination may not be intentional and may be the product of unconscious bias or discriminatory assumptions) (Nagarajan v London Regional Transport [1999] 4 All ER 65). Evidence of the reason for the treatment will ordinarily be by reasonable inference from primary facts. At Stage 1 proof is of a prima facie case and requires relevant facts from which the Tribunal could infer the reason. Relevant facts in appropriate cases may include evasive or equivocal replies to questions or requests for information; failure to comply with a relevant code of practice; the context in which the treatment has occurred including statistical data; the reason for the treatment (See Madarassy v Nomura International Plc [2007] ICR 867 (CA)). "In so far as this [information] was in the hands of the employer, the claimant could have identified the information required and requested that it be provided voluntarily or, if that was refused, by obtaining an order from the Tribunal" (Efobi v Royal Mail Group [2019] EWCA Civ 19).

214 Assessment of Stage 1 is based upon all the evidence adduced by both the claimant and the respondent but excluding the absence of an adequate (i.e. non-discriminatory) explanation for the treatment (which is relevant only to Stage 2) (See Madarassy). All relevant facts should be considered but not the respondent's explanation, or the absence of any such explanation (Laing v Manchester City Council [2006] ICR 1519, EAT and Efobi). The respondent's explanation for its conduct provides the reason why he has done what could be considered a discriminatory act. "Most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts" (See Madarassy). "In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts" (See Igen v Wong [2005] ICR 935).

215 The employer must seek to rebut the inference of discrimination by explaining why he has acted as he has (See Laing). The treatment must be "in no sense whatsoever" because of the protected characteristic (Barton v Investec Securities Ltd [2003] ICR 1205, EAT). The explanation must be sufficiently adequate and cogent to discharge the burden and this will depend on the strength of the Stage 1 prima facie case (Network Rail Infrastructure Limited v Griffiths Henry 2006 IRLR 865). The Tribunal may elect to bypass Stage 1 and proceed straight to Stage 2, if they are satisfied that the reason for the less favourable treatment is fully adequate and cogent (See Laing).

216 In Madarassy, the Court of Appeal found that the words "could conclude" must mean "a reasonable Tribunal could properly conclude" from all the evidence before it, meaning that the claimant had to "set up a prima facie case". That done, the burden of proof shifted to the respondent (employer) who had to show that they did not commit (or is not to be treated as having committed) the unlawful act. 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 balance of probabilities, the respondent had committed an unlawful act of discrimination.

217 The Supreme Court, in Hewage v Grampian Health Board [2012] ICR 1054 (SC), held that Tribunals should be careful not to approach the Igen guidelines in too mechanistic a fashion, and the Court of Appeal has confirmed that approach under the EqA in its Judgment in Ayodele v Citylink [2018] IRLR 114 (CA). The Supreme Court stated at paragraph 32 of their decision: "The points made by the Court of Appeal about the effect of the statute in these two cases could not be more clearly expressed, and I see

no need for any further guidance. Furthermore, as Underhill J pointed out in Martin v Devonshires Solicitors [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

Time limits

218 Section 123 of the EqA deals with time limits. Section 123(1) provides that proceedings on a complaint under 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.

219 Section 123(3) provides that (a) conduct extending over a period is to be treated as done at the end of the period, and (b) failure to do something is to be treated as occurring when the person in question decided on it.

220 The time limit in Section 123 is, however, subject to Section 140B, which provides for an extension of the time limit to facilitate conciliation before institution of Tribunal proceedings.

221 Day A is the day on which the worker concerned complies with the requirement of Section 18A of the Employment Tribunals Act 1996 to contact ACAS in relation to the matter in respect of which the proceedings are brought, and Day B is the day on which the worker receives or is treated as receiving the ACAS certificate issued under Section 18A.

222 In working out when the time limit expires, the period beginning with the day after Day A and ending with Day B is not to be counted. If the time limit set would, if not extended, 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.

223 As to conduct which 'extends over a period' the Court of Appeal in Hendricks v Metropolitan Police Commissioner [2003] IRLR 96, sets out that the burden is on the claimant to prove, either by direct evidence or inference, that the numerous alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period'.

224 In South Western Ambulance Service NHS Foundation Trust (appellant) v King (respondent) - [2020] IRLR 168 Chaudhury P in the EAT stated in the context of a continuing act at [36-38] "It will be necessary, in my judgment, for at least the last of the constituent acts relied upon to be in time and proven to be an act of discrimination in order for time to be enlarged."

225 Whether there is conduct extending over a period was considered to include where an employer maintains and keeps in force a discriminatory regime, rule, practice, or principle which has had a clear and adverse effect on the complainant - Barclays Bank plc v Kapur [1989] IRLR 387. The Court of Appeal has cautioned Tribunals against applying the concepts of 'policy, rule, practice, scheme or regime' too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period (Hendricks v Metropolitan Police Commissioner, [2003] IRLR 96).

226 Where a claim is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (Robertson v Bexley Community Centre [2003] IRLR 434). At paragraphs 23, 24 and 25 Lord Justice Auld states:

"23 I turn now to the second issue. The decision by the employment tribunal not to exercise its discretion to consider the claim on just and equitable grounds. There are a number of basic propositions of law to which Miss Outhwaite has referred us which govern the way in which this exercise has to be undertaken. If the claim is out of time, there is no jurisdiction to consider it unless the tribunal considers that it is just and equitable in the circumstances to do so. That is essentially a question of fact and judgment for the tribunal to determine, as it did here, having reconvened for the purpose of hearing argument on it.

24 The tribunal, when considering the exercise of its discretion, has a wide ambit within which to reach a decision. If authority is needed for that proposition, it is to be found in Daniel v Homerton Hospital Trust (unreported, 9 July 1999, CA) in the judgment of Gibson LJ at p.3, where he said:

'The discretion of the tribunal under s.68(6) is a wide one. This court will not interfere with the exercise of discretion unless we can see that the tribunal erred in principle or was otherwise plainly wrong.'

25 It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. It is of a piece with those general propositions that an Appeal Tribunal may not allow an appeal against a tribunal's refusal to consider an application out of time in the exercise of its discretion merely because the Appeal Tribunal, if it were deciding the issue at first instance, would have formed a different view. As I have already indicated, such an appeal should only succeed where the Appeal Tribunal can identify an error of law or principle, making the decision of the tribunal below plainly wrong in this respect."

227 Exceptional circumstances are not required for the Tribunal to exercise its discretion and the test remains what the Tribunal considers to be just and equitable (Pathan v South London Islamic Centre UKEAT/0312/13).

228 Even if the Tribunal disbelieves the reason put forward by the claimant it should still go on to consider any other potentially relevant factors such as the balance of convenience and the chance of success: Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278, following Pathan v South London Islamic Centre UKEAT/0312/13 and Szmidt v AC Produce Imports Ltd UKEAT/0291/14. We also considered the EAT's decision in Habinteg Housing Association Ltd v Holleran UKEAT/0274/14 holding that where there was no explanation for the delay tendered that was fatal to the application of the extension, which was followed. In Edomobi v La Retraite RC Girls School UKEAT/0180/16 in which the Judge added that she did not "understand the supposed distinction in principle between a case in which the claimant does not explain the delay and a case where he or she does so but is disbelieved. In neither case, in my judgment, is there material on which the Tribunal can exercise its discretion to extend time. If there is

no explanation for the delay, it is hard to see how the supposedly strong merits of a claim can rescue a claimant from the consequences of any delay."

229 Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13 (18 February 2014, unreported), a litigant can hardly hope to satisfy that burden unless he provides an answer to two questions (paragraph 52): "The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was."

230 In Wells Cathedral School Ltd (2) Mr M Stringer v (1) Mr M Souter (2) Ms K Leishman: EA-2020-000801 the EAT did not directly address those authorities but stated that, in relation to the issue of delay, "it is not always essential that the tribunal be satisfied that there is a particular reason that it would regard as a good reason".

231 In Rathakrishnan there was a review of authority on the issue of the just and equitable extension, as it is often called, including the Court of Appeal case of London Borough of Southwark v Afolabi [2003] IRLR 220, in which it was held that a Tribunal is not required to go through the matters listed in s.33(3) of the Limitation Act, in the context of a personal injury claim, provided that no significant factor is omitted. There was also reference to Dale v British Coal Corporation [1992] 1 WLR 964, a personal injury claim, where it was held to be appropriate to consider the plaintiff's (claimant's) prospect of success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. The EAT concluded "What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see Hutchison v Westward Television Ltd [1977] IRLR 69) involves a multi-factoral approach. No single factor is determinative."

232 That said, the Limitation Act checklist as modified in the case of British Coal Corporation v Keeble includes as possible relevant factors: i) the relative prejudice to each of the parties; ii) all of the circumstances of the case which includes: iii) The length and reason for delay; iv) The extent that cogency of evidence is likely to be affected; v) The cooperation of the respondent in the provision of information requested, if relevant; vi) The promptness with which the claimant had acted once she knew of facts giving rise to the cause of action, and vii) Steps taken by the claimant to obtain advice once she knew of the possibility of taking action.

233 In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194 the Court of Appeal held: "First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion."

234 That was emphasised more recently in Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23, which discouraged use of what has become known as the Keeble factors, in relation to the Limitation Act referred to, as a form of template for the exercise of discretion.

Complaints under the EqA and Remedy

235 Section 120 of the EqA provides that an Employment Tribunal has jurisdiction to determine a complaint relating to a contravention of Part 5 (work) of that Act and, subject

to the time limit provisions of Section 123, as detailed above, are subject to the remedies set forth in Section 124 of the EqA, if an Employment Tribunal finds that there has been a contravention of the EqA.

236 In that event, the Tribunal may, as per Section 124(2), (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate; (b) order the respondent to pay compensation to the claimant; and (c) make an appropriate recommendation, as defined in Section 124(3) of the EqA.

237 In terms of Section 124(6) of the EqA, the amount of compensation which may be awarded under Section 124(2)(b) of the EqA corresponds to the amount that could be awarded by the County Court under Section 119 of the EqA and, as per Section 119(4) of the EqA, an award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).

238 The Tribunal is empowered to award interest under the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 (SI 1996/2803), and we also considered Section 207(a) of the Trade Union and Labour Relations Consolidations Act 1992. We took into account the ACAS Code of Practice on disciplinary and grievance procedures as a relevant Code of Practice.

Submissions

239 Parties' representatives made detailed submissions which the Tribunal found to be informative. The Tribunal considered both parties' written, and oral submissions and we referred to the authorities cited therein. References are made to essential aspects of the submissions and the authorities relied on with reference to the issues to be determined in this Judgment, although the Tribunal considered the totality of the submissions from the parties.

240 The respondent's representative referred to a number of cases, included but not limited to:

i) Thompson v Ark Schools [2019] ICR 292, EAT, at para's 13-20 (time limits);

ii) Igen Ltd v Wong [2005] IRLR 258 (burden of proof in discrimination cases);

iii) Madarassy v Nomura International PLC [2007] IRLR;

iv) Olalekan v Serco Ltd [2019] IRLR 314 (comparators – Choudhury J rejected the suggestion that a different decision maker would necessarily amount to a material difference for the purpose of identifying a comparator, but he suggested that "there may be cases where the difference in decision-maker amounts to a material difference: this could arise, for example, where one decision-maker was operating under a different policy from the other…"(paragraph 31));

v) York City Council v Grosset [2018] ICR 1492 (section 15 claims);

vi) British Home Stores v Burchell [1980] ICR 303 (unfair dismissal – misconduct dismissals);

vii) Sainsbury's Supermarkets v Hitt [2003] IRLR 23 (unfair dismissal);

viii) Hadjioannou v Coral Casinos Ltd [1981] IRLR 352 (consideration of the extent to which a Tribunal should take account of apparent disparities in the treatment of employees accused of the same or similar conduct matters [reference to paragraphs 24-25 of Waterhouse J's Judgment); and

ix) Paul v East Surrey District Health Authority [1995] IRLR 305 (paragraphs 34-35 of Beldam LJ's Judgment).

241 In addition the claimant's representative made reference to a number of cases including but not limited to:

(i) Risby v London Borough of Waltham Forest UKEAT/0318/15/DM and Hall v Chief Constable of West Yorkshire 2015 WL 5202319 (para 15 to 18 of Risby – The causal link between the disability and the something is relatively loose. It is conduct that arises in consequence of the disability or of which the disability was one cause if there are many causes of the conduct);

(ii) Burdett v Aviva Employment Services Ltd WL6686223(2014) (Was the dismissal a proportionate means of achieving a legitimate aim? This is an objective test neatly summarised at para 34 – para 38);

(iii) Balamoody v UK Central Council for Nursing, Midwifery and Health Visiting [2001] EWCA Civ 2097 (If the Tribunal does not find any of the chosen men are valid comparators then the Tribunal would consider how a hypothetical comparator would be treated);

(iv) Baker v Cornwall County Council [1990] IRLR 194, [1990] ICR 452 (direct evidence of discrimination will seldom be available and thus if discrimination takes place in circumstances which are consistent with the treatment being based on grounds of sex or race, the employment tribunal should be prepared to draw the inference that the discrimination was on such grounds unless the alleged discriminator can satisfy the tribunal that there was some other explanation.);

(v) The City of Edinburgh Council v Mr Alistair Dickson 2009 WL 5641080 (where an employer failed to investigate an employee's claim that a serious incident had been caused by his disability);

(vi) The Governing Body of Hastingsbury School v Mr M L Clarke 2007 WL 4610675 (where an employee should have been referred to OH despite saying he was not ill where the Tribunal found [upheld by the EAT] that at para 47 "a reasonable employer would not have dismissed for these acts of misconduct without at least taking steps to investigate further whether they may have had a medical or psychological cause which could have been adequately treated");

(vii) Post Office v Fennell [1981] IRLR 221 (unfair dismissal - consistency);

(viii) Paul v East Surrey District Health Authority [1995] IRLR 305 (claimant's representative submits that the well-known warning about comparator cases in Paul v East Surrey District Health Authority [1995] IRLR 305 really does not apply to this case);

(ix) Mr C Daley v Vodafone Automotive Ltd EA-2020-000314-JOJ, 2021 WL 04889057 (EAT allowing an appeal based on the Tribunal failing to consider the adequacy of the respondent's investigation in relation to whether the claimant's misconduct may have been caused by their depression and/or the side effects of medication); and

(x) British Telecommunications PLC v Mr L J Daniels UKEAT/0554/11/MAA, 2012 WL 2065254 (Tribunal upheld the employer's case on BHS v Burchell (despite wrongly imposing the burden of proof on it) but found the gross misconduct dismissal unfair under Iceland for this global employer did not take up the claim that, as the Claimant had a history of mental illness, occupational health advice be sought. Appeal before the EAT was dismissed).

242 At paragraph 26 of their submissions on the substantive issues in the case, the claimant's representative refers to an extract from Harvey relating to hypothetical comparators. The case of 'Chief Constable of West Yorkshire Police v Vento [2001] IRLR 124, EAT is cited.

243 The claimant's representative also makes detailed submissions in relation to whether the claimant's discrimination complaints are time barred. There are number of references to passages from Harvey in relation to amendment applications. Firstly it is submitted that the balance of justice and hardship test with all information about the dates and when the acts took place was resolved earlier in this case when the claimant's amendment application was granted. Secondly, in the alternative, the claimant's representative says that it is both just and equitable and the balance of hardship favours the claimant in allowing the claims to proceed. It is contended that the Tribunal is entitled to look at all the documents in discerning a reason for the delay (and not just witness evidence) and not having a reason is not a necessary barrier to having an extension granted especially where the facts overlap with existing in time claims as in the instant case.

244 The following cases are cited in respect of time limits within the claimant's submissions (including in the relevant passages from Harvey):

(i) Selkent Bus Company v Moore [1996] ICR 836;
(ii) Arian v The Spitalfields Practice [2022] EAT 67 (also cited guidance from the Abercrombie case) ;

(iii) Safeway Stores v TGWU UKEAT/0092/07;

(iv) Conteh v First Security Guards Ltd UKEAT/0144/16/JOJ;

(v) Transport and General Workers Union v Safeway Stores Ltd at [12]–[13]; and

(vi) Ali v Office of National Statistics [2004] EWCA Civ 1363, [2005] IRLR 201.

245 The respondent's representative submits that the time limits issues were not decided previously that they are recorded in the list of issues, and they require to be determined at this hearing.

246 The respondent's representative also cites the Burchell principles (referred to above) and suggests that if procedural errors were made, there should be a 100% Polkey reduction. The claimant's representative states that this is not a suitable case for a Polkey reduction. It is also contended on behalf of the respondent that there should be a 100% reduction of any compensation in terms of contributory conduct.

247 The claimant's representative submits that "In the particular circumstances of this case she should not be found to be culpable and there should be no finding of contributory conduct. No one else was dismissed for this type of action at all. There is nothing that would make it not just to re-instate or re-engage the C."

Discussion and Decision

248 On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

Sex Discrimination

Direct Sex Discrimination – Section 13 of the Equality Act 2010

249 The claimant alleges that her dismissal on 5 April 2022 amounted to less favourable treatment and that such treatment was on the grounds of her sex (paragraph 6 of the agreed List of Issues).

250 The respondent's representative contends that the claimant must first establish a prima facie case that there has been unlawful discrimination before the burden passes to the respondent to provide a non-discriminatory explanation. The respondent's position is that the claimant has not established a prima facie case, but that in any event the respondent has a non-discriminatory explanation for the claimant's dismissal.

251 The claimant's representative submits that they cannot see how the respondent can satisfy the reverse burden of proof in respect of Ms Tracey Simms (the second decision maker in respect of the decision to dismiss the claimant). It is submitted on the claimant's behalf that Ms Simms did not give any evidence before the Tribunal, and further that, the evidence given by Mr Suleman was not sufficient to satisfy the Tribunal that the claimant's sex played no part whatsoever in terms of the decision to dismiss the claimant, and that he did not give a reasonable explanation in terms of why he had distinguished the claimant's case "from the line of cases" (it is put forth that consciously or unconsciously he was influenced by the claimant's sex). It is also submitted that Mr Smith did not provide a valid reason in terms of why (with all the options and mitigation) the claimant was the only person who was dismissed. This was, in the claimant's representative submits, notwithstanding the fact he had before him the claimant's four comparators and the letter obtained from Mr Suant.

252 The List of Issues requires the Tribunal to determine the following question "Are the following real comparators, whose circumstances the claimant alleges are not materially different to the claimant's own, the appropriate comparators?"

253 In terms of the four individuals that the claimant identified via her Trade Union Representative, Mr Goodman on 21 April 2022 after her appeal hearing (which we were required to investigate pursuant to the agreed List of Issues), we considered the facts and circumstances in relation to their individual cases and the outcomes in respect thereof.

254 We reminded ourselves that section 23(1) of the EqA requires that "On a comparison of cases for the purposes of section 13, 14, [19 or 19A] there must be no material difference between the circumstances relating to each case."

255 Having considered those four comparators, we found that there were material differences in terms of the circumstances relating to each of the four comparators (that the claimant's representative nominated on her behalf) and the claimant's circumstances.

256 In terms of our finding that there were material differences between the circumstances relating to each comparator (and the claimant's circumstances), we considered our findings of fact made above in respect of each comparator and compared the facts relating to their respective cases with the claimant's disciplinary matter.

257 The second question on the comparators within the List of Issues is whether there was a fifth male train driver who had a similar or worse incident to the claimant. It was not in dispute that the fifth train driver and their circumstances was not placed before Mr Suleman or Mr Smith by the claimant or the claimant's Trade Union representative. The respondent's representative says that as his details were not provided until these proceedings, the circumstances relating to comparator 5's incident were not considered by the relevant decision makers. The claimant's representative contends at paragraph 35 of their submissions that Mr Smith stated he was involved in some way in the case with comparator 5.

258 In relation to the fifth male train driver, we considered that the circumstances referred to by the claimant's representative (at paragraph 35 of their submissions) could potentially bear some similarity in comparison with the incident in relation to the claimant. The claimant's representative refers to "…Comparator 5 who committed a whole series of wrong actions over a period of time resulting in a wheelchair falling onto the track and he was not even subject to a sanction."

Did the Respondent discriminate against the Claimant on the grounds of her sex contrary to Section 13 of the Equality Act 2010?
In particular: With reference to the alleged acts or omissions listed above, did the Respondent carry out such acts or omissions, if so, did the Respondent in doing so treat the Claimant less favourably than others?

259 In relation to comparators 1 to 4, we did not consider that the respondent treated the claimant less favourably than it treated comparators 1 to 4 (who were male), in circumstances in which there were material differences between their circumstances and the claimant's circumstances.

260 In respect of the fifth comparator, we considered that on the basis of the matters pointed out in the claimant's representative's submissions (referred to above) this could potentially bear some similarities to the claimant's circumstances (and that the fifth

comparator was not dismissed whereas the claimant was dismissed). We proceeded to consider the respondent's explanation in respect thereof.

If yes, was the reason for the less favourable treatment due to the protected characteristic as alleged by the Claimant in terms of Section 4 of the Equality Act 2010?

261 In respect of comparators 1 – 4, we find that the reason why those comparators were treated differently by the respondent, related to the materially different facts and their individual circumstances (which were established during the disciplinary process) relating to each case. We noted that two of the comparators put forward on behalf of the claimant involved disciplinary matters that occurred a rather long time ago. This was a material difference because the same rule book and the respondent's procedures and protocols were not in operation at the relevant time. This meant that the decision makers in those cases were applying different rules and procedures.

262 We also noted the following explanations in relation to comparators 1 to 4 set out in the respondent's representative's submissions which was on the whole consistent with the documents that were before the Tribunal (including the documents relating to each employee's disciplinary proceedings that have been summarised in our findings of fact above):

(i) Comparator 1 contacted the service controller to advise he had opened the doors on the wrong side. The respondent's representative notes that the claimant's failure to do so was central to the reasons for her dismissal.

(ii) Comparator 2 had a reason to override the controls. He realised the error and checked the track. He tried to contact the line controller and admitted his error straight away.

(iii) Comparator 3 on appeal the panel found that it could not be certain that he was driving the train in question.

(iv) Comparator 4 opened the platform side doors, not the wrong side doors, in error. Further, the station supervisor assisted by checking the track and giving the driver a green lamp signal to proceed.

263 The claimant's representative submits: "Whilst there is never a perfect comparator there are no material differences. The R put forward no positive case in their Response that these were not valid comparators. The C asked for the material differences, in particular for Comparator 1. The R refused to provide them and said "differences will be addressed in the witness evidence due to be exchanged." AS did not address any differences in his statement. TS gave no evidence and DS put forward spurious points (p.587 – p.589) that he was cross examined on."

264 Mr Suleman explains in his witness evidence that they considered the comparator cases Mr Goodman had provided and that each case was assessed on their own facts, and that the decision made by the manager in one case, was not necessarily the same as another manager's decision.

265 Although the claimant's representative states that the second decision maker did not give evidence, Mr Suleman's evidence referred to the joint decisions and rationale that were made. We accepted his evidence in terms of those matters. Considering his

evidence and the documents before us, we were satisfied that neither Mr Suleman nor Ms Simms's decision to dismiss the claimant was in any sense whatsoever connected with the claimant's sex.

266 We also considered Mr Smith's detailed analysis in respect of each of the claimant's four comparators that were presented to him during the appeal process (at paragraph 34 of his witness statement). His analysis is consistent with the disciplinary documents we were referred to in respect of each individual comparator. The respondent's conclusion in relation to the four comparators presented on behalf of the claimant being materially different to the claimant's circumstances is supported by Mr Smith's analysis.

267 We accepted the evidence given by Mr Smith and Mr Suleman in relation to the above matters which we considered was both credible and consistent.

268 The details relating to comparator five were not provided by the claimant or her representative to Mr Suleman or Mr Smith. The claimant's representative refers to Mr Smith stating that he was in some way involved in the case with comparator 5. There is no suggestion in the submissions of the claimant's representative that Mr Suleman (or his joint decision maker) was aware of the circumstances relating to comparator 5 or involved in some way in the case with comparator 5. We proceeded to consider the factual matrix relating to the disciplinary action taken against comparator 5.

269 We took into account that Ms Simms had co-chaired the CDI and would have been aware of the circumstances relating to comparator 5 (along with the respondent's ER representative who was allocated to provide support in respect of the claimant's disciplinary process). There was no evidence before us that Ms Simms or the respondent's ER representative made Mr Suleman or Mr Smith aware of comparator 5's disciplinary outcome and the factual matrix in respect thereof.

270 In the circumstances, we considered the explanation provided in the respondent's witness evidence in respect of comparator 5. We asked ourselves whether the respondent had satisfied the Tribunal that the claimant's sex was in no sense whatsoever connected to her dismissal.

271 Mr Smith explained to the Tribunal that comparator 5 opened both sets of doors along the entire train in an attempt to cool the train down on a warm day and drove without a pilot light which led to passengers boarding the train and an empty wheelchair falling onto the track. After the situation was pointed out to him by the Line Controller, the train driver followed the correct procedure in those circumstances. He had 16 years' service, and he took full responsibility for his actions.

272 The disciplinary panel in terms of comparator 5 considered the circumstances to be unique (and that the train driver had made a very genuine error). He was provided with a corrective action plan to address gaps in his knowledge prior to resuming his train driver duties.

273 Mr Smith's evidence was consistent with the documentary evidence we were provided with in relation to the comparators.

274 The incident in relation to comparator 5 was a serious incident or at least a similarly serious incident to the claimant's incident, in that it endangered the health and safety of passengers. The train driver in question was not dismissed, and apart from the fact that the driver was a male driver, we were not given information about any other relevant protected characteristics of the driver in question. No additional comparators or evidence were put forward by the respondent in terms of any drivers who were dismissed in similar circumstances to the claimant's circumstances (and who were in fact male).

275 The respondent's representative points out that comparator 5 had legitimately opened the doors in a siding to cool the train; when later alerted to the problem he followed the correct procedure and refers to Mr Smith's evidence in which he had explained that these unique circumstances were very different to those of the claimant. It is also contended that neither the claimant nor her union representative had alleged sex discrimination at any time during the respondent's disciplinary process.

276 Whilst the outcome in comparator 5's case is a much lesser sanction, having considered the reasoning of the disciplinary panel (and the relevant documents) and Mr Smith's witness statement, together with his oral evidence, and considering the totality of the evidence we read and heard, we do not consider that the claimant's sex was in any sense whatsoever connected to the decision to dismiss the claimant (or the decision made to uphold that decision on appeal).

277 The claimant's representative submits: "If the Tribunal does not find any of the chosen men are valid comparators then the Tribunal would consider how a hypothetical comparator would be treated Balamoody v UK Central Council for Nursing, Midwifery and Health Visiting *[2001] EWCA Civ 2097."* The claimant's representative cites a passage from Harvey at paragraph 26 of their submissions relating to the treatment of hypothetical comparators and the consideration of evidence. We gave consideration to all the evidence including the comparator evidence put forward by the claimant in this regard.

278 Having considered the circumstances relating to an appropriate hypothetical comparator (as suggested by the claimant's representative - albeit no further details are provided in respect thereof), on the evidence we heard and documents we read, we do not find that there were elements in the treatment of all or any of the comparators before us that lead us to conclude that the claimant was treated less favourably than a hypothetical male train driver would have been in circumstances (where there is no material difference between the circumstances relating to each case). In the event, we were satisfied that the decision to dismiss the claimant was in no sense whatsoever connected to the claimant's sex.

279 Having considered the documents and the evidence that we heard from the claimant and the respondent's witnesses, we did not consider that either the decision to dismiss the claimant or the decision to uphold the claimant's appeal, was in any sense whatsoever connected with the claimant's sex.

280 We concluded that the claimant was not subjected to less favourable treatment because of sex. Accordingly, the claimant's claim for direct sex discrimination is not well founded and it is hereby dismissed.

<u>Discrimination arising from disability – s 15 of Equality Act 2010</u>

Was the claimant a disabled person as defined in Section 6 of the Equality Act 2010 at the relevant time or times?

281 The claimant relied upon anxiety and depression in terms of her disabilities. We accepted that the claimant was disabled by reason of her anxiety and depression. The respondent conceded that the claimant was disabled in terms of section 6 of the EqA by reason of her anxiety and depression. We referred to the claimant's disability impact statement from which it was clear that the claimant was at the material time suffering with anxiety and depression which had a substantial adverse impact on the claimant's ability to carry out normal day-to-day activities (and which was also clearly long-term as defined at paragraph 2 (1)(a) of Schedule 1 of the EqA).

282 We noted paragraphs 2-4 of the claimant's representative's submissions in respect of PTSD. Furthermore, at paragraph 5 the claimant's representative submits that it appears to make almost no difference in this case what label is applied to the claimant's mental health impairments, that the impact of them remains combined and the same. It is averred that as it has been mentioned by the claimant's GP and Occupational Health, it should be included.

283 We also considered whether, in terms of PTSD, upon which the claimant also relied, the claimant was a disabled person as defined in section 6 of the EqA. There was insufficient information before the Tribunal in relation to the claimant's alleged disability by way of PTSD. The claimant said in evidence that her PTSD arose after the death of her parents in 2018 but there was no reference to this in her detailed GP records. There are some references to PTSD on 28 January 2022 (see page 341 of the Hearing Bundle) and in the OH report of 27 February 2020 (see page 102 of the Hearing Bundle) in circumstances in which it appears to convey what the claimant reported at the material time. There is no diagnosis or prognosis in respect of PTSD. We referred to the claimant's disability impact statement and witness statement (and her answers given in oral evidence), and we were not satisfied that the claimant was at the material time suffering with PTSD which had a substantial adverse impact on her day-to-day activities (and which had long-term effects). We did not find that the claimant had a disability in terms of section 6 of the EqA and the claimant's PTSD.

The claimant alleges the respondent treated her unfavourably by dismissing her on 5 April 2022

284 We accepted that the claimant's dismissal on 5 April 2022 amounted to unfavourable treatment (per paragraph 4 of the List of Issues).

285 The respondent's representative did not seek to argue that the claimant's dismissal did not amount to unfavourable treatment.

With reference to the alleged unfavourable treatment, did the Respondent treat the Claimant unfavourably because of something arising in consequence of the Claimant's disability, contrary to Section 15 of the Equality Act 2010?

286 The agreed List of Issues records that "The claimant alleges that the something arising in consequence of her disability is that she momentarily lost concentration causing her to unknowingly open the doors on the wrong side of the tube train. As she was unaware in consequence of disability, her case is that she was unable to report this."

287 The respondent's representative submits that there is simply no evidence that this "something" – the momentary loss of concentration leading her to unknowingly open the train doors arose from the claimant's disability (taking the disability to be anxiety and depression). There was no medical evidence that the claimant has a propensity to temporarily lose concentration to the extent she cannot recall what she has just done; or to temporarily lose concentration and then to regain it; or simply that there is any connection between her concentration and her anxiety and depression.

288 The respondent accepted that the from time to time the claimant lost concentration. By way of example, the claimant gave an account on the day of the incident (see pages 122-123 of the Hearing Bundle) stating that she was thinking about her family and when she would finish work just prior to the incident and was clearly not concentrating on her job – but there is no connection, the respondent's representative submits, between poor concentration and her disability.

289 The claimant's representative says the matters set out at issue 5(1) clearly arose in consequence of the claimant's disability. She refers to page 108 of the Hearing Bundle and to the GP note at page 181 of the Hearing Bundle which states that the episode is very likely due to her extreme stress and anxiety. The claimant had not been able to have closure since her parents passed away, she was put back on Sertraline and referred for further counselling.

290 In this respect, we considered the factual circumstances as a whole. The claimant had clearly opened the wrong doors. She said that she was unaware of this. The claimant therefore did not report it. The claimant says that there was panic on the day. She advised the Tribunal in her evidence that she was pre-occupied with thoughts on her mind and that these could have been simply related to her mind wondering.

291 We were not satisfied on the evidence that we read and heard that these matters (and the matters described by the claimant in her evidence and set out at issue 5(1) of the agreed List of Issues) arose from the claimant's disability (namely anxiety and depression). If we were wrong to find that the claimant's PTSD did not amount to a disability, we would not have found that, any of the matters described in the claimant's witness evidence relating to the incident that took place (and set out at issue 5(1) of the agreed List of Issues) arose from PTSD.

292 In any event, and in the event, we were wrong to so find, we proceeded to consider whether the respondent treated the claimant unfavourably because of something arising in consequence of her disability. The claimant's representative says the "somethings relied on" clearly played a part in the decision to dismiss the claimant (and that there is no evidence from one of the decision makers). We accepted Mr Suleman's evidence in relation to the decision made by himself and Ms Simms and their rationale (we did not accept that this was in any way whatsoever connected with the claimant's disability or something arising in consequence of the claimant's disability).

293 The claimant's representative states at the end of paragraph 12 of their submissions "(the burden will be on the R subject to the findings above)".

294 The respondent's representative refers to this being a subjective test in which the Tribunal is required to consider the respondent's state of mind and attitude to the "something."

295 The respondent's representative submits that the respondent's witnesses gave clear evidence as to their reasons for dismissal; both Mr Suleman and Mr Smith explained that it was the failure to report the wrong side door opening that led to the decision to dismiss, not the initial error of opening the doors on the wrong side (whether that was due to a loss of concentration or for any other reason). Both decision makers considered the claimant had not been honest in her evidence about what happened and gave implausible evidence about her loss of concentration, and they both concluded that this created a lack of trust between the parties. It is submitted by the respondent's representative that it was the latter action by the claimant of failing to report the incident and to take corrective action which pushed the issue into one of gross misconduct.

296 We agreed that the respondent's witnesses gave clear evidence as to their reasons for dismissal and we accepted their reasons in respect thereof. Their reasoning was clear, and it was supported by the documentary evidence before the Tribunal. The claimant made it clear during the respondent's disciplinary process that she felt fit enough to return to work after sickness absence and fit enough to be driving on the day that the incident occurred. Her handwritten account of events provided on the day of the incident indicated that she had been thinking about family matters, but not that she was suffering from the effects of her disability (as is now alleged).

297 Neither the claimant nor her union representative suggested that the incident occurred because of something arising in consequence of the claimant's disability. There was no suggestion of this in the claimant's grounds of appeal.

298 In the circumstances and considering the evidence of the witnesses we heard from and the documents to which we were referred, we did not find that the respondent treated the claimant unfavourably because of something arising in consequence of her disability.

<u>If so, did the Respondent know or ought to have reasonably known that at the relevant times the Claimant was a disabled person?</u>

299 In the event that we are wrong to so find, we considered whether the respondent knew or ought to have known that at the relevant times the claimant was a disabled person.

300 The claimant's representative refers to the fact that the respondent admits knowledge of anxiety and depression. It is also suggested that the respondent must have had knowledge of PTSD as it is covered in the claimant's OH records. Reference is also made to the GP's letter handed in by the claimant during the disciplinary hearing.

301 The claimant says that her Occupational Health reports will show who referred her to Occupational Health due to disability (in particular James Harrison, the claimant's manager at Leytonstone, Woicezc, had knowledge of her disability).

302 We accepted that the respondent knew or ought to have reasonably known at the relevant times that the claimant had a disability by reason of anxiety and depression. We

noted that the claimant's anxiety and depression and the details relating to this were referred to in the meeting notes in relation to the meeting that took place on 2 March 2022.

303 If the event we were wrong to find that the claimant's PTSD did not amount to a disability in terms of section 6 of the EqA, we did not accept that the respondent knew or ought reasonably to have known at the relevant times that the claimant was a disabled person by reason of PTSD. There is insufficient evidence before the Tribunal in terms of the documents to which we were referred and the witness evidence that was before us, to show that the respondent knew or ought reasonable to have known at the relevant times that the claimant was a disabled person by reason of PTSD.

<u>If so, was the respondent's treatment of the claimant a proportionate means of achieving a legitimate aim?</u>

304 In the event that we were wrong to conclude that the respondent did not treat the claimant unfavourably because of something arising in consequence of her disability, we dealt with the respondent's defence in terms of section 15(1)(b) of the EqA. We considered the respondent's legitimate aim. The respondent's legitimate aim according to the agreed List of Issues is to ensure the health and safety of its staff, customers, and passengers.

305 The respondent's representative states that this cannot be criticised as the legitimate aim of a public transport provider.

306 The claimant's representative states this aim was specified within the agreed List of Issues at this hearing for the first time. We noted that the representations made by the claimant's representative were largely focussed on the contention that that aim could have been achieved by less discriminatory means and proportionality.

307 Mr Suleman referred in his witness evidence to the claimant committing a number of procedural failures, which put passengers in danger and could have caused fatalities and reputational damage to the respondent.

308 Mr Smith referenced in his evidence that the critical element was that the claimant failed to follow the correct procedures after opening the doors on the wrong side of the train and that the safety of customers had been put at risk by the claimant's initial error (which was compounded by her failure to report the error and to carry out critical checks to mitigate against serious injury or death). He refers to the fact that there could have been customers leaning onto the train doors, who could have fallen onto the track and that there are 630 volts running through the track (so falling onto them would likely result in serious injury or death). If a customer fell, they may also have been crushed by the claimant's train. He further states that if a customer had not reported the incident, the respondent may never have known that the incident had taken place.

309 We considered the respondent's aim (including the rationale relating to the correct procedures the claimant was expected to follow) and we concluded that it was a legitimate aim to ensure that the health and safety of the respondent's staff, customers and passengers were protected.

310 The claimant's representative says that there must be a real need, and it must be weighed up against the detriment to the disabled person. It is further submitted that it

seems unarguable that that aim could have been achieved by less discriminatory means. Reference is made to the respondent having a range of options in terms of those listed at paragraphs 16a to d of the claimant's submissions.

311 We balanced the claimant's needs as a disabled person against the respondent's obligations towards the health and safety of others and members of the public. We asked ourselves whether the treatment of the respondent was proportionate in all the circumstances.

312 The claimant could not carry out her role of train driver in light of the respondent's concerns relating to health and safety and ability to carry out the correct processes. The respondent considered alternatives to dismissal and any alternatives were ultimately rejected in light of the concerns (referred to earlier) of Mr Suleman and Mr Smith, which we find to be legitimately held concerns (with a rational basis).

313 In terms of the respondent's health and safety concerns, we considered the fact that a customer complaint had been made, and further that, public confidence in terms of the health and safety provisions made by the respondent is both a significant and a weighty matter.

314 We noted that the claimant had not reported that she was unfit for work on the day of the incident in question. In relation to the claimant's prior sickness absence, the respondent's procedures were followed. The claimant worked as a spare on the day of the incident, she had several hours while she was not working in order to reflect and could have advised a manager in the event that she was unfit to carry out her duties (or if she felt that she was unfit to work). In those circumstances, Mr Suleman and Mr Smith were not required to refer the claimant to Occupational Health in order to assess the claimant's fitness for work.

315 We found that the respondent had carried out an assessment in terms of the risk of a repeat of the circumstances relating to the incident involving the claimant. Both the co-decision makers in respect of the claimant's dismissal and Mr Smith could not be satisfied that there would be no reoccurrence. They considered all the relevant evidence in reaching that conclusion. We noted that the medical evidence provided within the Hearing Bundle to which we were referred did not state or seek to give any assurances that it was unlikely that the same incident would occur again. We gave consideration to this in the context of our finding that even if a further Occupational Health report had been obtained at the insistence of Mr Suleman or Mr Smith, it is unlikely to have reported that the same incident (and same or similar failure by the claimant to follow the correct process) would not be likely to happen again or that any risks could be mitigated against.

316 In terms of any corrective action (or a warning, a final written warning, suspension and/or regrading) that could have been provided as an alternative to dismissal, neither Mr Suleman (or his co-decision maker) nor Mr Smith could be confident that there will be no repeat of the claimant's misconduct. They had serious and significant concerns in respect of the claimant's reliability and her ability to follow the respondent's rules and procedures, which were designed to ensure the health and safety of members of the public. In light of those genuine and significant concerns, and considering all the factual circumstances, the range of options referred to at paragraphs 16a to d of the claimant's representative's submissions were clearly not appropriate. It would not have been appropriate to place the claimant on adjusted duties (in relation to which the Tribunal noted that on the previous

occasion referred to was a temporary arrangement in different circumstances) or to issue a sanction falling short of dismissal.

317 We also took into account that when the claimant was asked about whether she wanted to be reinstated into the same role, she said she would preferably like to be reinstated into her old role if it were possible. The claimant did not suggest (at any time within her evidence) that there were any other suitable alternative roles available for the claimant to carry out.

318 We considered the effect and impact on the claimant given her individual circumstances (per paragraph 17 of the claimant's representative's submissions) of the respondent's requirements in terms of processes designed to ensure the health and safety of members of the public, the claimant's non-compliance with those requirements on the date in question, and the impact of her subsequent dismissal for gross misconduct. We considered this matter in addition to the respondent's legitimate aim.

319 In summary, we were not satisfied on the evidence we read and heard that the issues the claimant described that she experienced on 6 January 2022, arose in consequence of the claimant's disability or that the claimant suffered unfavourable treatment (namely her dismissal) because of something arising in consequence of her disability. In any event, in the event we were wrong to so conclude, we considered the issue relating to justification. In relation to justification, the Tribunal unanimously preferred the submissions of the respondent's representative to those of the claimant's representative. The Tribunal were satisfied on the evidence (and in terms that the respondent had demonstrated) that the respondent's aim of ensuring the health and safety of members of the staff, customers and passengers was their legitimate aim for the purposes of Section 15 of the EqA being an aim. The respondent's aim required that its employees employed to carry out that work carried out by the claimant to be in a position to drive the respondent's trains in accordance with the respondent's rules and requirements and to follow the respondent's procedures in the event of a wrong side door opening incident occurring (which are centred around the health and safety of members of the staff, customers and passengers).

320 The Tribunal were further satisfied that where employees did not follow the correct process (in circumstances in which the respondent could not be satisfied that the same or similar conduct would not take place again), their dismissal could (and in the case of the claimant's dismissal did) constitute a proportionate means of achieving that legitimate aim. In reaching that conclusion, the Tribunal sought to balance the reasonable needs of the employer on the one hand against the discriminatory effect of applying their disciplinary policy and their processes (which were centred around the health and safety of members of the public) and the consequential dismissal of the claimant (who is a disabled person by reason of her depression and anxiety).

321 The Tribunal was not persuaded by the claimant's representative's submission that there was available to the respondent a less discriminatory means of achieving their legitimate aim, the same being to have the effect of deferring a decision to dismiss the claimant for a further indefinite period of time and to support her in the meantime (with no assurance that the same or similar conduct would not be repeated and no suitable alternative role having been identified that the claimant could carry out).

322 The Tribunal accepted the respondent's representative's submission that in that regard such a course of action would not result in the achievement of the legitimate aim

but would rather in the circumstances undermine it. While the Tribunal accepted that the respondent is a relatively large organisation, with a substantial budget, we also accepted the evidence of the respondent's witnesses in terms that they considered the range of reasonable outcomes but that the alternatives to the claimant's dismissal were not appropriate. While the claimant was one individual, she was also one of a number of train drivers working within the respondent whose conduct could be seen to adversely impact upon the achievement of the legitimate aim. We conclude that the respondent had shown that the application of their rules and their disciplinary policy to the claimant and her dismissal as a result of this was a proportionate means of achieving a legitimate aim.

323 We decided (for the reasons noted above), that the claimant was not treated unfavourably (by being dismissed) because of something arising in consequence of the claimant's disability. We were satisfied that the claimant was dismissed because of her conduct in relation to the incident on 6 January 2022. If we were wrong to so conclude, we would have found that the respondent has shown that the claimant's treatment was proportionate means of achieving a legitimate aim.

324 Accordingly, the claimant's complaint of discrimination arising from disability does not succeed and it is dismissed.

Time Limits

325 Notwithstanding our conclusions below in relation the issues relating to time limits, we considered the substantive merits of claimant's discrimination claims above (in the event that we were wrong in relation to our conclusions in respect of matters of jurisdiction and time limits).

326 We considered the respondent's representative's submission that the claimant's discrimination claims were presented outside the statutory time limit as set out in Section 123(1)(a) of the EqA.

327 Firstly, we did not find that there had been any previous determination in relation to time limits in terms of whether the claimant's discrimination complaints were presented in time, and if not whether the time limit should be extended pursuant to the provisions in Section 123 of the EqA. We considered both decisions made by Employment Judge Moor on 15 November 2022 and 06 December 2022, and we also considered Employment Judge S Knight's orders made at the hearing on 16 December 2022 in respect of the amendments and in relation to the complaints and issues to be investigated and determined at the Final Hearing. We note that the issues relating to time limits were set out in the agreed List of Issues to be determined at the Final hearing.

328 Taking into account the dates that the claimant's amendment application were considered (and accordingly the date that the claimant was given permission to pursue her discrimination complaints), we determined that the claimant's discrimination complaints in terms of her sex discrimination and disability discrimination complaints were presented outside the statutory time limit provided in Section 123(1)(a) of the EqA.

329 We considered section 123(3)(a) of the EqA. We find that there are no in-time acts in relation to any of the claimant's complaints (all discrimination complaints have been dismissed, the Tribunal having considered their substantive merits). Therefore, there is no conduct extending over a period that ended with the last act falling within the statutory time limits.

330 Furthermore, we did not find that in terms of section 123(1)(b) it would be just and equitable for the Tribunal to extend the time limit at section 123(1)(a) having considered all the circumstances and facts before us. We took into account that the claimant had a Trade Union Representative advising her in relation to both the respondent's disciplinary process and in relation to the presentation of her claim. The claimant advised the Tribunal that the Trade Union Representative did not tick the relevant boxes on her Claim Form in accordance with her instructions. There was a period of time during which the claimant was awaiting a solicitor to be found by her Trade Union Representative. It is not clear what steps (if any) the claimant took of her own accord to seek legal advice or to inform herself about time limits. We took into account that the claimant had contacted ACAS and engaged in Early Conciliation. The ACAS website contains information relating to time limits in Employment Tribunal claims. We did not consider that the claimant provided an adequate explanation in terms of the delay in presenting her discrimination complaints. In any event, we were not satisfied that having taken into account the circumstances described by the claimant that we should grant an extension of time on a just and equitable basis in respect of the claimant direct sex discrimination or discrimination arising from disability complaints in all the circumstances.

331 The claimant had ample opportunity to seek legal advice or to find relevant information about time limits online. At the hearing, the claimant was legally represented. It is not clear why the claimant did not instruct lawyers earlier in the process. She was aware or ought to have been aware of any relevant time limits and to have been able to take steps to present her claims to the Tribunal within the relevant time limits. The amendments the claimant sought to make were substantial, they sought to introduce new heads of claim, and the claimant required to provide additional particulars relating to the same. There was potential prejudice to the respondent as the respondent was required to undertake additional disclosure and make further enquiries of witnesses as a result of the claimant's additional complaints. We took into account that there was no mention whatsoever during the respondent's disciplinary process or in the claimant's ET1 Form that the claimant had allegedly suffered direct sex discrimination or discrimination arising from disability.

332 No details of the comparators were provided within the claimant's ET1 Form. It was necessary for Employment Judge S Knight to give directions for the the claimant to provide any material identifying her fifth comparator for sex discrimination. The claimant had a complaint of unfair dismissal (which was presented within the relevant statutory time limits) and, accordingly, it would be investigated and determined by the Tribunal during this hearing.

333 We therefore concluded that balancing the prejudice between the parties, we would not extend time on a just and equitable basis. Therefore, we did not have jurisdiction to consider the claimant's complaints of discrimination arising from disability and direct sex discrimination, and those claims stand dismissed.

334 As a result of the above, although we determined the claimant's discrimination complaints on their merits, we did not consider that those complaints were brought within the statutory time limit set out in Section 123(1)(a) of the EqA or that the time limit should be extended on a just and equitable basis in terms of section 123(1)(b) of the EqA. Accordingly, we dismissed the claimant's direct sex discrimination and discrimination arising from disability complaints.

Unfair Dismissal
What was the reason for dismissal?

335 The first question for Tribunal is what 'was the reason for dismissal' and whether it falls within one of the potentially fair reasons in terms of Section 98 of the ERA.

336 The burden of proof is on the respondent to show that there was a potentially fair reason for dismissal within the meaning of Section 98(2) of the ERA.

337 The respondent says that the reason for the claimant's dismissal was related to the claimant's conduct. The claimant's position is that there was a discriminatory motive. Conduct is the reason given by the respondent in their letter of dismissal and no other reason has been advanced by the respondent at the hearing.

338 We accepted the respondent's reason for dismissal was the claimant's conduct. This was confirmed in Mr Suleman's outcome letter (which he made along with Ms Simms as a co-decision maker) and also within Mr Smith's appeal outcome letter (upholding the decision to dismiss the claimant). As we stated above, the respondent did not rely on any other reason for dismissal.

339 The claimant did not suggest that there was a discriminatory motive or that discrimination was a reason for her dismissal during the respondent's internal disciplinary process either in relation to the initial disciplinary or the appeal. The claimant did not allege sex discrimination or disability discrimination (or discrimination arising from disability) at the material time.

340 Having reviewed the witness evidence and the documents before us, we were not satisfied that there was a discriminatory motive or that discrimination played any part whatsoever in respect of the claimant's dismissal.

341 We noted that conduct is a potentially fair reason for dismissal in terms of Section 98(2)(b) of the ERA. In the circumstances, we find that the claimant was dismissed by reason of her conduct and that this is a potentially fair reason for dismissal.

Did the Respondent have a genuine and reasonable belief that the Claimant committed an act of misconduct?

342 Regarding the claim of unfair dismissal, the Tribunal turns to the elements of the Burchell test in assessing these. We accepted that the respondent formed a belief that the claimant committed misconduct and we were satisfied that the belief that was held was genuine.

343 The respondent's reasoning included the fact that the claimant opened the doors of the train she was driving on 6 January 2022 on the wrong side of the train and that she failed to report the incident (and she failed to carry out the necessary checks thereafter). No other member of staff was made aware of the incident at the time that it had occurred. It was in fact a customer that had reported the incident to the respondent, which led to the respondent becoming aware of the incident and, in turn, the matter being investigated. We accepted the evidence given by Mr Suleman and Mr Smith which was both credible and consistent with the documents before the Tribunal. There can, in our minds, be no

question that the respondent had a genuine and reasonable belief that the claimant had committed misconduct in the circumstances.

Did the Respondent conduct a reasonable investigation?

344 We considered carefully the investigation carried out by the respondent prior to the claimant's dismissal. The claimant's representative highlighted the deficiencies within the respondent's investigation in her submissions from the claimant's perspective (paragraphs 38 to 63). The concerns raised by the claimant's representative include but they are not limited to the inadequacy of the investigation relating to whether the claimant's actions were caused by a disability or ill health, an issue with the wrong side door opening (at Holborn), the train having problems on the side in question with CSDE system itself which was replaced, Mr Suleman relying on the wrong procedures, and the claimant's comparators not being taken into account or genuinely considered. We are required to consider whether no reasonable employer would have carried out the investigation into the claimant's conduct in the manner in which the respondent carried out their investigation.

345 We reminded ourselves that we must not substitute our view for that of the employer and that any investigation must fall within the bands of reasonable responses.

346 Bearing this in mind, we did not find that the respondent conducted a reasonable investigation in all the circumstances. Firstly, given that the claimant's representative at the meeting on 2 March 2022 placed the respondent on notice of her mental wellbeing issues, we concluded that the respondent was under an obligation to take some steps investigate the same. There was also an Occupational Health Report commissioned towards the end of 2021 and (as a minimum) it is unclear why enquiries about this report were not made (or why the report was not sought, or indeed questions were not put to the employee in the investigation meeting) or in any event, it is not clear why any required form of consent was not obtained by the disciplinary officers or appeal officer from the claimant in order that copies could be provided to them.

347 Secondly, there should have been an opportunity for the respondent to put any information relating to any comparators it considered to the claimant and for the claimant to comment on any information that was taken into account by Mr Suleman and Ms Simms or Mr Smith relating to comparators. This did not happen either during the disciplinary or appeal hearings (and neither of the hearings were reconvened to enable the comparators to be discussed with the clamant).

348 These matters should have been addressed either by Mr Suleman or Ms Simms at the disciplinary hearing or at the appeal stage by Mr Smith.

349 We did not consider that the remaining criticisms of the respondent's investigation made by the claimant's representative were well founded. The respondent had carried out appropriate investigations in relation to the train in question and the incident on the day in question, including in respect of any matters raised by the claimant during the disciplinary process.

350 Mr Suleman considered the claimant's contention that Holborn is a common station for train drivers opening the doors on the wrong side and Mr Smith gave consideration to her comments relating to retraining following a period of sickness absence.

351 However, we find that the defects in terms of the respondent's investigation identified above were not cured on appeal as the respondent did not seek to investigate or properly investigate the claimant's Occupational Health Report or to arrange a meeting with the claimant to discuss the comparators put forward by Mr Goodman. We note that in terms of the claimant's appeal, a further appeal hearing could have been convened at which the claimant would have had the chance to present an explanation or mitigation with reference to the Occupational Health Report and to discuss the information provided by her representative with regards to comparators. The respondent did not take the opportunity to hold such a meeting or to conduct any further investigation and remedy the earlier defects at the appeal stage.

352 Accordingly, we are satisfied that no reasonable employer would have conducted the investigation in the manner in which the respondent conducted their investigation in terms of the investigation and procedural defects we have identified above. The Tribunal bears in mind the requirements of the ACAS Code of Practice on Disciplinary and Grievance procedures in relation to disciplinary investigations; the respondent, in this case, has not met those requirements.

Did the Respondent follow a fair and reasonable procedure?

353 We further gave further consideration to the issue of procedural fairness in terms of the claimant's dismissal.

354 A fair and reasonable procedure is not simply about establishing the basis on which the respondent could form a belief of whether the conduct happened or not, but it is also an essential requirement to give the claimant the opportunity to explain their conduct, present any mitigation or otherwise to seek to save their employment.

355 In this respect, we did not find that the respondent followed a fair and reasonable process in all the circumstances.

356 This is because it was unclear why the respondent did not seek to make enquiries regarding the claimant's past Occupational Health Report (as a minimum), or alternatively, seek an up-to-date report. It is difficult to see how mitigation could have been fully considered at the material time without making such enquiries.

357 It is also difficult to decipher why the respondent did not take steps to discuss the circumstances relating to the four comparators put forward by the claimant's representative with the claimant prior to any final conclusions being reached at the disciplinary or at the appeal stage.

358 The Tribunal found it unhelpful that the disciplinary outcome letter did not refer to or seek to analyse the details relating to the individual comparators put forward by Mr Goodman. If the relevant details were provided in relation to comparators and the disciplinary officers' reasoning had clearly been set out in relation to each comparator, the claimant could have had the opportunity to comment on these findings (and any relevant information) within her letter of appeal or during the appeal hearing itself (and indeed any points she wished to make about them could have been considered as part of the appeal).

359 Given the contents of the investigation report and Mr Suant's statement provided at the appeal stage, the Tribunal questioned whether the respondent also could have

contacted Mr Suant to ask him to address any apparent inconsistencies in his statements. The respondent's representative pointed out that Mr Suant was not called to give evidence as his investigation had not been challenged and he was not a decision maker. We explained in terms of our observations why we did not accept the claimant's evidence relating to her assertion that Ms Crook of the respondent had told Mr Suant to send the claimant to a CDI on a gross misconduct charge.

360 The respondent's representative explains that the investigation was not criticised until the Final Hearing, and that the claimant attended fact finding meetings with Mr Direnzo (see pages 130-132 of the Hearing Bundle) and Mr Suant (see pages 143-146 of the Hearing Bundle). It is submitted that Mr Suant fairly called the claimant to a further meeting so she could respond to any further evidence (see pages 154-155 of the Hearing Bundle).

361 In terms of the issues at Holborn station, the respondent's representative says that in evidence Mr Smith said that this had happened only three times in approximately four years, and it was a known issue on which training had been given. It is submitted that the claimant initially opened the doors on the platform side at Holborn, suggesting that any apparent "confusion" was not about the layout of the station and that in any event, if a location is known as being prone to error, it is even more important for drivers to be on alert and does not mitigate the fault (see page 226 of the Hearing Bundle).

362 Reference is also made to the fact that the respondent invited the claimant to meetings during the disciplinary process in writing, allowed the claimant to be accompanied by her union representative, provided the claimant with copies of minutes (her amendments to those minutes were agreed); and that the CDI was adjourned to enable the claimant's representative to attend.

363 We considered the procedure as a whole including the first instance disciplinary process and the appeal procedure, and we were satisfied that no reasonable employer would have conducted a procedure without addressing the issues we have identified (above).

<u>Was the decision to dismiss the Claimant within the range of reasonable responses open to a reasonable employer?</u>

364 Finally, there is the issue of whether the dismissal was within the band of reasonable responses. The Tribunal reminded itself that it should not substitute its own decision for that of the respondent and that the question is not whether there were other actions the respondent could have taken but rather whether what they did was a reasonable response.

365 We find that the decision to dismiss the claimant was not within the range of reasonable responses taking account the issues with the investigation that was carried out and the procedural issues (which we have highlighted above) which led to the claimant's dismissal on grounds of gross misconduct.

366 Although we consider this matter further below in terms of remedy (this issue not being relevant to our conclusions on liability), in respect of the Polkey deduction issue (issue 17 in the agreed List of Issues), had the process been carried out fairly and had the respondent investigated the issues that we identified, with the benefit of the evidence that we heard and the documents that we were taken to during the Final Hearing, we would

have found that the claimant's dismissal would have occurred. This is because the claimant's actions in connection with the incident on 6 January 2022 and failure to report the incident per the respondent's requirements (and to follow the respondent's rules), amounted to gross misconduct and it endangered health and safety of members of the public. This could have led to injury or in a worse case fatality to members of the public.

Consistency of Treatment

367 The agreed List of Issues records that in considering the range of reasonable responses the Tribunal will in particular consider whether the respondent treated the claimant inconsistently and that the claimant relies upon the same five comparators outlined in the sex discrimination section of her claim.

368 The incident relating to Comparator 1 is materially different from the claimant's circumstances. It involved physical differences in relation to Moorgate Station and there were issues with the download report. He also contacted the service controller (which the claimant failed to do).

369 We did not consider that it was appropriate for Comparators 2 and 3 to be given significant weight in light of the dates of the incidents, and in light of the fact that different rules and procedures are cited in the evidence. In any event, we considered that the circumstances relating to Comparators 2 and 3 were materially different.

370 Whilst Comparator 4 relates to entirely different factual circumstances, involving reopening train doors while the train was in motion, the factual description of what transpired afterwards is a key differentiating factor. As we noted earlier in our Judgment, the document we were taken to at page 295 of the Hearing Bundle records that Comparator 4 tried to use the connector radio to contact the Service Controller but he received no response.

371 The fifth comparator was not before the respondent's disciplinary officers or appeal officer at the relevant time. The respondent's representative submitted that it was not reasonable to expect Mr Suleman or Mr Smith to have considered the fifth comparator in the circumstances.

372 We did however consider comparator 5 as Ms Simms, had co-chaired the CDI (and the same ER representative was involved) and would have been aware of this. This should have been given further detailed consideration and appropriate justification should have been provided in the disciplinary outcome letter (and in the appeal outcome letter). Mr Smith provides a full explanation at paragraph 38 of his witness statement in relation to the circumstances relating to the fifth comparator (which we accept). He stated in his evidence that in light of the different circumstances, a different sanction was applied (it was not appropriate to apply the same sanction in the claimant's circumstances which were based on entirely different facts).

373 The respondent's representative submits that Waterhouse J in Hadjioannou set out the very limited circumstances in which a Tribunal can find that inconsistent treatment supports a finding of unfairness. It is submitted that only if there are "truly parallel circumstances" when comparing the claimant with the comparators should different treatment be considered unfair and that on the facts of this case, there are no truly parallel circumstances. The respondent's representative also contends that as set out in the case

of Paul, consistency of treatment means looking at all the circumstances including the personal circumstances of the employee in question (per paragraph 79 of the respondent's representative's submissions). The claimant's representative avers that the circumstances in Paul, do not apply to this case. We also considered the case of Fennell which was relied on by the claimant's representative.

374 Mr Smith and Mr Suleman clearly concluded that the situation relating to Comparators 1 to 4 were not truly parallel with the claimant's circumstances and we have no evidence that the fifth comparator was placed before them. Had the fifth comparator been placed before Mr Smith, it is unlikely to have altered his conclusion due to the differences highlighted between his circumstances and the claimant's circumstances in his witness evidence.

Alternative Roles

375 The claimant's representative submits that it was not true that there were no non-safety critical roles that were available. The respondent's representative points out that Mr Suleman said that there were limited non-safety critical roles available in any event, but the key point was that dismissal is the usual sanction for gross misconduct and there was no reason to deviate from this.

376 No other suitable alternative posts were mentioned in the claimant's witness statement that she was able to perform at the material time.

377 In terms of the TADs role carried out by the claimant previously (she followed that process in 2021), we noted that this would be a temporary position, it was not a permanent role, and it is not clear if this option is (or would have been) available. Ultimately the respondent would need to have been satisfied that it was feasible to place the claimant on TADs, and that she would be able to return to that role and carry out that safely within a reasonable time.

378 Mr Suleman stated at paragraph 58 of his witness statement: "We felt Ms Gritton's actions on the day in question were a catastrophic failure of duty and responsibility. Consequently, we did not have any confidence that Ms Gritton would be able to carry out the train operator role properly, or any role, in the future. We therefore considered that dismissal was the most appropriate sanction." We find that the conclusion in terms that, the respondent did not have any confidence that Ms Gritton would be able to carry out the train operator role or any other role in the future, was within the range of reasonable responses open to a reasonable employer and supported by the evidence before the respondent (and the evidence before the Tribunal).

Summary in relation to Unfair Dismissal

379 In conclusion, there was a potentially fair reason for dismissal (that is, conduct) and the respondent had a genuine and reasonable belief in that the claimant had committed misconduct. However, although the respondent took steps to investigate what happened in relation to the incident that took place, the Tribunal considers that the failures of the respondent to take the procedure beyond the fact-finding stage, particularly with respect to the failure to hold something which could be considered to be an investigation with the claimant in relation to discussing her Occupational Health Report previously obtained (or alternatively seeking an updated report), the comparators put forward on the claimant's

behalf and making further enquiries relating to Mr Suant's statement provided during the appeal stage (at which stage the claimant would have had the opportunity to explain or mitigate her actions with reference to the Occupational Health records and the comparator information) is sufficiently serious to render the claimant's dismissal unfair considering all the circumstances. We have taken account of all the circumstances (including the size and administrative resources of the respondent's undertaking) in reaching this conclusion.

Remedy for Unfair Dismissal

Reinstatement

380 We first considered whether to make an order for reinstatement pursuant to Section 114 of the ERA. We considered the factors set out at section 116(1) of the ERA in terms of exercising our discretion under section 113 of the ERA. We took into account that the claimant wishes to be reinstated. This was confirmed at paragraph 68 of the claimant's representative's submissions. It was suggested in those submissions that the claimant could be placed on TADs while she was assessed by Occupational Health and that she could proceed from there in respect of training.

381 In terms of exercising our discretion under Section 113, the second matter that we considered is the question of whether it is practicable for the respondent to comply with an Order for reinstatement. We concluded that it was not practicable for the respondent to comply with an Order for reinstatement. The claimant's dismissal was based on genuine safety concerns. Those concerns were matters of public safety. We are satisfied from the respondent's evidence that the respondent has legitimate concerns, that they do not trust the claimant to operate safely (in any safety critical role), and further, that they do not trust the claimant as an employee. We referred to our findings above in respect thereof. In those circumstances, we took into account that the respondent has shown that it is not practicable for them to comply with an order for reinstatement.

382 We also considered that the claimant caused or contributed to her dismissal and in those circumstances, it would not be just to order reinstatement. On the evidence we heard and read, the claimant's dismissal was based on genuine concerns relating to her conduct and the claimant's actions in terms of failing to comply with reporting requirements (and to follow the respondent's rules) placed members of the public at risk of serious injury or fatality. We provide further details about our analysis with respect to the claimant's contributory conduct below.

Re-engagement

383 As we decided not to make an order for reinstatement, we then considered whether to make an Order for re-engagement and if so on what terms. We considered the factors set out at section 116(3) in relation to whether we should make an order for reengagement. Save in relation to a potential form of an Order for re-engagement (claimant temporarily being placed on TADs), there were no submissions made in respect of an order for re-engagement at paragraph 68 of the claimant's representative's submissions. However, on the basis that we considered that the claimant did wish to be re-engaged, we then proceeded to determine whether it was practicable for the respondent to comply with an order for re-engagement.

384 The respondent's concerns were matters of public safety. We are satisfied from the respondent's evidence that the respondent has legitimate concerns, that they do not trust the claimant to operate safely (in any safety critical role), and further, that they do not trust the claimant as an employee. Once again, due to the respondent's concerns in regard to their genuine safety concerns and the risk to the members of the public, we did not consider that it would be practicable for the respondent to comply with an order for re-engagement.

385 We also considered that given our finding that the claimant caused or contributed to her dismissal it would not be just to order re-engagement. On the evidence we heard and read, the claimant's dismissal was based on genuine concerns relating to her conduct and the claimant's actions placed members of the public at risk of serious injury or fatality. We provide further details about our analysis in respect of the claimant's contributory conduct below.

386 We therefore decline to make an order for re-engagement or reinstatement. We also considered the respondent's submission in this respect at paragraph 90 of their written submissions that the respondent did not trust the claimant with any safety critical role and further did not have trust in the claimant as an employee.

Basic Award

387 We considered section 122(2) of the ERA which reads as follows: "Where the tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

388 We did not consider that it was appropriate to make a basic award to the claimant.

389 We took account of the claimant's conduct prior to her dismissal in reaching this decision. We considered all the circumstances and the parties' submissions in this respect.

390 Even in terms of the claimant's handwritten statement which was provided shortly after the incident in question, we considered that the claimant knew or ought to have known at the material time (that the incident occurred) that something out of the ordinary occurred and it would have been reasonable to expect her to at least have alerted a Station Manager or Line Controller (or other appropriate staff member) or to discuss this matter with them.

391 We also considered the fact that the claimant reported to work and did not advise the respondent on the day in question that she was unfit to work (or having any issues). The claimant was working in a spare capacity, and she had a number of hours before her driving duties commenced to reflect on her position. We note with concern that the claimant did not advise the respondent on the day in question that she was experiencing any problems prior to undertaking her driving duties. The claimant's dismissal was based on genuine concerns relating to her conduct and the claimant's actions placed members of the public at risk of serious injury or fatality.

392 Neither Mr Suleman or Mr Smith felt that the claimant could be trusted within her role (or as an employee) in the light of the events that transpired.

393 In those circumstances, we considered that it would be just and equitable to reduce the basic award payable to the claimant by one hundred percent (100%) because of the claimant's conduct before the dismissal in terms of Section 122(2) of the ERA.

394 We have taken account of the EAT's decision in Granchester Construction (Eastern) Ltd v Attrill UKEAT/0327/12/LA. We consider that the circumstances of this case are "exceptionally rare." A basic award is not affected by the Polkey deduction, except in an exceptionally rare case where such a (fair) dismissal might have taken place virtually contemporaneously with the unfair dismissal which actually occurred.

395 If the matters we identified in respect of the respondent's investigation and the procedure they followed as a whole were rectified, we are satisfied that (in light of the claimant's conduct before the dismissal on the day of the incident including not reporting the incident appropriately and not following the respondent's rules), this would have made no difference to the outcome and the claimant's dismissal would have been certain to have taken effect virtually contemporaneously with the unfair dismissal. We have reached this conclusion having considered the evidence we were provided and referred to during the hearing including medical evidence, comparator details, Mr Suant's report and his later statement provided during the appeal process (and the claimant's evidence relating to the same).

Compensatory Award

396 There are two matters which the Tribunal has to consider in terms of deductions from the compensatory award.

397 The first is the so-called Polkey deduction. This arises because the Tribunal has found that the dismissal was unfair, solely on the basis of what we consider to be procedural defects (including in relation to the reasonableness of the respondent's investigation) and we therefore have to consider whether the claimant would still have been dismissed if a fair procedure had been followed.

398 In assessing this, the Tribunal has taken into account the following matters: The nature of the conduct was serious with regards to the claimant in terms that she reported to work, she had several hours to reflect (she was working as a spare on the day in question), an incident occurred endangering the health and safety of the public or potentially endangering the health and safety of the public, and the claimant did not follow the respondent's procedures (or report the incident to the respondent as required to do so). A member of the public made a complaint and thereby alerted the respondent to the incident. It is possible that had that member of the public not made a complaint, the matters in relation to the incident in which the claimant was involved on 6 January 2022 would not have surfaced.

399 We have taken account that based on the evidence we read and heard, the deficiencies we identified were of a procedural matter and we are certain that they would not have made any difference in terms of the decision to dismiss the claimant. Firstly, we have considered all the evidence relating to the four comparators relied on by the claimant at the material time and in relation to the fifth comparator which was not presented by the

claimant during the respondent's disciplinary process. The claimant has had an opportunity to comment on those comparators in her witness evidence and (through her representative) in submissions. Secondly, we have seen evidence from Occupational Health and the claimant's medical records during this hearing. Thirdly, we noted the content of Mr Suant's investigation report and his later statement provided to the claimant. We did not accept the claimant's evidence that Ms Crook had told Mr Suant to send the claimant to a CDI on a gross misconduct charge. We are certain that the claimant's evidence and submissions on those matters would not have changed Mr Suleman's decision to dismiss the claimant or Mr Smith's conclusion to uphold that decision.

400 The claimant's dismissal was based on genuine concerns relating to her conduct and the claimant's actions placed members of the public at risk of serious injury or fatality.

401 Taking these matters into account, we consider that it is inevitable that had a fair procedure been followed the claimant still would have been dismissed. In particular, the claimant's conduct was very serious and there was no evidence to suggest that an expression of remorse or any further mitigation would have persuaded the disciplinary or appeal officers to come to a wholly different conclusion in respect of the outcome.

402 We accept that it is unusual to find a one hundred percent (100%) Polkey reduction, but as confirmed by His Honour Judge Shanks in Ms N Brown v Castlerock Group Ltd [2022] EAT 5, at paragrap16, it is perfectly possible in principle if a fair dismissal was indeed "inevitable".

403 Notwithstanding the failures in procedure and that the claimant did not have a full opportunity to put her case to the respondent in relation to the matters we identified earlier in this Judgment, it was nevertheless inevitable that the respondent would have found that she had indeed failed to follow the respondent's procedures (or report the incident to the respondent as required to do so) having opened the train doors on the wrong side at Holborn Station on 06 January 2022, which is clearly an act of gross misconduct, even if she had had the opportunity she ought to have had to put her case (and if the respondent had carried out the additional investigation in relation to the points we identified earlier).

404 The Tribunal finds that had a fair procedure been followed there was still one hundred percent (100%) chance that the claimant would have been dismissed given the seriousness of her conduct. The Tribunal considers it would be just and equitable to reduce the compensatory award accordingly by 100% to reflect this.

Contributory Conduct

405 The second deduction relates to contributory fault where the claimant's conduct has caused or contributed to their dismissal. We considered this in the alternative, if we were wrong in terms of our conclusion in respect of the 100% Polkey deduction. It is clear that the claimant's conduct in this case wholly caused the claimant's dismissal. We find that there is no reason for the claimant's dismissal other than the claimant's conduct during the incident of 6 January 2022 and the claimant's actions thereafter (including not reporting the incident and not following the respondent's rules designed to ensure the safety of passengers). The claimant, in effect, did not deny that the incident or the failure to report the incident (or failure to follow the respondent's procedures) had occurred, so there is no question in our mind that those matters did in fact occur. That is the conduct which we have identified which is said to give rise to possible contributory fault.

406 We considered the other circumstances including that the claimant reported to work that day, and she had not expressed concerns about her fitness to undertake her train operator duties, despite having been working as a spare on the day in question (which meant the claimant had a few hours prior to starting her train operator duties to reflect).

407 The incident and the claimant's reaction to it is clearly culpable and blameworthy conduct. Notwithstanding the claimant's personal circumstances on the day in question, the claimant should have reported the incident (as required to do so) and followed the respondent's safety procedures, but she failed to do so.

408 The Tribunal appreciates the claimant's personal circumstances, which she describes were on her mind on the day in question in her witness statement, but we are satisfied that the incident that had occurred and the events in terms of the aftermath were so serious that a sanction short of dismissal would not have been appropriate.

409 We conclude, on the evidence we heard and the documents that we were referred to, that for the purposes of section 123(6) of the ERA, the claimant's conduct on the day of the incident in question (which we have identified and which we consider blameworthy) caused or contributed to the claimant's dismissal.

410 When then considered to what extent the award should be reduced and to what extent it is just and equitable to reduce it.

411 In terms of the amount of any reduction, the Tribunal bears in mind the guidance in Hollier v Plysu Limited [1983] IRLR 260. We consider that this is a case where the claimant's conduct has wholly caused or contributed to her dismissal.

412 In all the circumstances, and having regard to that finding, the Tribunal considers that this is a case where it is just and equitable to reduce the compensatory award by one hundred percent (100%) pursuant to Section 123(6) of the ERA.

Conclusion – compensation for unfair dismissal

413 The Tribunal therefore makes no basic award or compensatory award.

Wrongful dismissal and breach of contract (notice pay)

Did the Claimant Commit an Act of Gross-misconduct being a repudiatory Breach of her Employment Contract Entitling the Respondent to dismiss her without Notice?

414 We then turn to the claimant's claim of wrongful dismissal. We took into account that the burden of proof in respect of the claimant's wrongful dismissal claim falls to the respondent insofar as they have to demonstrate that the claimant was in fundamental breach of contract in terms of gross misconduct.

415 In this regard, the respondent's representative submits that the claimant fundamentally breached her contract of employment by virtue of the gross misconduct – doing actions that potentially put the safety of customers and lives at risk and which contravened the respondent's requirements (and refers to their earlier submissions). The respondent's representative submits that on that basis the respondent was entitled to

dismiss the claimant summarily and that this possibility was made clear in the claimant's contract of employment, a copy of which is provided at page 54 of the Hearing Bundle.

416 The claimant's representative points out that the test for gross misconduct is that there must be a finding that the conduct in question actually occurred and not whether the respondent reasonably believed it to have occurred. They assert that on the facts of this case there should be no such finding. The claimant's representative refers to the fact that the claimant accepted that there was a safety critical incident and that in hindsight she should not have attended work, but she reacted that day as she did due to her disabilities. We do not accept, on the evidence we read and heard, that the claimant reacted that day as she did due to her disability or because of something arising in consequence of her disability.

417 The claimant's representative also refers to the fact that this did not happen previously despite the claimant working and living with her conditions and that the claimant thought that she was fit to drive on the day in question.

418 The claimant's representative submits that this did not result in a fundamental breach, the respondent did not treat those incidents in that way and there were a large number of other options that the respondent could have followed.

419 Based on the factual findings that we made (above) and the evidence we heard and read; we found that the claimant was in fundamental breach of contract on the basis that her actions on 6 January 2022 amounted to gross misconduct or gross negligence. The claimant had reported to work that day. She did not report to the respondent that she was unfit to work, and after the incident, she did not report the fact that an incident had occurred. This was contrary to the respondent's requirements, of which the claimant was aware. The claimant's actions on the day in question endangered health and safety and the safety of members of the public.

420 We took into account the nature of the gross misconduct put forward by the respondent in terms that at 11:42am on 6 January 2022 on a Westbound train at Holborn, the claimant overrode the train circuit system and opened the door on the wrong side then closed the doors and departed the station without reporting the incident to the Service Controller. This was contrary to the respondent's Code of Conduct and the respondent's operational procedures. The claimant was aware that the failure to meet the respondent's procedures was very serious. We accepted that the incident occurred in the manner described and that the claimant's actions amounted to a fundamental breach of contract.

421 We accepted both Mr Suleman's and Mr Smith's evidence in respect of their factual findings relating to the incident and their decisions to dismiss the claimant (and their reasoning in respect thereof), which were credible and consistent. Both Mr Suleman and Mr Smith had serious concerns about the claimant's failure to report a serious safety incident or admit to her actions during the investigation. The claimant could not be trusted to return to her role or to work in another role within the respondent. Mr Smith, in his evidence, described the possible consequences of the claimant's actions in detail, which could have resulted in serious injury or death.

422 We considered the claimant's comparators; we made detailed findings of fact in relation to those comparators (above). We found that there were material differences and, in addition, we considered the respondent's explanations given in evidence in relation to

the treatment of those comparators (and why any sanction short of dismissal was not appropriate in terms of the circumstances relating to the claimant's dismissal). Moreover, we did not find that this detracted from the fact that the claimant committed gross misconduct and that the claimant's dismissal was accordingly lawful in all the circumstances.

423 In the circumstances, the respondent has shown that not only had the claimant failed to follow their internal rules thereby creating a serious and significant safety risk, but that also the claimant's actions on the day in question completely undermined the respondent's trust and confidence in the claimant as an employee. The evidence and the material we considered together were clearly sufficient to warrant a finding that the claimant failed to follow the respondent's requirements and created a serious and significant safety risk, and that finding clearly means that the claimant's wrongful dismissal and breach of contract (notice pay) complaints must fail.

Does the Respondent owe the Claimant Notice Pay?

424 In view of our findings in respect of the claimant's wrongful dismissal and breach of contract (notice pay) complaints, and in light of the fact that the respondent has shown that the claimant was dismissed for gross misconduct, and that the claimant's dismissal for gross misconduct was appropriate in all the circumstances (and that accordingly the claimant was in fundamental breach in terms of her contract of employment with the respondent), we do not find that the respondent owes the claimant notice pay.

Conclusion

425 The Tribunal was satisfied that there was a fair reason for the claimant's dismissal, namely misconduct.

426 The Tribunal considered whether the claimant's dismissal was fair and reasonable in accordance with Section 98(4) of the ERA including the size and administrative resources of the employer, and we found that the claimant's dismissal was not fair and reasonable in all the circumstances. The claimant was unfairly dismissed.

170 In terms of compensation for unfair dismissal, we award £0.00 in respect of the basic award and £0.00 in relation to the compensatory award for the reasons stated above.

171 The claimant's remaining claims are not well founded and they are hereby dismissed.

Employment Judge B Beyzade
10 March 2024