



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Opoku

**Respondent:** London Underground Limited

**Heard at:** London Central (by CVP video)

**On:** 27 & 28 March 2024

**Before:** Employment Judge Brown

**Members:** Ms J Marshall  
Mr S Pearlman

**Appearances:**

**For the Claimant:** Mr M Walker, Counsel  
**For the Respondent:** Ms E Wheeler, Counsel

**JUDGMENT** having been sent to the parties on 10 April 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

### Preliminary

1. The Claimant presented this claim against the Respondent, his employer, on 22 August 2023.
2. There was a Case Management Preliminary Hearing on 7 November 2023 before EJ Nash. At that hearing, the Claimant confirmed that his claim was about sickness meetings resulting from the Claimant's sick leave which started on 13 March 2023. He withdrew all his complaints apart from a complaint of failure to make reasonable adjustments under ss 20 & 21 Equality Act 2010. He also withdrew his complaints against 2 named Respondents. The withdrawn complaints were dismissed on withdrawal.
3. EJ Nash identified the issues in the Claimant's remaining complaint as follows:

- a. The R agrees that it applied the following PCP (provisions, criteria or practices): Only allowing trade union representatives or workplace colleagues to accompany employees to case conference meetings under its attendance at work policy.
  - b. Did the above PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that he wanted a companion with whom he shared a long term and a close relationship and an understanding of his disability.
  - c. Did the respondent fail to take such steps as it was reasonable to have to take to avoid the disadvantage?
  - d. The claimant asserts that it would have been a reasonable adjustment to have allowed his friend (Mr Christopher Carroll) to accompany him to case conference meetings under the employer's attendance at work policy.
  - e. Did the respondent know or ought it to have known of the substantial disadvantage?
4. The Claimant relies on his diabetes condition. It is not in dispute that the Claimant is a disabled person by reason of his diabetes condition and that the Respondent had knowledge that he was a disabled person at all material times.
  5. The Tribunal heard evidence from the Claimant. For the Respondent, it heard evidence from Christopher Brady, Area Manager. There was a Bundle of documents. The Claimant asked for permission to give evidence in chief to supplement the evidence in his witness statement. The Tribunal did not give him permission to do so, for reasons it gave at the time.
  6. Both parties made oral submissions.

#### **Relevant Facts**

7. The Claimant has been employed by the Respondent since 3 September 2001.
8. At the times material to this claim he was employed as a Customer Service Assistant 2 (CSA2), based in the Shepherds Bush Area.
9. Christopher Brady has been Area Manager for the Shepherd's Bush Area since 2019. Mr Brady has known that the Claimant has diabetes since 21

March 2020. He agrees that he knew that the Claimant was a disabled person by reason of his disability at all relevant times in 2023.

10. The Claimant was off work from 21 March 2020 - April 2021, save for very brief periods.
11. During 2020 and 2021 the Claimant brought 3 other Tribunal claims against the Respondent, which included allegations about Mr Brady's and other managers' management and treatment of him. He commenced a bullying and harassment complaint against Mr Brady in November 2020. He was represented throughout 2020 by Mr Ali, a trade union representative.
12. He withdrew all 3 of those claims in January 2023. The Claimant had been allocated to work in other areas during his Tribunal claims. By email of 3 March 2023 the Respondent notified him of his return to the Shepherd's Bush area from 14 March 2023.
13. The Claimant went off work, sick, on 13 March 2023. Later Fit Notes gave the reason for absence as 'work related stress' p139-144.
14. The Claimant attended a sickness review meeting with Customer Service Manager ("CSM") Woodhouse on 19 April 2023, unaccompanied. He was reluctant to divulge the reason for his work related stress and asked to be referred to Occupational Health.
15. The Claimant attended OH on 25 April 2023, but the report said that the Claimant had ended the consultation to gather more information, p88-89.
16. On 10 May 2023, the Claimant attended a second sickness review meeting, with CSM Kearney. The Claimant was unaccompanied at this meeting. He was not willing to discuss the workplace stress. A further OH referral was made.
17. Dr Sinead Barrowman, Occupational Health Staff Doctor, reported on 2 June 2023, p 145-149. Her report stated that the source of the Claimant's stress was related to the 'perceived interpersonal conflicts' at Shepherds Bush. It said that the issues in the case were 'non-medical' and that the Claimant was experiencing symptoms of stress by way of a general adverse reaction to 'incompatibility between the person and the situation'. The report advised that the Claimant's sickness absence was likely to continue until those perceived work-related issues were resolved, and that those were best addressed by management and HR.
18. The report also referred to the Claimant's diabetes condition, saying, that the Claimant had "a long term medical condition which can lead to low blood sugars. This has been more controlled over the last 6 months, however I understand Mr Opoku has occasional low blood sugar readings which he self manages."

19. In its "Functional Assessment" section, the report recorded, amongst other things: "- Concentration/alertness: not affected - Communication with others: not affected."
20. The referral to OH had also sought advice on the Claimant's fitness to attend meetings: "Are they fit to attend a discipline/grievance/performance meeting?"
21. The report advised that the Claimant would be medically fit to attend such meetings as he, "
  - Is able to understand the reason for the meeting
  - Is able to understand the difference between right and wrong
  - Is able to follow the proceedings / respond to questions."
22. The report also noted, "However it is generally accepted that such meetings can be distressing so you may wish to consider measures to help alleviate distress and promote perceived "fitness" to attend such as:
  - Allowing Mr Opoku to be accompanied by a suitable person
  - Allowing comfort breaks as requested to enable Mr Opoku to absorb/process content etc.
  - Considering holding the meeting in a neutral location."
23. Following the OH report, the Respondent sought to arrange sickness absence meetings with the Claimant. At the Claimant's request, it rearranged a meeting on 22 June 2023 to 29 June 2023. At that meeting, the Claimant said he could not arrange a representative and would not discuss the OH report without one. The Claimant had not sought representation from any of the local Trade Union representatives. There was no supporting evidence before the Tribunal that he had tried to arrange a Trade Union representative from another London Underground Area.
24. CSM Mirza invited the Claimant to a further sickness review meeting to be held on 17 July 2023.
25. On 9 July 2023 the Claimant wrote to CSM Mirza, saying, "I am requesting, as a reasonable adjustment, in regard to my diagnosed disability, (accepted - as defined by the Equality Act 2010 - as a matter of record - by my employer), of diabetes, to be accompanied at the Sickness Review Meeting (17/7/23, 11am), by my friend, Mr. Christopher Carroll. Mr. Carroll is not an employee of London Underground Limited and is not an accredited trade union companion. Mr. Carroll has previously been an accredited trade union companion and is experienced in the appropriate and confidential conduct of such workplace meetings. Please agree to the above reasonable adjustment request, as Mr. Carroll accompanying me in this matter will provide me with the support that will assist me with engaging in this process." p164.
26. Mr Mirza sought advice from Employee Relations, who, in turn, sought legal advice. In short, they advised that the Respondent should not allow an external person into the meeting; the Claimant would need to be accompanied by a workplace colleague or Trade Union representative, p162.
27. Mr Mirza replied to the Claimant on 11 July 2023, stating the Respondent's policy that the Claimant could bring a workplace colleague or Trade Union

representative to the meeting. He said, "You are probably aware that we have allowed other people to accompany employees on rare occasions. That has usually been where the employee has mental health or learning disabilities and may not be able to advocate for themselves and usually where there is a recommendation from OH. None of that applies in this case. Diabetes does not prevent you putting forward your argument." P167.

28. The Claimant continued to correspond with the Respondent on a number of matters, most of which are not the subject of these proceedings. He continued to ask that Mr Carroll be permitted to accompany him to meetings. CSM Austen-Yembra emailed him on 10 August 2023 saying, "Mr Carroll is not an accredited trade union representative nor is he a workplace colleague and for these reasons he is not permitted to accompany you to workplace meetings. In exceptional cases LU may allow employees to be accompanied by other third parties. These cases are at the discretion of LU and are decided on their facts. LUL does not agree to you being accompanied other than by an accredited TU representative or workplace colleague." P182.
29. The Claimant postponed sickness review meetings scheduled for 17 July 2022 and 3 July 2022 on the basis that his representative was not available. He had previously agreed to these dates. There was no evidence that he attempted to arrange Trade Union representation on those dates.
30. The Claimant emailed the Respondent on 31 July 2023 saying that it was not appropriate to discuss the OH report apart from in a "case conference", p184. The Respondent then invited the Claimant to a medical case conference scheduled for 15 August 2023, p180. The Respondent reiterated, "At the meeting you have the right to be accompanied by a Trades Union Representative or a Workplace Colleague."
31. The Claimant asked that the case conference be postponed on a number of occasions, p193. On 27 September 2023, he clarified that Mr Carroll was his chosen representative, p218. He gave his reason for wanting to be accompanied by Mr Carroll as, "As a person with a disability I do not wish to discuss my private health concerns at formal meetings with my employer, such as at a Case Conference, with a workplace colleague or relevant trade union companion present. I wish Mr. Carroll to accompany me as he has my confidence in this matter, has assisted me previously in workplace concerns, as a matter of record known to LUL, an in depth knowledge of my concerns along with understanding, in my view, of LUL's processes and procedures."
32. Mr Brady replied on 28 September 2023, not agreeing to Mr Carroll being the Claimant's representative, p217.
33. The Claimant did attend a case conference on 29 September 2023, p226. He had been told that the Respondent might consider terminating his employment on medical grounds, p198. He agreed to return to work at this case conference and did so in November 2023.

34. In his witness statement, the Claimant told the Tribunal that Mr Carroll had an in depth knowledge of the Claimant's disability and had encouraged him to manage it and engage with medical services. In his witness statement he said, "For me as an employee with the disability of diabetes I am placed at a substantial disadvantage by the Respondent declined my request to be accompanied by a person, such as Mr. Carroll, who has in depth knowledge of my experiences with diabetes and also an in depth knowledge of my experiences and past concerns with the Respondent's management actions and procedures; not least since 2017 to date."
35. The Claimant produced evidence from Diabetes UK, which states that, "If you're feeling stressed, your body releases stress hormones like cortisol and adrenaline. This should give you an energy boost for a 'fight or flight' response. But the hormones actually make it harder for insulin to work properly, known as insulin resistance. As energy can't get into your cells, your blood sugar levels rise. If your blood sugar levels go too high, it's called going hyper (full name hyperglycaemia). ... If stress doesn't go away, it can keep your blood sugar levels high and put you at higher risk of diabetes complications. It can also affect your mood and how you look after yourself, which can start to affect your emotional health."
36. At the Tribunal, the Claimant gave other evidence about Mr Carroll. He said that, "Mr Carroll has learnt about the triggers which lead to me not being able to focus and being withdrawn. He notes my triggers, he can take me outside and give me a pep talk. No one else knows the effects of stress on me in these meetings." He told the Tribunal that a Trade Union representative would not know this.
37. The Claimant also said that stress can lead to high blood sugar levels in meetings, which can affect his concentration. He said that he has a blood sugar level monitor which will immediately alert him if his blood sugar levels are high. He said that Mr Carroll helps to identify when he is losing concentration.
38. He said that Mr Carroll had researched diabetes and is as knowledgeable about the Claimant's diabetes as the Claimant is.
39. Mr Carroll does not have any medical qualifications. He does not have diabetes himself.
40. Mr Carroll has never, in fact, accompanied the Claimant to any meetings, whether in the workplace or otherwise, nor has he accompanied him to medical appointments.
41. Mr Carroll did act as a representative for the Claimant at the preliminary hearings in this case.
42. The Claimant did not produce any medical evidence, for example, in the form of a short GP letter, which stated that the Claimant would be disadvantaged in

meetings if he was not accompanied by Mr Carroll, because of the effect of stress on the Claimant's diabetes.

43. The Claimant had not been given Fit Notes by his GP setting out that a reasonable adjustment for him at work would be being accompanied by Mr Carroll at workplace meetings.
44. It was not in dispute that Trade Union representatives, who have been approved or accredited by a Trade Union, are certified as having had appropriate training and experience to act as a representative.
45. The Tribunal accepted Mr Brady's evidence that internal TU representatives are well equipped to assist and support employees because they are familiar with LUL's policies and procedures and usually have significant experience in representing employees in similar situations.
46. It agreed with Mr Brady's evidence that familiarity with policies and procedures usually ensures that meetings are reasonably smooth running and efficient.
47. It accepted Mr Brady's evidence that an internal TU or workplace colleague representative is bound themselves to abide by the Respondent's policies, including its Code of Conduct. That means that there is a mutual understanding of the conduct expected at work and a form of redress if someone's behaviour falls outside those standards of behaviour. It also accepted Mr Brady's evidence that internal TU representatives and employees are bound by the Respondent's rules regarding confidentiality and data protection and will have received training on those issues. An external party is not bound by those same expectations and rules of conduct, with the resulting risk that an external party will not act in a respectful and professional manner, leading to the meeting being diverted through a lack of familiarity with the relevant processes. There is also a risk of breach of confidentiality, both in relation to the Respondent's business and employees' personal information.
48. From its industrial experience, the Tribunal noted that Trade Union representatives are adept at supporting employees in stressful situations, such as meetings, assisting them to present their evidence and arguments and advocating on their behalf, including asking for appropriate breaks in meetings.

#### **Relevant Law**

49. By *s39(5) Equality Act 2010*, a duty to make adjustments applies to an employer. By *s21 EqA* a person who fails to comply with a duty on him to make adjustments in respect of a disabled person discriminates against the disabled person.
50. *s20(3) EqA 2010* provides that there is a requirement on an employer, where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter, in comparison with

persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

51. The shifting burden of proof applies to reasonable adjustment complaints.
52. *Para 20, Sch 8 EqA 2010* provides that an employer is not under a duty to make adjustments if the employer does not know and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the substantial disadvantage.
53. The *Code of Practice on Employment (2011)* paragraph 6.19 states that, while an employer does not have a duty to make an adjustment if they do not know that the disabled person is likely to be placed at the substantial disadvantage, “The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment.”
54. Paragraph 6.28 of the *Code* says that some of the factors which might be taken into account in deciding what is a reasonable step for an employer to take are:
  - whether taking any particular steps would be effective in preventing the substantial disadvantage;
  - the practicability of the step;
  - the financial and other costs of making the adjustment and the extent of any disruption caused;
  - the extent of the employer's financial or other resources;
  - the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
  - the type and size of the employer.

### **Discussion and Decision**

55. The Tribunal took into account all its findings of fact and the relevant law when coming to its decision.
56. The Respondent agrees that it applied the following PCP (provision, criterion or practice): Only allowing trade union representatives or workplace colleagues to accompany employees to case conference meetings under its attendance at work policy.

*Did the above PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that he wanted a companion with whom he shared a long term and a close relationship and an understanding of his disability?*

57. The Tribunal was not satisfied that the Claimant, as a disabled person with diabetes, was put at a substantial disadvantage compared to non-disabled people by not being permitted to be accompanied by a companion with whom he shared a long term and a close relationship and an understanding of his diabetes.



58. The Claimant suggested that Mr Carroll knew the Claimant's diabetes and how it affected him. He said that Mr Carroll knew as much about the Claimant's diabetes as the Claimant did himself.
59. However, as the Claimant said, Mr Carroll's knowledge is equal to the Claimant's. As the Tribunal as observed, from its own industrial experience, Trade Union representatives are adept at representing individuals and assisting them to communicate their evidence and arguments. A Trade Union representative would have skills in assisting the Claimant to communicate about his disability to his employer in a meeting.
60. In addition, Mr Carroll is not a medical, nor an Occupational Health expert. OH advisers, and the Claimant's GP, are the appropriate people to advise the employer on the effects of the Claimant's disability in the workplace.
61. The Tribunal therefore did not accept, on the evidence, that the Claimant would be placed at a substantial disadvantage by not being accompanied in sickness absence review meetings or case conferences by Mr Carroll because of Mr Carroll's particular knowledge of the Claimant's diabetes and the workplace. A Trade Union adviser would be equally able to assist the Claimant to communicate his workplace needs. Occupational Health and the Claimant's GP would have the relevant expert knowledge to advise on the effects of the disability.
62. The Claimant also suggested that, at the meeting itself, Mr Carroll would be uniquely placed to identify when the Claimant had triggers in meetings which lead to him not being able to focus and being withdrawn. He suggested that only Mr Carroll understood the effect of stress on the Claimant and his blood sugar levels and his concentration.
63. The Tribunal did not accept the Claimant's assertion that the effect of stress on his diabetes meant that he was liable to lose concentration in meetings, so that Mr Carroll's attendance was necessary to assist.
64. The Tribunal observed that the Occupational Health report, prepared by a qualified medical professional, noted the Claimant's diabetes condition. Dr Barrowman specifically advised that the Claimant's concentration/alertness was not affected and that his communication with others was not affected.
65. The Occupational Health doctor was specifically asked about the Claimant's fitness to attend meetings. The report did not record that the Claimant's diabetes was affected by stress in meetings, so that he was likely to lose concentration.
66. The Claimant has not produced any evidence from his GP, whether in a short letter, or in a Fit Note, that the Claimant's concentration in meetings is likely to be impaired by the effects of stress on his diabetes.

67. The Tribunal accepted that the Claimant, as any employee, might be affected by stress in meetings. However, it did not find on the evidence that the effect of this on his disability put him at a substantial disadvantage so that Mr Carroll was necessary to assist.
68. For completeness, the Tribunal rejected the Claimant's evidence that Trade Union representatives were not available to represent him at sickness review meetings or case conferences. The Tribunal decided, on the evidence, that the Claimant had not sought to arrange Trade Union representation at the meetings.

*Did the respondent know or ought it to have known of the substantial disadvantage?*

69. Even if the Tribunal was wrong in finding that the Claimant was not put at the substantial disadvantage, it decided that the Respondent did not know and could not reasonably had been expected to know that he was at that disadvantage.
70. It reminded itself that the *Code of Practice on Employment (2011)* paragraph 6.19 states that the employer must do all they can reasonably be expected to do to find out whether the disabled person is likely to be placed at the substantial disadvantage.
71. The Claimant first sought the adjustment of being accompanied by Mr Carroll on 9 July 2023.
72. Occupational Health had very recently reported, on 2 June 2023.
73. The OH report advised that the Claimant's concentration/alertness was not affected and that his communication with others was not affected. It advised that the Claimant should be accompanied at meetings, but simply by "a suitable person". It did not advise that Mr Carroll's attendance was necessary.
74. Furthermore, the Claimant's request did not contradict the OH report. It simply asked that the Claimant be accompanied, but did not explain why this was necessary in relation to his diabetes. He did not state that he was at the disadvantage he now describes.
75. When the Claimant provided more information about Mr Carroll on 27 September 2023, he said simply, "As a person with a disability I do not wish to discuss my private health concerns at formal meetings with my employer, such as at a Case Conference, with a workplace colleague or relevant trade union companion present. I wish Mr. Carroll to accompany me as he has my confidence in this matter, has assisted me previously in workplace concerns, as a matter of record known to LUL, an in depth knowledge of my concerns along with understanding, in my view, of LUL's processes and procedures."

76. The Tribunal observed that that explanation did not set out the disadvantage the Claimant now contends. The explanation he gave at the time related primarily to privacy.
77. The Claimant never produced any Fit Notes which contradicted the OH report.
78. The Tribunal considered therefore that the Respondent had taken all reasonable steps to ascertain whether the Claimant would be at any disadvantage in attending meetings, by obtaining recent Occupational Health advice regarding the Claimant's fitness to do so. OH had advised that he was fit to attend. It also advised on appropriate adjustments. The advice did not suggest that the Claimant would be at the disadvantage he now asserts. It did not suggest that the adjustment which the Claimant now seeks was necessary. Nothing the Claimant said at the time cast any doubt on the OH advice, or suggested it needed to be revisited.

*The claimant asserts that it would have been a reasonable adjustment to have allowed his friend (Mr Christopher Carroll) to accompany him to case conference meetings under the employer's attendance at work policy.*

79. In any event, the Tribunal agreed that the Respondent's policy was reasonable, so that, save in exceptional circumstances, it was not a reasonable adjustment to permit an external person to attend sickness review meetings or case conferences.
80. It is somewhat artificial for the Tribunal to make a decision regarding an adjustment in respect of a substantial disadvantage which did not exist. However, the Tribunal considered that there were strong objective reasons for not permitting Mr Carroll to attend a sickness review meeting, or a case conference, as an adjustment. The Tribunal considered that, in all but the most exceptional circumstances, a workplace colleague and, in particular, a Trade Union representative, would be the appropriate person to accompany the Claimant to sickness review meetings and case conferences.
81. It addressed the factors which the Code indicates may be relevant to take into account.
82. *Whether taking any particular steps would be effective in preventing the substantial disadvantage:* The Tribunal decided that a Trade Union representative would be likely to be just as effective in assisting the Claimant to present his evidence and advocating on his behalf. Furthermore, OH, and not Mr Carroll, is the appropriate source of advice on the effects of the Claimant's disability in the workplace;
83. *The practicability of the step;* The Tribunal decided that it would, in most cases, be undesirable for an external person to be involved in internal meetings. Only the Respondent's employees are bound by the Respondent's policies, including its Code of Conduct. That means that there is a mutual understanding of the conduct expected at work and a form of redress if someone's behaviour falls outside those standards of behaviour. Internal TU

representatives and employees are bound by the Respondent's rules regarding confidentiality and data protection and will have received training on those issues. An external party is not bound by those same expectations and rules of conduct, with the resulting risk that an external party will not act in a respectful and professional manner, leading to the meeting being diverted through a lack of familiarity with the relevant processes. There is also a risk of breach of confidentiality, both in relation to the Respondent's business and employees' personal information.

84. *The financial and other costs of making the adjustment and the extent of any disruption caused:* As set out above, there would be greater risk of disruption and unnecessary prolongation of meetings by external representatives who are not accredited representatives, are not bound by codes of conduct, and are not as familiar with the Respondent's policies and procedures;
85. *Employer size and available resources and other funding:* The Respondent is a large employer and is more likely to be able to absorb the extra cost and administrative burden of making an adjustment to allow an external person to attend meetings.
86. While the Respondent is a large employer, with considerable resources at its disposal, on balance, the Tribunal considered that the relevant factors indicated that allowing Mr Carroll, an external person, to attend meetings was not a reasonable adjustment. Other representatives, allowed by the PCP, were equally capable of representing the Claimant and there were substantial risks of disruption and breaches of confidentiality in allowing an external person to attend the Respondent's internal procedures.
87. In summary therefore, the Tribunal found that the Claimant was not put at a substantial disadvantage by the PCP. It also found that Respondent did not know and could have reasonably been expected to know that the Claimant was likely to be put at any substantial disadvantage by the PCP. The duty to make adjustments therefore did not arise. In any event, in all the circumstances, the Tribunal considered that allowing Mr Carroll, an external person, to attend meetings, was not a reasonable adjustment.

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Employment Judge Brown

28 March 2024

REASONS SENT to the PARTIES ON

8 May 2024  
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FOR THE TRIBUNAL OFFICE