EMPLOYMENT TRIBUNALS

Claimant: Mr O Harwood-Allen

Respondent: London United Busways Ltd

Heard at: London South **On:** 24th, 25th and 26th February 2025, 2nd April 2025 (in chambers deliberations)

Before: Employment Judge MJ Reed, Ms V Gibbs and E Whitlam

Representation
Claimant: In person
Respondent: Ms S Cummings, Counsel

RESERVED JUDGMENT

1. The complaints of direct race and sexual orientation discrimination are not well founded and are dismissed.

2. The following complaints of failure to make reasonable adjustments for disability are well-founded and succeed:

    a. That the respondent applied a provision, criteria or practice of issuing a stage 1 warning if an employee's sickness absence exceeded four instances over a rolling twelve-month period. That placed the claimant as a disabled person at a disadvantage and the respondent did not take such steps as it was reasonable to take to avoid that disadvantage.

3. The remaining complaints of failure to make reasonable adjustments for disability are not well-founded and are dismissed.

REASONS

Background

1. Mr Harwood-Allen brought a number of claims against his employer, London United Busways Ltd. He alleged that he had been discriminated against

because of his race following a workplace incident when he was suspended and prevented from bringing a workplace colleague or trade union representative to a fact finding interview. He alleges that he was discriminated against because of his sexual orientation in that he was not allocated work as a relief manager role. Finally, he alleges that LUB failed to make reasonable adjustments to his disability in relation to sickness absence, which ultimately led to him receiving an oral warning.

Claims and issues

2. A list of issues had been produced by Employment Judge Rea at the case management hearing on 18th October 2023. At the beginning of the hearing the parties agreed that the list was accurate, save in one respect. That was that the respondent conceded at the beginning of the hearing that, at all relevant times, the claimant did have a disability as defined by the Equality Act 2010.

Procedure, documents and evidence heard

3. The Tribunal heard evidence from Mr Harwood-Allen on his own behalf. The Tribunal heard evidence from Andrew Evans and Jonathan McColl on behalf of the respondent. The Tribunal did not hear evidence from Mr Tony Andrews, another manager at the respondent, although he had produced a witness statement. The Tribunal was told that Mr Andrews was in Saudi Arabia and not available to give evidence. The Tribunal read his witness statement, but gave less weight to his evidence than it might otherwise had done, since Mr Andrews did not give sworn evidence and was not available for Mr Harwood-Allen to cross-examine.

4. There was a tribunal bundle agreed between the parties, running to 559 pages. References to page numbers within this decision are references to that bundle unless indicated otherwise.

5. The parties' submissions are addressed as the relevant points arise in these reasons rather than being set out separately.

Findings of fact

6. The Tribunal considered the oral evidence and the documentary evidence to which it was referred. All findings of fact were made on the civil standard of proof. That means that they were reached on the basis that they are more likely to be true than not.

7. These written reasons are not intended to address every point of evidence or resolve every factual dispute between the parties. The Tribunal has made the factual findings necessary to resolve the legal disputes before it. Where findings have not been made, or are made in less detail than the evidence presented, that reflects the extent to which those areas were relevant to the issue and the conclusions reached.

8. The following account of the Tribunal's findings is broadly chronological. But in order to make it easier to understand the Tribunal's reasoning many of the findings in relation to Mr Harwood-Allen's work as a Relief Manager are dealt with separately, so they can be set out together.

Background

9. LUB operates public bus routes under contract with Transport for London.

10. Mr Harwood-Allen began working for LUB in September 2008. He trained as a bus driver and was appointed permanently to that role at the Tolworth Bus Garage in October 2008. He was promoted to the position of Service Controller in December 2010. In 2011 he was relocated in that role to Fulwell Bus Garage.

11. From 12th September 2018 Mr Harwood-Allen was appointed as Relief Manager, p98-99. Relief Manager is not a substantive post and Mr Harwood-Allen's substantive role remained as a Service Controller at Fulwell Garage. Appointment as a Relief Manager, however, meant that he could act as a Traffic Manager on occasions that a cover was need (for example where a manager was absence due to sick leave or holiday). The Traffic Manager role is a managerial role, responsible for managing drivers. They deal with accident investigations, review reported incidents and deal with customer complaints. LUB's practice was to deploy a Relief Manager to cover a role if a Traffic Manager was going to be absent for more than a couple of days. There is no dispute that Mr Harwood-Allen acted as a Relief Manager following his appointment.

12. When an employee acts as a relief manager, they receive a payment enhancement for that period of £82 per week.

13. Mr Harwood-Allen identifies as a gay man for the purposes of his sexual orientation claim and as a British Caucasian for the purposes of his race claim.

Disability

14. Both parties agreed that Mr Harwood-Allen had the condition ulcerative-colitis and that, at all relevant times, this amounted to a disability for the purposes of the Equality Act.

15. Given that concession is sufficient to record that ulcerative-colitis is an inflammatory condition of the digestive tract, which causes symptoms of diarrhoea and stomach pain. It is often characterised by significant periods of limited or no symptoms, followed by periods of flare-ups during which symptoms are much more severe.

16. LUB accepted that it, as an organisation, had knowledge of Mr Harwood-Allen's colitis as early as 2016, when there were discussions of reasonable adjustments. Various documents relating to this period were produced, see pages 400-410. In 2016 it was agreed that Mr Harwood-Allen would assigned to work in office, rather than as a mobile controller, to accommodate his need to have toilet facilities available to him throughout the working day.

17. With those adjustments in place the impact of the ulcerative-colitis on Mr Harwood-Allen's work was limited. During some flare ups, however, he would be unable to work and require time off. He also needed to attend medical appointments relating to his condition.

Sickness Absence

18. It is not in dispute that, between July 2021 and June 2022, Mr Harwood-Allen was off sick from work on a number of occasions. The nature of these occasions is dealt with in more detail below.

19. The Tribunal was provided with LUB's attendance at work procedure, p115-117. It is described as a progressive procedure. Employees sickness absence is monitored. If certain trigger points are reached, they are expected to move through a number of escalating stages. This begins with informal counselling and guidance, followed by an oral warning, followed by a written warning, followed by a final written warning followed by dismissal.

20. Under the policy, a stage 1 oral warning is potentially triggered where an employee is absent for a whole or part of a day on more than four separate occasions in a rolling twelve-month period or is absent for more than fourteen calendar days in a rolling twelve-month period.

21. It was common ground between the parties that, until 3rd July 2023, Covid-related absence was excluded from the absence that was taken into account for the purpose of the attendance at work procedure. This reflected the unusual circumstances arising from the Covid-19 pandemic.

12th July 2022 meeting

22. On 5th July 2022 Mr Andrews invited Mr Harwood-Allen to an absence review meeting to take place on 12th July 2022. The invite letter was produced to the Tribunal, p210.

23. The meeting on the 12th July 2022 was attended by Mr Andrew, Mr Harwood-Allen and workplace colleague / witness. A note of the meeting was produced to the Tribunal, p211-213.

24. It is convenient to deal with the issue of the accuracy of the notes here. Mr Harwood-Allen said that notes were not taken at this meeting (or at the second sickness absence meeting dealt with below). In his evidence he described himself as 'disputing' the notes. He said that they were produced much later, after he brought a grievance. Mr Harwood-Allen did not identify any element of the note that he said was inaccurate. Essentially, he said that although he had a basic recollection of the meetings, the passage of time meant that his recollection was not such as to allow him to debate the note in detail. Mr Harwood-Allen broad recollection, however, did not appear to differ from the notes. The Tribunal also concluded that, if Mr Harwood-Allen did not have a detailed recollection of the meeting his evidence that he was sure that Mr Andrews was not taking notes was not likely to be reliable. The Tribunal did not

find that Mr Harwood-Allen was seeking to mislead the Tribunal on this point, rather that the passage of time meant that his recollection was probably not accurate.

25. The Tribunal did note, however, that the notes are presented as a largely verbatim transcript. Mr Andrews was the only manager present at the meeting and he was not accompanied by a witness or note taker. It would be extremely challenging to take such a verbatim record of such a meeting while also conducting it – especially given that the meeting became contentious.

26. On balance, the Tribunal concluded that Mr Andrews did take a note of the meeting. The typed version provided to the Tribunal was probably an elaboration and extension of the contemporaneous notes, supplemented later by Mr Andrews recollection. Nonetheless, the Tribunal accepted that the notes were a broadly accurate record of the meeting.

27. The meeting began in a conventional manner, with Mr Andrews explaining that its purpose was to discuss Mr Harwood-Allen's absences over the last 12 months. It quickly, however, became contentious. Mr Harwood-Allen's response to this summary was to ask 'Is it?' and he made similar rejoinders to Mr Andrews further explanations. When Mr Andrews asked him about the reason for his absence on the 30th November 2021, Mr Harwood-Allen replied that Mr Andrews should be the one to tell him why he was absent. When Mr Andrews disagreed and persisted in his question, Mr Harwood-Allen repeated 'You tell me'.

28. Mr Andrews then suggested that 'This is ridiculous' and asked again whether Mr Harwood-Allen could tell him the reason for the absence so that they could discuss it. Mr Harwood-Allen took this as Mr Andrews suggesting that he was ridiculous and objected to that.

29. Mr Andrews tried to move on to ask about another absence on the 31st December 2021. Again Mr Harwod-Allen replied that Mr Andrews should be the one to provide the reason for the absence. He said that Mr Andrews was not following the company's policy.

30. Mr Andrews then read out part of the policy referring to the stage 1 meeting. Mr Harwood-Allen denied that this was the policy. Mr Andrews made a further attempt to set out his understanding of the purpose of the meeting, saying that it was to review Mr Harwood-Allen's absences, discuss how LUB might assist and to decide whether any of the spells of absence should be excluded. He said that there were a number of reasons that absence might be excluded, including Covid absence. Following that explanation Mr Andrews asked again about the absence on the 30th November. Mr Harwood-Allen again responded 'You tell me'. Mr Andrews then asked again about the 31st December and received the same response. At that point, Mr Andrews brought the meeting to a close, describing Mr Harwood-Allen's behaviour as 'completely out of order'.

31. It is plain that the 12th July 2022 meeting was acrimonious. Mr Andrews described it was 'one of the stranger absence management meetings' that he has experienced. The Tribunal found that he had been entirely wrongfooted by the position taken by Mr Harwood-Allen and its vehemence. Mr Andrews had expected a routine, low-key meeting in which Mr Harwood-Allen's absence

record was discussed in a fairly amicable way. He was entirely unprepared for what seemed to him aggressive and intransigent stonewalling on the part of Mr Harwood-Allen.

32. To understand Mr Harwood-Allen's position at the meeting, it is necessary to consider the relevant absences in more detail. Mr Andrews summarised these in his witness statement and Mr Harwood-Allen was questioned about them during cross examination. Mr Andrews' summary was as follows.

    a. 3rd to 7th July 2021, Covid-19
    b. 30th November to 4th December 2021, Tummy Issue
    c. 31st December 2021, Back pain and migraine
    d. 18th to 22nd April 2022, Back pain
    e. 2nd to 11th May 2022, Covid-19
    f. 25th to 26th May 2022, Endoscopy Appointment
    g. 15th to 18th June 2022, Cough

33. Essentially, Mr Harwood-Allen's position was that a number of these absences should have been excluded from consideration of his sickness record and that therefore he should not have been invited for a stage 1 meeting.

34. Although it was mentioned in his witness statement, the Tribunal concluded that Mr Andrews did not, at the July meeting, take account of the absence between the 3rd July 2021 and 7th July 2021. At the point that the meeting occurred, this was outside the 12-month period set out in the sickness policy. Further, both parties agreed that the practice at the time was to disregard Covid-19 related absences. Finally, Mr Andrews began the meeting by asking Mr Harwood-Allen about the 30th November 2021, rather than the 3rd July 2021. The Tribunal was therefore satisfied that Mr Andrews had in mind six potentially relevant absences.

35. In his evidence, Mr Harwood-Allen explained that he believed that two further absences should have been disregarded on the basis that they were Covid-19 related. These were the 2nd May to 11th May absence and the 15th to 18th June 2022 absence.

36. Further, Mr Harwood-Allen explained, he believed that the 30th November to 4th December 2021 absence and the 25th to 26th May 2022 absence should also have been disregarded. This was because they related to his disability. The 30th November 2021 to 4th December 2021 absence was caused by a flare up of his colitis. The absence beginning on the 25th May was for an endoscopy appointment, also relating to his colitis. The Tribunal accepted that both absences related to his disability.

37. If those absences were disregarded, there would only be two remaining: the 31st December 2021 for one day and 18th to 22nd April for five days. This would fall below the threshold for a stage one meeting.

38. Mr Harwood-Allen, therefore, did not believe that he should have been called into an absence related meeting at all. This was a considerable part of the reason his reaction to the meeting and to Mr Andrew's questions was so negative.

39. The other factor that impacted on Mr Harwood-Allen's attitude and behaviour at the 12th July meeting and subsequently, was that he believed that it was Mr Andrew's responsibility to provide him with a record of his absence and the recorded reason for that absence. This explained his response to Mr Andrews when he asked him about the reasons for the absence.

15th July 2022 meeting

40. The meeting reconvened a few days later on 15th of July. Again, notes of the meeting were produced, p215-216. The Tribunal accepted that these notes were a broadly accurate record of the meeting, for the same reasons set out above in relation to the notes of the earlier meeting.

41. Mr Andrews began the meeting by noting that he had ended the previous meeting because of Mr Harwood-Allen's behaviour, which he described as obstructive and disrespectful. He said that there could not be a repeat of that behaviour at this meeting.

42. Mr Andrews then went on to reiterate that the purpose of the meeting was to discuss Mr Harwood-Allen's absences over the previous 12 months and to decide whether any of these should be excluded.

43. Mr Harwood-Allen agreed that he understood the purpose of the meeting. He then asked whether Mr Andrews had the details of why he was absent. Mr Andrews replied that he had had those details at the last meeting.

44. Mr Andrews then asked Mr Harwood-Allen why he had been absent on the 30th November. Mr Harwood-Allen replied that he could not quite remember and that maybe it had been his back or his stomach. Mr Andrews asked which one and Mr Harwood-Allen replied that he did not remember.

45. Mr Andrews then asked Mr Harwood-Allen about the absence on 31st December. Again Mr Harwood-Allen replied that it was maybe his back or his stomach. Mr Andrews again asked which and Mr Harwood-Allen replied that he could not remember and went on to say that Mr Andrews should be telling him.

46. At this point the meeting again became heated. Mr Andrews retorted that 'this isn't how this works' and asked how they could decide whether a particular absence could be included or excluded, and therefore whether Mr Harwood-Allen's overall absence had hit a trigger under the policy, if Mr Harwood-Allen was unwilling to discuss the details of the absence with him.

47. Mr Harwood-Allen responded that Mr Andrews was not following the procedure again. Mr Andrews replied that this was becoming ridiculous again and asked once more how they could establish anything if Mr Harwood-Allen was unwilling to discuss the absences.

48. Mr Harwood-Allen reiterated that Mr Andrews was not doing what he should and that he was 'not even taking my condition into account'. Mr Andrews replied that, at that point, he could not take anything into account because Mr Harwood-Allen was purposely not discussing the absences with him. Both individuals repeated these points.

49. Mr Andrews then said that, since Mr Harwood-Allen was clearly unwilling to discuss the matter further and he had six absences in a twelve-month period, he would place Mr Harwood-Allen on absence stage 1 warning under the policy for a period of six months. Mr Harwood-Allen objected, but Mr Andrews stood firm and the meeting ended.

50. Mr Andrews' decision was confirmed in a letter dated 18th July 2022, p218.

Mr Andrew's knowledge at the July meetings

51. There was significant dispute over what information Mr Andrews had and what knowledge he possessed at the July meetings.

52. The Tribunal concluded that Mr Andrews had access to and had considered Mr Harwood-Allen's absence record and sickness record as of the dates of the meetings (p386-392). Mr Harwood-Allen suggested in his evidence that Mr Andrews would either not have had access or not have known how to produce that information on the LUB systems. That meant, he suggested, that in order to identify his absences Mr Andrews would have needed to examine the LUB records on a day-by-day basis in order to identify when Mr Harwood-Allen had been absent. This would have been a laborious process, since it would involved examining each individual day in order to establish whether Mr Harwood-Allen had been rostered to work and, if he had, whether he had been absent on grounds of sickness. Mr Harwood-Allen argued that the Tribunal should infer from this that Mr Andrews was motivated by malice.

53. The Tribunal found that this suggestion was implausible. No specific reason was suggested as to why Mr Andrews should be motived by such malice, or if he had been, why he would choose to exercise his malice in a way that was so inconvenient to him and so uncertain to have any particular impact on Mr Harwood-Allen. Similarly, Mr Harwood-Allen did not offer any explanation as to why one of LUB's managers would be unable to access routine information of this type. The Tribunal therefore concluded that Mr Andrews did have access to Mr Harwood-Allen's sickness record and that he had considered it prior to both July meetings.

54. The Tribunal also concluded that Mr Andrews did not have in mind that Mr Harwood-Allen had a disability during these meetings. His witness statement, at ¶19 suggests that he was unaware that Mr Harwood-Allen had Ulcerative Colitis. But the Tribunal concluded that he was aware, at least in general terms, of Mr Harwood-Allen's condition. He had been involved in the decisions in 2016 to assign Mr Harwood-Allen exclusively to an office based role, see page 402-403. Although this was some time prior to the 2019 meetings, he had worked with Mr Harwood-Allen since then. It is unlikely that he would have forgotten entirely about Mr Harwood-Allen's health issues

55. That is not the same, however, as being cognisant that Mr Harwood-Allen had a disability that might require reasonable adjustments or believing that Mr Harwood-Allen's condition was likely to be an important element to consider in these meetings. The Tribunal concluded that Mr Andrews did not have this in mind. It was not that he had decided to disregard Mr Harwood-Allen's disability.

He had simply not given particular thought Mr Harwood-Allen's health condition or assessed it in those terms. Then, when the meetings took place, his focus was on, as he saw it, Mr Harwood-Allen's refusal to discuss the absences. At that point he took the view that he could not discount any of the absences when Mr Harwood-Allen was taking that approach. That led him to issue the stage 1 warning, without giving any real consideration to whether Mr Harwood-Allen had a disability or whether that meant that any of the absences should be disregarded.

56. The Tribunal's view was that, in order to understand Mr Andrews' behaviour and thought process during these meetings it is important to understand that he was genuinely upset and offended by Mr Harwood-Allen's behaviour during the first meeting. In particular, he felt strongly that Mr Harwood-Allen was wrong in his view that Mr Andrews should be the one to identify the reason for a particular absence. He appears to have concluded that he needed to push back against that view and insist that Mr Harwood-Allen provide an explanation. Having adopted that position he held to it firmly, even after Mr Harwood-Allen had provided a more substantive response. This, as set out above, lead him to conclude that Mr Harwood-Allen was refusing to cooperate with the process and he made his decision on that basis.

57. Essentially, although he may not have articulated his approach so precisely, Mr Andrews took the view that sickness absence should not be disregarded unless an employee was willing to provide an explanation. That meant he did not turn his mind to whether, on the information he did have available, any of the absences should be disregarded. This is apparent from the fact that he referred to there having been six absences taken into account in the warning letter. There was a clear policy that Covid-19 related absence should be disregarded and Mr Andrews knew about this. At least one of the absences (2nd May 2022 to 11th May 2022 was clearly marked as Covid-19 related in the absence record. This makes clear that Mr Andrews did not consider whether any of the absences should be disregarded, since, if he had done so, he would have been bound to disregard the absence commencing 2nd May 2022.

The Tribunal's view of the July meetings.

58. In the tribunal's view, there is much to criticise about both Mr Harwood-Allen and Mr Andrews' approach to these meetings.

59. Mr Harwood-Allen posture at the at the 12th July 2022 meeting was needlessly aggressive and confrontational. Given his absence record it was reasonable for Mr Andrews to call a meeting to discuss the absences and to consider next steps. There was no need for Mr Harwood-Allen to respond so rudely. It only raised the emotional temperature of the meeting and obscured the substantive points that he could have made.

60. At the same time, Mr Andrews allowed himself to adopt a fixed position in response to Mr Harwood-Allen that was, itself, unreasonable. To begin by asking why an employee was absent on a particular date was, in and of itself, unobjectionable. But at the second meeting, Mr Harwood-Allen did provide a substantive response, saying in relation to both the 30th November and 31st December absences that he believed they were probably because of his back

or his stomach, but he did not remember. On the face of it, that was a reasonable response. LUB's records suggest that the November absence was due to stomach issues, while the December absence was due to a back pain / migraine. There is nothing unlikely about an employee who was being asked approximately seven months later about two short absences that occurred relatively close together not having a precise recollection.

61. Mr Andrews had the sickness record that would have allowed him to prompt Mr Harwood-Allen, so that the discussion could continue. Instead, he treated Mr Harwood-Allen's reply as if he was refusing to answer the question. That as simply not a fair characterisation of Mr Harwood-Allen's position.

62. If Mr Andrews had felt that Mr Harwood-Allen was not being frank with him about his recollection, that too was a matter that should have been discussed with Mr Harwood-Allen and investigated. It would not, however, be matter properly considered under the absences policy, but as a disciplinary matter. Mr Andrews did not take that approach.

63. Mr Andrews then terminated the meeting and issued a stage 1 warning on the basis of that Mr Harwood-Allen was refusing to discuss the reasons for his sickness absence. As previously noted, that was simply not a fair characterisation of what Mr Harwood-Allen was doing in the meeting.

64. Mr Harwood-Allen appealed the warning on 25th July 2022, p229 & 231. On 26th July 2022 an appeal hearing was scheduled for the 18th August 2022, p233. That meeting did not take place. There is some further correspondence about rescheduling it on 17th October 2022, p350. But, so far as the evidence available to the Tribunal is concerned, no appeal meeting appears to have occurred and, in practice, Mr Harwood-Allen's objections to the warning were dealt with through the grievance process detailed below.

Suspension

65. Both parties agree that Mr Harwood-Allen and a driver, Mr Aurora, were both suspended on 19th July 2022 over an incident between them, p219-220 and p540. The decision to suspend Mr Harwood-Allen was made by Mr Andrews.

66. Mr Harwood-Allen wrote a report of the incident on the 19th July 2022, which has been produced to the Tribunal, p221. In brief, he said that Mr Arora was on a comfort break and has gone into a supermarket. He had, however, failed to note the time he was required to return to his route. He rang Mr Harwood-Allen to seek that information. Mr Harwood-Allen replied that he did not have the time to hand and that Mr Arora should return to the bus and check his duty card. Mr Harwood-Allen said that, in response to this, Mr Arora was abusive, calling him a 'cunt' and a 'fucking bitch, before saying that he would 'slice you up'. Mr Harwood-Allen said that he told Mr Arora that such language was inappropriate and, when he persisted in being abusive, hung up. He said that Mr Arora then called him back to continue with the abuse and threats.

67. Mr Arora's account was different. Essentially, he said that he had made a reasonable request and that it was Mr Harwood-Allen who had been abusive, in particular by making comments about his mother.

68. The Tribunal was provided with LUB's Guidelines on Disciplinary & Attendance at Work, p123-151. This included LUB's suspension policy, p135-136. The policy emphasises that the step of suspending an employee is a serious matter, which should not be used lightly. It notes that suspension is not a 'disciplinary award in itself'.

69. The Guidelines also included LUB's policy on 'Rights of Representation', p138. This provides that 'an employee is entitled to be represented by either an official of a trade union or a workplace colleague at all *formal* hearings and interview or appeal hearings' (emphasis in original).

70. Mr Andrews began a two week period of annual leave on 20th July 2022. This meant that he was not available to deal with the incident and he sought to arrange this to be done by another manager. On 20th July 2022 Mr Andrews emailed Mr McColl, asking him to arrange a fact-finding meeting with Mr Harwood-Allen the next day, p228. He replied the same day, agreeing to do so, p227.

71. On the 21st July, Mr Andrews emailed Mr McColl again, p226-227. In that email he explained that Mr Harwood-Allen had requested a recording of the calls between him and Mr Arora. He said that the member of staff who was able to create a copy of that recording was absent until the 25th July, but expressed his view that the fact-finding meeting could go ahead, since Mr McColl would be able to consider the recording later when it was available.

72. It is apparent that there was some difficulty in arranging the fact-finding interview. On 25th July 2022 Mr McColl sought to enlist another manager, Neil Mason to conduct it, p 226. But he said he did not have the capacity to do so, given his other work commitments, p225.

73. On 26th July 2022 Mr McColl invited Mr Harwood-Allen to a fact-finding meeting on the 28th July 2022, p234. At this stage, that was the next date on which Mr Harwood-Allen was expected to be available, since his rota had him on rest days on 26th and 27th.

74. Mr Harwood-Allen replied, confirming that he was available and requesting that he be accompanied by a colleague, p239. Mr McColl replied that as it was a fact-finding meeting rather than a disciplinary hearing, there was no right to Trade Union representation, p240.

75. Mr Harwood-Allen replied, say that his colleague would be attending as a colleague, rather than a Trade Union Representative. He referred to the fact that Mr Arora had been accompanied by a Trade Union representative at a similar meeting and suggested that he therefore felt he was being put at a disadvantage, p241.

76. Mr McColl met with Mr Harwood-Allen on 28th July. Notes of that meeting have been produced, p249-250. The Tribunal accepted that the notes were a broadly accurate account of the meeting.

77. At the beginning of the meeting Mr Harwood-Allen reiterated his wish to be represented by his colleague. Mr McColl maintained his view that, since the

meeting was a fact-finding interview Mr Harwood-Allen should not be accompanied. He did, however, allow Mr Harwood-Allen to ring his colleague during the meeting, taking breaks to allow him to do so.

78. In his evidence to the Tribunal Mr McColl explained that, in his view, the meeting was a fact-finding interview, rather than a disciplinary hearing. In his view, therefore Mr Harwood-Allen was not entitled to be represented. In cross-examination it was suggested to Mr McColl that the meeting was a formal one, given that Mr Harwood-Allen remained suspended at the time and that this meant that he was entitled to representation. Mr McColl disagreed with this analysis.

79. It was also put to Mr McColl that, when dealing with the subsequent grievance, Andrew Evans has suggested that it might have been good practice to permit Mr Harwood-Allen to be accompanied. Mr McColl agreed that this was Mr Evans' view, but said that it was a matter of perspective, where reasonable managers might disagree and would need to exercise their discretion. He said his view was that Mr Harwood-Allen was an articulate and intelligent controller, who was well able to answer questions in this sort of fact-finding interview.

80. The meeting then progressed to a discussion of the incident. Mr McColl asked Mr Harwood-Allen for his account. He said that he had been called by Mr Arora, who was asking for his depart time. Mr Harwood-Allen said that he did not have that information to hand and, since it was a busy day, he told him that he should retrieve his timecard from the bus. Mr Harwood-Allen said that Mr Arora was not happy about this and the call finished. He said that Mr Arora called back a number of times and that Mr Harwood-Allen told him that he did not have the information in front of him.

81. At the end of the meeting Mr McColl lifted Mr Harwood-Allen's suspension with immediate effect. In his evidence to the Tribunal he said that he accepted Mr Harwood-Allen's account of the events. Given this, he concluded that there was not need to either maintain the suspension or take any further action against Mr Harwood-Allen.

82. The Tribunal did not hear evidence from Mr Peter Gower, who was the Traffic Manager who dealt with Mr Arora following the incident or from the managers who conducted the subsequent disciplinary / appeal hearings. The outline of events, however, can be seen from the contemporaneous documentation and was not in dispute between the parties.

83. The salient points for the purpose of this case are that Mr Arora was also suspended on the 19th July 2022, p540. Mr Gower conducted a short meeting with him on the 20th July 2022 in which the incident was discussed, p 541-542. He was accompanied at that meeting by a Trade Union representative. At that meeting Mr Arora's suspension was lifted.

84. Mr Arora was then invited to a disciplinary hearing on the 23rd August 2022. P543. That meeting had to be rescheduled and ultimately took place on 7th September 2022, p548. On the 26th August 2022 Mr Arora appears to have been 're-suspended' pending the disciplinary, p546. At that disciplinary hearing Mr Arora was dismissed, on the basis that he had been guilty of gross misconduct in relation to the incident, p548-549.

85. Mr Arora appealed and there was an appeal hearing on 29th September 2022. That appeal was successful, p550-551. On compassionate grounds the sanction was reduced to a written warning. There was no clear evidence before the Tribunal as to what constituted compassionate grounds on this occasion. Mr McColl's evidence was that compassionate grounds often referred to mitigating factors arising from an individual's domestic situation. But he did not know if that was the case in relation to Mr Arora.

86. Mr Harwood-Allen's described Mr Arora as being 'Asian' and this was not disputed by LUB.

Further absence

87. On 29th July 2022 Mr Harwood-Allen went off sick. Both parties agreed that this was caused by workplace stress. The sickness record produced to the Tribunal indicates that he was off sick between 29th July 2022 and 31st January 2023.

Grievance

88. On 3rd August 2022, Mr Harwood-Allen sent a grievance letter to LUB's HR department, p251-254. The grievance set out a chronology of events from Mr Harwood-Allen's perspective in relation to both the stage 1 sickness warning and the incident with Mr Arora.

89. Mr Harwood-Allen has not brought a claim about the conduct of the grievance procedure or its outcome. These reasons therefore only deal with the process to the extent that it sheds light on the events that are the subject matter of the claim.

90. The grievance was dealt with by Andrew Evans, Head of Operations at the LUB's South Garages. He wrote to Mr Harwood-Allen on the 22nd August 2022, inviting him to attend a grievance hearing on 24th August 2022, p279.

91. The meeting took place on 24th August 2022. It was chaired by Mr Evans. Mr Harwood-Allen attended with his trade union representative. Steve Harvey, the Head of HR at LUB attended as a note taker. The notes were produced to the Tribunal and the Tribunal accepted them as a broadly accurate account of the meeting, p301-308.

92. On 26th August 2022 Mr Evans met with Mr Andrews to discuss the grievance. Mr Harvey attended and took notes, p317-319.

93. On the same day Mr Evans met with Mr McColl. Mr Harvey attended and took notes, p324-325.

94. On 30th August 2022 Mr Evans met with Mr West. Mr Harvey attended and took notes, p330-331.

95. Mr Evans wrote to Mr Harwood-Allen with the result of the grievance on 8th September 2022, p335-338. Mr Evans upheld the grievance.

96. In particular, Mr Evans was critical of the way that Mr Andrews had conducted the sickness absence meetings. He concluded that his manner towards Mr Harwood-Allen was not ideal and that the invite to the meeting had suggested that the outcome was predetermined. Most significantly, he concluded that the way in which Mr Andrews had declined to share the information that he possessed about Mr Harwood-Allen's absence had harmed the meetings and prevented them being more productive. Mr Evans concluded that there should have been at least one meeting to discuss Mr Harwood-Allen's absence prior to a more formal meeting being arranged, which he indicated might have avoided a formal process.

97. In respect of the sanction applied, Mr Evans recorded that 'You were issued a sanction of stage 1 warning following this meeting'. He noted that there was an outstanding appeal hearing about this.

98. It is not clear from Mr Evans' letter whether, when he upheld the grievance, he intended to remove the oral warning or whether he believed this would be dealt with by a future appeal.

99. In relation to the incident with Mr Arora, Mr Evans emphasised that suspension in such circumstances was intended be precautionary. He found that Mr Harwood-Allen had been 'kept waiting' on suspension because managers were not available to carry out an interview. He concluded that it was usual practice for a fact-finding meeting to be carried out without representation, but also that it would have been good practice to allow Mr Harwood-Allen a representative given he was on suspension.

Grievance appeal

100. On 14th September 2022 Mr Harwood-Allen wrote to appeal Mr Evans' decision, p342-343.

101. There was some delay in progressing the appeal, because Mr Harwood-Allen remained absent from work.

102. On 7th November 2022 a Grievance Appeal Hearing was scheduled for the 17th November 2022 to be conducted by Chris Tong, Engineering & Asset Director and John Boyce, General Manager for Park Royal, p355.

103. The appeal took place on the 17th November. It was chaired by Mr Tong alone. Notes of the appeal hearing were produced, p361-364. The Tribunal accepted they were a broadly accurate recover of the hearing.

104. Mr Tong wrote to Mr Harwood-Allen on the 6th December 2022, page 374-376. He concluded that Mr Andrews had not followed the correct process in relation to sickness absence and noted that he had been spoken to about this, as well has his behaviour during the meetings. He said that no sanctions had been recorded on Mr Harwood-Allen's records relating to the incident with Mr Arora or in relation to his sickness absence. He confirmed that no sanctions would be applied. The letter closed by inviting Mr Harwood-Allen to a meeting with Cark Ogden to discuss Mr Harwood-Allen returning to work.

Relief manager duties

105. After December 2021 Mr Harwood-Allen was not assigned to work as a relief manager.

106. Mr Harwood-Allen has argued that the reason he was not provided with such duties was that he is gay. In support of this allegation he refers to the fact that another employee, Liam Neville, was appointed to the position of Permanent Traffic Manager on 6th February 2023. Prior to that, Mr Neville had held the role on an interim basis. Mr Harwood-Allen's evidence was that, when he was offered the interim role, Mr Neville had not yet completed his Relief Manager Training. He says that the interim role was not advertised, either externally or internally. Mr Harwood-Allen's evidence was the Mr Neville is heterosexual.

107. Mr Harwood-Allen also says that additional Relief Managers have been recruited after 6th February 2023.

108. In order to understand Mr Harwood-Allen's claim, the Tribunal sought to clarify with him the significance of Mr Neville's appointment and its relevance.

109. Mr Harwood-Allen confirmed that he was not seeking to bring a claim on the basis of Mr Neville's appointment as Permanent Traffic Manager. He did not apply for the Permanent Traffic Manager role and did not suggest that the appointment itself was an act if discrimination.

110. At some points during the hearing Mr Harwood-Allen appeared to suggest that he should have been considered for appointment as interim manager.

111. The Tribunal therefore proceeded on the possible basis that the relevance of Mr Neville's appointments was as facts from which an inference might be drawn in relation to Mr Harwood-Allen's claim. In particular, if the Tribunal concluded that Mr Neville's appointments were as a result of his sexual orientation, it might infer from that that the failure to offer Mr Harwood-Allen work as a relief manager was also based on sexual orientation.

112. Similarly, the relevance of additional Relief Manager having been recruited was that the Tribunal might draw an inference from the fact that this suggested Relief Managers were needed, but Mr Harwood-Allen was not being offered that work.

113. Mr Harwood-Allen referred to a number of occasions when he might have been assigned to relief manager duties.

a. On 9th August 2022 Mr Evans, in his role as a General Manager at Fulwell and Tolworth approached Carl Ogden about the possibility of using Mr Harwood-Allen as a Relief Manager for about a month, page 266. At this time Mr Harwood-Allen was off sick. Mr Evans was aware of this, since he suggests the relief manager stint might be a way of getting Mr Harwood-Allen back to work. Mr Ogden replied declining the request,

p266. He said that Mr Harwood-Allen remained off sick and that, in any event, he was needed in the iBus control.

b. On 11th August 2022 Kevin Waite made a similar approach to Mr Ogden, requesting Mr Harwood-Allen from the 17th August page 274. There does not appear to have been a reply to this request.

c. Mr Waite follows up his previous request on 31st August 2022, making another request to have Mr Harwood-Allen as a Relief Manager from 20th September to 3rd October 2022 page 273-274. Mr Ogden replies saying that Mr Harwood-Allen remained off sick and it was unlikely he could be released, p273. Mr Ogden noted that he remained short of iBus controllers and was in the process of seeking an addition 13 people in that role.

114. Other than the occasions dealt with above the Tribunal was not provided with evidence relating to when Relief Managers were requested, whether they were assigned, who was assigned or the sexual orientation of the other Relief Managers.

The law

Direct discrimination

115. Following s13 and s39 of the Equality Act 2010, the Tribunal must determine whether the respondent, by subjecting the claimant to a detriment, discriminated against him by treating him less favourably than it treated or would have treated someone else, because of a protected characteristic.

116. A detriment is anything that a reasonable person in the claimant's place would or might consider to their disadvantage. It does not require that there be physical or economic consequences for the claimant – but an unjustified sense of grievance is not a detriment, see *Shammon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11.

117. Consideration of direct discrimination is an inherently comparative exercise. 'Less favourable treatment' requires that the complainant be treated less favourably than a comparator was or would be. The comparator may be an 'actual comparator'; that is someone in materially the same circumstances of the claimant. The tribunal may also need to consider how a 'hypothetical comparator' – that is someone in materially the same circumstances as the claimant, but with a different protected characteristic, would have been treated.

118. Where an individual is not an appropriate actual comparator, because they are not in materially the same circumstances to the claimant, evidence about their treatment may still be relevant evidentially in order to consider how a hypothetical comparator would have been treated. Such a person is often referred to as an evidential comparator.

119. In some cases, identifying a suitable hypothetical comparator may be difficult and it may be appropriate to focus on considering why a claimant was

treated in a particular way, using any evidence as to how other people are treated to inform that view.

120. If there has been less favourable treatment, the Tribunal must go on to consider whether that was because of a protected characteristic.

121. In some circumstance, however, separating the question of whether there has been less favourable treatment from the issue of why that less favourable treatment occurred will be artificial or cumbersome. In such cases the Tribunal may consider both questions together – essentially asking whether an employee has been treated less favourably because of a protected characteristic, see *Shammon*.

122. One consequence of this comparative approach is that the fact that someone has been treated unreasonably does not mean that they have been discriminated against. For that matter, an employee who has been treated in a way that is objectively reasonably may still have been discriminated against if they have nonetheless been treated less favourably than an appropriate comparator because of a protected characteristic.

123. Direct discrimination is not necessarily conscious or deliberate. The tribunal must decide 'what, consciously or unconsciously, was the reason for the treatment', see *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48. For there to be direct discrimination it is sufficient that the protected characteristic be a material influence on the reason for the treatment. It does not need to be the only or main reason for the treatment.

124. In relation to all of this, the burden of proof is on the claimant initially to establish facts from which the tribunal could decide, in the absence of any other explanation, that the respondent discriminated. This requires more than a difference in treatment combined with a difference in protected characteristic, see *Madarassy v Nomura International PLC* [2007] ICR 867. There must be something further from which it could be concluded that the protected characteristic influenced the decision. If this is established it is then for the respondent to establish that they did not discriminate.

125. If, however, a tribunal is able to make positive findings on the evidence it is not necessary to apply the burden of proof provisions mechanistically. In such a case a Tribunal may proceed directly to considering the reason for the treatment, see *Hewage v Grampian Health Board* [2012] UKSC 37.

Disability / Reasonable adjustments

126. Following s6 Equality Act 2010, someone has a disability if they have a physical mental impairment, which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. 'Substantial' in this context means 'more than minor or trivial', see section 212.

127. Section 20 of the Equality Act 2010 requires that an employer make reasonable adjustments for a disabled employee. This requires that, where an employer applies a provision, criteria or practice (PCP) that puts a disabled person at a substantial disadvantage in comparison with someone who is not

disabled, it must take such steps that are reasonable to avoid that disadvantage. Section 20 also deals with reasonable adjustments relating to a physical feature that puts a disabled person at a disadvantage and reasonable adjustments relating to the provision of an auxiliary. These, however, are not relevant to this case.

128. This duty will only apply if an employer knows, or could reasonably be expected to know, that a) the employee has a disability and b) that they are likely to be placed at the relevant disadvantage, (see Schedule 8, ¶20 Equality Act 2010).

129. To resolve a reasonable adjustment claim, a Tribunal must identify:

a. The PCP that has been applied by or on behalf of an employer.
b. Whether the PCP put the claimant at a substantial disadvantage and, if so, the nature and extent of that disadvantage.
c. Whether there were reasonable steps that the employer could have taken to avoid the disadvantage.

130. The duty to make reasonable adjustments means that employers are frequently required to treat disabled people more favourably than those who are not disabled. Only by doing so can the disadvantage that arises from the interaction between the PCP and the disability be removed.

131. What is reasonable is a question that the Tribunal must approach by making its own objective assessment. The Tribunal is not concerned with determining whether the employer genuinely or reasonably believed that it has discharged its duty or the process by which it made its decision. The Tribunal must, however, have regard to the implications of any potential adjustment for the employer, as well as the implications for the employee.

132. The Equality and Human Right Commission's Code of Practice on Employment, suggests that the following factors may be relevant to the question of reasonableness, but it is not an exclusive list of relevant considerations:

a. Whether taking any particular steps would be effective in preventing the substantial disadvantage;
b. the practicability of the step;
c. the financial and other costs of making the adjustment and the extent of any disruption caused;
d. the extent of the employer's financial or other resources;
e. the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
f. the type and size of the employer."

Conclusions

133. The Tribunal reached the following conclusions. The conclusions are structured by reference to the list of issues, but, in order to provide a clear narrative do not follow that list precisely.

Conclusions: race discrimination

Did the respondent a) suspend the claimant on 19th July 2022 following an incident at work with a Bus Driver, Mr Arora and b) Refuse to allow the claimant to be accompanied by a union representative or workplace colleague at the meeting following his suspension?

Did that treatment amount to a detriment?

134. Both parties accepted and the Tribunal agreed that that Mr Harwood-Allen was suspended on 19th July 2022. Further, it is clear that Mr Harwood-Allen was suspended for a significantly longer period than Mr Arora. Both being suspended and being expended for a prolonged period was treatment that amounted to a detriment.

135. Both parties accepted and the Tribunal agreed that Mr McColl refused to allow the Mr Harwood-Allen to be accompanied to the meeting following his suspension. This too was treatment that amounted to a detriment. Although much of the evidence and submissions in relation to this matter focused on whether Mr Harwood-Allen was entitled under LUB's policy be accompanied or whether he had a similar right pursuant to the ACAS Code of Practice on disciplinary and grievance procedures, this was not the relevant issue. Similarly, whether Mr Harwood-Allen required a representative or was capable of dealing with the issues in the meeting himself was not the relevant issue.

136. The question for the Tribunal was simply whether a reasonable person in Mr Harwood-Allen's position might consider that the refusal to allow them to be accompanied was to their disadvantage. The Tribunal concluded that they might. Mr Harwood-Allen was attending an important meeting, where a serious complaint had been made against him and where the meeting might lead to further disciplinary action in the future. An employee in such a situation might well feel that they would benefit by being accompanied by a colleague or Trade Union representative. That person might provide representation or during the the meeting. They might act as a witness to events. Or simply provide morale support. In all such cases it would be to the employees benefit and if that was forbidden by their employer they might well reasonably feel that this was to their disadvantage.

Was that less favourable treatment because of race?

137. The Tribunal concluded that the above treatment was not less favourable because of race.

138. A key dispute between the parties was identifying the appropriate comparator in relation to Mr Harwood-Allen's suspension. Mr Harwood-Allen sought to rely on Mr Arora, on the basis that he was also suspended following the same incident. The respondent argued that he was not an appropriate comparator, because Mr Arora worked in a different department and under different line manager.

139. The Tribunal concluded that Mr Arora was an appropriate actual comparator. Although he worked in a different department and under different line management, that did not, in these circumstances, amount to a material difference for the purposes of the Equality Act 2010. The key decision under examination was the decision to suspend both Mr Harwood-Allen and Mr Arora. Both had been suspended for the purposes of investigating serious allegations of misconduct in the workplace.

140. In regard to the decision to suspend, the Tribunal concluded that there was no less favourable treatment when comparing Mr Harwood-Allen and Mr Arora. Both were suspended following the incident. In that sense, both were treated the same.

141. Mr Harwood-Allen did argue that he should not have been suspended, because no formal allegation had been made against him. So far as any comparison between Mr Harwood-Allen and Mr Arora is concerned, if it had been the case that there had been a complaint against Mr Arora, but not against Mr Harwood-Allen, Mr Arora would not have been an appropriate statutory comparator. This is because the fact that there had been an allegation against one individual, but not the other, would amount to a material difference between those individuals.

142. In any event, however, it is clear from the interview notes with Mr Arora that he had made a serious allegation against Mr Harwood-Allen, in that he said that he had been very rude, very aggressive and insulted his mother. In this context, the fact that Mr Harwood-Allen had made his allegation in writing, while Mr Arora had made his verbally, was not a material difference. There was also some difference between the complaints made by both men, but the Tribunal concluded that this did not amount to a material difference.

143. The Tribunal was satisfied that a person of a different race, in the same circumstances as Mr Harwood-Allen would also have been suspended. The fact that both he and Mr Arora were suspended is evidentially significant. It was also a natural action for an employer to take when there was a serious dispute between colleagues who had made mutual complaints against each other.

144. Where there was a difference in treatment was in relation to the length of the suspension. Mr Harwood-Allen was suspended between 19th July 2022 and 28th July 2022, returning to work on the 29th July 2022. Mr Arora was suspended between 19th July 2022 and 20th July 2022; a far shorter period.

145. In that sense Mr Harwood-Allen was plainly treated less favourably than Mr Arora. The vast majority of employees would rather be suspended for a shorter, rather than a longer, period of time.

146. Similarly, there was a difference of treatment in relation to representation at the meetings follow their suspensions. Mr Arora was permitted to bring a Trade Union Representative to his meeting, while Mr Harwood-Allen was not

147. The key issue for the Tribunal was whether this difference in treatment was because of race. In accordance with the provisions relating the burden of proof, the Tribunal began by considering whether there were facts from which

the court could decide, in the absence of any other explanation that LUB had discriminated against Mr Harwood-Allen.

148. The Tribunal concluded that there were not. What had been established was a difference in treatment, combined with a difference between the race of Mr Harwood-Allen and Mr Arora. Beyond that difference, there was nothing to suggest – even in the absence of any explanation – that the difference in treatment related to Mr Harwood-Allen's race or that someone of a different race would have been treated any differently. This is insufficient to reverse the burden of proof. Even if the burden of proof had shifted, the Tribunal would have accepted LUB's explanation that the delay resulted from a lack of manager available to conduct a fact-finding interview with Mr Harwood-Allen.

Conclusions: sexual orientation discrimination

Did the respondent stop allocating him Relief Manager roles?

149. The list of issues refers to LUB ceasing to offer Mr Harwood-Allen Relief Manager roles from 19th July 2022 (i.e. following his suspension).

150. There was some argument between the parties as to which was the correct date for the Tribunal to consider. Mr Harwood-Allen said that his evidence was that he had not been offered such roles since December 2021; that the date in the list of issues was an error and the Tribunal should consider whether he had been discriminated against from December 2021. The respondent argued that the Tribunal should proceed on the basis of the case set out in the list of issues.

151. The Tribunal concluded that it should consider whether Mr Harwood-Allen had been discriminated against from December 2021. It did not appear to be in dispute that Mr Harwood-Allen had not been assigned to a role as Relief Manger from that date and the issues that the Tribunal would need to consider were similar. There was therefore very limited prejudice to LUB in considering the wider period.

152. The Tribunal concluded that Mr Harwood-Allen was not offered a role as a Relief Manager from December 2021. In that sense, LUB stopped allocating him Relief Manager roles. Beyond that, however, there was no evidence that suggested that there had been any decision that Mr Harwood-Allen should not act as a Relief Manager for any reasons. It is clear from the emails between managers that Mr Harwood-Allen was treated as holding the post of Relief Manager. Managers requested to use him in that role. Those requests were denied, but on the basis that Mr Harwood-Allen was not available, rather than because he was not considered a Relief Manager or because a decision had been made that he not be deployed in that role. The situation was that Mr Harwood-Allen was not offered assignments, rather than he had been removed from the position of a potential Relief Manager.

Did that amount to a detriment?

153. The Tribunal accepted that not being offered Relief Manager roles was an action that was capable of amounting to a detriment. Assignment as a Relief

Manager provided additional pay and was also likely to be viewed as beneficial to an individual's career development

Was that less favourable treatment?
Was it because of sexual orientation?

154. The Tribunal concluded that Mr Neville was not an appropriate statutory comparator. It was not suggested that he was assigned Relief Manager roles not given to Mr Harwood-Allen. Rather, he was appointed to an interim manager role and then to a permanent manger role. He was not therefore in the same circumstances as Mr Harwood-Allen

155. No other actual comparator was proposed, nor was a suitable actual comparator apparent from the evidence provided to the Tribunal.

156. The Tribunal therefore considered whether Mr Harwood-Allen had been treated less favourably than a hypothetical comparator.

157. In the period from December 2021 to 19th July 2022 the appropriate hypothetical comparator is a heterosexual employee, with Mr Harwood-Allen's skills and experience, appointed as a Service Controller.

158. In the period from 19th July to the 28th July 2022, the appropriate hypothetical comparator is a heterosexual employee, with Mr Harwood-Allen's skills and experience, appointed as a Service Controller – who had been suspended from work.

159. In the period from 29th July 2022 the appropriate hypothetical comparator the appropriate hypothetical comparator is a heterosexual employee, with Mr Harwood-Allen's skills and experience, appointed as a Service Controller – who was absent from work on the basis of ill health.

160. In relation to the periods from 19th July 2022, the Tribunal concluded that the hypothetical comparator would not have been treated differently to Mr Harwood-Allen. Both being subject to a suspension and being off sick would be an insuperable obstacle to being assigned as a Relief Manager. It would simply not have been possible to assign someone to cover for an absent manager if that person was also absent from work.

161. In relation to the period from December 2021 to 19th July 2022, the Tribunal concluded that Mr Harwood-Allen had not established facts from which the tribunal could decide, in the absence of any other explanation, that the respondent discriminated. The evidence before the Tribunal did not establish when Relief Managers were used during this period or who was assigned. The Tribunal had no information about the sexual orientation of the other relief managers.

162. Further, there was no basis on which any inference in support of this claim could properly be drawn from Mr Neville's appointments. Although there was limited evidence in relation to Mr Neville's sexual orientation, the Tribunal proceeded on the basis that Mr Harwood-Allen was correct that he was heterosexual. But that takes the claim no further. Even if Mr Neville had been

given Relief Manager roles in preference to Mr Harwood-Allen, a difference in treatment combined with a difference in sexual orientation would be insufficient to reverse the burden of proof. In fact, Mr Neveille was appointed to quite different roles. That fact does not suggest that there was any discrimination against Mr Harwood-Allen and certainly falls well short of anything that might reverse the burden of proof.

Conclusions: reasonable adjustments

Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date

163. The respondent accepted that, at all relevant times, LUB had knowledge of Mr Harwood-Allen's disability.

Did the respondent have the following PCPs: a) Invoking its Attendance at Work Procedure once an employee had 4 or more sickness absence? b) Not checking the recorded reasons for the absences before meeting with the employee? c) Issuing a warning if the employee did not explain the reasons for the absences? d) Not complying with its Attendance at Work Procedure?

164. LUB accepted that it had the PCP of applying its Attendance at Work Procedure and this included the potential for a Stage 1 Oral warning if any employee had more than four sickness absences within 12 months.

165. Mr Harwood-Allen argued that, contrary to the written policy, LUB's PCP was to invoke the Attendance at Work Procedure if there were four sickness absences. The Tribunal did not accept that this was the case. This argument arose because Mr Harwood-Allen suggested that, even leaving aside those absences which related to his disability, LUB should have disregarded the two absences relating to Covid, meaning that he had been invited to a meeting following only four absences. The Tribunal did not accept, however, that the evidence established that there was any general practice of either calling employees into meetings or applying the absence procedure in relation to four absences in a rolling twelve-month period. There was no evidence about the application of the policy to any other employee.

166. In any event, on the face of his absence record, Mr Harwood-Allen had six absences within a twelve-month period. Although the absence beginning on 18th April 2022 is marked as Covid-19 in the sickness record, the absence beginning on 15th June 2022 is recorded as 'Cough'. It is far more likely that what was in Mr Harwood-Allen's mind when he invited Mr Harwood-Allen to the July 2019 meetings was that Mr Harwood-Allen appeared to meet the policy's written criteria, rather than that he was applying a lower threshold. Then, in reaching his decision, he applied a general rule that, since he believed that Mr Harwood-Allen refused to discuss the absences, that he should not disregard any of them.

167. Having concluded that the PCP was to invoke the Attendance at Work Procedure as written, it is helpful to articulate more precisely the two parts of policy that were relevant to the circumstances of this case. First, LUB had a policy of recording their employee's sickness absence and holding a meeting if

their absences exceeded four instances over a rolling twelve-month period. Second, LUB had a policy of issuing a stage 1 warning if an employee's sickness absence exceeded four instances over a rolling twelve-month period.

168. The Tribunal concluded that the LUB did not have a policy of not checking the recorded reasons for sickness absences before meeting with an employee. The only evidence in relation to this was Mr Andrews' conduct during the July meetings, in which he refused to tell Mr Harwood-Allen what the reasons for his absence were. The Tribunal concluded, however, that this was because Mr Andrews believed that Mr Harwood-Allen should be the one to explain the absences, rather than because he had not examined the record prior to the meeting. Mr Andrews attitude and approach also followed from Mr Harwood-Allen's own combative approach to the meetings. The evidence did not establish that he, or other managers, took a similar approach in relation to any other employees.

169. The Tribunal concluded that LUB did not have a PCP of issuing a Stage 1 Oral Warning if an employee did not explain the reasons for the absences. The Tribunal concluded that Mr Andrews' decision was an individual one, which stemmed from his frustration with Mr Harwood-Allen's behaviour during the July meetings. The evidence did not establish that it reflected any wider policy or practice within LUB.

170. The Tribunal concluded that LUB did not have a PCP of not complying with its Attendance at Work Procedure. During his submissions Mr Harwood-Allen clarified that his allegation was that LUB failed to remove the absences that related to Covid-19 and to his disability; and that he was required to provide information about his absences. The Tribunal concluded that the evidence did not establish that these were anything other than individual decisions applied to Mr Harwood-Allen. There was no evidence that anyone other than Mr Harwood-Allen had Covid-19 related absences that were taken account of under the absence procedure or disability related absences that were not disregarded. Similarly, there was no evidence that anyone other than Mr Harwood-Allen was required to provide information about their absences, in the sense that a manager refused to provide the information available on LUB's records.

Did the PCP put Mr Harwood-Allen at a substantial disadvantage?

171. The Tribunal concluded that the PCP of applying the Attendance at Work Procedure did place Mr Harwood-Allen at a substantial disadvantage. In particular, his disability meant that it was more likely that he would be absent on grounds of sickness. This meant that he was more likely to be invited to an absence related meeting. And that he was more likely to place on the system of escalating warnings that might ultimately lead to dismissal.

172. In their evidence both Mr McColl and Mr Evans emphasised that the intention of the Attendance at Work Procedure was to be supportive and to ensure that that employees got the assistance they needed if there was difficulty in attending work. The Tribunal accepted that the Attendance at Work procedure, in general, was not intended to be a hostile or punitive exercise. The intention was to support employees in returning to reliable attendance,

which was to the benefit of both them and LUB. Nonetheless, no employee would wish to receive a warning for attendance, however, supportively framed. Further, each stage on the Attendance at Work procedure brought an employee closer to a potential dismissal. Anything that made it significantly more likely that an employee would progress through this procedure would amount to a substantial disadvantage.

Did the respondent know or could it reasonable have been expected to know that the claimant was likely to be placed at the disadvantage?

173. The Tribunal concluded that LUB could reasonably have been expected to know that the claimant was likely to be placed at the disadvantage. LUB knew of Mr Harwood-Allen's disability. It was self-evident that someone with ulcerative colitis was likely to be absent by reason of sickness more often than someone without that condition and that this made it more likely that they would be invited to a stage 1 meeting and subject to the progressive stages of the absence policy.

What steps could have been taken to avoid the disadvantage? Was it reasonable for the respondent to have to take those steps?

174. In respect of the PCP of recording their employee's sickness absence and holding a meeting if their absences exceeded four instances over a rolling twelve-month period, the Tribunal concluded that LUB was not in breach of its duty to make reasonable adjustments. This was because the only steps that would have avoided the disadvantage would have been to either adjust, in advance, the level of sickness absence that would lead to Mr Harwood-Allen being invited to a meeting or to exclude Mr Harwood-Allen from that part of the Attendance at Work policy altogether.

175. It would not have been reasonable for LUB to have to take those steps. First, LUB had a legitimate interest in monitoring / addressing sickness absence among its employees. Second, the disadvantage to employees in having to attend a meeting in such circumstances was a relatively minor one.

176. Further, although such an approach would have avoided one type of disadvantage – i.e. the disadvantage of being invited to an absence meeting and the concomitant increased risk of being placed on a stage 1 warning – there was a substantial risk that it would create a different type of disadvantage to employees in a similar position to Mr Harwood-Allen. It would lead to an increased risk that absence was not addressed in a timely and organised manner. Without some system for monitoring and discussing sickness absence it would be harder for LUB to comply with its duty to make reasonable adjustments in other respects. It is easy to image an alternate set of circumstances in which LUB would be robustly criticised because they had not given thought to the reasons for a disabled employees increased sickness absence and taken appropriate steps to support them.

177. Taking those three factors together it would not have been reasonable for LUB to take the above steps.

178. Members of the panel have reach different conclusions in relation to whether LUB had failed to make reasonable adjustments in relation to the PCP of issuing a stage 1 warning if an employee's sickness absence exceeded four instances over a rolling twelve-month period.

179. The majority of the panel, including the Employment Judge, concluded that there were reasonable steps that LUB failed to take to avoid the disadvantage caused by that PCP.

180. This is because the majority concluded that it would have been reasonable for LUB to disregard the absences that related to Mr Harwood-Allen's absences that had related to his disability when applying the mechanistic thresholds of the policy. This would have meant that the absences beginning on the 25th May 2022 and the 30th November 2021 would have been disregarded. This would have left Mr Harwood-Allen below the threshold for a stage 1 warning (even if the Covid-19 related absences had not also been disregarded).

181. The majority concluded that this approach would have eliminated the disadvantage that arose from this PCP. Given the small number of absences related to Mr Harwood-Allen's colitis, it would have had a minimal to no impact on LUB's operations.

182. Such an approach would also not have precluded LUB taking further action in the future, if there was substantial absence relating to Mr Harwood-Allen's disability. Disapplying the mechanistic provisions of the sickness absence procedure would not have been the same as concluding that disability related absence would always be disregarded for all purposes or that no future action would be taken. LUB would have remained able to make a qualitative assessment of the situation based on Mr Harwood-Allen's specific circumstances. There was little disadvantage to LUB in applying such an individualised and qualitative approach to Mr Harwood-Allen's sickness absence, rather than the mechanistic approach set down in the policy.

183. The majority also noted that, in practical terms, LUB did go on to disregard Mr Harwood-Allen's disability related absence when the matter was re-considered through the grievance process. It is not clear from Mr Evans' grievance outcome letter whether he believed that his decision had the effect of removing the warning. It is, however, clear that he formed the view that it should not have been applied. Mr Tong's grievance appeal outcome letter makes it clear that any sanction that had been applied to Mr Harwood-Allen had been removed and would not be reapplied. The fact that the respondent went on to make the suggested adjustment is not determinative of this issue, but is a relevant factor to consider.

184. Although Mr Harwood-Allen's conduct in the July meeting goes some way to explain why LUB did not take these steps, the majority concluded that this was not relevant to what steps it was reasonable to have to take to avoid the disadvantage. The focus in a reasonable adjustments claim must be on whether there a PCP has caused substantial disadvantage and, if it has, on the steps that the employer must reasonably take to avoid that disadvantage, judged objectively. It is not an assessment of the reasonableness of the process used to determine whether an adjustment should be made.

185. The minority concluded that the reasonable step that should have been taken in relation to this PCP was to investigate the reason for the incidents of sickness absence and to disregard them if they were found to be related to the disability. They concluded that LUB had taken reasonable steps to investigate, by conducting the July 2019 meetings and thereby discharged its duty. The minority concluded that Mr Harwood-Allen's refused to participate meaningfully in that process, in that he was rude and obstructive during the July meetings.

186. The minority concluded that, despite the reasonable efforts of LUB, Mr Harwood-Allen's approach to those meetings had meant that absences that might otherwise have been disregarded for the purposes of the policy had not been. The minority concluded that it was not unreasonable to expect Mr Harwood-Allen to provide details of why he had been absent and that, if he wished certain absences to be disregarded, to present an explanation as to why. The duty to make reasonable adjustments did not require LUB to investigate the possibility of disregarding absences, where Mr Harwood-Allen did not provide such an explanation.

187. As noted above, the majority made its decision on the basis of a different approach to the legal question to the minority. In the alternative, however, the minority went on to consider whether, if it was right to assess the process used by the respondent, LUB had made reasonable adjustments. On this question, the majority concluded that LUB had not taken reasonable steps to investigate Mr Harwood-Allen's absences, because in the second meeting Mr Andrews had proceeded on the basis that Mr Harwood-Allen was refusing to provide an explanation of his absences, when that was not a fair characterisation of his conduct. This means that, if the majority had approached this issue in the same way as the minority, they would still have concluded that LUB had not discharged its duty to make reasonable adjustments.

Next steps

188. The case will now be listed for a remedy hearing. It will be listed for a face-to-face hearing at London South for one day The parties should provide details of any dates they are unavailable for in the next 12 months with 14 days of the date that this judgment is sent to the parties.

189. The remedy hearing will consider the compensation that should be awarded in respect of the successful claim. At present, it appears to the Tribunal that this is likely to be limited to an award for injury to feelings, because it does not appear to be suggested that Mr Harwood-Allen suffered financial loss as a result of the warning that he received. If Mr Harwood-Allen intends to argue that he has suffered financial loss or seeks any other form of compensation, he should provide a revised schedule of loss setting the financial loss that he claims and how it has been calculated. That schedule of loss must be sent to the Tribunal and to the respondent within 28 days of the date that this judgment is sent to the parties.

190. For the purposes of that hearing the parties should seek to agree a bundle of relevant documents no later than 28 days prior to the hearing. Four copies of that bundle must be provided to the Tribunal.

191. The Tribunal anticipates that Mr Harwood-Allen will give evidence in respect of his injury to feelings. He should produce a witness statement in relation to this (which should also deal with any other compensation that he is seeking). If the respondent intends to call any witnesses they must also produce witness statements. All witness statements should exchanged between the parties no later than 14 days prior to the hearing. Four copies of all witness statements must be provided to the Tribunal.

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Employment Judge Reed

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Date 7th August 2025

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Recording and Transcription

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

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/