# EMPLOYMENT TRIBUNALS

**Claimant:** **K Kostova**

**Respondent:** **ABM Facility Services UK Limited**

**Heard at:** **London South Employment Tribunal** **On: 1, 2, 3 and 4 September 2026**
**Before:** **Employment Judge Burge**

**REPRESENTATION:**

**Claimant:** **In person**
**Assisted by a Bulgarian interpreter, Ms I Almeida**

**Respondent:** **Ms G Nicholls, Counsel**

# JUDGMENT

It is the Judgment of the Tribunal that:

1. The complaint of failure to make reasonable adjustments for disability fails and is dismissed; and

2. The complaint of unfavourable treatment because of something arising in consequence of disability fails and is dismissed.

# REASONS

***The Claimant having requested written reasons by email on 4 September 2026 after oral summary reasons had been delivered, the following full reasons are provided:***

## Introduction

1. The Claimant was employed by the Respondent, ABM Facility Services UK Limited, as a Multi-Skilled Operative on the Transport for London contract from 1 February 2023 until her dismissal on grounds of capability due to ill health

with effect from 31 May 2024. The Claimant claims that the Respondent discriminated against her arising from her disability and failed to make reasonable adjustments.

## The hearing

2. The Claimant gave evidence on her own behalf and Adrian Morgan, an RMT representative also gave evidence on behalf of the Claimant. Adediran Aderinola (Senior Contract Manager), Kwame Dartey (Senior Operations Manager) and Kim Martin (Head of Stations) gave evidence on behalf of the Respondent.

3. The Tribunal was referred during the hearing to documents contained within a hearing bundle comprising 391 electronically paginated pages, together with a supplementary bundle comprising 6 electronically paginated pages. On the second day the Claimant provided a further document.

4. Both the Claimant and Ms Nicholls provided written and oral closing submissions.

5. Prior to the Tribunal hearing the Claimant had made an application for MITIE to be added as a second Respondent as the cleaning service had transferred to them (approximately 2 years after she had been dismissed). The Claimant did not say in her witness statement that she thought her dismissal was to do with the transfer. The Respondent confirmed that if the Claimant was successful, they would pay the Tribunal award. The Claimant withdrew her application to add a second Respondent at the start of the hearing following the discussion.

## List of Issues

6. At the start of the hearing we went through the List of Issues that had been prepared at the Preliminary hearing on 30 September 2025.

7. On 29 June 2026 the Respondent had accepted that the Claimant was disabled at the relevant time by reason of:
   (i) Back pain (linked to a protruding disc);
   (ii) Lymphoedema; and
   (iii) Osteoarthritis in the knees

8. The Respondent did not accept that it knew about the Claimant's osteoarthritis when the decision was made.

9. The PCP for the reasonable adjustments complaint was not clear. The Claimant confirmed that it related to her having to work 5 days (full time) and she wanted

to work 3 days. The Respondent helpfully did not object to the amendment, they had understood that the Claimant had not wanted to work full time. The Claimant also said that she wanted to only work in Euston and Stratford and that she had previously been on rotas to work elsewhere. Her being on the rota to work in Euston and Stratford and then moved elsewhere was not in her application for flexible working, not in her claim form, nor had it been raised by her at the preliminary hearing and so I did not include it in the List of Issues to be determined. No application to amend was made.

10. The Respondent accepted that the Claimant's dismissal arose because of her sickness absence and inability to work. They did not accept that not offering a job arose in consequence of disability.

11. The agreed amended List of Issues is as follows:

1. Discrimination arising from disability (Equality Act 2010 section 15)

1.1 Did the Respondent treat the Claimant unfavourably by:
- 1.1.1 Dismissing the Claimant?
- 1.1.2 Not offering her a suitable alternative job?

1.2 Did the following things arise in consequence of the Claimant's disability:
- 1.2.1 Not being able to fulfil her current role and being on long term sick leave?

1.3 Was the unfavourable treatment because of any of those things?

1.4 Did the Respondent dismiss the Claimant because of that sickness absence?

1.5 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:
(a) The health, safety and welfare of the Claimant
(b) The staffing requirements of the business; and
(c) Providing an efficient service

1.6 The Tribunal will decide in particular:
- 1.6.1 as the treatment an appropriate and reasonably necessary way to achieve those aims
- 1.6.2 could something less discriminatory have been done instead;
- 1.6.3 how should the needs of the Claimant and the Respondent be balanced?

1.7 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability?

2. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

2.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

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

2.2.1 The requirement to work 5 days per week

2.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that she had back pain, leg swelling and had to carry 10kg suitcase 5 times per week?

2.4 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

2.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests: Granting her flexible working request

2.6 Was it reasonable for the Respondent to have to take those steps? The Respondent says it would have made no difference, the Claimant remained unfit for work.

2.7 Did the Respondent fail to take those steps?

3. Remedy for discrimination

3.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

3.2 What financial losses has the discrimination caused the Claimant?

3.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

3.4 If not, for what period of loss should the Claimant be compensated?

3.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

3.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

3.7 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

3.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.9 Did the Respondent or the Claimant unreasonably fail to comply with it?

3.10 If so, is it just and equitable to increase or decrease any award payable to the Claimant?

3.11 By what proportion, up to 25%?

3.12 Should interest be awarded? How much?

**Findings of Fact**

12. Before commencing employment, the Claimant completed a pre-employment health questionnaire dated 9 December 2022. The Claimant answered "No" to questions relating to back pain. The evidence of Mr Aderinola is accepted that he later discussed this with the Claimant during a welfare meeting and that she stated she had not expected the pain to return.

13. The evidence of Mr Aderinola is accepted that the Respondent is a provider of cleaning, security, building maintenance, waste and facilities management services. The Respondent provides the services under a contract to various clients including the TfL, which is the contract on which the Claimant worked.

*14.* The Claimant commenced employment with the Respondent as a Multi-Skilled Operative ("MSO") on 1 February 2023. Her place of work was the Pan-TfL network. She worked over 5 days in Euston and Stratford. The MSO role is a general cleaning role. The job description provides that the main purpose of the role is:

> *"The Multi Skilled Operative will provide a comprehensive service ensuring a high quality service is delivered to the client. You will represent ABM as part of an on site team providing cleaning services on*

*an ad-hoc basis whilst maintaining a professional image to our staff, suppliers, clients and our clients customers at all times. Although the primary focus is on cleaning, as an MSO you will be required to carry out any reasonable tasks for which you are deemed competent and as is reasonable. You are responsible for general upkeep for designated areas ensuring that the general appearance of buildings and surrounding areas are maintained in accordance with ABM and our clients required standards. Reporting to ABM nominated supervisors and managers you will cultivate relationships with our clients and managers alongside staff, to ensure an efficient and consistent level of operational performance."*

*15.* The Respondent has an attendance policy:

*"11 Long-term Absence*

*Any absence over 4 weeks is considered as long-term absence and therefore requires the involvement of the team members HR representative. The AMP is not designed to deal with long term absence therefore the following will apply:*

- *Team member is required to keep in touch and continue to provide updated medical certificates*
- *The line manager should endeavour to stay in regular contact with any long-term sick team member and to provide them with support and assistance throughout their period of absence*
- *A long-term sickness meeting will be scheduled initially after the first 4 weeks of absence, and then regularly thereafter, and dependent on the health of the team member these meetings can be held at their home, via telephone or at a mutually agreed venue."*

*"11.1 Termination due to Ill Heath*
*Long term sickness is not a disciplinary issue. However, it can lead to termination on grounds of ill-health (capability) where a team member is unable to meet and sustain the attendance levels required of their role.*

*Decisions regarding ill health terminations should only be made where the Company has sought appropriate medical evidence. The line manager, in conjunction with the team members HR representative must make any necessary arrangements to obtain medical reports and/or a referral to the Occupational Health Advisor, to consider:*

*• the nature of the condition*
*• an expected return to work date*
*• the long-term effects of any medical condition in respect of future job performance and attendance at work*
*• the potential suitability of redeployment opportunities*
*• whether the team member could be considered as a disabled person under the Equality Act 2010*
*• the reasonable adjustments that may be required for a disabled person*

*In all cases, but more importantly where the team member is, or might be a disabled person, consideration must be given to the possibility of redeployment and/or reasonable adjustment. A team member who is unable to carry out their duties may be fully capable of performing a different role and this possibility should be explored.*

*The Company is not, however, obliged to create alternative employment where none exists.*

*If a team member's long-term absence continues and the Company does not have reasonable grounds to believe there will be an improvement in the foreseeable future, the Company may need to terminate their employment on the grounds of ill health. This decision will be explained to the team member and confirmed in writing.*

*Team members may appeal against dismissal by writing to a more senior manager within 7 calendar days from receipt of the outcome letter, giving the reasons for their appeal."*

16. The Claimant's evidence is accepted that she was not provided with a locker and as she did not want to travel in her uniform she commuted with them in a heavy suitcase containing her uniform, safety footwear, lunch and water bottle. The Claimant's evidence is accepted that this exacerbated her back and leg conditions and it meant she did not want to travel further afield than Stratford and Euston.

17. On 20 August 2023 an MRI report recorded the Claimant had lumbar spine abnormalities. On 22 August 2023 the Claimant attended the Lymphoedema Clinic. Medical records referred to lymphoedema and leg swelling.

18. The Claimant had worked for approximately 6 months and then commenced sickness absence on 29 August 2023. She thereafter remained absent from work and submitted a series of fit notes saying she was not fit for work (with

one exception, see below) citing conditions including back pain, lymphoedema and knee problems.

19. On 29 September 2023 the Claimant's GP provided a letter for the Respondent recording that the Claimant:

> *"an MRI previously taken revealed a disc bulge at L5/JS1 with possible L5 nerve root impingement. [The Claimant] has had physiotherapy with only limited benefit and the previous L5 laminectomy procedure was also given. Her pain radiates to the left leg and is exacerbated when she has to walk up and down the stairs, has to lift anything heavy or needs to bend down. Her pain is also made worse by the heavy work boots she has to wear.*
> *I can confirm that she saw the GP on the 26th September 2023 when a referral to the orthopaedic specialist was done for her for a further assessment to be given. She has been prescribed Naproxen painkillers for her pain relief"*

20. On 4 October 2023 the Claimant emailed Mr Aderinola stating that she had not been able to get hold of her supervisor, she was on sick leave and attached sick notes and medical evidence. She asked for assistance and expressed the hope that she would return to work soon.

21. On 4 October 2023 Mr Aderinola invited the Claimant to attend a welfare meeting on 6 October 2023 to discuss her absence and possible assistance with a return to work.

22. On 6 October 2023 a welfare meeting took place. The evidence of Mr Aderinola is accepted that the Claimant reported a problem with her leg, that she was taking medication and that she was not fit to return to work. The Claimant said that she was "Not feeling well problem with leg back side. Not feeling well to work." The Claimant confirmed she would wear a lighter safety boot.

23. On 26 October 2023 a further GP letter was provided. It referred to longstanding and ongoing back pain that had been deteriorating over the preceding two years and to a previous laminectomy procedure undertaken in 2002.

> *"I can confirm that [the Claimant] has a medical history that includes a diagnosis of long-standing and ongoing low back pain, which has been deteriorating over the past two years. [The Claimant] has a historical L5 laminectomy procedure in 2002 for a herniated disc at L5 – L5 level.*
> *In July 2023 [the Claimant] had a face-to-face consultation with the GP when she reported a two month history of low back pain with cramping*

*pain shooting down her left leg. Aggravating factors included walking, lifting, standing, ascending and descending stairs with an associated poor balance.*
*A subsequent MRI taken in August 2023 revealed no spinal canal stenosis but a possible left L5 nerve root impingement with a moderate posterior disc bulge and facet joint degeneration at L4/L5. The surgeries physiotherapist subsequently saw [the Claimant] on the 29 August 2023 and she was given a six-week home exercise programme.*

*In September 2023 [the Claimant] saw the GP again when her pain medication was changed to codydramol 500 mg tablets and naproxen 250 mg tablets as over-the-counter medication were not helping her. I am attaching a medication list for your information.*
*A referral was also done to the musculoskeletal specialist on that date for a further assessment to be done and [the Claimant] will be on the waiting list to be seen."*

24. To the Tribunal the Claimant did not accept that her back pain had deteriorated over the previous two years, but accepted that this was the information that the doctor gave to the Respondent. Her evidence is accepted that her operation in 2002 had resolved the issue from that time and that she did not expect further problems.

25. On 30 October 2023 the Claimant emailed Mr Aderinola stating that she wished to return to work as soon as possible and asking for details of her workplace and rota. Later on 30 October 2023 Mr Aderinola replied asking the Claimant when she expected to return to work so that arrangements could be made with her supervisor. On 1 November 2023 Mr Aderinola invited the Claimant to a further welfare meeting to discuss the medical advice that had been received. He informed her that her absence had already lasted approximately two months and that the Respondent could not keep her position open indefinitely. On 2 November 2023 the Claimant emailed Mr Aderinola stating that her fit note ran until 12 November 2023 and that she would be happy to return on 13 November 2023.

26. On 9 November 2023 the Claimant emailed Mr Aderinola stating that she had spoken to a doctor, that her back pain affected her functional condition and that she was becoming disabled. She sent a disability card and fit note and stated that she wished to discuss returning to work when her condition improved.

27. The evidence of Mr Aderinola is accepted that the Claimant did not attend the welfare meeting scheduled for 9 November 2023 and did not advise beforehand that she would not attend. He therefore rescheduled the meeting.

28. On 24 November 2023 a welfare meeting took place. The Claimant stated she could clean accommodation areas, offices and toilets and could empty bins if they were not full, but stated that she could not climb stairs or lift many boxes, "only station with lift an[d] escalators". Mr Aderinola pointed out that all London Underground stations contain stairs and the Claimant agreed.

29. On 12 December 2023 the Respondent made an Occupational Health referral. The referral recorded that the Claimant had been absent since August 2023 with back pain and had submitted a disability card. The Respondent asked whether the Equality Act 2010 applied, what the timescales were and whether adjustments or redeployment were possible.

30. On 27 December 2023 an Occupational Health report was produced. The doctor recorded degenerative lower back pain and lymphoedema, stated that both conditions were not curable, and considered that physical activity exacerbated symptoms. He advised that the Claimant was not fit to undertake her role without adjustments, suggested reductions in the physical demands of the role, stated that limitations in physical capacity were permanent and expressed the opinion that the Equality Act 2010 was likely to apply:

    *"Degenerative back pain is multi-factorial, with physical and psychosocial factors. However, she has showed me her medical reports which have suggested degenerative disease in her spine without any significant surgical target, so it is likely that she will be managed conservatively (i.e., without an operation). Her condition is not curable and will get worse over time.*

    *She also has a diagnosis of lymphoedema in her legs and has compression stockings for this. Lymphoedema is an important bodily fluid that flows around the body in the lymphatic system in a similar, but smaller, way to blood.*

    *Lymphoedema occurs when this flow is interrupted. In general, the cause is not ascertained, but the chances are higher in those with a raised BMI. This condition is also not curable, and her leg swelling will get worse during the day and with prolonged physical activity."*

31. The doctor gave the following summary of fitness to work and recommendations:

    *"From a medical perspective, this lady would benefit from having the physical demands of her role reduced to as much as she can tolerate, with this being subject to business considerations.*

    *She has mentioned numerous issues such as preferring to work at Euston station because this is a smaller station. She also mentioned that her work*

*boots are heavy (and remember this in the context of her lymphoedema which makes her legs heavier), but these should be discussed between herself and her manager to assess what can be accommodated…"*

32. The Claimant subsequently accepted that Euston is not a small station.

33. In the Occupational Health doctor's view, the Claimant's "limitations in her physical capacity are permanent." In relation to a likely date of return to work, the doctor said that "she is happy to return on 8/1/24." However, the Claimant then submitted a fit note from her GP on 4 January 2024 saying she was not fit for work.

34. On 15 January 2024 the Respondent invited the Claimant to a welfare meeting to discuss the Occupational Health report.

35. On 19 January 2024 a welfare meeting took place. The evidence of Mr Aderinola is accepted that the Claimant accepted that her conditions were not curable and that her role was physical. He advised that lighter safety boots could be supplied but may not be suitable with Claimant's leg condition. Mr Aderinola asked the Claimant whether there were reasonable adjustments that could be made and she said "not at moment but after my appointment with doctor I will see if I need one". I do not accept the Claimant's evidence to the Tribunal that she was well enough to return if adjustments had been made. Up to this point she had not been well enough with or without adjustments.

36. On 23 January 2024 an orthopaedic MRI report was produced.

37. On 23 February 2024 a further welfare meeting took place between the Claimant and Mr Ibrahim. The evidence of Mr Aderinola is accepted that the Claimant requested accommodation-cleaning duties only. The evidence of Mr Aderinola is accepted that accommodation cleaning formed only a small element of the MSO role and that there was insufficient accommodation-cleaning work at Euston or Stratford to create a dedicated role. In response to being asked how she was feeling the Claimant said that one day was better and one day bad and that if she was walking too much 2 – 3 hours she would get pain and tension in her back. She asked if she could work part time. Mr Ibrahim raised that the occupational health report had suggested a reduction in the physical demands of her role, as much as the business can tolerate. He asked if the Claimant still felt that she could carry out her role and asked what sort of reduction she was looking for. The Claimant replied that she wanted to work in the accommodation area as she thought it would suit her. Mr Ibrahim asked what about her current role as a MSO and the Claimant replied that she was "only looking to do accommodation cleaning" because it would help her back and also an ability to wear a lighter shoe. The Claimant thought that if she

had to still work on the station it would mean she would be walking too much, manual handling and lifting heavy objects.

38. On 28 February 2024 the Claimant obtained a fit note stating that she might be fit for work if amended duties and altered hours could be provided. On 28 February 2024 Human Resources advised management that alternative positions, redeployment and reasonable adjustments should be explored before progressing to capability proceedings and that it was necessary to ensure that all necessary steps had been taken to avoid a discrimination claim.

39. On 6 March 2024 a further welfare meeting took place. The evidence of Mr Aderinola is accepted that the Claimant's position remained unchanged. In evidence to the Tribunal the Claimant accepted that the situation was the same. Mr Aderinola discussed a vacancy list with the Claimant but she declined to consider it and instead requested train litter-picking work. He then gave her a flexible working request form. The evidence of Mr Aderinola is accepted that this would involve walking up and down trains which he doubted would be possible for her. The internal HR emails show discussion about alternative roles, reasonable adjustments, welfare meetings and a flexible working application.

40. On 11 March 2024 the Claimant submitted a formal flexible working request requesting a reduction from 5 days to 3 days per week at Stratford and Euston.

41. On 27 March 2024 the Claimant attended a welfare meeting and a separate flexible working meeting. The evidence of Mr Aderinola is accepted that it became apparent that the Claimant's objective was to secure accommodation-cleaning duties rather than simply reducing her working days. He told her there were no accommodation-cleaning vacancies, provided information about alternative roles, and undertook to make enquiries of other managers.

42. The evidence of Mr Aderinola is accepted that:

> *"Accommodation cleaning is cleaning the back-office area of a station, however Euston and Stratford stations do not have a big enough back office for an accommodation cleaner to be an entire role each shift. Cleaning the accommodation areas of both stations would take approximately 1 hour each day. An MSO is required to clean the accommodation areas, as well as the other areas of the station as part of their role."*

43. The evidence of Ms Martin is accepted that:

> *"I asked [ the Claimant] what she would do if it was only her at the station and she stated that she would just do accommodation cleaning. Most stations, including Euston and Stratford do not have a big enough back office areas to be a full shift. Euston and Stratford station have a small back office area which are roughly the size of 2 living rooms and would take approximately an hour to clean each day. I then stated that MSOs are required to do all the jobs in the station. I was concerned that [the Claimant] was not capable of doing the job and did not wish to place her in a job that would put her at risk."*

44. The Claimant gave evidence that she thought that it would take longer than an hour to do the accommodation cleaning. However I prefer the evidence of Mr Aderinola and Ms Martin due to their greater length of experience at the Respondent and their roles overseeing cleaning services.

45. The evidence of Ms Martin is further accepted that:

> *"There is a full accommodation cleaning role at Fleet House, which is a 3 floor accommodation block at Stratford station. This is the only accommodation cleaner in nearly 300 stations and there is only one cleaner assigned to this shift. They work 6 shifts a week and has worked that shift for 6 years. To place [the Claimant] in this role would involve displacing the current operative in that role and in any event given [the Claimant's] condition, this role would simply have been too big for her."*

46. By fit note dated 25 March 2024 (submitted to the Respondent after the 27 March meeting), the Claimant was signed off as not fit for work again for 4 weeks.

47. On 3 April 2024 the Respondent invited the Claimant to a capability meeting which was rescheduled to 18 April and then 24 April 2024 to allow the effects of the Claimant's medication to resolve.

48. On 10 April 2024 a musculoskeletal clinical assessment report was produced.

49. The evidence of Mr Dartey is accepted that on 19 April 2024 Mr Aderinola asked him if he had any vacancies for an accommodation cleaner for three days per week but that he did not.

50. Mr Dartey took over the capability process from Mr Aderinola. On 24 April 2024 a capability meeting took place. The evidence of Mr Dartey is that the Claimant reported taking medication which caused drowsiness and sleepiness. He says he considered that this raised health and safety concerns in the station

environment and therefore allowed further time to see whether the medication helped. The Claimant said “I really want to come back to work but it will depend on how I feel”.

51. The Claimant’s witness statement to the Tribunal stated that “Attending these meetings required significant physical and mental effort” and that she “explicitly explained how this medication impacted [her] concentration and overall condition. During this period, [her] prescription was escalated to Tramadol, a potent synthetic opioid analgesic, to manage [her] chronic pain…”

52. On 1 May 2024 the Respondent rejected the Claimant's flexible working request. The outcome letter stated that there was no vacancy matching her requirement to work accommodation-cleaning duties on specified days, that alternative vacancies had been identified and declined, and that enquiries with Mr Dartey had not identified a suitable vacancy.

53. Following several adjournments, a further capability meeting took place on 21 May 2024 by Microsoft Teams as the Claimant was not well enough to attend in person. The Claimant does not agree the notes of the meeting. She requested a copy of the recording but the Respondent said that it had not been recorded. According to the minutes the Claimant said that she was not feeling well and she did not know when she was going to be back. To the Tribunal, the Claimant gave evidence that she agreed it was conducted online as she was not well enough and that she had said that she did not know when she was going to be back. However, she disputed other parts of the minutes which suggested she wanted to resign. It is not clear who raised resignation first but either way, I accept that the Claimant said she wanted to keep her contract with the Respondent. This was something she was consistent about in contemporaneous documentation and Tribunal proceedings. The Claimant remained unwell, she was using a walking stick and was taking Naproxen and Pregabalin.

54. On 21 May 2024, shortly after the capability meeting, the Claimant emailed HR stating that she had been placed under pressure to resign and that no support or accommodations had been provided despite her disability:

> *“During our meeting, I expressed that due to my knee problem and mobility issues, exacerbated by the medications I am taking (Naproxen and Pregabalin), I am unable to return to work at this time. I rely on a walking stick for support because had pain in my knee and the medications often make me feel sleepy. Despite these challenges, I have been met with pressure to resign from my position, which has left me feeling deeply troubled.”*

55. The Claimant and HR exchanged emails.

56. On 30 May 2024 the Respondent dismissed the Claimant on grounds of capability due to ill health. The outcome letter referred to her long-term sickness absence, ongoing mobility difficulties, medication, Occupational Health advice and the lack of suitable redeployment opportunities. The Respondent concluded that there was little prospect of her returning to work in the foreseeable future:

> *"During the meeting we discussed the whole of your long-term sickness which began in August 2023. You were not fit for work since August 2023 due to back problem, lymphoedema and left knee pains. It was noted that your health condition had not improved since then and you stated that you are still unfit to return to work."*
>
> *"Therefore, it was suggested that you would benefit from having the physical demands of the role reduced as much as you can tolerate, with this being subject to business considerations and that you will be able to return to work on 8th January 2024. You acknowledged that the report was correct, and you agreed with the content, although till present you have not been able to resume work since you are still unfit to return to work."*

57. The evidence of Mr Dartey is accepted that in reaching his decision he took into account the continuing absence since August 2023, uncertainty regarding a return-to-work date, mobility limitations, medication side effects, Occupational Health advice, the physical requirements of the Multi-Skilled Operative role and the absence of suitable vacancies. The Claimant's employment ended on 31 May 2024.

58. On 5 June 2024 the Claimant appealed against the dismissal through her trade union representatives. The appeal alleged failures to recognise her disability, failures to make adjustments and disability discrimination. It also included an assertion that she was in "excruciating pains" such that she was not of sound mind to be able to make her own decisions.

59. In evidence to the Tribunal the Claimant accepted that she was not fit to return to work in May 2024.

60. On 7 June 2024 the Claimant commenced ACAS Early Conciliation which ended on 19 July 2024.

61. On 17 June 2024 an appeal hearing began before Mr Baccarini but was adjourned following objections raised by the Claimant's representatives.

62. On 29 July 2024 a rescheduled appeal hearing took place before Ms Martin. The Claimant said she wanted to come back to work with reasonable adjustments. The Claimant also said that she was currently not fit for work, was taking Pregabalin and would be for 2 months. The evidence of Ms Martin is accepted that Pregabalin has side effects that can cause dizziness and sleepiness and as such the medication is on a banned list - no workers who are taking Pregabalin are permitted to work on the TfL contract due to health and safety concerns. They discussed lighter boots and the practical difficulties of the Claimant carrying out the full Multi-Skilled Operative role.

63. The evidence of Mr Morgan is accepted that in his view Ms Martin understood the requirements of the Equality Act 2010, appreciated that reasonable adjustments should have been considered and was receptive to proposals for accommodating the Claimant. Ms Martin wanted to try to find other roles for the Claimant to consider. There was some confusion about whether or not the Claimant remained dismissed after the appeal hearing. On the balance of probabilities I find that Ms Martin would have reinstated the Claimant if suitable alternative employment could be found. As it was not, the Claimant did not get reinstated.

64. On 30 July 2024 Ms Martin sent the Claimant a vacancy list for review. On 31 July 2024 the Claimant identified a number of vacancies that interested her, including MSO posts and a CCTV Controller role. The evidence of Ms Martin is accepted that by the time enquiries were made several of the vacancies selected by the Claimant were no longer available.

65. On 12 August 2024 a meeting took place with Mr Ibrahim regarding a Cover Staff Multi-Skilled Operative role. The evidence of Ms Martin is accepted that the role was not suitable for the Claimant and that no other suitable vacancy could be identified. The Claimant's evidence is accepted that the Cover Staff role involved extensive travel between locations and was unsuitable because of her disability and medication.

66. On 21 August 2024 Ms Martin issued the appeal outcome. After reviewing the welfare process, Occupational Health evidence, fit notes, redeployment efforts and the August 2024 vacancy exercise, she rejected the appeal and upheld the dismissal:

> *"we agreed that the Company would accommodate the reasonable adjustments such as locker, light boots. You also were provided*

*Company's vacancy list to review once again for any suitable positions across the wider business. The list was provided for you to review all the vacancies across the business to not limit the options just on the TFL contract."*

…

*"I note that you have provided only one Fit note for light duties and altered hours from 28th February 2024 until 31st March 2024. The Company has provided you with a Vacancy list in March 2024, but you refused to review the positions available for the Company to support you. You did not wish to see the list because you said that you would like only to work as a train litter picker or accommodation cleaning. You were informed that your position as Multiskilled operative cannot isolate a specific task and therefore such alterations cannot be done."*

67. On 29 August 2024 the Claimant presented her claim to the Employment Tribunal.

68. The Tribunal accepts the Claimant's fit notes supplied to the Tribunal showing that she was unfit to work until February 2026.

## The law

### Discrimination

69. Section 6 of the Equality Act 2010 ("EqA") provides that disability is a protected characteristic.

70. S.39(2) EqA prohibits an employer from discriminating against one of its employees by subjecting the employee to a detriment.

71. An Employment Tribunal must take account of the Code of Practice on Employment (2011), published by the Equality and Human Rights Commission (the EHRC Code) where it considers it relevant (pursuant to paragraph 12 of Part 1 of Schedule 1 of the 2010 Act).

### The burden of proof

72. S.136 of the EqA sets out the burden of proof:
    - *"…(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
    - *(3) But subsection (2) does not apply if A shows that A did not contravene the provision…"*

73. The burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another (*Hewage v Grampian Health Board* [2012] IRLR 870, SC).

74. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong* [2005] IRLR 258. Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

75. Case law recognises that very little discrimination today is overt or even deliberate. Witnesses can be unconsciously prejudiced.

**Reasonable adjustments**

76. Section 20(3) EQA 2010 provides:

> *"…where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, [there is a requirement] to take such steps as it is reasonable to have to take to avoid the disadvantage."*

77. Section 20(4) EqA 2010 provides:

> *"The second requirement is a requirement, where a physical feature 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.*

78. Section 20(5) EQA 2010 provides:

> *"…where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, [there is a requirement] to take such steps as it is reasonable to have to take to provide the auxiliary aid."*

79. "Substantial" is defined at section 212(1) EQA 2010 to mean "more than minor or trivial".

80. Section 23 EqA does not apply to section 20. It must be a disadvantage which is linked to the disability. That is the purpose of the comparison required by

section 20. However, it is not really a causation question. HHJ Simler P said in *Sheikholeslami v University of Edinburgh* [2018] IRLR 1090 that:

> *"The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question. For this reason also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances…The fact that both groups are treated equally and that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability.*
> *Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."*

*81.* General guidance as to the overall approach to reasonable adjustments was given in *Environment Agency v Rowan* [2008] ICR 218:

- The PCP must be identified;
- The identity of the non-disabled comparators must be identified (where appropriate);
- The nature and extent of the substantial disadvantage suffered by C must be identified;
- The reasonableness of the adjustment claimed must be analysed.

82. The identification of the PCP should follow a liberal approach and a Tribunal should widely construe the statutory definition: *Ahmed v Department for Work and Pensions* at [2022] EAT 107 [25]. In *Carreras v United First Partners Research* UKEAT/0266/15/RN the EAT stated that the tribunal's approach was overly technical and took an unduly narrow view of the employee's identification of the PCP.

83. The duty does not arise however unless the employer knows or ought reasonably to know that the employee is disabled *and* that the PCP put him at a substantial disadvantage (paragraph 20(1) Schedule 8 EQA). The EHRC *Code of Practice on Employment* gives useful guidance on knowledge particularly at paragraph 5.15.

84. In *Secretary of State for Work and Pensions v Alam* 2010 ICR 665 and *McCubbin v Perth and Kinross Council* EATS 0025/13 the EAT held that a tribunal should approach this aspect of a reasonable adjustments claim by considering two questions:

(i) did the employer know both that the employee was disabled and that the disability was liable to disadvantage the employee substantially?

(ii) if not, ought the employer to have known both that the employee was disabled and that the disability was liable to disadvantage the employee substantially?

85. Responsibility lies with the claimant (not the employer) to broadly identify the nature of the adjustment that would alleviate the substantial disadvantage. Once this is done, the burden shifts to the employer to demonstrate either that the proposed adjustment would not have mitigated the disadvantage, or that it was not a reasonable adjustment to implement.

86. In *Doran v DWP* [2014] UKEATS/0017/14/SM, a case decided under the predecessor to the Equality Act 2010, the Disability Discrimination Act 1995, Lady Stacey upheld a Tribunal's decision that the duty to make reasonable adjustments did not arise where the Claimant was off sick and not fit to work with no proposed return date.

87. Case law confirms that the test of reasonableness under Section 20 of the Equality Act is objective. Ultimately, it is the employment tribunal's assessment of what is reasonable that prevails. A claim for failure to make reasonable adjustments may therefore require the tribunal to take the unusual step of substituting its own judgment for that of the employer—an approach that contrasts sharply with the standard applied in unfair dismissal cases, where such substitution would constitute an error of law. The Equality and Human Rights Commission Code of Practice gives useful guidance at paragraphs 6.28 and 6.29 upon potentially relevant factors. These include allocating duties to another worker.

88. In *Home Office (UK Visas and Immigration) v Kuranchie* UKEAT/0202/16 wherein the EAT held that an employer may breach the duty to make reasonable adjustments for failing to take steps that the employee has never asked should be taken until the Tribunal hearing.

89. The Tribunal's evaluation of reasonableness must focus on the practical effect of the measures available, rather than the employer's reasoning or the process by which the decision to implement (or not implement) an adjustment was reached.

90. Whilst a one-off decision or act could amount to a practice, the term generally connotes *"some form of continuum in the sense that it is the way in which things generally are or will be done"* (*Ishola v Transport for London* [2020] EWCA Civ 112).

91. In *Rentokil Initial UK Ltd v Miller* [2024] EAT 37 the EAT held that a tribunal had not erred by regarding the giving of a trial period in a new role as a reasonable adjustment - The wording of s.20(3) referred simply to "such steps as it is reasonable to have to take to avoid the disadvantage". The statute did not

attempt to restrict or sub-categorise what form such steps might take in a given case. The proposed step did not have to be guaranteed to work.

**Discrimination Arising from disability**

92. Section 15 EqA provides that discrimination arising from disability occurs where:

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

93. In *Pnaiser v NHS England and anor* [2016] IRLR 170 EAT, Mrs Justice Simler considered the authorities and summarised the proper approach to determining s.15 claims in paragraph 31:

> *"(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*
>
> *(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.*
> *(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).*
> *(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing*

*J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*

*(e) For example, in Land Registry v Houghton UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.*

*(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.*

*(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.*

*(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.*

*(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."*

94. In respect of the employer's knowledge, The Statutory Code of Practice suggests that "Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person"" (para 5.14). An example is given at paragraph 5.15, of where a sudden deterioration in an employee's time-keeping and performance and change in behaviour at work should alert an employer to the possibility that these were connected to a disability and lead the employer to explore with the worker the reason for the changes and whether difficulties are because of something arising in consequence of a disability, in this example, depression.

95. Further, 6.19 states:

> "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 upon the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

96. Unfavourably" is not defined in the EQA. The Code at paragraph 5.7 states that it means that the disabled person "must have been put at a disadvantage". The Code notes that: "Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably."

97. A respondent can successfully defend a claim if it can prove that the unfavourable treatment is a proportionate means of achieving a legitimate aim. Under section 15, what must be weighed in the balance is the discriminatory impact on the individual (including the causal connection to their disability) rather than the impact on the disadvantaged group as a whole (*Stott v. Ralli Ltd* UKEAT 0223/20, para 81).

98. The Code, para 5.21 states – "If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified."."

## Conclusions

### Reasonable adjustments

### (a) When did the duty to make reasonable adjustments arise?

99. The Claimant worked for approximately 6 months until commencing sickness absence on 29 August 2023. She thereafter remained absent from work and submitted a series of fit notes citing conditions including back pain, lymphoedema and knee problems saying she was not fit for work. This changed on 28 February 2024.

100. On 4 October 2023 the Claimant emailed Mr Aderinola stating that she had not been able to get hold of her supervisor, she was on sick leave and attached sick notes and medical evidence. She asked for assistance and expressed the hope that she would return to work soon. At the welfare meeting the Claimant told Mr Aderinola that she was not well enough to work. The Claimant's doctor wrote on 26 October 2023 saying that the Claimant had longstanding and ongoing back pain that had been deteriorating over the preceding two years, she was unable to lift or stand without support and had poor sensation in the leg. An MRI had revealed possible nerve root impingement and a disc bulge and facet joint degeneration. She had been referred to a musculoskeletal specialist and was on the waiting list. While the Claimant said to the Tribunal that the reference to 2 years' of pain was incorrect, this was the information that was provided to the Respondent by the Claimant's doctor.

101. On 30 October 2023 the Claimant emailed Mr Aderinola stating that she wished to return to work as soon as possible, he replied asking the Claimant when she expected to return to work. The Claimant emailed Mr Aderinola stating that her fit note ran until 12 November 2023 and that she would be happy to return on 13 November 2023. However, before this happened, on 9 November 2023 the Claimant emailed Mr Aderinola with a disability card and fit note and stated that she wished to discuss returning to work when her condition improved. At a welfare meeting on 24 November 2023 the Claimant said she could clean accommodation areas, offices and toilets and could empty bins if they were not full, but stated that she could not climb stairs or lift many boxes. However, she remained under a fit note saying she was not fit for work.

102. The Respondent took advice from Occupational Health who produced a report dated 27 December 2023. The report recorded degenerative lower back pain and lymphoedema, stated that both conditions were not curable, and considered that physical activity exacerbated symptoms. The report advised that the Claimant was not fit to undertake her role without adjustments, suggested reductions in the physical demands of the role and stated that limitations in physical capacity were permanent. In relation to a likely date of return to work, the doctor said that "she is happy to return on 8/1/24." However, the Claimant then submitted a fit note from her GP on 4 January 2024 saying she was not fit for work. The Respondent was bound to take at face value the GP notes that said she was not fit for work.

103. On 19 January 2024 the Claimant attended a welfare meeting where she was asked whether there were reasonable adjustments that could be made and she said "not at moment but after my appointment with doctor I will see if I need one".

104. On 23 February 2024 a further welfare meeting took place where the Claimant reported good and bad days with pain if she was walking too much. The Claimant did not think she could do her MSO tasks and wanted to do accommodation cleaning only. She then submitted a fit note dated 28 February 2024 stating that she might be fit for work if amended duties and altered hours could be provided.

105. I conclude that it was only at this point that the duty to make reasonable adjustments arose. The medical evidence presented and what she said about her health had demonstrated she was not fit to return to work. While she had indicated from time to time that she would like to return, and I do not doubt that she wanted to be well enough to return, she simply was not well enough and her medical information and repeated fit notes showed this. She had not got to the point of having a date that she could actually return. I have not accepted her evidence to the Tribunal that she was well enough to return if adjustments had been made. The contemporaneous records do not support that. If the real issue had simply been an absence of adjustments and that was why the doctors considered her to be unfit for work, they would have instead recorded that she could work with adjustments, as they did on 28 February 2024. The reason why her doctors issued fit notes saying she was unfit for work was just that – she was unfit with or without adjustments.

106. Once the Claimant submitted a fit note dated 28 February 2024 stating that she might be fit for work if amended duties and altered hours could be provided the duty to make reasonable adjustments arose.

**(b) Did the Respondent have a PCP of the requirement to work 5 days per week?**

107. There were some people at the Respondent who worked part time (less than 5 days). While the Claimant's flexible working request requested a drop from five days to three days at her usual places of work in Stratford and Euston, it was clear in the meetings that the Claimant was also seeking a change in duties. She accepted that she could not undertake the duties required of the MSO role. The Respondent did explore with her what duties she could do and what duties she could not do. The Claimant wanted an accommodation cleaning role which involved back office cleaning. However, there was not enough work to sustain a role, it only amounted to approximately 1 hour per day. I conclude that the Respondent did not, in isolation, have a PCP of the requirement to work for 5 days.

108. As an aside, it is my view that they did have a PCP of the requirement to carry out the duties of the MSO role (whether that was 5 days per week or part time), but even if the Claimant had pleaded this (which she did not), as set out below, adjusting it to 1 hour a day accommodation cleaning only role would not be a reasonable adjustment.

**(c) Knowledge, the nature and extent of the substantial disadvantage suffered by the claimant**

109. The Respondent knew the Claimant was disabled in respect of all three disabilities and that the disability was liable to disadvantage the employee substantially. While the Respondent disputed knowledge of the Claimant's osteoarthritis, they should have known. The doctors' letters, occupational health records, fit notes and what the Claimant said about her health meant that the Respondent had knowledge, or inferred knowledge in respect of osteoarthritis.

110. If there was a PCP to work 5 days (which I have concluded there was not), having to work 5 days would have put the Claimant at a substantial disadvantage due to her back pain, leg swelling and the need to commute more days with a suitcase containing her uniform.

**(d) The reasonableness of the adjustment claimed**

111. The Claimant suggested the reasonable adjustment of granting her flexible working request. Her flexible working request was to reduce her days to three at Euston and Stratford. As I have found, the Claimant would not have been able to perform the MSO role. This is regardless of whether it was 5 days or 3 days. While it is true that the proposed step did not have to be guaranteed to work (*Rentokil*), in this case, even the Claimant was not saying that she could have worked 3 days in the MSO role. Reducing her days to three would not have alleviated the substantial disadvantage. Further, the period that the Claimant was fit to work with adjustments only lasted for 3 ½ weeks. The flexible working request was considered at the meeting on 27 March 2024. The Claimant subsequently provided a fit note dated 25 March 2024 stating that she was not fit for work again. I conclude that reducing her hours to three days per week would not realistically have enabled her to return to work. She simply was not well enough to do the requirements of the MSO role over three days.

**(e) Other adjustments**

112. While the Claimant has not pleaded these proposed adjustments, for completeness I consider other adjustments as the Claimant did seem to argue

for them in the Tribunal. The Claimant sought either an accommodation cleaning only role or a train litter picking role. Neither were suitable. Accommodation cleaning at Euston and Stratford was insufficient to create a standalone post. The single dedicated accommodation cleaning role at Fleet House was already occupied by an employee who had held the post for several years and, in any event, involved duties which the Claimant was unlikely to be able to perform because of her medical condition. Train litter picking involved extensive movement and cleaning within train carriages, which Mr Aderinola concluded would not be safe in light of the Occupational Health advice.

113. While the Equality and Human Rights Commission Code of Practice suggests allocating duties to another worker, the Respondent would have had to have given all of the MSO duties to another worker, with the exception of one hour a day accommodation cleaning. The Claimant suggested to the Respondent's witnesses that they should have found other duties to make up the rest of the day. That would not be reasonable. The Respondent was not required to remove the essential duties from the Claimant's role nor create an entirely new post for her and find her other duties.

114. The Claimant submitted that the alternatives proposed by the Respondent were unsuitable because of travel distances, night work or lack of training. I conclude that the Respondent did actively explore alternatives. It discussed vacancies with the Claimant, provided vacancy lists, made enquiries regarding available roles and investigated opportunities both before and during the appeal process. Some vacancies identified by the Claimant subsequently became unavailable, the CCTV role had already been filled. The Respondent should have provided more up to date lists of vacancies. To find out that the vacancy she was interested in had already been filled was disappointing to the Claimant, but the reality was that there were no available alternative roles that were suitable for the Claimant. The National Gallery role was rejected by the Claimant because she considered it unsuitable as she was not used to working in a specialised environment. The Claimant did not want to pursue the Cover Staff MSO role because it involved travelling between locations. I reject the Claimant's submission that the Respondent should not have offered her jobs that she could not do. The Respondent should have, and did, provide her with available vacancies and then the discussions about hours, adjustments and specifics of the role would have been discussed at interview with the hiring manager. Unfortunately, no suitable alternative employment existed which the Claimant could perform and wished to accept.

115. The Claimant submitted to the Tribunal that she was required to wear heavy boots. The Respondent consistently said that they would provide her with

lighter safety boots, although of course because she did not return they did not provide them to her.

**Discrimination arising from Disability**

**(a) Unfavourable treatment and what caused it**

116. The Claimant claims that the Respondent treated her unfavourably by not offering her a suitable alternative job (List of Issues 1.1.2). Not offering a suitable alternative job could be unfavourable treatment. However, the reason why she was not offered a suitable alternative job did not arise from her being unable to fulfil her current role and being on long term sick leave. There is no evidence to substantiate this and this was not what the Claimant was arguing before the Tribunal. The reason why the Claimant was not offered a suitable alternative role was not because of her sickness absence or inability to fulfil her existing role but because no suitable vacancies existed. A reduction in duties to one hour accommodation cleaning was not a suitable alternative, nor was a train litter picking job, nor were the other available vacancies.

117. The Claimant claims that the Respondent treated her unfavourably by dismissing her (List of Issues 1.1.1). Dismissal is unfavourable treatment. The Claimant's employment ended for reasons arising out of her disability, because she had been off sick for lengthy period of time, because she had become medically incapable of undertaking the duties of her MSO role and because there was no realistic prospect of her return to work in the near future.

**(b) Was the treatment a proportionate means of achieving a legitimate aim?**

118. The Respondent relies on three legitimate aims: The health, safety and welfare of the Claimant, the staffing requirements of the business and providing an efficient service.

119. By the time of her dismissal on 30 May 2024 the Claimant had been absent continuously for approximately nine months and remained medically unfit. While I do not doubt that the Claimant very much wanted to retain her job and wanted to return when she could, the reality was that she was not well enough to do so.

120. The Respondent held repeated welfare meetings, considered GP evidence, obtained Occupational Health advice, explored adjustments, postponed capability proceedings to allow medication to settle and continued discussions over many months. The fit notes the Claimant supplied consistently

certified the Claimant as not fit for work save for a brief period between 28 February and 31 March 2024 when a fit note stated that she might be fit if adjusted duties and altered hours were available.

121. By May 2024 the Claimant remained absent, stated that she did not know when she would return, and could offer no medically supported return date. Contrary to the Claimant's submissions, in circumstances where the Claimant herself says she is unwell and does not know when her return will be, I do not think it was incumbent on the Respondent to obtain an updated OH report. I accept the Respondent's submission that waiting longer would not have been reasonable and that the capability process could not continue indefinitely.

*122.* The Claimant's suggestion that she was only unfit for work because reasonable adjustments had not been implemented is inconsistent with the contemporaneous evidence. The wider medical evidence demonstrated progressive deterioration in her health rather than improvement. The fit notes she provided said that she was continuously not fit to work (with one short exception), the Claimant's own statements at meetings, her use of a walking stick, the need for a capability meeting to be conducted remotely, the medication she was on and her trade union's description of her being in severe pain all show she was unfit for work with or without adjustments.

123. The internal HR emails show discussion about alternative roles, reasonable adjustments, welfare meetings and the flexible working application. The Claimant submits the decisions were predetermined and that there was an air of inevitability about her dismissal. Mr Aderinola and other managers were trying to understand what the Claimant's medical issues were, what work the Claimant could perform and whether any alternative arrangements were operationally possible. Unfortunately, as the policy provides, where an employer can no longer support an absence, there are no reasonable adjustments that can be made and no clear idea on when the person may return, dismissal is often the result. The Claimant was clear that she wanted her employment to continue but that was not something the Respondent had to do in the circumstances.

124. The Claimant's duties had been covered by other staff during her absence and I accept that this arrangement could not continue indefinitely where there was no foreseeable return-to-work date. In her dismissal meeting the Claimant said that she was not sure when she would be able to come back to work, perhaps in November, which was in six months' time. At the appeal hearing the Claimant stated she was still unfit for work, was continuing to take medication that was prohibited by the TfL contract and would be taking this

medication for another two months. The Claimant confirmed to the Tribunal that she was not fit to work at that time. Ms Martin tried to find other roles for the Claimant to consider. Ms Martin would have reinstated the Claimant if suitable alternative employment could be found but as it was not, the Claimant did not get reinstated.

125. It is a legitimate aim that the Respondent manages the Claimant's health, safety and welfare through implementation of its capability processes. The Claimant herself found the process required "significant physical and mental effort", the Claimant's representative said she was in "excruciating pains".

126. The staffing requirements of the business and providing an efficient service are also legitimate aims. The Respondent had been covering the Claimant's role using cover staff. The Respondent could not have been expected to continue this indefinitely, especially in circumstances where the Claimant had been off sick for 9 months and there was no foreseeable return to work date. Weighing up the effect on the Claimant against the impact upon the Respondent, I conclude that it was proportionate in the circumstances to dismiss the Claimant.

Approved by:

**Employment Judge Burge**

**8 September 2026**

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at https://www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. 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 at www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/