RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr R Garrard**

Respondent: **London Underground Ltd.**

Held at: **East London Hearing Centre**

On: **19, 20 November 2020,**
10 and 11 August 2021 and 21 December 2021
(17 January 2022 hearing in chambers)

Before: **Regional Employment Judge Taylor**

Members: **Mrs B Saund**
Ms S Harwood

Appearances:
For Claimant: **Mr Toms, Counsel**
For Respondent: **Mr Liberadzi, Counsel**

JUDGMENT

1. **It is the unanimous judgment of the Tribunal that the claimant's claim of a failure by the respondent to comply with its duty to make a reasonable adjustment is dismissed.**

2. **It is the unanimous judgment of the Tribunal that the claimant's claim of discrimination arising from disability is dismissed.**

REASONS

1. The claimant brings claims of disability discrimination against his employer of failure to make reasonable adjustments under section 20 and 21 of the Equality Act 2020 and discrimination arising from disability under section 15 of the Act.

2. The hearing was listed for two days but due to a series of technical difficulties it was necessary to list the hearing for additional days.

3. This judgment has also been delayed due to the heavy workload of the region and the Tribunal apologies to the parties.

4. The Tribunal heard evidence from the claimant and Mr Paul Shannon, RMT Union officer gave evidence on his behalf. On behalf of the respondent, the Tribunal heard evidence from Mr Chris Taggart, Head of Line Operations, District, Circle and Hammersmith Lines, Mr Kieran Dimelow, Train Operations Manager, Central Line, Ms Laura Knott, Temporary Train Operations Manager at the respondent's Loughton Depot and Ms Tracy Styles, Train Operations Manager at the Loughton Depot.

5. The Tribunal had a bundle of documents that comprised of 328 documents.

The claim and issues

6. The claimant was employed by the respondent on 29 December 2014 originally as a Customer Service Assistant, eventually promoted to the role of Train Manager. The claimant is still employed by the respondent.

7. The claimant has Type 1 Diabetes and is insulin dependent. He was diagnosed with diabetes in 1989. Shortly after his employment started and before his probationary period had expired, the claimant had surgery to amputate his big toe on his left foot; that was in April 2015. The claimant's left middle toe was subsequently amputated in February 2016 (114). The claimant's mobility has been impaired by these amputations. He cannot walk long distances. His ability to bear weight on his left foot has been adversely affected. More recently his ability to walk on his right foot has also been affected. The claimant has difficulty driving long distances.

8. The respondent accepts that the claimant is a disabled person within the meaning of section 6 Equality Act 2010 (EQA) by reason of Type 1 Diabetes and by the physical impairment to his left foot.

9. The claimant lives in Benfleet, Essex. The respondent operates a management team at several depots in London, Greater London and Essex. The depot located closest to the claimant's home is the one located at Upminster Station in the London Borough of Havering.

10. On his promotion to Trains Manager the claimant was transferred to work at Edgware Road Underground station. He found commuting to the station extremely difficult due to his impaired mobility and was transferred to work at Upminster Station, as a locum, initially for a period of six months. The claimant was due to be transferred back to work at Edgware Road Underground station at the end of that period but, as a concession to his disability, the claimant was transferred to work at the respondent's depot located in Loughton, Essex.

11. The PCP relied on is the requirement for him to work at the respondent's Loughton Depot or at Edgware Road Underground station.

12. This claim mainly concerns the claimant's inability to commute to and from his home address to his current place of work in Loughton or Edgware Road Underground station.

13. The claimant contends that the PCP puts him at risk of being dismissed because he cannot comply with it.

14. The claimant claims that being required to work at the respondent's Loughton depot, which is located further away from his home, is not a reasonable adjustment and by requiring him to work there the respondent has failed to comply with its statutory duty to make reasonable adjustments. The claimant clams that the requirement to work from Edgware Underground station was also a failure of the respondent to comply with its statutory duty to make reasonable adjustments.

15. The claimant claims that because of his disability he was incapable of commuting to work at Edgware or Loughton; he was only able to commute to Upminster. The respondent's decision to require him to attend a medical case conferences to discuss his fitness to work in early 2020 was a disadvantage imposed on him by the respondent and amounted to discrimination arising from his disability.

16. This case is not about the claimant's work performance. The claimant has an exemplary work record.

17. Relevant to this case is the help the claimant has recently received from Access to Work. Access to Work is a government grant scheme which supports disabled people in work. Only a person in paid work can apply. An employer cannot apply to Access to Work.

18. Access to Work can pay extra transport costs of commuting to work, such as the cost of a taxi, where no public transport is available to a disabled employee.

19. The Access to Work scheme may assist an employer to decide what steps to take when making reasonable adjustments.

20. The claimant successfully applied for assistance to the Access to Work scheme. Access to Work approved the claimant's grant application and has been paying for the claimant to commute to and from work by taxi between his home address and the respondent's Loughton depot from 13 July 2020. The grant is scheduled to cease on 12 July 2023. The total cost of this support is £109,500. Access to Work contributes a maximum of £96,203.57. The claimant receives Personal Independence Payment, has a 'blue badge', a disabled bus pass and a disabled Railcard. The claimant meets the excess transport costs himself; the respondent is not required to make a contribution to these costs.

21. Following an application to transfer to Upminster Station because of his disability, in March 2019 the claimant was informed that he had been placed at the top of the waiting list. The claimant remains the first employee in line for a transfer to Upminster station when a Train Manager vacancy arises.

The legal issues

22. The issues for the Tribunal to determine were initially discussed at a preliminary hearing held on 15 June 2020 and set out in a case management order of Employment Judge Russell sent to the parties on 17 June 2020. Further information was provided by the parties following that hearing and the final list of issues are:

Disability

1. Was the Claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the following condition(s)?

(a) Diabetes Type 1
(b) Physical impairment to the left foot.

2. It is accepted by the respondent that the claimant is a disabled person within the meaning of section 6 **Equality Act 2010** (EQA) by reason of Diabetes Type 1 and by the physical impairment to the left foot.

Reasonable adjustments: EQA, sections 20 & 21

3. Did the respondent apply a provision, criterion or practice to the claimant in that they required him to work either at Loughton or Edgware Road Underground stations ("the PCP")?

4. If the respondent did apply the PCP to the claimant, did it cause the claimant a substantial disadvantage due to his disability compared to non-disabled employees?

(a) The substantial disadvantage is the claimant's inability to attend at either Loughton or Edgware Road Underground stations and/or only attend with significant difficulty due to his disability. The claimant will say that his disability means:

(i) He is unable to drive to Loughton Underground station and/or can only drive there with great difficulty; and/or

(ii) He cannot attend at either Loughton or Edgware Road Underground stations via public transport due to the amount of walking involved. The claimant is only able to walk short distances due to his disability.

(b) The comparators relied on by the claimant are non-disabled employees of the respondent who are based at either Loughton or Edgware Road Underground stations and who have no difficulty travelling there.

5. If so, what steps was it reasonable for the respondent to take to avoid the disadvantage? The claimant suggests the following steps were reasonable:

(a) Transferring the claimant to work at Upminster Underground station as recommended by Occupational Health and the claimant's podiatrist; and/or

(b) Transferring the claimant to Upminster Underground station on a 'one over establishment' basis pending a permanent vacancy becoming available;

(c) Transferring the claimant to any other suitable alternative station closer to his home.

6. The claimant contends that these adjustments ought to have been made by 20 February 2018; 1 October 2018; 5 December 2019 and 17 December 2019 (in an email dated 13 July 2020).

Equality Act 2010, section 15: Discrimination arising from disability

7. Was the claimant treated unfavourably by the respondent through them not finding him a suitable alternative work location and/or leaving him without a work station so he is unable to work with his ongoing employment being in increasing jeopardy.

8. Was any unfavourable treatment because of something arising in consequence of the claimant's disability? The claimant will rely upon his inability to drive or walk any significant distance.

9. For any proven unfavourable treatment, (*ie by the respondent starting the capability/case conference process in January 2020*) was that because of the claimant's inability to drive or walk any significant distance?

10. Was any proven unfavourable treatment a proportionate means of achieving a legitimate aim? The respondent will rely on the following aims:

(a) Workforce management.
(b) Business efficacy
(c) Maintaining a service within the allocated budget
(d) Health and safety of employees and the public

Jurisdiction

11. Is the claimant's claim in time?

12. Does any failure to make a reasonable adjustment and/or ongoing failure to find the claimant alternative work amount to conduct extending over a period within s.123(3) EA?

13. If the claimant's claim is out of time, is it just and equitable for time to be extended?

Remedy

14. If the claimant's claim succeeds, what is the appropriate remedy? Declaration; and/or compensation; and/or recommendation?

The facts we found

23. The Tribunal has not dealt with every single matter that was raised in evidence or all of the documents. We have dealt with matters that we found relevant to the issues we have had to determine. The two heads of claim: discrimination arising from disability and failure to make reasonable adjustments are inextricably linked by the same factual matrix. We will deal with both claims separately in our conclusion, but some of our findings are relevant to both claims.

24. The London Underground is a public transport system serving London, Greater London and some parts of the adjacent counties, including Essex.

25. The claimant was employed by the respondent company from 29 December 2014 and has been continuously employed since then. The claimant has lived in South Benfleet, in Essex, throughout the period of his employment with the respondent. At the date of the hearing the claimant was working at the respondent's Loughton depot.

26. The claimant was initially employed as a Customer Services Assistant working at Liverpool Street Underground station (which is on the Central Line). In February 2016, the claimant was appointed to the more senior position of Train Operator, working at Leytonstone Station (which is also on the Central Line). The claimant was promoted again on 8 August 2017, this time to the position of Trains Manager, when he was assigned to work at Edgware Road Underground station (on the Bakerloo line).

27. Early conciliation started on 19 December 2019 and ended on 19 January 2020. The claim form was presented on 6 February 2020.

Start of employment in 2014

28. When the claimant first applied to work for the respondent as a Customer Service Assistant working at Liverpool Street Station, he was required to attend an initial employment assessment and examination with an occupational health medical adviser (OH). The assessment was conducted on 5 December 2014. OH advised the respondent that the claimant did not meet the medical requirements for the Customer Service Assistant role. The respondent was specifically advised that in order to employ the claimant the following restrictions would need to be made:

> '…. No live trackwork
>
> No platform edge
>
> If employed he will require yearly medical reviews from occupational health (53).'

29. The claimant was employed by the respondent as a Customer Services Assistant commencing on 29 December 2014, but with the restrictions recommended by OH were imposed.

Deterioration of health in 2015

30. In a letter dated 7 March 2015 the claimant wrote to OH seeking removal of these restrictions (54-55) because he intended to apply for promotion to the position of Train Operator. Although the restrictions did not prevent the claimant carrying out his role as CSA, it had, according to the claimant, prevented him from completing the 'live track' part of his training. The claimant complained to the respondent that the restrictions had been imposed because he had diabetes and claimed the restrictions were, therefore, discriminatory. He informed the respondent that although he was an insulin dependent diabetic his condition was stable and had been well controlled for many years. The claimant added that he had previously worked for a railway company carrying out safety critical work without restrictions having been imposed. He could drive an articulated lorry on an LGV class I licence, he could lead a normal life with his condition, which included travelling on trains, crossing roads, getting on and off buses and trams, all without difficulty.

31. In a letter of reply from a consultant occupational physician, the claimant was reminded that no medical information can be taken into consideration before the offer of a job. As he had been a diabetic treated with insulin for over 25 years he would need to undertake a risk assessment for the position of Train Operator, but that was not something that would be available to him before an offer of appointment to that role. The claimant was referred to his then line manager who, he was told, could request a review of the restrictions (56).

32. The claimant approached his area manager, Mr Powell, about this, and Mr Powell applied on his behalf for a review of the restrictions by completing a sickness and absence referral to OH, which was dated 26 March 2015 (57-60). A brief history of the claimant's condition, prepared with the claimant's approval, was included in the referral. This recorded that the claimant considered that having diabetes, without more, was not a reason for applying these restrictions (58).

33. Despite the confidence the claimant had expressed in the stability of his medical condition, a few weeks later, on 14 April 2015, he attended the Accident and Emergency Department at Southend University Hospital with severe swelling of his foot, ankle and lower leg. In an email dated 19 April 2015, the claimant informed Mr Powell about that. The claimant informed his manager that after tests he was found to have a severe infection in the left foot and in the big toe of his left foot. As a consequence, his big toe had been amputated. He was still in hospital and likely to remain there for at least one more week and he required several months convalescence. The claimant informed Mr Powell that he was concerned about his uncompleted probationary period and his entitlement to sick pay.

34. In a follow up to the statement made about his health on the 7 March 2015, the claimant added:

> '..as you know my diabetes is extremely well controlled and I am fit and well, so it has come as a complete shock to me…. The surgeon has told me that I will make a full recovery in a couple of months or so… I will be unable to return for several more weeks, as the wound is very deep and needs a lot of medical attention, including total rest, foot elevation and the district nurses having to call upon me every day, so I thought I had better let you know …'(62-63).

35. Before a response had been received to the referral sent to OH on 26 March 2015, the claimant's manager wrote a second referral letter dated 28 April 2015, following the deterioration in the claimant's health (64-67).

36. The discharge from hospital summary dated 8 May 2015 records:

> 'Mr Garrard presented with worsening of a left foot ulcer on his big toe. He underwent an amputation of this toe on 16/4/15 and recovered well post operatively. He has suffered with phantom limb pain during his admission and was commenced on Pregabalin….'(68-69)

37. The claimant remained absent from work on sick leave for several months. During this period of sick absence, the claimant attended an examination with OH on 12 June 2015. The occupational health physician advised:

> '.. At this stage, he needs to completely rest his foot and have daily wound dressings. Therefore, he is currently not fit for any work.
> Based on his rate of progress so far, he may be able to resume some work in around one month's time. This is subject to him being able to manage the commute at that stage. He should resume to a seated role only, with a stool to elevate his foot. It is likely that he will require reduced hours initially, which could be increased gradually. I do not think he will be fit to resume CSA duties before six months post-op (i.e .October 2015) (71-72).

38. A case conference was held on 21 July 2015 to discuss arrangements for the claimant's return to work. At this conference the claimant reported that his wound had 'nearly completely' healed and he was wearing normal footwear (trainers) and he was no longer walking with a stick. The claimant reported he had stopped taking all medication apart from insulin. Asked what had caused the massive improvement since the last occupational health report on 12 June, the claimant explained he had a 'positive outlook' and had been managing his own physiotherapy and exercises. The claimant claimed to be ready to return to work on a phased return. The claimant proposed that he return to work on 3 August 2015, taking up light duties between 3 August and 4 September, followed by taking a period of annual leave from 5 until 19 September 2015. He proposed a return to work carrying out his full CSA duties on the 20 September 2015.

39. Mr Powell agreed to claimant's proposed return to work schedule, but only if the claimant was assessed as fit to return to work by his GP. Mr Powell also said that he would ask OH to comment on suitable footwear for the claimant. The claimant said that he would also discuss suitable footwear with his own foot specialist at his next review (73-74).

40. Following this meeting Mr Powell referred the claimant to OH for specific guidance on the return to work schedule proposed by the claimant. (The referral is dated 21 July 2015 and is at document 75-78.)

41. On 3 August 2015, the claimant returned to work on temporary alternative duties, while he continued to recover from the amputation.

42. The claimant attended another OH assessment on 19 August 2015 (80 to 82). It is recorded in the notes that the claimant was by then still in discomfort and was not wearing safety shoes. When he was completely free from discomfort, he may be allowed to purchase comfortable safety footwear which comply with the respondent's PPE policy.

43. It was anticipated that the claimant would be returning to his full CSA duties on 5 September 2015, beginning with working five hours per shift for the first week, increasing to full hours over three weeks. However, OH assessed the claimant as not being ready to return to carry out 'track based work' until he was able to purchase and wear safety footwear. The claimant was permitted to wear comfortable footwear until he was symptom-free. The respondent was required to adopt a flexible approach to the timing of rest breaks to prevent any swelling and tension and informed that the claimant should elevate his foot as much as possible (80-82).

44. In December 2015 the claimant applied for role of supervisor (CSS1 or CSS2). The claimant completed an occupational health medical questionnaire on 26 November 2015 (83-89) in support of his application for this role.

Occupational health assessments in 2016

45. The claimant was assessed by OH on 19 January 2016 as medically fit for promotion/transfer to CSS1 or CSS2. This role involved working day and night shifts. The claimant was given guidance about how to manage his diabetes while on duty, but no safety restrictions were required for this role. The claimant was required to be reviewed annually at occupational health (91-96).

46. The claimant had more surgery in February 2016. This time the surgery was to amputate his left middle toe. The claimant was absent from work on sick leave following the procedure.

47. At about the same time, and before having taken up a CSS1/2 post, on 18 February 2016, the claimant successfully applied for the job of (part-time) Train Operator (104). The appointment was put on hold until the claimant was assessed as fit for the role by OH (104 -110, 111 -112). The claimant completed an occupational health questionnaire intended to assess his fitness for that role (97-103).

48. The claimant was examined by an occupational health physician on 2 March 2016 (106-110,113). The claimant was still on sick leave and had not returned to work by that date.

49. Following the examination, the occupational physician informed the respondent, in a letter dated 3 March 2016, that further information was required about the claimant's diabetes condition before his suitability for the role of Train Operator could be assessed. The claimant was assessed as fit for his CSA role with restrictions of 'no prolonged standing or walking…' for a period of two weeks.

50. The occupational health physician wrote to the Southend University Hospital for information about the claimant's diabetic health on 3 March 2016 (111-112). The Hospital's Diabetes Department replied to OH in a letter dated 5 April 2016. No matters

of concern were mentioned in that letter (114-5). That letter was delivered by the claimant with a second letter from himself, dated 5 April 2016, chasing confirmation of his internal promotion to the role of Train Operator. The claimant confirmed that he had returned to work following the recent surgery and had been completing his CSA duties with 'no restrictions at all' (116).

51. The claimant was informed that another occupational health assessment was required on his medical suitability for promotion/transfer to the role of Train Operator (117, 118, 119).

52. The claimant attended an occupational health assessment on 29 April 2016 (120 -124). The occupational health physician recommended that the claimant test his blood sugar level for one month and first attend a practical mobility check on a mock track (127,129). An OH appointment was then arranged for 7 June 2016 (140-145). Following this appointment, the respondent was notified, on 8 June 2016, that the claimant could be assessed as medically suitable for promotion/transfer to the role of Train Operator, provided that he completed recommended checks and steps set out by the occupational health adviser. These included that the claimant could complete the classroom-based training but that a risk assessment would need to be undertaken before he would be permitted to begin the practical part of the Train Operator training (146-147, 149). It is not clear on what date, but the claimant was appointed as Train Operator working from Leytonstone Station (Central Line).

Promotion to Trains Manager and transfer application made in 2017

53. In or about August 2017, the claimant applied for promotion from Train Operator to the position of Trains Manager (sometimes referred to as Train Manager). The respondent assigns a fixed establishment of Trains Managers to each depot. The numbers assigned depending on operational requirements and allocated budget for each depot, on average there were about ten Trains Managers per depot, managing a total of about 150 Train Operators (318). The employment cost to the respondent of employing a Trains Manager was approximately £100,000. Save in exceptional circumstances, such as locum cover or cover for long term sick leave, the respondent did not assign Trains Managers to work at a depot if to do so would exceed the number of established posts. With fewer Trains Managers employed by the respondent it follows that opportunities to transfer location might be more restricted than for Train Operators.

54. The claimant attended an occupational health assessment and promotion medical for the role of Trains Manager on 8 August 2017. The claimant was assessed as medically fit for the position but was required to check his blood sugar level before undertaking any safety critical role (148-155).

55. The claimant was appointed as a Trains Manager, assigned to work at Edgware Road Underground Station (Hammersmith and City Line) from 9 November 2017, after completing staff room training (155i).

56. The claimant was used to working on the Central Line and was not at all willing to work at Edgware Road. On 5 September 2017, before he commenced his new role at Edgware Road, he sought a position on the Central Line by writing to Mr Simon

Curtis, Performance Manager, who he thought might have some influence (155i). The claimant alleged that the respondent chose to place him Edgware Road notwithstanding that there were vacancies close to his home. The Tribunal was satisfied that the claimant was assigned to work at a location where there was a vacancy and found no evidence to support his allegation.

57. The claimant started work at Edgware Road and shortly afterwards, on 9 December 2017, he completed a standard transfer application form (155iii-iv, 155v).

58. The claimant nominated locations that he wished to be transferred to. The claimant selected locations were: Hainault, Leytonstone and Loughton, stations on the Central Line. The claimant also indicated Barking station, which is on two lines, the Circle and Hammersmith Line and the District Line. The claimant also nominated Upminster station which is on the District Line and North Greenwich and Stratford stations, which are both on the Jubilee Line. All of these cases are allocated to the eastern end of the service.

59. The transfer application form informs applicants that:

> '…Upon your transfer all previous nominations will be cancelled unless a new nomination form is submitted within 28 days of your move. Any previous locations will keep their original application and
>
> …Following your initial appointment to Trains Manager and any subsequent transfers you are not eligible to move to another location for 12 months.'

60. Commuting to any of these nominated stations would involve the claimant walking in order to interchange between stations and would involve periods of standing, walking, climbing stairs and could include him driving to a station to begin his journey. With the exception of Upminster Station and Edgware Road, there was little difference in the difficulty of the commute to those stations.

61. At this hearing, the claimant claimed that he could not easily commute to any of the stations he had nominated, with the exception of Upminster station. He gave evidence that he had simply assumed that any station located to the east of the service would have involved a more manageable commute than Edgware Road. The claimant claimed not to have checked whether he would be able to commute easily to any of these locations. The Tribunal did not accept this evidence. The claimant had expressed a firm view about the locations he preferred to work at, even following up one of his choices in an email (155v). The Tribunal finds the transfer application form the claimant completed accurately recorded which locations the claimant could easily commute to.

Transfers to Upminster and Loughton in 2018

62. Within a few weeks of completing the transfer application form, on 17 January 2018, the claimant spoke to Mr Naughton, the Train Operations Manager at Edgware Road, setting out his now urgent need for a transfer. The claimant is no longer relying on having a preference for working on the Central Line. The claimant had also set out his case for a transfer in writing, in an email, sent to Mr Naughton, on 17 January 2018:

> '… my daily commute to and from work has resulted in a lot more walking and standing than previously, because I am required to interchange between various transport modes and stations, naturally involving a lot of walking…. I am in constant pain because of the greatly increased amount of walking, and this in turn has now caused an ulcer to form on the ball of my foot, which terrifies me, because if this were to get infected it could be catastrophic for me. This ulcer is being closely monitored and managed by my podiatry and biomechanics team on weekly visits, and thankfully appears to be improving. My podiatry team have told me in no uncertain terms that the amount of walking that I'm now doing has most certainly cause these latest problems, and will only worsen due to it. My podiatrist has advised me that I will require further surgery to the ball of my foot… I can only describe the pain and discomfort as excruciating and feel like somebody is burning it with the blowtorch at times.… If I were able to work at a depot closer to my home, I feel that it would not only benefit me, and help with my disability, but also the company, because I am more than fit enough to fulfil my role as a Trains Manager fully.… If I were able to move to Upminster, Loughton and Hainault (they are realistically my first three choices) it would be of massive benefit to me. For instance if I were based at Upminster, I could park my car at Benfleet station using my blue badge, and do the short work to the platform, and again at Upminster, it is a case of a short walk to the stairs to the train crew accommodation. I would also be able to use my blue badge to park at Upminster too, if I was required to drive there at any time. Compare this with my hour and three quarter commute to Edgware Road each way, that involves changing trains, walking from Fenchurch Street, standing on Tube trains etc, etc and you can see why I feel the need to send you this memo Tom.… As I said I am quite capable of doing everything required of me within my role, it really is just the issue of getting in to Edgware Road.…' (155C)

63. Mr Naughton responded to the claimant's request by contacting the relevant Head of Operations, on the same day, 17 January 2018, asking whether the claimant could be transferred to Upminster station. Mr Naughton was informed that a transfer would not be possible because there were no Trains Manager vacancies at Upminster station at that time (155B). Mr Naughton also consulted his colleague Ms Laura Knott, Train Operations Manager and People Management Adviser (PMA), for advice about referring the transfer request to OH. He then made a referral to OH for advice about how the claimant could be helped. (A copy of the referral is at 159-162.) Mr Naughton made the referral the following day, 18 January 2018, and the claimant attended an appointment with an occupational health physician on the 9 February 2018.

64. Following the claimant's examination on 9 February 2018 (156-158, 159-163) a report was sent to Mr Naughton and Ms Laura Knott, informing them that:

> '… on my assessment today there is no doubt that he would benefit from limited amounts of walking/standing which is required in his current commute. I would therefore support his move to a depot with easier commute for medical reasons. It is of course a managerial decision if this can be accommodated… It would benefit him to limit pressure on his foot by limiting standing/walking at work as well as when commuting… On a separate note, with regards to his diabetes, this remains under satisfactory control with insulin and doesn't restrict him from carrying out his substantive role' (168-9).

65. The claimant was invited to a meeting to discuss his transfer request with Mr Naughton and Ms Knott on 20 February 2018 (170). In addition to what he had set out

in his email, the claimant informed them that the pain he was experiencing in his left foot was caused by wearing safety shoes, which he claimed had led to an infection on his foot.

66. Mr Naughton informed the claimant that he had recently identified a temporary Trains Manager vacancy at Upminster station. This position was available because a Trains Manager had been assigned a temporary assignment working at different location. Mr Naughton explained to the claimant that this transfer was being offered to him by way of a reasonable adjustment but would be for a maximum of six months. Mr Naughton emphasised the arrangement would have to be time-limited because the respondent would be incurring additional costs to the business of having to pay for a second manager to cover the position the claimant would be vacating at Edgware station. Mr Naughton hoped that a long-term solution could be found to the claimant's need to work closer to home during this six-month period (173). The claimant was transferred to work at Upminster station, for a six-month period, beginning in March 2018.

67. The Tribunal heard evidence from Mr Taggart, Head of Line Operations for District, Circle and Hammersmith lines, about the respondent's transfer process. There are 6000 members of train staff who work for the respondent and the respondent has a system for the movement of staff. Mr Taggart described that where an individual employee wanted to transfer to a different location, but there was no pressing need for a transfer, they would complete a standard transfer application form and then be added to a waiting list for a transfer to their chosen location. The applicant would be offered a transfer when they had both reached the top of the list for the chosen location and when a suitable job vacancy had arisen. However, where a pressing need for an individual to transfer from one location to another developed that employee could make an extreme hardship transfer application ('hardship application'). If the hardship application was being made for medical reasons an OH report supporting the transfer would need to be produced to support the application. A successful hardship application would see the applicant transferred ahead of other train staff held on the waiting list to a suitable vacancy. A decision on whether a hardship transfer must be made as a reasonable adjustment could not be made at a local level. For the claimant's grade of train staff, the application would be referred to the Managers Administrative Training Council ('MATS Council') for a decision.

68. (The Tribunal did not hear evidence from anyone who sat on the MATS Council decisions affecting the claimant.) The MATS Council is a joint committee of managers and trade union representatives. Applications for transfer by Trains Managers fall under the remit of the Movement Committee of the MATS Council. The terms of reference are set out at 178B. The MATS Council considers the reasons for the hardship application, rather than the preferred location of the applicant when making its decision and there is no appeal.

69. Hardship applications for transfer are only granted by the MATS Council in exceptional circumstances. An exceptional circumstance that can satisfy the requirements for a transfer include the need for reasonable adjustments on medical grounds. The MATS Council considers the available written information about the individual applicant and the relevant OH report, but only where OH has advised that it

is necessary for the individual applicant to move to a different location in order for them to continue to carry out their role.

70. Where the MATS Council concludes that an exceptional reason for transfer has been made out, it will take into account whether a suitable vacant position is available at the preferred location(s) before agreeing the appropriate action. The terms of reference provide that an applicant may not be offered a location of their choice. The MATS Council do not create new posts for the benefit of a hardship applicant or remove an employee out of their existing post ('bumping') to accommodate a hardship applicant. The Tribunal heard and accepted evidence that the respondent has a unionised workplace and it is not the practice of the respondent to compulsorily relocate staff members from their established posts; train staff were protected in their posts. If a suitable vacancy is not available, after a movement request has been granted, the MATS Council will consider transferring the applicant to alternative appropriate locations, where there is a suitable vacant position.

71. The MATS Council will consider assigning the successful applicant a place at the head of a waiting list for a position in a particular location, effectively displacing other train staff who have gained their position at the top of the waiting list by waiting their turn.

72. This strict approach is intended to prevent hardship applicants unduly disadvantaging train staff queueing on the normal transfer waiting list.

73. The claimant was informed that the next step would be to refer his transfer application to the MATS Council.

74. The claimant complained that he did not make a hardship application and he was not informed when the MATS Council would next meet or what information they would take into consideration. The Tribunal finds that hardship applications are made through the manager of the train staff. While it accepts that the claimant was not invited to submit any separate submissions, the Tribunal notes that the terms of reference agreed with the trade unions do not require that hardship applicants should be given this information. Hardship applications for transfer are considered as a standing item by the Movement Committee. The Tribunal finds that in accordance with the usual hardship transfer procedure, the claimant was told by his manager that his application would be referred to the MATS Council. The claimant asked no further questions about this. The Tribunal was satisfied that the MATS Council had the information it required to make a decision on his hardship application.

75. Mr Naughton emailed an occupational health physician on 5 June 2018 about the claimant's application for transfer. The occupational health physician confirmed that the claimant would benefit from an easier commute and that a return to the Edgware Road location would lead to a deterioration in his condition (178). Through Ms Jackson of HR that information was referred to Ms Margaret Waite who was the chairperson of the MATS Movement Committee considering the claimant's application.

76. The MATS Council considering the claimant's transfer application met on 26 July 2018 (178B). The MATS Council had available the claimant's Trains Manager's Initial Nomination Form (provided by Ms Jackson, HR Business Partner (155iii-iv,

178A). The Tribunal find that the MATS Council also had the claimant's letter to Mr Naughton dated 17 January 2018 and the OH report; without which the MATS Council would not have had the information necessary to make or support a decision.

77. The MATS Council reviewed the claimant's application and recorded it approval of his application would mean that he would be placed at the top of the Trains Managers' waiting list for a transfer to Hainault station and that his application was supported by OH (178B -178C, 178D). It was intended that the claimant would remain working at Upminster until the end of August 2018 when he would transfer to Hainault station:

'Mr Garrard was temporarily relocated to Upminster from Edgware Road following a review of his medical condition at Tfl Occ Health; he is sitting in an over established position at Upminster with the hope of moving into a permanent position at Hainault. Which he had nominated as part of the train managers waiting list. A hardship move to Hainault will benefit his health and well-being.' (178B)

78. Although the MATS Council had directed that the claimant would transfer to Hainault, in August 2018, due to the respondent requiring another Trains Manager to be moved there, the claimant was instead transferred to work at the respondent's Loughton depot on 1 October 2018 (178E,179). Ms Tracey Styles, Train Operations Manager, became the claimant's line manager. This was at a time when the claimant was scheduled to return to work following a period of sick leave and holiday leave. (Loughton is located closer to the claimant's home than Hainault.)

79. The claimant did not express any objection to this move or suggest that driving or commuting on public transport to that location would be difficult for him or that he would not be able to continue working for the respondent if moved to that location. The claimant could either drive or commute by train to Loughton. The claimant's could commute by driving to Loughton, a journey of approximately one hour, and then using one of several car park spaces reserved for disabled badge holders, located outside the office on arrival or drive to his local train station and completing the journey by train, that journey would also take him about an hour. Mr Dimelow gave evidence that the amount of walking involved in commuting by train from the claimant's local station in Benfleet to Loughton was less than the walking involved in travelling to Upminster. The claimant disagreed with that view. It is not in dispute that the journey to Loughton is longer that the journey from Upminster.

80. Shortly after his transfer to Loughton the claimant completed a second transfer form dated 22 October 2018. On this occasion the claimant only nominated Upminster station as his preferred location (178G -179). The claimant was asked during cross-examination why he had nominated only Upminster in this form when on 17 January 2018 he had stated that he would be able work from Upminster, Loughton and Hainault stations, but he did not provide an explanation (170).

81. The claimant gave evidence that he had been promised a permanent transfer to Upminster station by Mr Naughton. The contemporaneous notes clearly show Mr Naughton arranged the claimant's transfer to Upminster on a temporary basis. The claimant was informed by Mr Naughton that a further review of his situation would take

place and that in the meantime his case would be referred to the MATS Council, which is what happened.

The claimant is moved to the top of Upminster waiting list in 2019

82. The MATS Council considered the claimant's transfer application for a second time on 13 March 2019. There was still no vacancy at Upminster but a decision was taken to place the claimant at the top of the waiting list for a transfer to Upminster. The respondent was informed that the claimant would be contacted when a permanent Trains Manager vacancy became available on the same day (180A).

83. By the date of the tribunal hearing a permanent Trains Manager vacancy had not become available and the headcount for Trains Manager did not allow for claimant to be transferred. The result is that the claimant remains working at Loughton, while waiting at the top of the list for a transfer to Upminster.

The claimant's foot health and sickness absence in 2019

84. When the claimant was transferred to Loughton, Ms Styles was aware that the claimant had Type 1 diabetes and had had an amputation of part of his foot. Therefore, she regularly discussed his health with him as part of their general discussions. Until the claimant began a period of sick leave in April 2019, after he developed gangrene in his right foot, the claimant had not mentioned to her that he was experiencing any physical difficulties commuting to the Loughton depot.

85. The claimant had surgery on his right foot to remove gangrene on 25 April 2019 and he supplied the respondent with a fit note dated 29 April 2019. The claimant was continuously absent from work on sick leave from 25 April 2019 (193A) until 22/24 September 2019 (185 and 187). In addition to maintaining regular telephone contact with him during this period, Ms Styles, Train Operations Manager, carried out home visits to the claimant on 31 May 2019, 17 June 2019, 3 July 2019 (193B,193C) and on 16 August 2019 (185 – which file note bears the incorrect date of 23 August).

86. The claimant obtained a letter from the hospital podiatry services, dated 11 July 2019 that was addressed on his behalf to Ms Styles stating:

> 'Mr Garrard previously worked at Upminster where the walking distance to get to the workplace destination was reduced and he reports his diabetic foot health was consequently vastly improved resulting in a large reduction in time required for medical appointments and medical treatment and a reduction in the risk further amputation.
>
> Since his move to Loughton resulting in an increased amount of walking and travelling to reach his workplace destination Mr Garrard has suffered a considerable increase in diabetic full foot ulceration placing him at a high risk of infection and consequently a higher risk of further digital amputation.
> It would be of benefit to Mr Garrard's foot health if he could be at a place of work where his travel to work distance is reduced to previous levels.' (184)

87. The claimant held on to the letter and gave it to Ms Styles when she visited him at home on 16 August 2019. Although the letter states that the claimant had been experiencing problems since his move to Loughton, this was the first time that Ms

Styles had been informed that the claimant was having any difficulties with the commute to Loughton.

88. The claimant informed Ms Styles that on his return to work he wanted to move to Upminster station, which he told her was just 15 minutes from his home. At this time the claimant's current fit note expired on 22 September 2019. The claimant explained that the hour-long commute to and from Loughton, either by public transport or by car was so injurious to his mental health and his doctor might prescribe him with anti-depressants. Ms Styles told the claimant that a move could not take place unless he had returned to work. On his return to work at Loughton she could arrange for him to work from home two days a week in order to reduce the commuting time, as a temporary measure. Ms Styles informed him that if a move to Upminster was not available, they would have to consider redeployment or another area (185, 186 and 193D).

89. The claimant informed the respondent that he was assessed as fit to return to work by his consultant (193D). The claimant later complained that the respondent did not carry out a risk assessment before he returned to work at this time. However, it appears that the claimant, who wanted to resume work on 30 September 2019, misled Ms Styles by informing her that his consultant had signed him fit to return to work (202), which was untrue, and by not attending an examination with an occupational health physician before informing Ms Styles he was fit to return to work (187). The Tribunal notes that the claimant did not include a return to work certificate or fit note for in the hearing documents this date, so that we find that no qualified medical practitioner approved this return to work plan. The claimant must therefore bear some responsibility for OH not having given the respondent up to date information before he informed Ms Styles that he was ready to resume work and for agreeing to a return to work plan that he could not comply with.

90. Following the various discussions, the claimant had had with Ms Styles while on sick leave, the claimant resumed working at Loughton on 30 September 2019, on reduced hours as agreed with her.

91. Ms Styles held a return to work meeting with the claimant on his first day back at work (193D and 194). The claimant was not keen to return to work at Loughton because he thought continuing to work at that depot was not sustainable because of his fragile foot health. The claimant returned to work only because he understood from Ms Styles that the MATS Council would not consider another transfer application while he was still absent from work on sick leave (200-202A).

92. A document was shown to the Tribunal, which was an undated letter drafted by the claimant addressed to the MATS Council as a hardship application, which he intended to be sent to the MATS Council through his union, supporting the reasons why he wanted to be moved to Upminster (196-200 and 200A to 200D). The Tribunal is satisfied that while the document was written with the intention of supporting his case for a transfer to Upminster this document was not sent to or seen by the MATS Council.

93. It was arranged that the claimant would initially work three days in the office and two days at home for eight weeks. At about this time there was some discussion

between the claimant and Ms Styles about adapting his car by fitting car paddles to it, so that he could reduce the use of foot pedals when driving to work (195). The claimant investigated this possibility but subsequently found that the fitting of such devices would not provide an effective practical solution because he would still need to operate the car's brake by foot (205). In November 2019 the respondent announced cost saving measures of cuts to the overall number of Trains Managers employed, by a reduction of 22 posts (201) and Ms Styles was aware that there was almost no chance of the claimant being transferred to Upminster.

94. The claimant did not comply with the return to work schedule that had been agreed. He attended the Loughton depot for a few shifts before arranging to take outstanding holiday leave, so that he was only scheduled to work five working days between his return to work on 30 September 2019 and 5 January 2020 (205, 206). The claimant informed Ms Styles that the adjustments she had made were not suitable, given his disability, and he needed to be referred to occupational health at the earliest opportunity. He informed her that he intended to apply to the MATS Council for a transfer to Upminster by way of reasonable adjustment under the Equality Act. Ms Styles informed the claimant that he should not come into work for the scheduled five working days (202A, 202B).

95. Ms Styles concluded then that the arrangements she had made for the claimant had proved not to be suitable adjustments to help him return to work and she could not suggest any further adjustments (206). Ms Styles referred the claimant to OH (204 - 210).

96. The claimant was examined by an occupational health physician on 6 December 2019 (209-210). (In this report the claimant is mistakenly recorded as having Type II diabetes (215C).)

97. The claimant arranged for his podiatrist to provide a medical report for the respondent, which was dated 12 December 2019 (211-22). The podiatrist advised that:

> '… The majority of the problems that Mr Garrard experiences are due to weight-bearing and walking. Due to the amputations on the left foot Mr Garrard has an area of high pressure beneath the second, third and fourth metatarsophalangeal joints which is in constant danger of ulceration and is also extremely painful to weight bear on due to the amount of callus formation that occurs.
>
> I understand that at the present time Mr Garrard's place of work is Loughton underground station. This involves a lengthy walk to the station from his home address to the station, three different changes of train with lengthy walking between services and a long walk from the station at Loughton to his place of work.
>
> This amount of walking is detrimental to Mr Garrard's feet and increases the likelihood of further problems such as ulceration. I understand that no risk assessment was carried out prior to Mr Garrard moved to Loughton. If this had been completed it may have shown that this amount of walking when travelling to get to and from work was putting his feet at further risk.

> I believe that a move to work closer to home which involves less travelling/walking would be beneficial from Mr Garrard and reduce the likelihood of further complications.… ' (212)

98. The occupational health report is dated 16 December 2019. The occupational physician had seen the podiatrist's report and referred to it in his own report. The occupational health physician gave his opinion that the claimant was not fit to work at Loughton when travelling was taken into account. The situation was likely to be permanent and therefore a move to Upminster would likely be hugely beneficial to the claimant (214-214A).

99. The claimant's extreme hardship transfer application was considered for a third time at the MATS Council on 5 December 2019. The extreme hardship application was not accepted, but the claimant was offered as an alternative work location a transfer to the Edgware Road depot. The claimant was informed of the decision in a letter dated 17 December 2019:

> '..from your local station to Edgware Road depot, the number of interchanges on your journey to work reduces although the distance from your home to work location increases. A reason for requesting to change locations was to reduce your walking distance.
>
> Whilst Edgware Road was not your first choice it does support your request.…' (215)

100. The staff establishment of 10 Trains Managers at Upminster was reduced in November 2019, as a consequence of planned costs savings, by one Trains Managers post. It was agreed with the union that this post (and other Trains Manager positions) would be reduced by natural wastage, to avoid making any of them compulsorily redundant. Since November 2019 the staff establishment has remained at 10, although it must be reduced to 9. No vacancies for the position of Trains Managers have arisen at Upminster.

101. The claimant disagreed with the MATS Council analysis of the amount of walking required to attend Edgware or the assessment that he would have less difficulty commuting there than Loughton depot and remained assigned to the Loughton depot.

Fitness to work investigation in 2020

102. Given that the claimant was assessed by occupational health as not fit to work at Loughton, a medical case conference, under the respondent's fitness to work policy was arranged. The purpose of the case conference was to discuss whether the claimant's employment could continue or alternatives. Initially postponed to accommodate Ms Styles absence from work on sick leave, the meeting was eventually held on 24 January 2020 (215i)

103. Ms Styles had not returned to work by that date and Mr Kieran Dimelow, the Acting TOM, Loughton, replaced Ms Styles at the medical case conference. Mr Dimelow and Ms Jackie Galloway, the Employee Relations Partner, were present. The claimant was represented by Mr Paul Shannon (RMT Trade Union). Case conference

notes were written by the respondent dated 24 January 2020 (215A-215E). Mr Shannon also made his own notes of the meeting that were dated 27 January 2020 (216 to 217).

104. At the meeting, the claimant stated that he had been moved from Upminster to Loughton/Hainault without any risk assessment having been prepared in advance and without any consultation with him. He claimed the respondent had failed to make reasonable adjustments and had neglected his welfare. He blamed the move to Loughton as being the reason for his return to hospital in April 2019 with gangrene in his right foot. He claimed to have been required to return to work before occupational health had been consulted and he could not manage the commute to Loughton.

105. The claimant stated that working at either Loughton or Edgware Road would have a seriously detrimental effect on his health and well-being, due entirely to the excessive commuting involved in getting to either of those depots travelling by public transport and/or driving. He was at a loss to understand why his extreme hardship move to Upminster had been rejected. Since his application had been rejected, he had been prescribed anti-depressants by his doctor. (The claimant did not inform the meeting that he had not taken them (193D)). He claimed the rejection of his application to move to Upminster was in breach of the protection to which he was entitled under the Equality Act 2010. The offer to move to Edgware Road made it impossible for him to work at present. Both venues were unsuitable and recognised as such by the occupational health physicians. The claimant added that he believed he was being constructively dismissed. The claimant reminded Mr Dimelow that he was registered disabled, receives PIP (Personal Independence Payment), has a disabled person's blue badge, a disabled well card and bus pass (218).

106. Ms Jackie Galloway asked the claimant whether he had applied to Access to Work for advice regarding options for getting to work, such as taxis. This was the first time that the claimant had heard about them. Access to Work is a scheme to which an employee must apply for assistance. Employers can facilitate the application but cannot apply on their behalf. The claimant began his enquires with Access to Work shortly after this meeting.

107. The claimant prepared notes of additional comments of the meeting which he sent to Mr Shannon by email on 28 January 2020 asking him to pass them on to Mr Dimelow and Ms Galloway, for inclusion in the notes of the meeting (218-221, 215F and 215G).

108. After the meeting enquiries were made as to whether the Train Operation Manager for Upminster was prepared to exceed the establishment of Trains Managers so that the claimant could transfer there (215L). The claimant contended this was not a genuine enquiry, because the details of his case were not made clear to the TOM for Upminster. However, Mr Dimelow explained in his email to the TOM that the request was being made because claimant had mobility issues (222). The staff situation had not changed, with the depot needing to reduce the number of Trains Managers at that time.

109. Mr Dimelow also contacted Ms Margaret Waite the chairwoman of the MATS Council for an explanation of the reasons for the decision the Movement Committee

had made. He was given further information in an email dated 29 January 2020. It was explained to the claimant that the minutes of the MATS Council's committee only record what information can be shared publicly (214A-215, 223). The MATS committee considered that the offer of working at Edgware Road was made because fewer number of interchanges were required to travel to that location on public transport by comparison with Loughton.

110. Mr Shannon wrote a note he wished to add to the record following this meeting (216) setting out that the claimant was prepared to work at Barking, North Greenwich or Stratford depots while waiting for a vacancy at Upminster depot. The claimant also wrote a note to Mr Dimelow (215F-215G) stating that he wished to set the record straight, in that he was not saying he would only work at Upminster - he might be willing to work elsewhere, including Loughton on advice of OH. He also requested a review of the MATS Council decision of his hardship application made on 5 December 2019 (confirmed in a letter dated 17 December 2019) (217).

111. A second medical case conference was arranged to be held on 10 February 2020 but took place on 12 February 2020 (227-229). The claimant was informed that this was to review his medical condition and his occupational health report and discuss what options were available:

> '…Anything you tell me in connection with your medical condition will be taken into consideration when assessing your ability to perform your role of Train Manager at Loughton or if consideration is to be given as to whether it may be appropriate to refer you to the redeployment unit or consider terminating your employment on medical grounds. You should note that one possible outcome of the case conference is that your employment may be terminated on medical grounds…' (225 – 226).

112. By this date the claimant had been in frequent contact with Access to Work (245). At this meeting the claimant announced that he had applied to Access to Work who would give him assistance either by putting controls in place to modify his car, to reduce the foot control necessary, or to pay for a taxi service to taking to and from work, to enable him to carry out his role at Loughton.

113. The respondent confirmed that the claimant could be guaranteed a disabled parking space at Loughton. It was agreed that when the claimant's current medical certificate (fit note) expired he would take a period of annual leave and then return to work at Loughton on full duties. The claimant reminded those attending that that he was top of the list for a transfer to Upminster and that continued to be the best option for him.

114. The claimant was scheduled to return to work on 14 April 2020. However, the Covid-19 pandemic was announced and on 30 March 2020 the claimant took a minimum of 12 weeks special leave for reasons relating to the Covid-19 pandemic (232, 230, 241). Therefore the claimant was scheduled to return to work, on full duties, at Loughton was extended to 6 July 2020 (234, 235 and 236). He returned to work on that day and had a return to work meeting with Ms Laura Knott, TMO, on 8 July 2020 (241-243). During the return to work interview the claimant explained why he considered the adaptations being considered would not add any benefit or relief if fitted to his automatic vehicle.

115. A letter dated 6 July 2020 from the claimant's podiatrist, setting out the current position with his foot health (239-240), was made available to the Occupational Health Physician. This report concluded that commuting to Edgware station in 2018 had led to ulceration to the claimant's feet; the report did not address the effect on his foot health, if any, on the claimant travelling to and from work by taxi.

116. On 10 July 2020 the respondent received confirmation from Access to Work that the claimant's application for assistance had been put in place from 13 July 2020 until 12 January 2023 (245, 246-247).

117. The claimant has been driven to and from work by taxi service since 13 July 2020. It was confirmed on 3 August 2020 that the arrangement would be extended until 12 July 2023 (249 – 250).

118. In an email to Ms Styles dated 29 October 2020 the claimant complains that the amount of travelling is causing him concern and worry. However, the claimant has provided no evidence that the taxi journeys adversely affect his foot health. The Tribunal finds that there is no evidence that the taxi journeys are in any way detrimental to the claimant's health. The Tribunal consider that the taxi journeys would not have been authorised and funded by the Access to Work scheme if they were in any way injurious to his health.

119. The claimant remains at top of the transfer list for any vacant Trains Manager position at Upminster.

The relevant law

Time limits

120. Section 123(1)(a) Equality Act 2020 (EqA) provides that a claim of disability discrimination must be brought within three months, starting with the date of the act to which the complaint relates. The three-month time limit is paused during ACAS early conciliation. The period of pause begins with the day after conciliation and ends on the day of the ACAS certificate (s.140B(3) EqA).

121. If the ordinary time limit would expire during the period beginning with the date on which the employee contacts ACAS, and ending one month after the day of the ACAS certificate, then the time limit is extended, so that it expires one month after the day of the ACAS certificate (s.140B(4) EqA).

122. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period.

123. Where a tribunal must decide whether there is continuing discrimination extending over a period of time, guidance is given in the case of Hendricks v Commissioner of Police of the Metropolis [2003] ICR 530. The Court of Appeal held that Tribunals should not take too literal an approach by focusing on whether the concepts of 'policy, rule, scheme, regime or practice' fit the facts of the particular case. The focus should be on the substance of the complaint that the employer was

responsible for an ongoing situation or a continuing state of affairs, in which an employee was treated in a discriminatory manner.

124. S.123(1)(b) EqA provides that the tribunal may extend the three-month limitation period, where it considers it just and equitable to do so. In exercising this broad discretion, the Tribunal should have regard to all the relevant circumstances. These can include the reason for the delay, whether the Claimant was aware of his right to claim and/or of the time limits; whether he acted promptly when he became aware of his rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194, CA).

Duty to make reasonable adjustments

125. The duty to make reasonable adjustments is set out in Sections 20 to 21 of the **EqA**. Section 20 provides:

> "(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (4) 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.
>
> (5) The third requirement is a requirement, 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, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
>
> (6)…
>
> (7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.
>
> (8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9)….

(10)…

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

Failure to comply with duty

126. S 21 provides:

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

127. The applicable schedule is Schedule 8 to the EqA.

Code of Practice on Employment ("the Equality Code")

128. The Equality and Human Rights Commission has produced a Code of Practice on Employment (2011) ("the Equality Code"), amended from time to time. The Code of Practice does not impose legal obligations but provides guidance about the scope of the duty and the factors to be considered when determining reasonableness. These factors are listed in paragraph 6.28 of the Equality Code. Some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take are:

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

129. The Code gives guidance that while help may be available from Access to Work that does not diminish any of an employer's duties under the Act. The legal

responsibility for making a reasonable adjustment remains with the employer even where Access to Work is involved in the provision of advice or funding in relation to an adjustment.

130. It is likely to be a reasonable step for the employer to help a disabled person in making an application for assistance from Access to Work and to provide on-going administrative support (by completing claim forms, for example). It may be unreasonable for an employer to decide not to make an adjustment based on its cost before finding out whether financial assistance for the adjustment is available from Access to Work or another source.

131. The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination (Archibald v Fife Council [2004] IRLR 651, HL). The test of reasonableness is an objective one.

132. Although it is advisable for an employer to consult with an employee who is disabled, a failure to consult with the employee about what adjustments could or should be made is not of itself a failure to make a reasonable adjustment. It is necessary to identify the adjustment steps that should be taken. (Tarbuck -v- Sainsburys Supermarkets [2006] IRLR 664).

133. In Royal Bank of Scotland v Ashton 2011 ICR 632, the EAT held that when addressing the issue of reasonableness of any proposed adjustment the focus has to be on the practical result of the measures that can be taken. It is an error for the focus to be on the process of reasoning by which a possible adjustment was considered. It is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment.

134. The correct approach to assessing reasonable adjustments is addressed in Smith v Churchills Stairlifts Plc [2006] IRLR 41. The Court of Appeal confirmed that the test of reasonableness in the context of what is now S.20 EqA is an objective one. It is for the employment tribunal to determine what is reasonable.

135. The EAT in Leeds Teaching Hospital NHS Trust v Foster EAT 0552/10 emphasised that when considering whether an adjustment is 'reasonable', it is sufficient for a Tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage and that there does not have to be a 'good' or 'real' prospect of that occurring.

136. In Matuszowicz v Kingston Upon Hull City Council [2009] ICR 1170 the Court of Appeal held that where the employer had not deliberately failed to comply with the duty to make reasonable adjustments, there may breaches of the duty to make reasonable adjustments "due to lack of diligence, or competence, or any reason other than conscious refusal". The tribunal must decide upon the date of the omission, which may be, in one sense, an artificial date.

Discrimination arising from disability – section 15, EqA

137. S15. of the EqA provides:

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

138. The Court of Appeal (CA) in City of York Council v Grosset [2018] IRLR 746 held that on its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability.

139. The first consideration involves examining the state of mind of A to establish whether the unfavourable treatment in issue occurred because of A's attitude to the relevant "something". Then it must be decided, objectively, whether there is a causal link between B's disability and the relevant "something" ….'

140. The Code of Practice gives advice that, 'something arising in consequence of disability' for the purposes of s.15 EqA includes anything which is the result, effect or outcome of a disabled person's disability:

> 'The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet.'

141. In the case of Trustees of Swansea University Pension and Assurance Scheme v Williams [2019] ICR 230 the Supreme Court considered the meaning of 'unfavourable treatment'. It held that '… in most cases a relatively low threshold of disadvantage is sufficient to trigger the requirement to justify under section 15.'

142. In City of York Council v Grosset the CA stated that the test of proportionality is an objective one:

> 'the test under s 15(1)(b) EqA is an objective one according to which the ET must make its own assessment'.

143. It is necessary for the tribunal to carefully consider the employer's defence of justification where an employee is found to have been subjected to unfavourable treatment. S.15(1)(b) EqA provides that the unfavourable treatment may be justified, if it is a proportionate means of achieving a legitimate aim.

144. Often business needs and economic efficiency are relied on as justification by an employer. The EAT in Hensman v Ministry of Defence (UKEAT/0067/14/DM) held that when assessing proportionality, while a tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and

business considerations involved, having particular regard to the business needs of the employer.

145. To be proportionate, the conduct in question must be both an appropriate means of achieving a legitimate aim and a reasonably necessary means of doing so. The Code gives guidance that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective. The tribunal must objectively balance the needs of the employer, as represented by the legitimate aims pursued, against the discriminatory effect of the treatment.

146. Guidance on assessing whether the alleged discriminatory measure is or is not proportionate in the context of the legitimate aim being pursued was provided by HHJ Gullick in Department of Work and Pensions v Boyers EAT 0282/19:

> "It is…an error for a tribunal to focus on the process by which the outcome was achieved. That was explained by this Tribunal in Chief Constable of West Midlands v Harrod, [2015] ICR 1311 at [41]:
>
> "I consider also that [Counsel for the employer] is right in his contention that the Tribunal focused impermissibly on the decision-making process which the Forces adopted in deciding to utilise A19. When considering justification, a Tribunal is concerned with that which can be established objectively. It therefore does not matter that the alleged discriminator thought that what it was doing was justified. It is not a matter for it to judge, but for courts and tribunals to do so. Nor does it matter that it took every care to avoid making a discriminatory decision. What has to be shown to be justified is the outcome, not the process by which it is achieved. For just the same reasons, it does not ultimately matter that the decision maker failed to consider justification at all: to decide a case on the basis that the decision maker was careless, at fault, misinformed or misguided would be to fail to focus on whether the outcome was justified objectively in the eyes of a tribunal or court. ….."

147. The time at which justification needs to be established is the point when the unfavourable treatment occurs (Trustees of Swansea University Pension and Assurance Scheme v Williams [2015] ICR 1197 EAT). While the test remains an objective one, where an alleged discriminator has not considered questions of proportionality at the time the unfavourable treatment occurred it is likely to be more difficult for them to establish justification.

The submissions

148. The parties each provided written submissions which are briefly summarised. The claimant submitted that the claimant was put to a substantial disadvantage due to his disability and was unable to work at Edgware Road. He saw Upminster as his first preference by far. His reference to working at Hainault or Loughton were not based on any experience of commuting there. The respondent was under a duty to make reasonable adjustments. The respondent have no disability or reasonable adjustment procedure and showed scant care for the claimant. It was a breach of that duty to

transfer the claimant to Loughton. The claimant should have been transferred to Upminster or a location closer to his home. The claimant claims discrimination arising from disability. Failure to find the claimant a suitable work location was the unfavourable treatment relied on. The respondent cannot justify the treatment given they had the ability to move the claimant to a depot where he would not have been disadvantaged. The claimant's claims are in time alternatively it is just and equitable to extend time as the claimant was hospitalised in April 2019.

149. The respondent submitted that the claimant's criticism of the respondent not having a reasonable adjustments policy or procedure was misplaced. The respondent had a system for enabling it to meet its duty to make reasonable adjustments which was through the MATS Council Movements Committee. The respondent met its duty to make reasonable adjustments in February 2018 by locating claimant to Upminster, albeit temporarily. The new requirement to work at Loughton in October 2018 was made against the background of the claimant notifying his managers that the location was one of his first choices and when he was informed that he would be required to work in Loughton he did not raise any concern about the commute involved. There is not evidence that travelling to Loughton was causing any disadvantage at that time. Without knowledge a duty did not arise. Should the Tribunal nonetheless find the respondent was under a duty to make reasonable adjustments it would not have been reasonable to keep the claimant at Upminster permanently or to relocate him there at any time subsequently, given all of the circumstances. The taxi arrangements enable the claimant to continue working at Loughton. In any event, this claim is significantly out of time, even if it is made out. ACAS conciliation took place from 19 December 2019 to 19 January 2020 and the claim was received on 6 February 2020 therefore any complaint before 20 September 2019 is out of time. The claimant claims discrimination arising from disability and relies on the respondent starting the case conference process in January 2020. It is accepted that this was unfavourable treatment, and that it was because of the claimant's mobility restriction arising from his disability; but it was only the beginning of a full capability process which had no pre-determined outcome. The respondent relies on the legitimate aims of workforce management, business efficacy, maintaining a service within budget, and health and safety of employees and the public. It is submitted that beginning a capability process in January 2020 was a proportionate means of achieving those aims. The claims should be dismissed.

The Tribunal's conclusions

150. In arriving our conclusions, we have applied the burden of proof under section 136 Equality Act 2010.

151. The Tribunals conclusions are considered and determined on the basis of the agreed list of issues.

Disability

152. It was accepted by the respondent that the claimant is a disabled person within the meaning of section 6 Equality Act 2010 (EQA) by reason of Diabetes Type 1 and by the physical impairment to the left foot and that the claimant was a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the following condition(s):

(a) Diabetes Type 1
(b) Physical impairment to the left foot.

153. The claimant had sick leave absence following serious medical issues with his right foot, including an operation in April 2019, but this was not pleaded as a disability. However, the Tribunal accepted the claimant's evidence that these difficulties also adversely affected the claimant's mobility.

Reasonable adjustments: EQA, sections 20 & 21

Did the respondent apply a provision, criterion or practice to the claimant in that they required him to work either at Loughton or Edgware Road Underground stations ("the PCP")?

154. The claimant was required to work at Edgware Road at the time he was transferred on promotion, commencing 19 November 2017 until March 2018 and he was required to work at Loughton from 1 October 2018. The Tribunal was satisfied that the respondent applied a PCP of requiring the claimant to work at these locations at these times.

If the respondent did apply the PCP to the claimant, did it cause the claimant a substantial disadvantage due to his disability compared to non-disabled employees?

(a) The substantial disadvantage is the claimant's inability to attend at either Loughton or Edgware Road Underground stations and/or only attend with significant difficulty due to his disability. The claimant will say that his disability means:

(i) He is unable to drive to Loughton Underground station and/or can only drive there with great difficulty

(ii) He cannot attend at either Loughton or Edgware Road Underground stations via public transport due to the amount of walking involved. The claimant is only able to walk short distances due to his disability.

(b) The comparators relied on by the claimant are non-disabled employees of the respondent who are based at either Loughton or Edgware Road Underground stations and who have no difficulty travelling there.

155. The claimant was required to work at Edgware Road from 19 November 2017 until March 2018 and at Loughton from 1 October 2018. The Tribunal was therefore satisfied that the Respondent did apply the PCP of requiring him to work either at Loughton or Edgware Road.

156. The Tribunal accepts the claimant's evidence that his disability means that he has difficulty commuting by car or on public transport to Loughton or Edgware which is supported by various occupational health assessments and podiatrists reports, referred to above.

157. The Tribunal considered the respondent's knowledge of his disability. Although the claimant did not inform Ms Styles of his specific difficulties when he transferred to Loughton in 2019, the respondent knew with the claimant's history that he had a disability sufficient for the duty to make reasonable adjustments to apply. The Tribunal bear in mind the deterioration in the claimant's health from the outset of his employment and particularly following the surgery in 2015. The claimant specifically informed the respondent that he was only able to walk short distances due to his disability on 17 January 2018.

158. The comparators relied on by the claimant are non-disabled employees of the respondent who are based at either Loughton or Edgware Road Underground stations and who have no difficulty travelling there. The Tribunal conclude that the claimant was at a substantial disadvantage compared to others based at either Loughton or Edgware Road by reason of his disability.

If so, what steps was it reasonable for the respondent to take to avoid the disadvantage?

159. The Tribunal finds that the PCP of requiring the claimant to commute to Loughton or Edgware put the claimant at a substantial disadvantage in comparison with employees who are not disabled. The Tribunal concludes that, therefore, the respondent had a duty to make reasonable adjustments.

160. The duty comprises of three requirements, the first and third requirements apply to this case. The first requirement is a requirement for the respondent to take such steps as it is reasonable to have to take to avoid the disadvantage. The third requirement is a requirement, 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, to take such steps as it is reasonable to have to take to provide the auxiliary aid. An auxiliary aid includes a reference to an auxiliary service.

161. The Tribunal considered what steps it was reasonable for the respondent to take to avoid the disadvantage.

162. The Tribunal must consider this question objectively and when deciding whether taking any particular steps would be effective in preventing the substantial disadvantage to the claimant the Tribunal may have regard to all of the relevant circumstances. These can include the practicability of the step, the financial and other costs of making the adjustment, the extent of any disruption caused, the extent of the employer's financial or other resources, the availability to the employer of financial or other assistance to help make, an adjustment (such as advice or assistance through Access to Work) and the type and size of the employer.

The claimant suggests the following steps were reasonable:

Transferring the claimant to work at Upminster Underground station as recommended by Occupational Health and the claimant's podiatrist, by 20 February 2018; 1 October 2018; 5 December 2019 and 17 December 2019 and in January/February 2020.

163. **20 February 2018**. The Tribunal considered whether transferring the claimant to Upminster station was a reasonable step that the respondent could have taken on any of these dates.

164. The claimant was invited to a meeting to discuss his need to request to transfer Edgware Road with Mr Naughton and Ms Knott on 20 February 2018.The claimant provided additional information detailing the adverse consequences to his health of the commute to Edgware Road and was temporarily transferred to work at Upminster station.

165. The claimant argues that the respondent as a reasonable adjustment should have transferred him permanently, rather than temporarily, to Upminster station. The Tribunal disagrees. In arriving at this decision, the Tribunal took into consideration whether taking that particular step would be effective in preventing the substantial disadvantage to the claimant and the practicability of the step. The Tribunal has taken into consideration that the respondent had established processes and procedures for considering transfer requests from Trains Managers; with lifestyle requests being managed by the member of staff completing a nomination form and being placed on a waiting list and by hardship requests being referred by a senior manager to the Movement Committee of the MATS Council.

166. The Tribunal accepted the respondent's evidence that the respondent company is unionised and it is not possible to transfer a Trains Manager to a permanent position where no vacancy exists. The Tribunal was satisfied on the evidence that it was not practicable to transfer the claimant to Upminster permanently in 20 February 2018. The Tribunal accepted the evidence of the respondent that local managers did not have authority to make such decisions. The long-established practice of management and unions making joint decisions on applications for transfer on grounds of disability or hardship via the MATS Council ensures fairness and avoids disputes between both sides. The claimant's contention that arranging a permanent transfer to Upminster outside of these arrangements was practicable was simply not supported by the evidence.

167. The claimant criticises the respondent for its lack of a specific written disability or other policy for dealing with applications such as his. However, the Tribunal found that was not determinative of this issue. The respondent had considered the claimant's need to transfer to another station which involved less commuting and transferred him temporarily because of his disability. Mr Naughton explained to the claimant that he would be transferred to Upminster station by way of a reasonable adjustment for a maximum of six months and explained that for reasons of the employer's financial and other resources the arrangement would not be made permanent.

168. Having considered all of the circumstances, the Tribunal finds that transferring the claimant to work at Upminster station for 6/7 months from 1 March 2018 was the only step that the respondent could reasonably have taken at that time. The action taken by his manager avoided the disadvantage of the commute to Edgware Road; and his manager referred his transfer application to the MATS Council in accordance with its procedure in such cases.

169. The Tribunal concludes that transferring the claimant's to Upminster on 20 February 2018 for a limited period was effective in preventing the substantial disadvantage to the claimant. Accordingly, the Tribunal finds that the respondent satisfied the duty to make a reasonable adjustment when these arrangements were made on or about 20 February 2018.

170. The claimant claims that it would have been a reasonable step for the respondent to transfer him Upminster on October 2018. However, the claimant's colleague returned to his duties and there were no Trains Manager vacancies at Upminster. The tribunal finds that such a step was not practicable.

171. **5 December 2019 and 17 December 2019 and in January/February 2020**. The Tribunal considered whether transferring the claimant to Upminster station was a reasonable step that the respondent could have taken on any of these dates. By this time the claimant was unable to work at Loughton because his foot health had deteriorated. The claimant was unable to use public transport to commute to work and he could drive only with difficulty.

172. The MATS Council had moved the claimant to the top of the waiting list for Upminster in March 2019. Unfortunately, a vacancy had not arisen by the time the MATS Council reviewed the claimant's situation. It concluded that a return to Edgware Road could be offered as an alternative to Loughton. The Tribunal accepts that such a move would not have been appropriate and would not have removed the disadvantage to the claimant. However, the claimant's colleague returned to his duties and there were no Trains Manager vacancies at Upminster. The Tribunal finds that transferring the claimant to Upminster on any of these dates was not practicable.

Transferring the claimant to Upminster Underground station on a 'one over establishment' basis pending a permanent vacancy becoming available;

173. The claimant was absent from work on the 25 April 2019 on sick leave and he did not return to work until 30 September 2019 when he was expected to resume working at Loughton, because no vacancy had arisen at Upminster. The claimant contends that transferring him to work at Upminster on a 'one over establishment' basis pending a permanent vacancy would have satisfied the first requirement.

174. The Tribunal accepted the evidence of the respondent that it was not possible to engage the claimant over establishment pending a permanent vacancy. The claimant had been placed at the top of the waiting list for Upminster by the MATS Council in March 2019 and the review of his application by the MATS Council on 5 December 2019 with the decision notified to him on 17 December could not change his position on the waiting list.

175. There was no work for an over establishment Trains Manager at Upminster and this is a step that was not and would not have been considered by the MATS Council. The step proposed by the claimant of transferring him to Upminster on a 'one over establishment basis' was not practicable.

176. The claimant provided evidence that from time to time a Trains Manager was appointed to a depot over establishment, but we were satisfied that this occasionally occurred in exceptional circumstances and for a finite period.

177. The Tribunal notes that the claimant was careful not to suggest that it would have been possible or reasonable for the respondent to bump another Trains Manager at Upminster to make way for him, but absent a vacancy arising at that depot it is only one of two options that might be said to be available. It would not have been appropriate or acceptable to the trade unions for an existing manager to be forcibly transferred to another depot in order to make way for the claimant.

178. While the duty to make adjustments may require the employer to treat a disabled person more favourably, that must be set against the wider factors relevant to the particular circumstances. In this case there were no vacancies for a Trains Manager at Upminster and it would not have been reasonable in the context of industrial relations or costs to the respondent to either remove a manager to make way for the claimant or appoint the claimant as a supernumerary manager. The Tribunal was therefore satisfied that any such proposed adjustment would have been a reasonable step.

179. The duty is to make such adjustments as are reasonable. The Tribunal finds that there was no other step the respondent could have taken that would have been effective in preventing the substantial disadvantage to the claimant. The Tribunal therefore finds that the duty to make reasonable adjustments has not been breached.

180. **January/February 2020**. The claimant was still absent from work on sick leave having been absent from work since April 2019.

181. The third requirement is a requirement, 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, to take such steps as it is reasonable to have to take to provide the auxiliary aid. An auxiliary aid includes a reference to an auxiliary service.

182. By 15 January 2020 the claimant was, scheduled to return to work on 14 April 2020. However, a period of Covid-19 related absence intervened so that his return to work was delayed until 6 July 2020, by which time Access to Work had awarded him a grant for payment of taxi services to enable him to commute to work in a manner that would prevent the substantial disadvantage. These payments commenced on 13 July 2020 and will continue until July 2023.

183. The respondent suggested the claimant apply to Access to Work following the medical case conference meeting on 24 January 2020 and supported his application, as necessary.

184. The Tribunal is required to have regard to assistance provided by Access to Work when deciding whether particular steps would be effective in preventing substantial disadvantage. The Tribunal finds that the claimant has been able to commute to work by taxi without difficulty and is no longer at a disadvantage by comparison to others. The Tribunal therefore concludes that no further steps could

have been taken by the respondent to remove the disadvantage of commuting to work in Loughton after 13 July 2020, and the duty to make reasonable adjustments has not failed in its duty.

(c) Transferring the claimant to any other suitable alternative station closer to his home.

185. The claimant informed the respondent after the meeting on 24 January 2020 that he would consider working at other stations if approved by OH but Loughton was the only one of the three stations closest to the claimant's home that had a vacancy for a Trains Manager.

186. The question for the Tribunal when considering the first requirement is whether there were any adjustments which could be made which could have avoided the substantial disadvantage. That is an objective question for the Tribunal to determine. The Tribunal concluded having considered all of the circumstances that transferring the claimant to work at Upminster was not a reasonable step that could have been taken by the respondent. The Tribunal therefore concludes that the respondent did not breach the duty to make a reasonable adjustment.

187. The third requirement concerns auxiliary aids, which includes a reference to an auxiliary service. The Tribunal must consider whether it is reasonable for the respondent to take such steps as it is reasonable to provide an auxiliary service to remove the substantial disadvantage to the disabled person. The claimant needed an auxiliary service, i.e provision of taxi services, to enable him to commute to and from his place of work to remove the substantial disadvantage. While the duty to make reasonable adjustments by providing an auxiliary service remains with the respondent, when considering the question of whether it is reasonable for the respondent to provide an auxiliary service the Tribunal is required to take into consideration that Access to Work funding was made available to the claimant. The respondent assisted the claimant to make the application for funding from Access to Work and that assistance was a reasonable step that helped the claimant make the successful application. Provision of the taxi service through securing funding from Access to Work has removed the substantial disadvantage to the claimant, so that he has continued working at Loughton without difficulty and has been able to continue in employment. The Tribunal therefore concludes that the respondent did not breach the duty to make a reasonable adjustment.

188. The Tribunal therefore concludes that the claimant's complaints that the respondent has failed to make reasonable adjustments are not well-founded and are dismissed.

Equality Act 2010, section 15: Discrimination arising from disability

Was the claimant treated unfavourably by the respondent through them not finding him a suitable alternative work location and/or leaving him without a work station so he is unable to work with his ongoing employment being in increasing jeopardy.

Was any unfavourable treatment because of something arising in consequence of the claimant's disability? The claimant will rely upon his inability to drive or walk any significant distance.

For any proven unfavourable treatment, (ie by the respondent starting the capability/case conference process in January 2020) was that because of the claimant's inability to drive or walk any significant distance?

189. By January 2020 the claimant had been absent from work from April 2019 and the return to work arrangements made with Ms Styles had failed, in the circumstances set out above. The claimant was unable to commute to work because of his disability. The Tribunal found that being required to attend a medical case conference, under the respondent's fitness to work policy in January and February 2020, that could have conclude, in dismissal amounted to unfavourable treatment.

190. The Tribunal was satisfied that the unfavourable treatment was because of the claimant's inability to drive or walk any significant distance which was the 'something arising' as a consequence of his disability. It was the 'something arising' that the respondent acted upon by commencing he medical case conferences to explore whether the claimant was capable of continuing working at Loughton or whether other alternatives were available or whether the claimant should be dismissed.

Was any proven unfavourable treatment a proportionate means of achieving a legitimate aim? The respondent will rely on the following aims:

(a) Workforce management.
(b) Business efficacy
(c) Maintaining a service within the allocated budget
(d) Health and safety of employees and the public

191. The Tribunal was satisfied that the respondent's reasons for the unfavourable treatment were a proportionate means of achieving a legitimate aim. The respondent demonstrated that effective workforce management was a principal aim. The respondent maintained its management services within an allocated budget. The Tribunal accepted the respondent's evidence that the budget for the establishment of Trains Managers was reduced and that Train Operation Managers were required to ensure that the management service was maintained within their allocated budget and budgetary constraints. There was no evidence to suggest that it was the practice of the respondent to retain or assign Trains Managers to jobs that were over establishment.

192. The operation of the MATS Council to fairly manage staff applications for transfers also provided evidence of the respondent's practice of maintaining a service within an allocated budget.

193. The Tribunal was satisfied that beginning the procedure of exploring whether the claimant could continue to work for the respondent was an appropriate means of balancing the needs of the respondent, as represented by the legitimate aims of operating an efficient business, against the discriminatory effect on the claimant. While the outcome of the medical case conference could have been a decision to dismiss other outcomes were also possible, for example the claimant was considering whether

adaptations to his car were available. On this occasion the claimant's employment was preserved because the procedure led to the claimant been advised to apply to Access to Work for assistance, which he did.

194. The Tribunal finds that the unfavourable treatment of requiring the claimant to attend medical case conferences was a proportionate means of achieving the respondent's legitimate aim. Therefore the claimant's claim of discrimination arising from disability fails and his claim is dismissed.

Jurisdiction

11. Is the claimant's claim in time?

12. Does any failure to make a reasonable adjustment and/or ongoing failure to find the claimant alternative work amount to conduct extending over a period within s.123(3) EA? If the claimant's claim is out of time, is it just and equitable for time to be extended?

195. In considering whether the claims were in time, the Tribunal considered whether there was a continuing discrimination extending over a period of time or, as argued by the respondent, a series of distinct acts. Where there is a series of distinct acts, the time limit begins to run when each act is completed, whereas if there is continuing discrimination, time only begins to run when the last act is completed.

196. Guidance in the case of Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA, and in Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548, CA is that employment tribunals should not take too literal an approach to the question of what amounts to 'continuing acts' by focusing on whether the concepts of 'policy, rule, scheme, regime or practice' fit the facts of the particular case.

197. The Tribunal had regard to the respondent's knowledge of the claimant's disability. The Tribunal considered the respondent knew or ought to have known that the claimant was disabled from March 2015 when he wrote to Mr Powell after he was admitted to hospital. The claimant was expected to have annual health reviews with occupational health to check his diabetic health from the outset of his employment. Occupational health also provided various work-related guidance and various limitations and restrictions were imposed on the claimant from time to time as a consequence of his foot and diabetic health. From February 2018 when the claimant informed Mr Naughton of the serious difficulty he was having commuting to working to Edgware Road the respondent ought to have known that the claimant was disabled.

198. The requirement for the claimant to remain working at Loughton, or as an alternative Edgware, was decided upon by the MATS Council throughout the relevant period, with the MATS Council reviewing its decision on three occasions. The Tribunal found that the MATS Council was the decision maker responsible for the ongoing situation.

199. Having regard to the Court of Appeal guidance, the Tribunal concluded that the PCP for the claimant to be assigned to work in his substantive post at either Edgware

Road or Loughton was an act extending over a period and therefore that the claimant's claims are in time.

Regional Employment Judge Taylor

15 March 2022