EMPLOYMENT TRIBUNALS

Claimant: Mrs M Cole

Respondent: Merseytravel

HELD AT: Liverpool **ON:** 17,18,19,20 December 2018 and 21 December 2018 & 11 January 2019 (in chambers)

BEFORE: Employment Judge Shotter

Members: Mr M Gelling
Mr PC Northam

REPRESENTATION:

Claimant: Ms A Niaz-Dickinson, Counsel
Respondent: Mr L Rogers, solicitor

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was not subjected to unlawful discrimination on the grounds of her disability and her claims of unlawful discrimination brought under section 15 of the Equality Act 2010 are not well founded and dismissed.

2. The claimant was not subject to unlawful discrimination and the claimant's claim that the respondent had failed in its duty to make reasonable adjustments brought under Section 20 of the Equality Act 2010 is not well-founded and is dismissed.

3. The claimant was not subject to victimisation and the claimant's claim for victimisation brought under section 27 of the Equality Act 2010 is dismissed.

REASONS

Preamble

1. In a claim form received on 23 April 2018 following ACAS conciliation between 9 February and 23 March 2018, the claimant, who continuous to be employed by the respondent in the capacity of a customer services officer, brought claims of disability discrimination under sections 15, 20 and 27 of the Equality Act 2010 ("EqA"). The details of complaint were amended in the further and better.

2. The claimant maintains she is disabled by a physical impairment, plantar fasciitis short Achilles tendon. The respondent concedes the claimant is disabled, does not dispute it had knowledge of the disability but denies the claimant's claims.

Agreed issues

3. The parties agreed the issues as follows:

S. 15 the Act - Discrimination Arising from Disability

3.1 Did the respondent treat the claimant less favourably because of something arising in consequence of her disability?

3.2 In relation to paragraphs 3.1, 3.3 and 3.4 (below) was the 'something' the Claimant's inability to carry out her role of Customer Services Officer at the Tunnel Tolls without suitable shoes that met both the Respondent's safety requirements and her needs due to her disability and the Respondent's delay in providing suitable shoes in accordance with paragraph 3 of the Schedule to the COT3?

3.3 In relation to paragraph 3.2 (below) was the 'something' the Claimant's inability to work her existing shift pattern?

Unfavourable treatment

3.4 The unfavourable treatment relied on by the Claimant is as follows:

3.4.1 The removal of the Claimant from her substantive post on 10th November 2017;

3.4.2 The failure to manage the Claimant's hours over the period 10th of November 2017 -12th of January 2018 in a manner to ensure that pre-planned rest/work days/hours on her existing shift pattern were honoured without requiring her to take annual leave and/or resulting in her being deemed to "owe" the Respondent hours;

3.4.3 The decision to medically suspend the Claimant on 13th January 2018; and

3.4.4 The requirement to work at the Hubs Travel Centre resulting in an extended commute, inability to work a regular shift pattern and a loss of overtime.

Proportionate Means of Achieving a Legitimate Aim:

3.5 If the matters outlined at 3.4.1 – 3.4.4 amount to unfavourable treatment because of something arising in consequence of the Claimant's disability, can the Respondent demonstrate that the treatment was a proportionate means of achieving a legitimate aim?

3.6 The legitimate aim relied on by the Respondent in respect of 3.1 and 3.3 is 'the obligation on the Respondent to provide the Claimant with a safe place of work'.

3.7 The legitimate aim relied on by the Respondent in respect of 3.2 and 3.4 is 'the provision of suitable alternative work for the Claimant in circumstances in which she is not able to safely undertake her substantive duties as a Customer Services Officer at the Mersey Tunnels'.

S. 20 the Act – Duty to Make Reasonable Adjustments

3.8 The claimant contends the respondent failed to comply with its duty to make reasonable adjustments.

Provision Criterion Practice / Auxiliary Aid:

3.9 The Claimant contends that she was placed at substantial disadvantage by reason of the following provision, criterion or practice of the Respondent in comparison with persons who are not disabled: -

3.9.1 The requirement to wear specific footwear to carry out the Claimant's role of a Customer Service Officer at the Tunnel Tolls.

3.9.2 The requirement to work an alternative shift pattern/work schedule during the period 10 November 2017 – 12 January 2018.

3.9.3 The requirement to be physically capable of working in the Tunnel Tolls/Plaza and/or to have access to work emails in order to be enabled to participate in team meetings/votes affecting the team.

The Claimant contends that, but for the provision of an auxiliary aid, she would be put to a substantial disadvantage compared to persons who are not disabled. The auxiliary aid relied on by the Claimant is custom shoes and/or innersoles.

Substantial Disadvantage:

3.10 The substantial disadvantage the Claimant was put to because of each of the PCP's identified at above are as follows: -

PCP 1:

3.10.1 increased pain over a prolonged period, stress and anxiety because of the unreasonable delay in providing the shoes,

3.10.2 the requirement to work a different shift pattern at different locations and at short notice, the removal from post (placing the Claimant, a disabled person, at a greater risk than nondisabled employees of finding suitable alternative employment),

3.10.3 and financial detriment due to the removal from the overtime rota,

3.10.4 increased employment uncertainty, stress and anxiety,

3.10.5 increased pain and stress and anxiety due to the extended commute, and

3.10.6 inability to work a regular shift pattern and/or her contracted shift pattern due to the extended commute,

3.10.7 financial loss due to the loss of overtime,

3.10.8 isolation/segregation from colleagues and increased employment uncertainty.

PCP 2

3.10.9 increased stress and anxiety about an inability to make back any time owed to the Respondent because of the Claimant's disability;

3.10.10 and an inability to make pre-arranged appointments without taking annual leave.

PCP 3

3.10.11 increased employment uncertainty and stress and anxiety.

Reasonable Adjustments:

3.11 The Claimant contends that it would have been reasonable for the Respondent to take the following steps to avoid the substantial disadvantage as a result of the PCP's:-

3.12 To provide custom footwear within a reasonable period.

3.13 To permit the Claimant to work overtime whilst unable to undertake the full duties of a Customer Services Officer and subsequently following the removal from that post.

3.14 To identify a suitable temporary post (pending the provision of suitable footwear) within a reasonable period.

3.15 To remove Steve Maher from decisions regarding the Claimant's health.

3.16 Following the removal from her substantive post.

3.17 To provide the Claimant with a shift pattern that mirrored her existing pattern; and/or

3.18 Allowing the Claimant to honour existing shift pattern without requiring the use of her annual leave or her owing time to the Respondent.

3.19 To forward information regarding the Claimant's substantive role to her personal email and/or home address during the period of her medical suspension.

3.20 To permit the Claimant to travel the whole or part of the extended parts of her commute (following the removal of her substantive post) within work time.

3.21 To ensure the Claimant could book leave having returned from medical suspension.

Evidence

4. The Tribunal heard evidence from the claimant on her own behalf. The claimant was not found to be a credible witness at all times, as set out below in the finding of facts. In short, the Tribunal took the view the claimant exaggerated her evidence, for example, when she maintained that her travelling time had been increased because she travelled in peak traffic at 7am. The Tribunal possessed knowledge of the claimant's commute and peak commuting times in Liverpool which was not 7am or before 4pm. The Tribunal did accept the claimant's evidence that she brought to the respondent's attention at a meeting on 31 May 2017 her wish for the NHS to be involved in the provision of custom-made shoes, and it has dealt with this evidence further below.

5. On behalf of the respondent it heard evidence from Michael Kerrigan, customer service manager, Lynne Gogerty, HRD operations manager, and Gary Evans, head of customer services manager. All were found to be credible witness, largely supported by contemporaneous documents as the communications between the parties were well-recorded at the time. The Tribunal found Gary Evans gave factual and to the point oral evidence on cross-examination. Conflicts in the evidence have been resolved as set out within the factual matrix, particularly the claimant's allegation that she indicated at the 31 May 2017 meeting she wished to instruct the NHS.

6. The Tribunal was referred to an agreed bundle of documents together with witness statements, written statements, written submissions, oral submissions and case law. The Tribunal thanks Ms Niaz-Dickinson for her detailed and comprehensive written closing submissions. It has considered both the respondent's and claimant's oral and written submissions, which the Tribunal does not intend to repeat wholescale, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons, and has made the following findings of the relevant facts taking into account the conflicts in the evidence.

Facts

7. The respondent employs 250 employees, and is in the business of running the Mersey Ferries, Mersey Tunnels (Birkenhead and Wallasey Tunnels) and six bus stations including Birkenhead and St Helen's. In Liverpool city centre Gateway Bus station there is some limited parking for employees at the Haymarket Carpark situated at the mouth of the Birkenhead tunnel. Parking is only available to operational staff who use their car for work during their work, those employees working on the late shift and those who require parking facilities as a reasonable adjustment.

8. The claimant was originally employed as a toll officer, based mainly at the Wallasey tunnel booth where she remains in employment. The role of toll officer has been renamed to customer services officer. The claimant, sitting alone in the booth, is primarily responsible for giving change to motorists paying the fee for using the tunnel, ensuring the smooth running of the barriers on the tunnel plaza, and dealing with any issues as they arise.

The claimant's shift pattern

9. Unlike the ferries and bus stations, the Mersey Tunnels were and continue to be open 24 hours a day throughout the year and the claimant's three shift pattern was 6am to 2pm, 2pm to 10pm and 10pm to 6am. The claimant worked an average shift of 8 hours 20 minutes, and each rotating team worked on a rolling shift pattern of 5 early shifts, followed by three days off, five late shifts, followed by three days off and five-night shifts followed by four days off. This shift pattern was only available for customer service officers working at tolls, and there was no possibility of it being duplicated anywhere else in the respondent, where normal office hours were worked starting at 7am and finishing 7.30pm. When the claimant was temporary relocated as a

reasonable adjustment she was given the facility to choose any shift pattern she wanted to work, and could have avoided the commuter traffic by a 7am to 3/4pm shift and do the Tribunal found.

Health and safety requirement

All customer service officers working at the tolls, including the claimant, were required to wear and did without exception, personal protective equipment that included non-slip occupational safety shoes compliant with EN ISO 20347: 2012 ("20347") safety standard due to health and safety risks of working in an environment where there could be oil and fuel spillages. The footwear EN ISO 20345 could not be used because of the health and safety implication of a steel toecap, employees were not allowed to wear footwear with steel toecaps and the respondent would not have sourced any off the peg or made to measure shoes with steel toecaps incorporated.

7 March 2013 to 23 October 2013 occupational health reports

10. On the 7 March 2013 the respondent obtained an occupational health report that confirmed the claimant had the condition Plantar Fasciitis and the way forward for her was to alter her shoes. The sourcing of the shoes was "is not usually provided by an occupational health department but usually be the relevant manager who is responsible for approving and purchasing safety shoes or the local NHS podiatry department. Two pairs of work shoes were recommended. It was recorded "If the claimant wears flat shoes without innersoles she experiences pain in her Achilles, feet, back of legs and back." It is undisputed in a correctly fitting pair of shoes the claimant can walk many miles, she is a member of a walking club and more than capable of walking from her car to work providing she is not wearing the health and safety compliant shoes necessary to work as a customer service officer at the tunnels and so the Tribunal found.

11. Occupational health advised on 2 October 2014 that the claimant was being treated by her GP, physical therapist and Orthotic specialist, had been provided with insoles but was struggling to "get adjusted to the safety shoes provided by your provider". It was recommended she was to remain in work and seek a further referral to her Orthopaedic surgeon for an urgent opinion regarding her condition…Margaret has been in touch with her Orthotic advisor via the NHS and has an appointment…she has also been in touch with Access to Work regarding safety footwear…I have advised Margaret to refrain from overtime to prevent overuse problems at work."

12. Occupational health advised in a report dated 23 October 2014 the claimant was capable of undertaking all of her duties, and she should be provided with safety footwear non-slip fitted with appropriate insoles, pending further advise from speciality clinics assessment and confirmed the condition was likely to be classified as a disability under the Equality Act 2010. The report did not

advise the respondent that the claimant required bespoke safety shoes, or that safety shoes should source via the NHS.

13. A number of communications were exchanged concerning the claimant's footwear which reflect there was an attempt by the respondent's managers to resolve the claimant's problem, including trips to stores where the claimant was accompanied senior management. It is not disputed the claimant was provided in excess of 30 pairs of shoes, which she found to be unsuitable. An approach was made to Trulife, a shoe manufacturer who also supplied the national health. The evidence before the Tribunal was that managers were proactively seeking a wide pair of safety shoes that would accommodate the claimant's innersole. Lynne Gogerty, HRD operational manager, emailed Trulife on 6 February 2015 in anticipation of an appointment arranged with the claimant. She confirmed the respondent would cover half the cost of the shoes subject to cost. Communications also took place between the respondent and the NHS that culminated in an agreement being reached that the respondent would contribute 50% towards the cost of shoes, the NHS paying the remaining 50%. The order did not progress as the respondent was waiting for confirmation of the amount it was expected to pay, which was never forthcoming from the NHS, who appeared to ignore all requests.

14. In 1 March 2015 Mike Kerrigan emailed the claimant following Lynne Gogerty's contact with Aintree NHS in which he referred to the following; "…Contact has been made and reasonably we are awaiting response with an indication of price…the made-to-measure service currently being progressed would hopefully find a permanent solution…as you know many different types of footwear have been sourced for you including trips by senior managers to stores with you. To look again at another potentially non-suitable item of non-wide footwear while progressing made-to-measure shoes seems illogical."

15. By 26 June 2015 the NHS had still not provided the respondent with any costs, and on 18 June 2015 Lynne Gogerty sent a reminder, she continued to email and by 7 July 2014 it was clear an impasse had been reached, the respondent seeking costings that were not forthcoming. In an email sent to the claimant on 8 July 2015 Mike Kerrigan informed the claimant; "Lynne will not be contacting NHS any further nor will Steve or myself. You are the patient of the NHS and it is our understanding following the grievance and subsequent appeal that you will contact the NHS. The NHS will not discuss patient records with anyone else and therefore you need to ascertain the cost…so Merseytravel can make an informed decision on the appropriateness and reasonability of price to meet half the cost…. you will now process with contacting the NHS for a cost."

16. On 24 July 2015 referring to previous emails, Lynne Gogerty asked again for assistance. Trulife responded on the same day "My colleague…[has] actually seen Mrs Cole and tried extensively to try and find safety shoes that suited

[her] your requirements however with no success therefore we cannot contribute any more as we can only issue standard safety footwear."

20 August 2015 Employment Tribunal proceedings

17. On the 20 August 2015 the claimant issued proceedings in the Employment Tribunal under case number 2407407/2015 alleging a failure to make reasonable adjustments that was settled by a COT3 on 22 December 2015.

18. In an email sent to Bolton Bros, who describe themselves as "expert manufacturers of footwear and orthotic devices" dated 26 August 2018 the claimant asked "rather than safety, could you make non-slip foot ware EN/ISO rated. I would not require a steel or composite toes cap." The respondent on 27 August 2015 was informed all footcare was manufactured to ISO standards. Bolton Bros were also a third-party manufacturer used by the NHS.

19. The claimant also attended Moores Bros, a local firm, and tried on shoes. She emailed Mike Kerrigan, customer operational manager, on 25 September 2015 stating Moores Bros were "not medically trained. They can however make an appliance that fits under my heel…I rang the NHS Orthotic with the intention of getting their expert advice…I have 'timed out' on my time there and need a re-referral from my GP…I explained I wanted advice…the NHS cannot do this apparently, even with a rereferral and has advised I seek private advice. I therefore need your instruction on whether to proceed with the innersoles as it stands or go through the services of a podiatrist or orthotic for their advice."

20. In an email sent on 29 October the claimant informed Steve Maher, one of her line manager, she had not found wide fit shoes "wide-fit footwear is not available in non-slip; therefore, I believe the way forward would be to have them made. I attach an email from Bolton Bros with costs and I am aware this was an issue with the NHS." The Tribunal has not seen the attachment, however, Steve Maher emailed Lyn Gogerty on 2 November 2015 confirmed he had spoken with Bolton Bros based in Newcastle and Bristol observing "this is not the local company (Moores Bros) as initially thought, they are based in Newcastle and Bristol. I have been advised that the cost of making shoes range from £450 to £1000 plus a consultation fee of £40.00 and a minimum of three site visits at a cost of approx. £400 each…we have been unable to provide a local supplier…"

The Schedule to the COT3 dated 22 December 2015

21. The Schedule to the COT3 dated 22 December 2015 provided "if the respondent wishes to continue to search for ready-made footwear which is complaint with safety requirements then the claimant will be supplied with custom footwear until ready made footwear is available. If ready-made footwear is not available within 3 months then a second pair of custom footwear will be supplied to enable the claimant to alternative footwear. If ready-made footwear is not available by the time the claimant needs replacement footwear then custom footwear will be used as a replacement.

The claimant will be reinstated to the overtime rota with effect from Friday 1 January 2016." The Schedule did not expressly provide that custom footwear would be via the NHS, and there was no evidence the claimant requested this, which is unsurprising given the impasse reached earlier with the NHS.

Referral of claimant to podiatry expert and provision of suitable footwear in compliant with the respondent's duty to make reasonable adjustments in January 2016

22. The claimant was referred to Martins Lane Podiatry, and the podiatrist Claire McLoughlin was instructed by the respondent to source suitable footwear compliant with 20357 non-slip and she recommended the Saloon wide fitting lace up shoes from Safer Safety. Two pairs were ordered by the respondent and provided to the claimant in January 2016 in accordance with the COT3. In her witness statement the claimant complained about these shoes, but at the relevant time she made no complaints whatsoever, worked as normal including overtime and took no time off sick. There was nothing to put the respondent on notice that she had a problem up to 27 March 2017, and the claimant wore safety shoes referred to as "Saloon" footwear during this period. It was not entirely clear to the Tribunal how many shoes the claimant was provided with during this entire period, her statement referred to "several pairs of footwear," an indication to the Tribunal the respondent was doing its utmost to comply with its statutory obligations.

Claimant's request for replacement footwear March 2017

23. On the 28 March 2017 the claimant asked for replacement saloon shoes. The evidence before the Tribunal that there was no problem with the claimant wearing the Saloon footwear, had there been she would have reverted to the COT3 and made the respondent aware in no uncertain terms. The Tribunal finds the respondent had met its obligation to make a reasonable adjustment in respect of the claimant's safety shoes during this period, evidenced by the claimant continuing to work on the tolls without any physical difficulties, and seeking a replacement of the exact pair of shoes provided to her by the respondent on the advice of a specialist podiatrist.

24. Immediately on 28 March 2017, Mike Kerrigan purchased two pairs of the exact same shoes "Saloon" from Safer Safety Ltd that had originally been ordered in December 2015 on the understanding that they were suitable for the claimant and complied with the respondent's health and safety requirement. There was no reason for the Tribunal to doubt Mike Kerrigan's evidence, given the factual matrix, that had he been aware the Saloon style shoes did not comply with 20347 he would not have ordered them, and instead would have sourced a different type of shoes. There was nothing to put the respondent on notice at the time that the shoes did not comply with their health and safety requirement. The shoes were waterproof, slip resistant, the respondent had purchased the shoes following advice from an expert podiatrist, which they were entitled to rely upon not being experts themselves and the claimant had worn the shoes since January 2016 day in and day out without incident or complaint.

25. In an email sent to Steve Maher on 7 April 2017 the claimant, who had been involved in a road traffic accident, confirmed it was not her intention to accept "overtime if I believe it will aggravate my injuries…" She did not complaint about the shoes she was wearing.

PIP

26. In the claimant individual Performance Plan ("PIP") held on 5 April 2017 one of her stated objectives was to review respondent's policies and procedures, and the individual learning plan identified the claimant wanted to shadow fast tag department, hubs and ferries "to gain better knowledge of how the department works and how it impacts on toll section." The respondent took the claimant's request into account when it made the reasonable adjustments set out below.

27. By 10 May 2017 the claimant complained about the new Saloon shoes stating they were not wide enough, she was concerned with their ISO rating and would no longer wear them, seeking a replacement. The claimant continued to wear her old Saloon shoes.

28. On the same date Mike Kerrigan emailed the claimant pointing out the specification was the same, suggesting she showed them to a manager and wrote; "I remember that when you received your previous shoes you had similar problems and you were referred to the podiatrist again. The podiatrist identified that the problem was due to the shoes existing inner sole, this was removed and your orthotics fitted. You then found the shoes to be comfortable and you and the podiatrist were happy with the fit of the shoes….in answer to the ISPO slip rating can you look yourself on the company's website…'all our footwear meets and surpasses SRC rating under the commonly used ISO EN20345:2011 but this is the very basis minimum requirement so we go much further by testing to a new grip rating scheme developed by the UK Health & safety Laboratory'. I hope this alleviates any concerns over their non-slip properties as they exceed those of the industry rating."

29. The claimant responded on 11 May 2017 unhappy with the suggestion that managers assessed the footwear, confirming "I have not suggested the footwear you ordered me are any different from the previous ones, I am suggesting pair have been incorrectly labelled at the factory." In response, the claimant was informed by Mike Kerrigan that she would be referred to the podiatrist. The claimant remained unhappy and raised many issues in an email sent 12 May 2017, questioning why she was being sent to the podiatrist, what the respondent's expectations were, and requesting an urgent appointment. The claimant was advised by return to liaise with her team leader for a mutually convenient appointment to be arranged with the podiatrist, as she had been instructed to do in the earlier email and the claimant had not done so.

30. On 17 May 2017, 6 days later, the claimant attended the podiatrist. On the same date Safer Safety Ltd confirmed the "spec on the style has not changed and is not due to change."

31. Claire McLoughlin produced a report dated 24 May 2017 having viewed the old and new footwear agreeing the newer pairs were "tighter and could possibly cause some discomfort…the simplest solution is to move the insole…I removed this and got Margaret to try the adapted inner sole…plus her own orthotics…she found without the insole more comfortable. Margaret also informed me that a trainer type of non-slip safety shoe was being considered for her by your department and I advised her to try them." There was no mention of sourcing any shoes via the NHS by the claimant.

The 31 May 2017 Meeting

32. On the 31 May 2017 a meeting took place with the claimant supported by her union representative (who did not give evidence) Lynn Gogerty and Mike Kerrigan that was not minuted. Due to the passage of time all the participants have different recollections of what was said and agreed. The claimant's recollection was that she raised the possibility of going back to the NHS and recollects the initial response was "it wouldn't harm to revisit the option again…it was my understanding it was agreed this was the best option." Lynn Gogerty in her statement makes no reference to the NHS being discussed, and she understood that she was to ask Anthony Connolly, Health, Safety and Well-being business partner to identify a company able to manufacture a bespoke pair of safety shoes. Contrary to Ms Niaz-Dickinson's submission, this action was compliant with occupational health advice given in 2014 and the respondent was not limited to progressing the matter through the NHS whether the claimant made that request or not, and so the Tribunal found.

33. During this period the possibility of providing the claimant a trainer-like safety shoes was explored by the respondent but this was unsuccessful and the respondent continued to press for a resolution through the provision of custom-made shoes via an orthotic expert, and the Tribunal took this view against the background of its earlier dealings with the NHS, which had not borne fruit, the NHS had failed to confirm the price of made-to-measure shoes to either the claimant or respondent. By 25 September 2015 the claimant had received advice from the NHS that she should seek private advice. Occupational health had advised earlier that the issue could be dealt with by relevant manager responsible for approving and purchasing safety shoes sourcing the claimant's shoes. The relevant manager was the respondent's health and safety manager. It is notable the written communications up to this date concerning the sourcing of shoes were not between the claimant and Steve Maher, a line manager but Mike Kerrigan and Lynne Gogherty.

34. The claimant remained concerned with the new saloon shoes, their fit and the ISO rating. By 31 May 2017 the ISO issue raised by the claimant with Claire McLoughlin was resolved. On 1 June 2017 the claimant was informed the insole has no effect on the ISO rating of the shoes, albeit Anthony Connolly

referred to the 20345 rating and not 20347, the only difference being the toecap.

35. On 31 May 2017 the claimant was informed the trainer style shoes were available for her to trial. Mike Kerrigan had looked at the Dr Marten website and suggested "we can discuss the option of removing the sole with Moore Bros. and replacing one that is ISO rated." In tandem with the above, the respondent was also pursuing the option through the medical route affiliated with Fazakerley Hospital and Moore Bros of made to measure shoes and were looking to set up an appointment. On the same date an email sent to a number of managers was copied to the claimant. Anthony Connolly confirmed he had been in contact with Bolton Bros "he will probably build the solution that is agreed. He had put us in contact with Mike Vaughan who is an Orthotic specialist." Mike Kerrigan had confused Bolton Bros with Moore Bros. but nothing hangs on this. The Tribunal finds on the balance of probabilities it was reasonable for the respondent to progress sourcing a new pair of health and safety complaint shoes by instructing an orthotic specialist. As at 31 May 2017 the respondent would have had no idea the claimant would not find the shoes provided through Michael Vaughan suitable; and during this period, she continued to wear the two pairs of Saloon footwear, carrying out her duties at tolls without difficulties.

36. On 1 June 2017 Michael Vaughan confirmed to the respondent he could use the factory as an assessment centre "any time next week." The claimant was informed of the appointment by Steve Maher and she was not happy.

The 5 June 2017 email to Lynne Gogery

37. On the 5 June 2017 after a discussion with Steve Maher when the claimant suggested the NHS should make shoes for her, having been informed of the appointment with Mr Vaughan, she emailed Lynne Gogerty. It is notable in the first paragraph the claimant confirmed she had felt reassured and confident after the 31 May 2017 meeting. However, despite not having met with Michael Vaughan the claimant was unhappy with his involvement. She noted "Mr Vaughan works at Fazakerley. I mentioned the way forward may be for the NHS to make the shoes... I tried to explain what had been said in the meeting namely you agreed that would be a viable option in my best interests and Merseytravel if they agree to get involved again after the last embarrassing dealings with them…SM said the problem was the NHS couldn't give Merseytravel a cost.

38. With reference to Steve Maher the claimant wrote; "he does not believe the NHS is a viable option if they do not submit a cost first…the appointment with Mr Vaughan is primarily a cost issue rather than primary sourcing suitable footwear as a reasonable adjustment. I do not believe he will be using common sense to move this forward objectively or amicably…I respectfully request that COM Maher is withdrawn from this matter." The claimant was unhappy that Steve Maher had stood up to her by taking a different view as to whether the respondent should directly instruct the NHS given the fact they

had attempted to unsuccessfully do in 2015, instead it intended instructing an expert who worked at Fazakerley Hospital, part of Aintree NHS.

39. The Tribunal finds the claimant had taken a negative view of Mr Vaughan without any basis whatsoever, and her viewpoint that the respondent should not need information on the cost was unreasonable; it was not a reasonable to expect the respondent to approach the NHS with an open-ended chequebook without receiving assurances as to the costs. It was reasonable for it to proceed with Mr Vaughan, who was connected to the NHS and unlike the respondent and claimant, was an expert in Orthotics. The respondent was complying with the terms of the COT3, and it makes no difference to the Tribunal's consideration whether the claimant suggested the NHS at the 31 May meeting or for the first time to Steve Maher followed by the email of 5 June 2017 to Lynn Gogerty. The respondent was entitled to progress the matter as it deemed fit in light of what had transpired previously, and the difficulties it had making direct contact with Aintree NHS in 2015. The expectation was through the auspices of Mr Vaughan, the made-to-measure shoes would be put in place in a reasonable time. The Tribunal took the view that from 5 June 2017 the claimant had set her mind against Mr Vaughan as she believed the respondent should comply with her demands, despite the fact the steps taken by the respondent at the time complied with the COT3 and occupational health advice.

40. Much has been made by Ms Niaz-Dickinson of the 31 May 2017 meeting and 5 June 2017 email, the contents of which the Tribunal has considered closely, concluding that Lynn Gogerty's oral evidence on cross-examination as to why she had not denied in subsequent correspondence the NHS option had not been raised by the claimant at the 31 May meeting, was logical and credible. The 5 June 2017 email is partly aimed at criticising Steve Maher, and was headed as such. This is how Lynne Gogerty interpreted the letter and what she responded to. Lynn Gogerty referred to Michael Vaughan as a "contact from a local hospital who is a specialist in this area" promising the claimant would either be provided with a modified pair of shoes complying with safety standards or a bespoke pair. She wrote in response "I recall from last year you were uncomfortable with engaging with any supplier who was not medically trained but we have been assured that if the bespoke route is the most suitable one to follow it will be with a suitably qualified person. I have been unable to establish if this contact is associated to Truelife as we discussed. This is as we discussed a further option should this one not prove to be suitable. I therefore suggest you attend the schedule appointment on Wednesday and we will discuss the next steps thereafter." Trulife is an oblique referral to the NHS, and the Tribunal concluded that at the 31 May 2017 meeting, the claimant understood that she had referred to the NHS, but Lynne Gogerty missed the point. Michael Vaughan was linked to the NHS and it was reasonable for Lynne Gogerty to suggest the claimant attended the meeting with Michael Vaughan in order to get the ball rolling.

41. Lynne Gogerty refused to comment on the conversation between the claimant and Steve Maher, was unable to authorise his removal as she did not have

line-management responsibility for him, and suggested the claimant approached Mike Kerrigan, which she did.

42. There was no evidence before the Tribunal that the issue for the respondent was the actual costs involved in providing the reasonable adjustment as alleged by the claimant. The motivating factor was not cost, the respondent had a budget of £10,000 but it required costings to be confirmed before going ahead which the Tribunal found was not unreasonable. It is notable the claimant was informed in an email sent 5 June 2017 "Gary Evans…. agrees, in principle, to fund the cost of the bespoke footwear should this be a viable option. We will, as you would expect, require a quotation prior to the approval given." Feedback was requested on the appointment with Mr Vaughan.

43. The claimant met with Mr Vaughan meeting on 7 June 2017, and at that meeting she did not suggest Trulife, the NHS or any other provider.

Michael Vaughan's report of 12 June 2017

44. Mr Vaughan wrote to the respondent on 12 June 2017 confirming a "full Orthotic assessment" had been carried out and a report was attached. In the letter he confirmed Moore Bros could not provide the shoes to the 20347 standards, but Peacocks Medical could produce bespoke safety footwear without a steel toecap. The time frame was set out, this was a maximum of 6-8 weeks from order followed by a 3-4-week evaluation period, however as matters progressed this period increased substantially as a result of the attempts to build a pair of shoes that suited the claimant.

45. Peacocks Medical in their brochure confirmed the footwear they produced complied with EC Directive EC 89/686/EEC, was slip resistant and "as this is a made-to-measure service we can facilitate any size, width or fitting…a full range of modifications are also available for the bespoke range." There was no mention of only "heavy industrial shoes" being built as alleged by the claimant, and the respondent's understanding was that Peacocks Medical would provide the claimant with a bespoke pair of shoes under the expert advice of Michael Vaughan.

46. In Michael Vaughan's report the plan confirmed was "the provision of footwear fabricated to accommodate the structural shape and function" of the claimant's feet, "be constructed to a specification that meets the working environment, incorporate inserts…and by the nature of their manufacture with the footwear will provide a stable base…the nature of the intervention of the footwear will provide the optimum intervention and should enable effective management of the issue during the working day." The Tribunal took the view the respondent was entitled to rely on this specialist advice, given by a senior Orthotist in respect of shoes to be fabricated by Peacocks Medical. The respondent reasonably took the view the claimant would be provided with a shoe that assisted her with her disability in order that she could continue to work at tolls, and that the shoes fulfilled the necessary health and safety specification. The nub of the claimant's case is that had the respondent not proceeded with the advice of Michael Vaughan but instead complied with her

suggestion to instruct the NHS directly to provide a pair of shoes, the shoes would have been provided in a much shorter time. The claimant has the benefit of hindsight, as at June 2017 the expectation of the respondent based on expert advice, was that shoes would be provided to the claimant within approximately two-months with a one-month evaluation period. The respondent would not have known or guessed the shoes finally provided, having undergone many alternations as referred to below, would be deemed fit for purpose by Michael Vaughan in his professional view, but unsuitable as far as the claimant was concerned.

47. Mike Kerrigan authorised the Mr Vaughan to proceed in the belief that the respondent would be in a position to provide the claimant with a custom-made pair of shoes. In the meantime, the claimant worked without issue wearing her two pairs of Saloon shoes supplied in 2016.

48. In an email sent 13 June 2017 Mike Kerrigan informed the claimant that the respondent would not be instructing Moore Bros as they could not guarantee the non-slip rating or ISO compliance, so Mr Vaughan was recommending "looking at bespoke shoes through Peacock medical."

22 June authority to procced was given by the respondent and the order placed for custom made shoes with Peacocks Medical.

49. On 21 June 2017 Michael Vaughan provided prices for the footwear which totalled with fees £878.00. On the 22 June authority to procced was given by the respondent and the order placed.

50. Michael Vaughan on 3rd July 2017 confirmed to Peacocks the claimant's measurements and impression mould for the manufacture of bespoke safety shoes. Ms Niaz-Dickinson submitted the claimant wanted to go the NHS so that proper measurements could be taken. There was no evidence before the Tribunal Michael Vaughan was incapable of taking proper measurements, and this was not a complaint put the respondent at any during the period when they were dealing with their duty to make reasonable adjustments. Michael Vaughan's professional qualifications were never questioned.

Claimant's further request for the removal of Steve Maher

51. On 6 June the claimant forwarded her email of 5 June 2017 originally sent to Lynne Gogerty to Gary Evans, who responded on 7 June as follows; "I am not prepared to make the decision that you ask without some detailed evidence to justify such a decision…and would ask that you continue to work with both Steve and Mike (supported by Lynn) in finding a solution." The claimant did not provide the evidence requested.

52. On the 16 August 2017 a "mid fit" of the shoes took place with the claimant. Mike Vaughan informed the respondent it was a "good fit although slight rear foot slippage." Further adaptions were needed, and these were carried out. There was further fitting on 11 September 2017 and further adaptions were necessary. The claimant was unhappy with the shoes, which she felt were too

big and heavy causing her pain. It is notable that there was no limit to the adaptations the claimant could seek, all which cost the respondent money, belying the claimant's assertion that the respondent seeking to cut costs.

The reasonable adjustment that the claimant was not to work on the plaza for overly long periods.

53. In an email sent 22 September 2017 sent by the claimant to Mike Kerrigan whilst she was trialling the new shoes, she found herself in conflict with the team leaders as was unable to work on the Plaza for approximately 2-hours, and she was unable to work in wet weather in her old footwear. The claimant requested an email be sent from Mike Kerrigan to team leaders about her working on the plaza. Mike Kerrigan complied with the claimant's request and sent an email the next day to team leaders referring to problems with the bespoke pair of shoes and for them to ensure the claimant did not "work on the plaza for overly long periods." A copy was provided to the claimant and she was thus made aware that a reasonable adjustment had been made to her duties because of her raising the issue.

54. On the 9 October 2017 the claimant met Michael Vaughan for a fitting of the adapted shoes, further alterations were necessary and on the same date Michael Vaughan emailed Peacocks for an estimate. A number of alterations were listed including "reduction of forefoot length…depth…light weight Vibram oil resistant sole and heel unit." Ms Niaz-Dickinson submitted the shoe provided was the same as "Odin" in the Peacock catalogue. The evidence before the Tribunal that whilst the style may have been based on "Odin" the shoe was bespoke and there were a considerable number of adjustments and alterations including shortening and lightening. As a matter of logic, it cannot be said it was the same shoe, and in any event the claimant did not complain of this until 16 October 2017.

55. In an email to Mike Kerrigan the claimant stated her old shoes were no longer waterproof, the heal had worn smooth, and requested a copy of Michael Vaughan's referral, which was provided by return. The claimant was given 2-3 weeks from her last meeting for the alterations to be put in place and shoes ready for her. Mike Kerrigan informed the claimant "If your existing shoes get to a point that they can no longer be used then let us know and we will explore options."

56. The claimant remained unhappy with Michael Vaughan's attempt to source shoes. She complained in a further email sent 17 October 2017 "any changes he makes or does not make are done on his professional opinion not at my request…when in your opinion can I no longer wear my current shoes? At what point are they unfit for purpose?" The claimant raised these issue despite it having been made clear to her that she was to let the respondent know if her existing shoes could no longer be used and options would then be explored; it was not for the respondent to tell her. In the Tribunal's view the emails reflect the claimant's lack of objectivity, and her stance that the respondent could do nothing right, as put by Mr Rogers during oral submissions, it could not do right for wrong. This attitude of the claimant

underlined how she managed the entire process; she had been unhappy with Michael Vaughan from the outset prior to even meeting him, she was unhappy with management, particularly Steve Maher, and despite the oral evidence on cross-examination that he had very little to do with her health matters over this period, she continued to insist on his removal as her manager of her health issues.

57. Mike Kerrigan's immediate response encapsulates the factual position as found by the Tribunal; "With regard to the referral that you are seeking. Just to recap when we were made aware that the shoes we procured for you were no longer suitable we looked to have a pair made as no off the shelf types were suitable….it was for the provider to come in, speak with you and determine the best solution. There was no such referral to Mike Vaughan other than we required a pair of bespoke shoes to be made…"

58. In an email sent 17 October 2017 to Gary Evans, the claimant requested for the second time the removal of Steve Maher from "having any involvement in "managing my health condition…I feel that approving my request will remove the detriment I am suffering to my health by removing the anxiety and other associated detriments over SM being involved." This was sent some 4-months after the original request made to Gary Evans, and she ignored the instruction that for her request to be considered evidence supporting it must be provided. The claimant had not provided evidence and despite pleading that his involvement was a detriment to her, it was unclear why this was the case given Steve Maher was not involved in the claimant's health issue and that had been the case for some time and certainly since he had refused to comply with her request to directly instruct the NHS.

59. Gary Evans responded on 18 October reiterating his earlier request that the claimant provide him with "the details of your specific allegation so I may consider your request in more detail and bring this matter to a conclusion…My understanding to date is that all your discussion have been with Mike Kerrigan supported by Lynn Gogerty." The claimant confirmed in oral evidence that the observation of Gary Evans was correct. The claimant responded by lodging a grievance on 3 November 2017 in which she still failed to provide specific details.

60. On 1 November 2017 at the claimant's request Mike Kerrigan was to have met with the claimant to inspect her old shoes, but this meeting did not go ahead due to the claimant being unwell. The meeting took place on 2 November and Mike Kerrigan was of the view, whilst he was no expert, the shoes had plenty of grip and looked safe to be used in the short term. He made it clear to the claimant that if at any point she considered them to be unsafe she would need to stop working and inform him, asking her to use the replacement shoes provided by the podiatrist in May as an interim measure pending delivery of the bespoke shoes. The claimant agreed and continued working without issue with the adjustment that she did not work on the plaza for overly long periods still in place.

61. It was the respondent's belief that the claimant would be provided with a suitable pair of bespoke shoes within a matter of weeks.

3 November 2017 grievance

62. The 3 November 2017 grievance was raised under the Equality Act 2010, and rather than provide Gary Evans with the information he had requested the claimant wrote that she felt "pressurised" by him to raise the grievance. The claimant did not provide any more detail of the allegations against Steve Maher, in which she alleges the respondent failed to "honour the terms of the COT3" in respect of items 1,2 and 3 in the Schedule, maintaining it had failed to make reasonable adjustments and breached confidentiality. Mr Rogers submitted that it was "telling" there was no mention of the NHS or Bolton Bros in the claimant's grievance, and no mention of the fact the claimant had raised or an agreement had been reached concerning the HNS option at the 31 May 2017 meeting, and so the Tribunal agreed.

63. The claimant met with Mike Vaughan on 3 November 2017 for a re-fitting. Further adaptations were needed and it was anticipated these would take up to 2-weeks.

Reasonable adjustment not undertaking toll plaza duties and working in the toll booth only

64. On the 8 November 2017 the claimant emailed Mike Kerrigan informing him she would not be able to get to the end of the two-week period wearing her old shoes and asked, "could you tell me what is in place for me when I am unable to carry on in the current footwear?" Mike Kerrigan agreed the claimant should not undertake any toll plaza duties and should only undertake toll booth duties that largely required her to sit in the toll booth and on occasions get out and resolve any problems with drivers.

Reasonable adjustment taking claimant off toll booth duties on 10 November 2017 and providing the claimant with work in accordance with her requests set out in the PIP.

65. By 10 November 2017, the claimant having informed Mike Kerrigan she was unable to wear her shoes due to pain, was immediately taken off toll booth duties. Mr Rogers submitted that this decision was entirely reasonable and appropriate; the Tribunal agreed. Mike Kerrigan took the view that as the claimant had identified "shadowing" in other departments in her PIP she could do this as a short-term measure, and review the respondent's policies and procedures, which she did on 11 November 2017 confirming by email that she had made some comments on the content. It is notable the claimant had requested the respondent, as part of her personal improvement plan, provide her with this facility, and yet she now raises a complaint before this Tribunal that they did so.

66. The claimant did not complain at the time about the duties allocated to her or the fact that she was placed on 11 November 2011 in the office next to Mike

Kerrigan. In the claimant's witness statement before this Tribunal, she complained that she was segregated from her team and there was cross-examination of witnesses on this point. The Tribunal took the view that since the claimant had informed Mike Kerrigan she was in too much pain to work on the toll booth, it was a reasonable adjustment to place the claimant in an office in the same vicinity as her team, with the claimant being able to speak with her line managers and team members, carrying out work referenced in her PIP. It was not a reasonable adjustment, as maintained now by the claimant, to leave the claimant wearing her own shoes that were not health and safety compliant in situ given her medical condition and its effect on her substantive post. None slip weighted shoes that did not comply with 20347 was not an option on health and safety grounds, and the Tribunal accepted Mike Kerrigan's evidence that the respondent had no idea the Saloon shoes were not health and safety compliant, having taken professional advice. Had it been brought to the respondent's notice Saloon shoes were not health and safety compliant, the claimant would not have been allowed to wear them while she was working at tolls. The respondent was satisfied at the time that the Saloon shoes suggested by an expert, were health and safety compliant, and had been worn by the claimant without problems until the new pair of Saloon shoes provided were rejected.

<u>The alleged substantial disadvantage: isolation/segregation from colleagues and increased employment uncertainty.</u>

67. There was no evidence before the Tribunal that the claimant was put to a substantial disadvantage in that she had suffered isolation/segregation from colleagues and increased employment uncertainty when she was placed in the office next to Mike Kerrigan for one day on 11 November 2017. The Tribunal took the view the claimant, an accurate historian, was exaggerating her evidence in order to enhance this claim.

68. During this period Mike Kerrigan was pressing Michael Vaughan for delivery of the made-to-measure shoes, and he kept the claimant informed of this.

<u>Reasonable adjustment – shadowing</u>

69. With her consent he arranged for shadowing to take place at various centres whereupon the claimant would meet the relevant manager. With reference to her working hours, on 15 November 2017 Mike Kerrigan made it clear to the claimant that she would continue to work at the hubs and "for hours – the choice is your I don't mind either way. You can either ask if you can work 8.20 or bank the hours not worked or pay is back at some point or if you wish take some leave for the hours short."

70. The oral evidence before the Tribunal from Mike Kerrigan was that he had made it clear to the claimant she could chose whatever hours she wanted to work, starting at 7am and avoid the 8am commuter traffic if she wanted, and it was for her to ensure that she complied with her contractual hours. It was clear to all the claimant could not undertake the same shift she had whilst working at the toll booth due to the unique nature of the Merseytravel tunnels

and the fact they were perpetually opened, unlike the respondent's other offices.

71. Ms Niaz-Dickinson submitted this was stressful for the claimant; the Tribunal finds it difficult to comprehend how an employee, who can choose whatever hours they want to work, can find that position stressful or a breach of the Equality Act. It is clear from the evidence before it the claimant was supported by being given the facility to dictate her start and finish times, and she was never asked to repay any shortfall in weekly hours that were not worked. The evidence that any hours underworked by the claimant have not been claimed back, and are not going to be claimed back, was unchallenged.

72. David Poole, team leader at tolls, wrote to the claimant in relation to her query concerning meeting the contractual hours of 8.20 per day. He wrote; "You could start and finish at the Pier Head going over to Woodside on the boat and back later…complete your hours in Seacombe Terminal…I will let the team leaders know at Ferries." In short, the claimant was to travel to and from various centres as and when they were open, in the respondent's time to achieve her 8.20 hours per day target, and the evidence before the Tribunal was that she was largely able to do this.

73. On 27 November 2017 the claimant asked to leave one of the hubs to attend a team meeting at the tolls, which was granted. Whilst the claimant was not cross-examined on this point, the Tribunal would have been surprised if the claimant, who had been employed on the tolls for some nineteen years, had not no awareness of when team meetings ordinarily took place.

74. In short, the Tribunal finds claimant could dictate her working hours, and the arguments it has heard as to rest days and holidays have no merit whatsoever. The Tribunal found the claimant's evidence on this point not credible, and her emphasis on the detriment she was caused as a result of the travel commute also did not reflect the reality. Cumulatively, the Tribunal panel has detailed knowledge gained over decades of the commute into Liverpool from several directions, including to and from both tunnels, and it is aware the commute is very light at 7am becoming heavier by 8am, contrary to the claimant's evidence on this point. The claimant could have dictated a start at 7am every morning to assist with her commute, and the Tribunal took the view she was intend on placing as many obstacles as possibly between her, the respondent and a successful resolution, in the knowledge that the respondent's managers, even to the extent of accompanying the claimant to various outlets to try suitable shoes, were intent on assisting her as best as possible and went to great lengths to remedy the issues as and when they arose.

75. On the 16 November the claimant requested that she attend a course on hidden disabilities, which Mike Kerrigan refused as it was only for team leaders and not CSO's at tolls. The request was not refused out of hand, and as it transpired the claimant eventually attended the course.

Claimant's rejection of the made-to-measure shoes

76. On the 1 December 2017 in the presence of Michael Vaughan the claimant tried on the new shoes again, and a report was subsequently produced. The report confirmed many adjustments had made at the claimant's request including not exhaustively, reducing the toecaps, altering length and reducing weight. Michael Vaughan set all of the adaptations made, including a lightweight non-slip sole and concluded "this has proven to be a disappointing footwear supply process. The claimant's perception that the footwear will manage all underlying issues is both challenging and frustrating since functionally the footwear fits but issues that have been raised…[that] cannot be attributed to the intervention…"

77. The shoes were sent back for a final re-fit on 19 December which included a reduction at toe length, increase at heels, reduce inlay thickness and so on. These are not minor alterations, and point to the shoes indeed being bespoke despite the claimant's evidence and counsel's submission to the contrary.

78. On the 22 December, the claimant who was aware she had the flexibility of managing her own rota and hours, informed her manager that she could not make her shift on 23 December 2017 and a day's leave was authorised which the claimant accepted. Mr Rogers submitted that this was a day the claimant would ordinarily have worked had she been working in her substantive role, and the Tribunal found there was no evidence to the contrary.

79. Mike Kerrigan's understanding was that Michael Vaughan believed he had produced a pair of shoes fit for purpose and whatever alterations were made to the bespoke safety shoes, they would still not be acceptable to the claimant. By the 10 January 2018 Michael Vaughan confirmed "there were no further alterations which could be made to meet her individual requirements." At the end of this process the claimant who did not find the shoes comfortable, and her initially view of Michael Vaughan as expressed above was reinforced. Despite professional advice to the contrary that the shoes were fit for purpose, Mike Kerrigan continued seeking a resolution, accepting the claimant's views despite Mike Vaughan's expert opinion that the shoes were suitable. The Tribunal found the fact the claimant did not find the shoes suitable was not attributable to any failure on the part of the respondent, who underwent the process of sourcing made-to-measure safety shoes in good faith with the support of an expert in the field.

Addendum to grievance

80. On the 28 December 2018 the claimant submitted an addendum to her grievance alleging a number of detriments suffered as a result of "wearing unsuitable footwear" since the submission of her earlier grievance, despite the fact that she had been wearing her own shoes at work. The claimant also alleged stress and anxiety in "trying to manage and fulfil my contractual hours" the impact on her lifestyle including the commute and paying for parking.

Final rejection of the made-to-measure shoes and medical suspension on 13 January 2018

81. By the 10 January 2018 the final alterations had been made to the shoes, which were unacceptable to the claimant. Mike Vaughan produced a report dated 10 January 2018 stating that the slipping of the claimant's heels had been addressed, the rear long and short heels reduced, a change to a lighter sole and construction of an insert. He concluded "I feel that there are no further adaptations that could be done to meet the claimant's individual requirements."

82. On the 13 January 2018 the claimant was medically suspended, and this was confirmed in a letter dated 19 January 2018 "the…action was necessary in that you were unable to work in your substantive role due to a safety risk." A workplace meeting was scheduled for 25 January, which did not go ahead due to the non-availably of the claimant's trade union representative.

15 January & 6 February 2018 grievance hearings

83. The grievance hearing took place on 15 January 2018 before Liz Chandler, director of corporate development. The claimant was represented. Liz Chandler was supported by the head of People and Customer Development, Mike Kerrigan and Gary Evans were also present on the basis that they had managed the claimant, and were supported by Lynne Gogerty. The claimant complained in her witness statement she found the meeting "extremely adversarial and intimidating", but this is not a matter raised in the final list of issues agreed by the parties, and the Tribunal does not intend to deal with it other than to note the claimant did not make this complaint at the time.

84. The claimant clarified her complaint about Steve Maher alleging "she has been victimised and doesn't believe Steve Maher has used common sense in the management of her health issues which she also believes is being over managed." The grievance meeting notes record the claimant setting out "…her concern about not being involved in the purchase of her shoes…[she] believes Steve was being dismissive when Margaret was explaining her concerns regarding her shoes…she does not feel the request needs the production of evidence…. she would not go down the mediation route as this is a personal issue not a work issue" when the avenue of mediation was suggested to resolve the grievance. In respect of the shoes, the claimant complained about the medical intervention. The notes reflected the claimant's position as follows; "she doesn't know why Bolton Bros weren't used as the supplier." In response Gary Evans was recorded as stating "he too agrees that this is taking too long but expresses his concerns that Margaret has already tried on over thirty pairs of shoes…the supplier states that no further adjustments can be made. Gary stated that three years is too long, but he has tried and Margaret has been supplied with a pair that had no issues." The claimant alleged there were issues with the original shoes provided as her heel kept slipping out, the shoes were half an inch too small. The complaint that had not been raised during the period the claimant had worn the shoes,

and she had not been mentioned this when she had asked for a replacement of those shoes with an identical pair. The grievance hearing was adjourned.

85. Gary Evans had no further dealings with the claimant after this point.

86. A workplace meeting was arranged which the claimant was unable to attend because she was on holiday.

The reconvened grievance hearing on 6 February 2018

87. The reconvened grievance took place on 6 February 2018. The claimant complained that two mangers managing her health issues were "overbearing" and the claimant discussed the shoes situation in detail, which the Tribunal had read but does not intend to repeat. The claimant admitted she had not provided information requested by Gary Evans in relation to her complaint against Steve Maher, her union representative maintained she did not did not need to. The claimant confirmed there was meeting regarding her health with Steve Maher, and only the one incident. The claimant confirmed she had raised the grievance because Gary Evans had asked her for evidence of her complaint against Steve Maher.

88. Gary Evans confirmed had the claimant provided him with the information sought he would arranged an investigation in line with policy, but she did not, and had informed him in an email sent 5 July 2017 that "she was not alleging anything and was comfortable with Steve Maher managing her performance – but not her health-related issues."

89. Gary Evans explained how Michael Vaughan, an orthotic specialist, had come to be instructed, adaptations to the shoes had been carried out over many months, and when the bespoke footwear was not suitable and no further adjustments possible "for reasons of safety to protect Margaret and the organisation, a difficult decision was taken to medically suspend her and arrange a workplace interview." The temporary redeployment arose when it was reported by the claimant that "the footwear she was wearing was no longer fit for purpose. Due to the bespoke shoes still under construction a sensible pragmatic decision was taken to temporarily redeploy…until the shoes were available. The move was not directly driven by Merseytravel but by Margaret's condition." The explanation given by Gary Evans is instructive. one of the substantial disadvantages relied upon by the claimant is a repeated reference to increased employment uncertainty and greater risk of finding suitable employment in comparison to non-disabled employees. There was no reference or hint of the claimant's employment or prospects of temporary redeployment being at risk, quite the reverse. The claimant received assurances from the respondent and the Tribunal found she was not disadvantaged in any way as there was no employment uncertainty and she was not at a greater risk of finding suitable employment in comparison with non-disabled employees and so the Tribunal found.

90. In relation to the effect of the redeployment on the claimant's working hours it was explained by Gary Evans that this was done to protect physical health and not to exacerbate the claimant's condition any further. He confirmed "outstanding from Margaret's last IPP review was job shadowing in other areas of the business…none of these operations were 24/7 as were Margaret's contractual hours so naturally there had to be a change in working hours…on most if not all occasional contractual days were maintained. **Shift allowance and weekend enhancement protected so no detriment was suffered to contractual pay** [the Tribunal's emphasis] …I cannot identify a location which is further in distance from Margaret's commute…designated rest days were maintained during the period of office based working from 11 December 2017 to 29 March 2017…Margaret to my knowledge has not suffered any financial loss as all contractual pay has been maintained." The claimant does not dispute that her shift allowance, pay, designated rest days and contractual hours remained unaffected by the redeployment, and the only issue was non-contractual overtime and a day when she had to take holiday.

91. The claimant informed Gary Evans she could walk miles, was in a walking group, and the "NHS said they would give me a pair of shoes if employer pays half. Couldn't give a cost. MT wouldn't agree without cost…this was pre-COT3. Now present I can go back cap in hand to NHS only if you guarantee I can have them to avoid embarrassing situation previously. It's become a costs issue again." In response, Gary Evans confirmed "I physically can't guarantee without knowing costs. I agreed to do it if I was provided with an indicative cost." Gary Evans gave evidence on cross-examination before this Tribunal that he could not proceed with any contract to purchase without an indicative cost, and the Tribunal accepted that this was a reasonable business requirement. It was not the actual costs per se that were in issue, the issue concerned the respondent possessing knowledge of the indicative cost that they were committing themselves to. The claimant's view was that her reasonable adjustment took priority over cost. The respondent had authorised expenditure up to £10,000 but that does mean to say it could blindly commit itself to a purchase in the hope that the £10,000 would not be exceeded. As Gary Evans pointed out to the claimant's union representative, the respondent had already funded a pair of bespoke shoes, had agreed to fund another pair and the Tribunal accepted the issue was not the actual cost but a requirement for the actual cost to the respondent to be confirmed before a contract was entered into.

92. The claimant confusingly stated "I am prepared to go back cap in hand and I will go back if I can get a guarantee [the respondent] will pay for it", to which Gary Evans responded that he could not make a commitment without knowing cost and it was agreed in principle the respondent would foot the cost to the NHS, and the meeting was adjourned on the basis that the claimant would arrange an appointment with her GP in order to gain access to the NHS. It is notable the claimant was aware of this process, and the fact the respondent was unable to directly make contact on the claimant's behalf, and yet she had taken no steps to visit the GP despite emphasising to the respondent she wanted to "manage her own condition," a telling phrase used by the claimant who sought to control the entire process. The claimant's explanation to the

Tribunal as to why she felt she had to go back to the NHS "cap in hand" was unsatisfactory, and the Tribunal took the view that the claimant had exaggerated the position she as in; there was no requirement for her to go "cap in hand" as the respondent had agreed to pay the whole bill; all that was required was for her to be referred to the NHS by the GP and a price provided in order for the purchase to proceed.

93. The Tribunal found Mike Vaughan had an open remit to do whatever was required to assist the claimant and put in place the reasonable adjustment, and the respondent had nothing to do with the communication between the claimant and Mike Vaughan. The respondent's part was to pay, and they never objected to the cost, including the additional costs involved in their development and adjustments, which they did. The respondent then agreed to pay for the entire process to be repeated with the NHS, the only condition being a price would need to be agreed.

Parking

94. With reference to parking, Lynne Gogerty informed the claimant at the grievance hearing on 6 February 2018 that she could have a badge to park in the Haymarket carpark. Much has been of this by Ms Niaz-Dickinson, however, providing the claimant with parking at Haymarket was not pleaded as a detriment or a reasonable adjustment and there is no requirement for the Tribunal to deal with this complaint as there has been no application to amend the claimant to include it.

95. In oral evidence Lynne Gogerty admitted she was incorrect when the offer of a badge was made to the claimant. Gary Evans confirmed there was no parking available unless the car was to be used for operational purpose during the day, late shift workers or workers with restricted mobility who required reasonable adjustments and the claimant did fall into any of these categories, and accordingly providing her with parking was not a reasonable adjustment and so the Tribunal agreed, the claimant being capable of walking long distances without any problems. It is not disputed the claimant was provided with a Walrus travel pass to replace her Fast Tag (the claimant's staff concession as she was required to travel through the tunnel in her substantive post) and this provided her with free public transport.

Completion of skills audit 8 February 2018

96. On the 8 February the claimant completed a skills audit, necessary for her to be redeployed into another department in accordance with the respondent's Redeployment Policy dated September 2012. The claimant was the only employee on the register, at the time there were no vacancies, and despite the respondent's size nowhere to put the claimant until her skills were assessed given that she had worked 19 years in the same role on tolls. The respondent's Redeployment Policy applied to redundancy and medical redeployment, the alternative being to dismiss on the grounds of ill-health which at the time was not a consideration in respect of the claimant who was aware the respondent was intent on finding her a meaningful role within the

organisation with a view to her returning to her substantive post as quickly as possible once a suitable pair of shoes had been provided. It was envisaged the claimant would be slotted into a position, which she was when opportunity came up for her to cover maternity leave. Her pay was protected and she had the right to an appeal. The claimant was to take part in a 4-week trial during which she was unable to book holidays on the basis that she may not accept the position or deemed to be unsuitable. There was no guarantee the claimant would want to remain in the redeployed role, or from the respondent's perspective that it would be suitable. There was no suggestion that the claimant's employment was insecure, she did not question ill-health suspension on full pay or a redeployed role were the options, and at no stage did she express any concern to the effect that she may be dismissed because there was no question of a dismissal.

97. On the 8 February 2018 the claimant emailed Lynne Gogerty to inform her that she had arranged an appointment with Mark Barnett, Patient Appliances Aintree University Hospital NHS, concerning the shoes and Lynne Gogerty promised to email Mark Barnett and Mike Richardson, the previous NHS contact who had previously confirmed he could not assist, to see if they could assist with providing a suitable pair of shoes that would meet the safety standard. Mike Richardson confirmed again he could not assist on 13 February 2018. Mike Barnett confirmed an orthopaedic company could produce the shoes and the claimant required a GP referral.

98. The claimant and respondent's managers continued to communicate with the claimant during this period on her personal email address. The claimant did not have access to the respondent's intranet. Employees who were absent from work for whatever reason did not have access to the respondent's intranet.

Approval of cost provided by the NHS for a custom-made pair of shoes 8 March 2018

99. In a letter dated 8 March 2018 Mike Barnett confirmed to Lynne Gogerty the amount it would cost for a pair of custom-made shoes, unlike previous communications in 2015 when no quote was given. This was approved immediately by Gary Evans.

Reasonable adjustment of a successful redeployment 13 March 2018

100. Lynne Gogerty explored re-deployment opportunities for the claimant based on her skills audit, and by 13 March 2018 at a meeting with the claimant, an offer was made for her to take up the role of customer services officer at the Hubs travel centre on a 4-week trial to commence on 3 April 2018. The claimant complained she would be disadvantaged due to lack of parking in the city centre, and her staff concession for a Fast Tag (free tunnel use) was changed to a Walrus Travel Pass (free public transport).

101. In an email send 22 March 2018 Gary Evans emailed the claimant dealing with a number of points she had raised in previous communications. It is

instructive to consider the email in some detail, this is contemporaneous evidence of what had passed between the parties at the time, rather than the gloss given by the claimant at this liability hearing. The relevant points are as follows;

101.1 The COT3 was honoured by suitable shoes having been provided, and they had since worn out. Bespoke footwear had been explored that the claimant found not to be suitable, this led to her medical suspension and identification of two different types that were off the shelf purchases to allow a quicker return to work, both of which the claimant deemed unsuitable.

101.2 It was confirmed the respondent agreed to meet the cost of shoes sourced by the NHS and two pairs were to be provided to the claimant.

101.3 The offer of redeployment to Hubs was on a trial basis and temporary to facilitate an early return to work whilst her shoes were being manufactured. The Tribunal was satisfied that this amounted to a reasonable adjustment pending provision of the custom-made shoes. In turn the custom-made shoes were a reasonable adjustment necessary for the claimant to work in her substantive role.

101.4 The term "trial" was defined as "it is important that the new role is suitable for the employee, as well as the employer…[to] reassure you that the position is as you expected and you are comfortable to move forward in this position pending your shoes being ready. This gives the employee real time to ensure the role is what they expected and if it isn't you have the right to state this and reject the redeployment."

101.5 The redeployment offer "still facilitates your working a 35-hour week on an average basis…We have reviewed your total salary as a toll officer (including shift allowances and weekend enhancements) and compared this with a comparable salary of the hub officer post…we can confirm that the toll position is a higher salary taking into account all allowances **and therefore we will protect you at this amount** (the Tribunal's emphasis) during your period of temporary employment. An exact like-for-like swop does not exist and it is not reasonable to assume we can create a specific role to accommodate your adjustments.

101.6 There is no contractual elelemnt of overtime in both the tolls and the Hubs tams.

101.7 There is no staff parking provision at Old Haymarket for bus station staff and the Walrus travel pass was provided "allowing you to use public transport free of charge during your re-deployment period."

102. The claimant remained unhappy and wrote to Gary Evans on 24 March 2018 about the suitability of shoes proposed, accepting the medical redeployment but alleging she had suffered a detriment by the loss of her rest day and

overtime. The claimant had been informed there was no parking facilities for her and she wrote "I have no option but to commence using the Walrus travel pass" and "I anticipate a much longer journey which is undoubtable a detriment which will have a negative impact upon my health." The claimant did not explain how her physical impairment relating to her feet was impacted by the re-deployment, and the Tribunal who possesses local knowledge of public transport and the local roads, did not accept the claimant's travel by car had been increased, either by distance or time, in any substantial way. The claimant in her substantive role had travelled to the tunnels and in her redeployed role she was to travel into the city centre free of charge if she chose to use public transport, alternatively, she could have chosen to start work at 7am and avoid the commuter traffic. The evidence before the Tribunal as accepted by the claimant was that she had the ability to dictate her own hours proving she met her weekly contractual working hours, and had the claimant considered the matter objectively she would have realised that no detriment had been suffered by her. The claimant had the ability to arrange her hours so as to enjoy a rest day, start early or late, it was entirely a matter up for her as Gary Evans would have ensured her needs in respect of working hours were met.

Claimant commenced working at the Hubs on 3 April 2017

103. The claimant commenced working on the 3 April 2018 in her redeployed role at the Hub based in city centre Liverpool, and on reading through emails discovered that Mike Kerrigan had emailed customer service officers at tolls on 13 March 2018 with an agenda for a team meeting to be held on 15 March 2018 that referred to a vote in relation to the rotating shift pattern. As matters transpired the vote changed nothing and the status quo remained, thus the only issue was the claimant not being given the vote or the opportunity to attend the team meeting during the period when she had been suspended on medical grounds. The claimant accepted the outcome of the vote was the one she would have sought, and she did not raise any complaints with the respondent.

104. The claimant had been forwarded notice of the vote on her work email address, but as she was not at work she had no access to her work emails during this period, and the respondent, although it communicated to the claimant via email on her personal account, did not forward work related communications due to an oversight. The claimant also complained she had not been invited to attend the team meeting. The Tribunal found the claimant was aware of the regularity of team meetings and when they were usually held, she employed at tolls for nineteen years, and at no stage during her medical suspension when she was not required to work but stay at home on full pay, did the claimant ever indicate to her colleagues or managers she wanted to travel into work and attend a team meeting.

105. The claimant issued Employment Tribunal proceedings on 23 April 2018.

106. A telephone conversation took place between the claimant and Gary Evans on 24 April 2018 confirmed in an email dated 25 April relating to the re-

deployment. It was recorded the claimant had confirmed to him the redeployment had "exceeded your expectations and you are enjoying this temporary role…you still find the commute difficult…and as you do not have affixed roster role at present, your ability to plan and adjust to a work life balance is impacted….you recognise this is a positive redeployment and prefer to work in this post…we jointly agreed for your temporary redeployment to continue beyond your trial period, for an indefinite period pending your shoes being supplied by the NHS – at which point you would return to your substantive post in tolls….your commute is not something that as your employer we can directly affect. Your new shift patterns in hubs should limit travelling in peak hours and your base location Queen Square is nearer to your home than Wallasey or Birkenhead." With reference to the roster Gary Evans indicated that he would let the claimant's manager know and "they can look to allocating you a fixed line in the roster at a date in the future as soon as your training is complete." Finally, the claimant's shoe fitting with the NHS on 3 May 2018 was referred to.

107. The claimant worked a regular shift pattern at the Hubs, and it is not disputed that the shift she had worked on the tunnels could not be replicated. The claimant worked overtime on 29 occasions when working in the Hub. The Tribunal considered the overtime list, and noted the hours of overtime worked were variable and appeared to peak during July and August, corroborating the respondent's evidence that overtime was not a right but offered to facilitate absences especially during holiday periods. The respondent gave evidence that the claimant's overtime rate was higher than the Toll hourly rate, as she was paid at the Hubs hourly rate for overtime, albeit not at the top of the Hub scale and so the Tribunal found. There was no satisfactory evidence of any overtime dates which the claimant should have been offered and was not, as set out below.

Reconvened grievance hearing 15 May 2018

108. The grievance hearing before Liz Chandler was reconvened on 15 May 2018 and a letter was sent to the claimant dated 23 May 2018 which confirmed "throughout the course of your presentation and in your summary, you state it is not your intention to accuse Steve Maher of inappropriate behaviour. You have been quite clear that this case is solely about how Steve Maher makes you feel when discussing your health." The claimant's grievance was not upheld.

109. In an email sent 11 June 2018 the claimant asked if she "needed to make myself available for overtime as I've only been offered one turn since I started at Hubs…apparently I haven't been offered overtime because I am on a lower pays scale than Hubs. How do I resolve this to enable me to be offered overtime?" From the overtime list submitted in the evidence before the Tribunal the claimant had worked 7 hours overtime on 10 May 2018, there was a gap when no overtime was worked until 18 July 2018 when she worked overtime of 13 hours, thereafter overtime was worked without any recognisable pattern. They were no evidence before the Tribunal that overtime was regularly available, or available between May and July 2018.

The claimant's statement is silent on this point, and the overtime issue appears to be the claimant was not receiving a higher grade of overtime pay; this is not a complaint before the tribunal. In oral evidence on cross-examination the claimant stated she was told as tolls were paying her wages overtime was not authorised. The Tribunal noted that this explanation was not set out in the claimant's email. Gary Evans in oral evidence on cross-examination confirmed that customer service was a single cost centre managed by him, and there was no issue paying the claimant overtime. On balance, the Tribunal did not accept the claimant's evidence as credible, and concluded there was no evidence overtime was available as alleged by her, the uncontroversial evidence before the Tribunal was that after 18 July overtime was offered reflecting the needs of the business, and the burden of proof did not shift. The Tribunal recognise that overtime entitlement for all employees, including the claimant, was and remains non-contractual, the amount varies with the needs of the business peaking in the holiday season and there is no guaranteed overtime as reflected in the contemporaneous documents.

110. In the period leading to the claimant being provided with a suitable bespoke pair of safety shoes and her return to her substantive role on 5 December 2018, numerous communications were exchanged concerning shoes, which the Tribunal does not intend to repeat. The claimant appealed the grievance outcome, the appeal hearing took place on 13 July 2018 before Frank Rogers, chief executive and director general on 25 July 2018 confirmed it was it had not been upheld. With reference to the appeal relating to the removal of Steve Maher from making decisions dealing with the claimant's health it was found "Gary Evans was considerate to…the request in that he ensured from the correspondence in July 2017 that it was Mike Kerrigan and Lynne Gogerty that had bene dealing directly with the related issues…I note that in practice it was indeed Mike Kerrigan who was dealing directly with Margaret over her health issues, supported by Lynne Gogerty from HR and Steve Mathers involvement was only to ensure that any outcomes were put into practice when he was on duty." The Tribunal found that this finding was reflected in the respondent's practice at the time.

111. The claimant was provided with a suitable pair of shoes on 3 December 2018 and she returned to her substantive role at tolls on 5 December 2018 where she has continued to work to date. The claimant raises a number of complaints in her witness statement about her present role; these are not claims before the Tribunal and it does not intend to deal with any of them other than address her "disappointment" that "management did not value my contribution sufficiently to make adjustments by providing suitable footwear within a reasonable timeframe which would have prevented the detrimental impact on my health, well-being and finances." If the claimant is in a position to step back and objectively consider the factual matrix set out above, whilst suitable shoes were finally provided on 3 December 2018 (the NHS starting the procurement process on 8 March 2018, a period of some 9-months before the shoes were finally provided) it was not in the respondent's power to shorten this period in any way, during which a number of reasonable

adjustments were made to facilitate the claimant working as a customer service officer, albeit not always based at tolls.

Disability discrimination arising from disability

112. Section 15(1) of the EqA provides-

"(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B less favourably 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.

113. Paragraph 5.6 of the Equality and Human Rights Commission: Equality Act 2010 Code of Practice provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with than of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

114. In order for the claimant to succeed in her claims under s.15, the following must be made out and the Tribunal has followed this process:

(1) there must be unfavourable treatment;

(2) there must be something that arises in consequence of C's disability;

(3) the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability;

(4) the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

115. Unfavourable treatment is not the same as detriment. The test is whether a reasonable worker would consider that the treatment is unfavourable. An unjustified sense of grievance will not suffice. This is particularly relevant to some of the claims made by Mrs Cole, given a considerable number of her complaints were unjustified and without any basis as she appeared to completely disregard the steps taken by the respondent that were favourable to her. Useful guidance on the proper approach to a claim under s.15 was provided by Mrs Justice Simler in Pnaiser v NHS England and anor [2016] IRLR, EAT:

a) "A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, **but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it** [the Tribunal's emphasis].

c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises…"

d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

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

116. With regard to the objective justification test, when assessing proportionality, the 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 (see Hensman v Ministry of Defence UKEAT/0067/14/DM).

Disability discrimination – failure to make reasonable adjustments

117. The duty to make reasonable adjustments is set out in S 20 of the Equality Act 2010 ("EqA"). Section 20(3) sets out the first 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. Section 21(1) provides that a failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments. Schedule 8 of the EqA 2010 applies where there is a duty to make reasonable adjustments in the context of 'work' and the Statutory Code of Practice on Employment is to be read alongside the EqA. The Code states that a PCP should be construed widely so as to include, for example, informal policies, rules, practices, arrangements, criteria, conditions and so on.

118. In the EAT decision in the well-known case Secretary of State for Work and Pensions (Job Centre Plus) v Higgins [2013] UKEAT/0579/12 it was held at paragraphs 29 and 31 of the HHJ David Richardson's judgment that the Tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, (3) the nature and extent of the substantial disadvantage suffered by the employee, and (4) identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage.

Burden of proof

119. Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

120. In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that he did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondents and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds.

Time limits

121. (1) [Subject to [sections 140A and 140B] proceedings] on a complaint within section 120 may not be brought after the end of —

1. the period of 3 months starting with the date of the act to which the complaint relates, or

2. such other period as the employment tribunal thinks just and equitable.

(2) ..

(3) For the purposes of this section —

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something —

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Conclusion – applying the law to the facts

Did the respondent treat the claimant less favourably because of something arising in consequence of her disability?

122. The Tribunal has followed list of issues agreed between the parties, and refers to the numbered allegations set out above.

S. 15 the Act - Discrimination Arising from Disability

123. With reference to the first issue, namely, did the respondent treat the claimant less favourably because of something arising in consequence of her disability, the Tribunal found on the balance of probabilities that it did in relation to the removal of the claimant from her substantive post on 10 November 2017 and she was unable to work her existing shift pattern after that, but both were objectively justified. In respect of the shift pattern she worked after temporary removal from her substantive post, the Tribunal took the view that the effect on the claimant of the less favourable treatment was to a large extent ameliorated by her being given the freedom to dictate the hours she worked providing her contractual obligations were met with the result that between

7am and 7pm she could dictate her own shift pattern, and her original toll shift and rest days were mirrored as best as possible.

124. The Tribunal accepted Ms Niaz-Dickinson's submission that it is evident the claimant was removed from her post because she did not have adequate footwear as the respondent stated on 6 February 2018:

"It was reported by Margaret on 10 November 2017 that the footwear she had been wearing was no longer fit for purpose…The move was not directly driven by Merseytravel but by Margaret's condition…This was done to protect physical health and not to exacerbate the condition any further".

125. She further submitted that the claimant was treated unfavourably because of something that arose in consequence of her disability, the unfavourable treatment that was caused by her removal from post was that: she was unable to work overtime until July 2018 (with the exception of one day on 10 May 2018); she was segregated from her team; she was required to work at several different sites in an ad hoc fashion; she was unable to follow her existing shift pattern and she was refused an annual leave request. In written submissions Ms Niaz-Dickinson's incorrectly stated, "It is notable that C could have remained on her existing shift pattern but that option was not pursued by R." The clear evidence before the Tribunal was that the claimant could only work the 24-hour shift pattern in tolls, she could no longer work on tolls due to health and safety risks, and there was no other option for the claimant to work a 24-hour shift that could have been pursued by the respondent.

126. Ms Niaz-Dickinson referred the Tribunal to the causal "two-stage test" set out in *Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT*, Mr Justice Langstaff, the then President of the EAT, explained that there is a need to identify two separate causative steps in order for a claim under S.15 EqA to be made out. The first is that the disability had the consequence of 'something'; the second is that the claimant was treated unfavourably because of that 'something'. According to Langstaff P, it does not matter in which order the tribunal approaches these two steps: 'It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that ask whether that was something that arose in consequence of B's disability'.

127. The Tribunal was also referred to Charlesworth v Dransfields Engineering Services Limited [2017] UKEAT/0197 and the tension between Weerasinghe and Hall v Chief Constable of West Yorkshire Police [2015] UKEAT/0057/15/LA was addressed. Honourable Mrs Justice Simler DBE stated at paragraph 15

"I do not consider that there is any conflict between the approach identified in Hall and that identified by Langstaff J in Weerasinghe. As Langstaff J said in Weerasinghe the ingredients of a claim of discrimination arising from disability

are defined by statute. It is therefore to the statute that regard must be had. The statute requires the unfavourable treatment to be "because of something"; nothing less will do. Provided the "something" is an effective cause (though it need not be the sole or the main cause of the unfavourable treatment) the causal test is established".

128. It is uncontroversial that the claimant required either off the peg or bespoke made-to-measure safety shoes because of her disability, she was unable to carry out her duties at the tolls without this health and safety equipment, and this resulted in her removal from her substantive post on 10 November 2017, albeit temporarily, the change in the claimant's shift pattern, the decision to medically suspend on 13 January 2018 and the requirement for the claimant to work at the Hubs Travel Centre .

129. The Tribunal was satisfied, considering the factual matrix, that whilst suitable safety shoes had not been provided, any unfavourable treatment that could have resulted to the claimant was ameliorated by other reasonable adjustments that were put in place. Had the claimant not been provided with reasonable adjustments during the process of sourcing a suitable pair of shoes for her, the outcome of her claim may well have been different.

130. A number of references were made by Ms Niaz-Dickinson to a delay in providing suitable shoes pursuant to the COT3. The Tribunal found in accordance with paragraph 3 of the Schedule to the COT3 it did not set out any dates by which the footwear should have been provided. In compliance with the COT3 the respondent provided the claimant with suitable footwear, she continued working and there were no issues until the claimant informed the respondent they were wearing out, and one pair was worn out and not fit for purpose. When it became clear the replacement shoes (which the respondent was informed were identical to the shoes the claimant had worn without complaint), the respondent immediately instructed an expert to manage the provision of custom made footwear, which took time. It is notable from 2015 the claimant had been provided with between 30-40 pairs of shoes. In addition, from 10 May 2017 to 10 November 2017 a variety of shoes saloon shoes, trainer shoes, and bespoke shoes that were adapted following fittings with her on numerous occasions, were provided. This was not an action of an employer ignoring its duty to make reasonable adjustments, and it is notable during this period the claimant had no time off work due to her disability and worked overtime if it was available, (despite the observations made by occupational health that she should refrain from overtime) and she suffered no financial loss.

131. The nub of this case is the claimant's belief that had the respondent instructed the NHS and not Michael Vaughan, the shoes would have been provided earlier than they were, and the evidence of this is the fact the claimant was eventually provided with shoes via the NHS, which were suitable and enabled her to return to work in her substantive role. Given the fact that other reasonable adjustments were made during this period, the Tribunal found the respondent's decision to instruct an expert to provide the custom-made shoes was reasonable, bearing in mind prior to the COT3 the NHS had failed to

provide the respondent with a figure on cost, despite numerous requests. When Michael Vaughan was instructed, the respondent would have no inkling that the claimant would reject the custom-made shoes, which the expert found fit for purpose even if the claimant did not.

132. It is uncontroversial the claimant was unable to work her existing shift pattern when the shoes were not provided by the time her "Saloon" shoes had worn out until the NHS finally supplied suitable shoes on 3 December 2018, but there was no disadvantage to the claimant as she was able to determine her own shift pattern, albeit she could no longer work early mornings and late nights. The fact the claimant was provided with a number of temporary duties between 10 November 2017 and 13 January 2018 pending the imminent provision of shoes through Michael Vaughan and Peacocks, was entirely reasonable, especially taking into account the respondent's flexibility of start and finishing times, maintaining where possible the claimant's work and rest days, red-circling her salary and allowances.

Unfavourable treatment

133. Less favourable treatment is not defined in the EqA. The EHRC Employment Code indicates that unfavourable treatment should be construed synonymously with 'disadvantage'. It states: 'Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably' — para 5.7.

134. Taking into account the two-stage test and turning to the alleged unfavourable treatment relied on by the Claimant as follows the Tribunal found on the balance of probabilities:

<u>The removal of the Claimant from her substantive post on 10th November 2017</u>

134.1 The removal of the Claimant from her substantive post on 10th November 2017 was found by the Tribunal to be unfavourable treatment arising in consequence of the claimant's disability as indicated above.

<u>The failure to manage the Claimant's hours over the period 10th of November 2017 -12th of January 2018</u>

134.2 The failure to manage the Claimant's hours over the period 10th of November 2017 -12th of January 2018 in a manner to ensure that pre-planned rest/work days/hours on her existing shift pattern were honoured without requiring her to take annual leave and/or resulting in her being deemed to "owe" the Respondent hours; was not found to be unfavourable treatment arising in consequence of the claimant's disability. It was submitted on behalf of Ms Niaz-Dickinson the claimant was unable to work her existing shift

pattern due to being transferred to alternative roles, that transfer being due to the inability to provide her with appropriate shoes that were suitable for her disability. The Tribunal accepted her argument that the claimant's inability to work her existing shift pattern was a consequence of her disability as indicated above. It accepted the claimant's evidence, on the balance of probabilities, that her inability to work her existing shift pattern resulted in her working less than her contracted hours and on occasion working on days that had previously been scheduled as rest days, but it did not accept the claimant was unable to manage her own working schedule and facilitate prior arrangements. Clearly, the claimant was no longer required to work nights but she was in a position to arrange her hours of work as and when she required between 7am and 7.30pm providing she met her contractual hours and the evidence before the Tribunal was that the claimant's original rest days were largely replicated.

134.3 With reference to the claimant's evidence that 'owing' time caused her stress and anxiety, the Tribunal did not find it credible bearing in mind she was in control of her own hours, and at no stage did the responded put pressure on the claimant to work her hours, or demand that she worked any time owed. The undisputable evidence was that the claimant has never been asked to make up for any time owing by her.

134.4 The Tribunal concluded that the claimant's treatment was advantageous to her; in contrast to other employees she could dictate her own start and finishing times, the shift pattern between 7am and 7pm, and was not asked or put under pressure to work any time "owed" and thus it could not amount to unfavourable treatment given the fact it was available to claimant because of her disability and the requirement that she temporarily worked away from tolls.

134.5 If the Tribunal is incorrect in its finding that the a "failure to manage the claimant's hours" resulted in any less favourable treatment to the claimant, the Tribunal has in the alternative, made findings in relation to whether it was a proportionate means of achieving a legitimate aim as set out below.

<u>The decision to medically suspend the Claimant on 13th January 2018</u>

134.6 The decision to medically suspend the Claimant on 13th January 2018 was found to be unfavourable treatment arising in consequence of the claimant's disability. However, the claimant was not required to work, did not suffer financially and the suspension allowed her to be successfully matched up with suitable alternative employment as the claimant returned to work without any complaints regarding the actual role she undertook in the Hub, although she did complaint about overtime issues and travel commute/parking at the time. On the balance of probabilities, the Tribunal finds the claimant did suffer unfavourable treatment because of something arising in consequence of her disability in respect of this complaint, however, for the reasons set out below the treatment was a proportionate means of achieving a legitimate aim.

The requirement to work at the Hubs Travel Centre

134.7 With reference to the requirement to work at the Hubs Travel Centre resulting in an extended commute, inability to work a regular shift pattern and a loss of overtime, this was not found to be unfavourable treatment arising in consequence of the claimant's disability. The Tribunal did not find on the balance of probabilities the claimant had extended her commute, was unable to work a regular shift pattern (see above) and had lost overtime for the reasons already stated. It prefers the evidence given on behalf of the respondent that there was no extended commute, and the claimant had the ability to dictate her own working hours, by which she could avoid travelling in peak times. The claimant's evidence that peak time was 7am was not accepted by the Tribunal, who is aware for its own experience this is not the case in Liverpool City Centre when peak time is approximately 7.45/8am onwards. The claimant's commute could have been reduced by her turning into work earlier, which she had the ability to do. It is noted that she worked a 24-hour shift pattern in her substantive role that included early travel, and driving in to Liverpool for a start earlier than 7am was not unusual, the claimant having worked a 9-hour starting work at 6am. The hubs were open 12 hours, 7.00 to 7.30 with three shifts commencing at 7.00 which the claimant could have taken up had she chose to do so, thus avoiding any heavy traffic to and from work.

Proportionate Means of Achieving a Legitimate Aim:

135. Ms Niaz-Dickinson referred the Tribunal to Buchanan v Commissioner of Police for the Metropolis [2016] UKEAT/0112/16/RN Judge Richardson gave guidance on the manner in which a justification defence should be considered. The Tribunal was taken to paragraphs 56 and 57:

> [56] In this case, therefore, the ET was required to consider whether each of the six steps taken by the Respondent and found by the ET to be unfavourable treatment arising from disability was justified - that is to say, whether it was a proportionate means of achieving a legitimate aim. It will probably not be difficult to deduce the aims of the Respondent, and for this purpose the policies which it adopted will of course be highly relevant; if the aims are not explicit within the policies, they may well be implicit. …
>
> The question will always be whether it was proportionate to the Respondent's legitimate aims to take a particular step under the UPP … It is also relevant to take into account the impact of applying the procedure in a particular way on a particular officer. I would, however, caution the ET to make careful findings as to the Respondent's aims; I think the policies show they may have been more sophisticated than simply "to move in stages towards either a return to work or dismissal".

136. In the case of Hensman v Ministry of Defence (2015) UKEAT/0299/14/BA Mr Justice Singh gave guidance on the assessment of proportionality in relation to claims under section 15, EA (2010). He stated at paragraphs 43 and 44 of the judgment that: [43]. Accordingly, it is clear, first, that the role of the

Employment Tribunal in assessing proportionality, in contexts such as the present, is not the same as its role when considering unfair dismissal. In particular, it is not confined to asking whether the decision was within the range of views reasonable in the particular circumstances. The exercise is one to be performed objectively by the Tribunal itself. However, secondly, I accept Mr Tunley's submission that the Employment Tribunal must reach its own judgment upon a fair and detailed analysis of the working practices and business considerations involved…"

137. Sections 20–21 are focused on affirmative action: if it is reasonable for the employer to have to do so, it will be required to take a step or steps to avoid substantial disadvantage. The test of justification is an objective one and the issue of reasonable adjustments should be considered *before* any view is taken as to whether the circumstances amount to less favourable treatment for a reason that is related to disability. Whilst the Tribunal has set out the issues in the same order as agreed between the parties, it considered the reasonable adjustments claim first.

138. Ms Niaz-Dickinson accepted that the claimant does not dispute the respondent's aim of providing the claimant with a safe place of work is legitimate. She submitted that the decision was not proportionate and a number of reasons were given including:

138.1 "R had been advised by OH from March 2013 that C required a shoe which should be identified by the relevant manager or via the NHS. There were discussions with the NHS in 2015 in order to provide bespoke shoes. R had agreed to fund half of the cost of the shoes, subject to the cost, however R did not proceed to have bespoke shoes made for C because the NHS could not provide a definitive quote.

138.2 Ms Niaz-Dickinson argued that the failure to agree to shoes being made by the NHS due to a definitive quote is incongruous given that in 2018 R was willing to spend up to £10,000, an argument the Tribunal did not accept. The issue was not the amount of the spend, but the NHS's inability to provide the respondent with a quotation in 2015 in contrast to 2018 when one was provided, a contract agreed and the purchase went ahead. The Tribunal, taking into account the respondent's business consideration and policy of requiring the cost of the shoes to be confirmed, did not find it was disproportionate for it to insist on the NHS providing a definitive quote and refusing to enter into a contract for purchase when the NHS failed to provide one.

138.3 Ms Niaz-Dickinson argued "C identified Bolton Bros in 2015 as a supplier of non-slip footwear which is manufactured to ISO/ENO standards. Although R then obtained a quote from Bolton Bros around the same time it is inexplicable that this provider was not then instructed to manufacture footwear for C when she alerted R to the difficulties with her shoes in May 2017. The evidence shows that it is Bolton Bros who eventually did manufacture bespoke shoes for C in September 2018, which enabled C to return to her role on 5 December 2018." The Tribunal does not accept Ms

Niaz-Dickinson's observations on the respondent's alleged "inexplicable behaviour." The Bolton Bros shoes in 2018 were produced through the auspices of the NHS, in 2015 shoes were successfully obtained for the claimant via a referral to Claire McLoughlin, a podiatry expert. The NHS in 2015, as acknowledged by Ms Niaz-Dickinson, refused to provide any quote, least of all a definitive quote despite the respondent's attempts at obtaining this information. By 25 September 2015 the claimant was aware from her conversation with NHS Orthotic she had "timed out on my time needed a re-referral from my GP" (which was outside the respondent's control and entirely a matter within the power of the claimant), was informed "the NHS cannot do this apparently, even with a rereferral" and was advised to seek private advice, which she did at the cost of the respondent. The case put by the claimant was that she wanted the NHS involved so that her feet would be measured properly.

138.4 The Tribunal found that the respondent in 2017 against this background sourced a new pair of "Saloon shoes" identical to the shoes the claimant had worn without complaint from early 2016 until the time they started to wear out in 2017. This was not unreasonable or inexplicable, the respondent having been informed by the shoes manufacturer that the "spec" had not changed, and it was not inexplicable for the respondent to re-refer the claimant to Claire McLoughlin to see if a resolution could be found to make the new shoes as comfortable as the old shoes the claimant had worn since January 2016. The possibility of trainer style shoes was then explored and made available for trial as an alternative. It was not inexplicable, as the attempts to find suitable shoes for the claimant dragged on, for the respondent to instruct Michael Vaughan an orthopaedic expert to provide the shoes, in the knowledge that he was an expert connected to the NHS, would ensure that the measurements were correct and the custom-made shoes fit for purpose.

138.5 Ms Niaz-Dickinson emphasised that as the claimant had suggested on 31 May the respondent should have go back to the NHS, and it was unreasonable that this suggestion was not followed up at the time. As indicated above, the Tribunal accepted the claimant had suggested this option at the very latest on 5 June 2017, it did not accept that an agreement had been reached to the effect that the respondent would go back to the NHS reigniting the 2015 communications. The parties understanding as to what was said at the 31 March 2017 meeting are different, and it is more likely than not they were talking at cross-purposes and a misunderstanding arose. The claimant wanted a referral to the NHS., Vaughan Orthotics were linked to the NHS and had advised the respondent the claimant would be provided with the reasonable adjustment sought, namely, a suitable pair of health and safety shoes.

138.6 Ms Niaz-Dickinson submitted Vaughan Orthotics indicated that they would provide safety shoes, (i.e. of a steel toecap type), with the steel toecap removed in the 'Odin' style, i.e. to the style of a safety shoe and the claimant had not worn industrial safety shoes prior to that time. She further submitted heavyweight industrial shoes were not appropriate and that simply removing

the steel toecap would not alter the large heavy weight style of the shoes, ignoring all of the evidence before the Tribunal concerning the adjustments made to the shoes, ranging from supplying a light sole and so on as set out in the findings of facts. The Tribunal does not accept Ms Niaz-Dickinson's submission that no thought was given to the suitability of the shoes Vaughan Orthotics intended to provide; a great deal of thought had been given. It is clear from the contemporaneous documentation the claimant was provided with customer-made shoes that had undergone a number of transformations, and at the end of the process was considered by the expert to be fit for purpose. Despite the claimant's insistence when giving evidence on cross-examination, she had not been provided with an Odin style shoe, but a shoe custom-made specifically for her requirements. There was never any question of a steel toe cap being required, the respondent having taken the decision much earlier when deciding on safety shoes to worn when carrying out toll duties, that steel toecaps were a health and safety hazard and should never be worn. The fact that managers (who were not experts in safety shoes) got confused with the ISO numbers is by the way, as was the submission that the Saloon shoes worn by the claimant were only SRC rated, given the fact that SRC rated shoes were never acceptable to the respondent, and had it known the Saloon shoes were not health and safety compliant, the claimant would not have been allowed to wear them. In any event, there was no persuasive evidence the Saloon shoes were not health and safety complaint as alleged, the Tribunal did not agree with Ms Niaz-Dickinson on this point, and nor did it agree the claimant could have been permitted to continue to wear SRC rated shoes until a bespoke solution was found, for the health and safety reasons put forward by the respondent.

138.7 In all of the circumstances the Tribunal found that the removal of Claimant from post was a proportionate means of achieving the respondent's legitimate aim to provide the claimant with a safe place of work. The Respondent demonstrated that the treatment was a proportionate, the legitimate aim relied on by the Respondent in respect was 'the obligation on the Respondent to provide the Claimant with a 'safe place of work' and her treatment thereafter was a proportionate means of achieving that legitimate aim being 'the provision of suitable alternative work for the Claimant in circumstances in which she is not able to safely undertake her substantive duties as a Customer Services Officer at the Mersey Tunnels'.

139. With reference to the alleged failure to manage the claimant's hours, Ms Niaz-Dickinson accepted it was a legitimate aim of the provision of suitable alternative work for the Claimant in circumstances in which she is not able to safely undertake her substantive duties, but referred to the points raised above all of which the Tribunal considered when it came to its decision.

140. With reference to the medical suspension, Ms Niaz-Dickinson submitted that the decision to medically suspend the claimant arose in consequence of her inability to carry out her role for all the reasons set out earlier, which was accepted by the Tribunal who found it amounted to unfavourable treatment given the claimant's evidence that it affected her mood and holiday. It does not accept the claimant was depressed as alleged, there being no medical

evidence to support this condition. Ms Niaz-Dickinson pointed out that despite the claimant's 's reference to the NHS in the meeting in 31 May 2017 (or 5 June 2017) it is clear that no steps were taken to approach the NHS for assistance until around February 2018 and the reason was the NHS had been unable to provide a quotation of the exact cost. The Tribunal have dealt with this above, and does not intend to repeat its finding that the respondent made reasonable adjustments during this period to ensure the claimant would return into her substantive post, having no option but to medically suspend when it did.

141. The main thrust of the claimant's case is that the respondent should have approached the NHS on 31 May 2017 to instruct it to provide a bespoke solution and the claimant permitted to wear SRC rated shoes. Ms Niaz-Dickinson submitted it was clear from the evidence of Michael Kerrigan that the respondent was prepared to compromise on its footwear requirements when it suited them, for example when the claimant was expected to wear shoes that were "not waterproof for many months" and therefore the respondent could have have relaxed its requirements in order to keep the claimant in post. The Tribunal did not agree. When the claimant complained of the shoes not being waterproof an adjustment was made to her duties which were limited to working in the dry toll booth. There is a difference between the claimant wearing SRC rated shoes that were not health and safety complaint and her work shoes that were, even if they were not waterproof as far as the claimant's risk to a health and safety breach was concerned. The Tribunal did not accept Ms Niaz-Dickinson's submission that the claimant's medical suspension was not a proportionate means of achieving a legitimate aim of health and safety protection; it was proportionate given the reasonable adjustments that were made, and the necessary risk control the respondent's business required.

142. Finally, with reference to the claimant being required to work at the hub, in the alternative, had the Tribunal found unfavourable treatment (which it did not as the claimant working in the hub was a reasonable adjustment) it would have gone on to find it was a proportionate means of achieving a legitimate aim, namely, keeping the claimant in work as opposed to medically suspending her pending the production of her made-to-measure health and safety complaint shoes in circumstances in which she is not able to safely undertake her substantive duties. It was conceded by Ms Niaz-Dickinson that the aim was legitimate but she not conceded that the unfavourable treatment was proportionate for the reasons already put forward above, which the Tribunal does not intend to repeat and refers the parties to the points already made.

S. 20 the Act – Duty to Make Reasonable Adjustments

143. The claimant contends the respondent failed to comply with its duty to make reasonable adjustments, the Tribunal does not accept this contention taking into account the whole picture of the factual matrix and the reasonable adjustments made in tandem with the respondent's attempt to provide the ultimate reasonable adjustment, namely a pair of suitable health and safety compliant shoes. The Tribunal found, taking into account the guidance

provided by the higher courts, that the respondent had taken steps as was reasonable throughout the relevant period, and there was a very real prospect that Michael Vaughan would have produced the shoes at the time he was instructed in the capacity as expert.

144. Ms Aziz-Dickinson referred the Tribunal to Archibald v Fife Council [2004] IRLR 651 the House of Lords gave guidance on the parameters of reasonable adjustments. That guidance, albeit under the Disability Discrimination Act (1995), is applicable to the EqA (2010) and it is submitted that paragraph 19 of the speech of Lord Hope is of relevance to this case:

"s.6(7) is subject to the duty to make adjustments in relation to people who are at a substantial disadvantage because they are disabled in comparison with persons who are not disabled: s.6(1). The performance of this duty may require the employer, when making adjustments, to treat a disabled person who is in this position more favourably to remove the disadvantage which is attributable to the disability".

145. In the case of Royal Bank of Scotland v Ashton [2010] UKEAT/0542/09/LA the EAT gave guidance on the parameters of reasonable adjustments. Langstaff J stated at paragraph 15:

"[15] The duty, given that disadvantage and the fact that it is substantial are both identified, is to **take such steps as are reasonable to prevent the provision, criterion or practice (which will, of course, have been identified for this purpose) having the proscribed effect** [the Tribunal's emphasis] - that is the effect of creating that disadvantage when compared to those who are not disabled. It is not, therefore, a section which obliges an employer to take reasonable steps to assist a disabled person or to help the disabled person overcome the effects of their disability, except insofar as the terms to which we have referred permit it."

146. In the case of Leeds Teaching Hospital NHS Trust v Foster [2011] UKEAT/0552/10/JOJ the EAT considered whether it was necessary for a tribunal to find that there was a real or less than real prospect that a reasonable adjustment (redeployment) would remove a disadvantage, at paragraph 17 of the judgment Keith J stated:

"In fact, there was no need for the tribunal to go as far as to find that there would have been a good or real prospect of Mr Foster being redeployed if he had been on the redeployment register between January and June 2008. It would have been sufficient for the tribunal to find that there would have been just *a* prospect of that. That is the effect of what the Employment Appeal Tribunal (Judge McMullen QC presiding) held in Cumbria Probation Board v Collingwood (UKEAT/0079/08/JOJ) at 50. That is not inconsistent with what the Employment Appeal Tribunal (Judge Peter Clark presiding) had previously said in Romec Ltd v Rudham (UKEAT/0069/07/DA) at 39. The Employment Appeal Tribunal was saying that if there was a real prospect of an adjustment removing the disabled employee's disadvantage, that would be sufficient to make the adjustment a reasonable one, but the Employment Appeal Tribunal

was not saying that a prospect less than a real prospect would not be sufficient to make the adjustment a reasonable one."

Provision Criterion Practice / Auxiliary Aid:

147. The Tribunal accepts the Claimant's contention that she was placed at substantial disadvantage by the requirement to wear specific footwear to carry out the Claimant's role of a Customer Service Officer at the Tunnel Tolls (the PCP relied upon) in comparison with persons who are not disabled, and the respondent knew that the claimant had the disability and was likely to be placed at a substantial disadvantage. However, it did take such steps as was reasonable to have to take to avoid the disadvantage.

148. The Tribunal accepts the requirement to work an alternative shift patter/work schedule during the period 10 November 2017 to 12 January 2017 amounted to a PCP, however, there was no reasonable adjustment that could have been carried out in respect of it in order that the claimant could continue working that shift, as only tolls could offer the 24-hour alternative shift pattern and the respondent made the reasonable adjustment of allowing the claimant total freedom over her shift pattern falling between 7am and 7.30am, ensuring the pattern of her rest days remained when possible, and the Tribunal took the view that this amounted to more favourable treatment that the claimant's non-disabled employees who worked set shift patterns in the toll, hub and elsewhere.

149. The Tribunal does not accept there existed PCP requiring employees to be physically capable of working in the Tunnel Tolls/Plaza and/or to have access to work emails to have enabled them to participate in team meetings/votes affecting the team. The claimant was physically capable of working, had access to her work emails and attended a team meeting at tolls when she was working elsewhere, including in the office located next to the tolls. The PCP was the requirement for the claimant to wear health and safety footwear, not to be physically capable of working. In the alternative, if a PCP can be the requirement to be physically capable of working (which the Tribunal doubts can amount to a provision, practice, or criterion in these specific circumstances given the fact that the PCP relied upon appears to be that claimant was required to attend work at the tolls in her substantive role) it would have gone on to find, the claimant was not placed at a substantial disadvantage in the circumstances of this case given the reasonable adjustments that were carried out. The comparator referred to in four steps set out in Higgins above was not made out as employees, whether disabled or not, working in the respondent's other premises had access to emails, team meetings and so on.

150. The Tribunal accepts but for the provision of an auxiliary aid of custom-made shoes and/or innersoles, the claimant could be put to a substantial disadvantage compared to persons who are not disabled, but in the circumstances of this case taking into account the factual matrix and the reasonable adjustments that were carried out, the claimant was not

disadvantaged the respondent having taken steps as was reasonable to have to take to avoid the disadvantage.

Substantial Disadvantage:

151. Turning to the individual allegations of substantial disadvantage the Claimant was allegedly was put to because of each of the PCP's identified at above as follows the Tribunal found;

PCP 1:

151.1 As indicated above the Tribunal found the respondent operated PCP 1. It was submitted by Ms Niaz-Dickinson the claimant was put at a substantial disadvantage in comparison to non-disabled people who would be able to wear the shoes provided, without pain and discomfort, and remain in their role. Had it not been for other reasonable adjustments carried out by the respondent, this proposition would have been accepted by the Tribunal to be the case.

151.2 In oral submissions Ms Niaz-Dickinson further submitted that as the respondent (i.e. Michael Kerrigan) had accepted that it had failed to provide the reasonable adjustment of appropriate footwear between 10 November 2017 and 5 December 2018, the Tribunal must come to a finding in favour of the claimant and its failure to do so would amount to a bias against her. The Tribunal did not agree; had the case been that straight-forward it would not have taken 6 days including Tribunal time spent in chambers considering the lengthy issues. The respondent's "failure" must be looked at in context, with due regard given to the reasonable adjustments that were carried out in tandem whilst it was attempting to set in hand the reasonable steps of sourcing appropriate footwear which totalled thirty to forty pairs plus all the remedial works carried out on shoes.

151.3 Ms Niaz-Dickinson disputed the respondent had taken reasonable steps during that time to make the necessary adjustment for all the reasons she has argued earlier, which the Tribunal did not accept were legitimate points preferring the submissions put forward on behalf of the respondent by Mr Rogers. The one matter Ms Niaz-Dickinson has raised, that has not been dealt with by the Tribunal, is the fact the Respondent did not dispute the shoes provided by Vaughan Orthotics Ltd were unsuitable and did not suggested that claimant was being deliberately difficult. Throughout this whole process the respondent actively sought a resolution, and even when Michael Vaughan was of the expert opinion the claimant had been provided with a fit for purpose pair of shoes, it accepted the claimant's word that they were not suitable and proactively went about sourcing another pair to comply with its duty to make a reasonable adjustment. The claimant's views on Michael Vaughan were preconceived, and she did not possess the expertise to comment on the capabilities and expertise of a medically trained supplier, shoe manufacturers or the expert opinions obtained in her case. The claimant could only say if the shoes were comfortable and if not, why and this resulted in many other reasonable adjustments being made, with no

suggestion at any time during the process that the claimant's substantive role was at risk. The expectation of all parties was that a pair of shoes would be sourced, which it was eventually, and the claimant return to work in her substantive role. The Tribunal did not accept on the balance of probabilities, the steps taken by the respondent were not reasonable in the circumstances outlined on behalf of the claimant. Mr Rogers submitted that the respondent's authorisation of bespoke footwear on the 13 May 2017 was easy to criticise with hindsight. The literature provided by Peacocks did not state that only "heavy industrial shoes" could be provided, and at the time the claimant did not raise this as an issue with the respondent. The Tribunal agreed.

151.4 It is notable in Ms Niaz-Dickinson's written submission she referred at paragraph 39(iii) to the respondent going back to the NHS, when the evidence before the Tribunal was that the claimant was required as a matter of course to consult with her GP for a NHS referral, and this was outside the power of the respondent. The relationship was claimant, GP and NHS back to the claimant; the only role the respondent had was paymaster and for that to work it required details of cost.

151.5 There was no satisfactory evidence before the Tribunal that the claimant had suffered from increased pain over a prolonged period, stress and anxiety because of the unreasonable delay in providing the shoes. From the time the COT3 was entered into the respondent made reasonable adjustments by providing the claimant with the 'Saloon' pair of shoes, there were no complaints by the claimant. Immediately the claimant complained, steps were taken including adjustments that were reasonable in all the circumstances as set out above. It is notable the claimant was kept updated as to the progress relating to the provision of suitable shoes at all times, and it had been made clear to her by Mike Kerrigan that if she was unable to wear shoes due to any pain, she should say so immediately. On the occasion the claimant did say so, she was immediately taken off toll booth duties as a reasonable adjustment.

151.6 Throughout the relevant period the claimant was aware of all the steps taken by the respondent, as set out above in the facts, and the Tribunal took the view that if the claimant did suffer stress and anxiety (for which there was no supporting medical evidence) this was not down to the respondent, but the claimant's general negative attitude toward her employer, whom she criticised even when a number of the reasonable adjustments made supporting her continued attendance at work reflected the claimant's own suggestions set out in her PIP.

151.7 The respondent engaged a specialist who dealt with the claimant on a one-to-one basis. Between thirty to forty pairs of shoes were provided to the claimant, and the custom-made shoes were fitted and re-fitted numerous times at the claimant's request. The Tribunal did not accept there had been any unreasonable delay, the respondent had engaged an expert and as can be seen for the contemporaneous documentation, it was proactive when dealing with sourcing the shoes, appointments, objections made and the claimant's correspondence. In short, had the claimant stepped back and

viewed what was happening to her objectively, she would have realized the respondent was doing its very best in the circumstances. It was not an orthopaedic expert, it relied on the expertise of others including the shoe manufacturer, kept on top of the instructions, pushed the experts for a resolution and even when Michael Vaughan indicated the shoes were fit for purpose and he could do nothing else to assist the claimant, the respondent accepted what the claimant had to say about the shoes, and expeditiously put in place the exploration for replacement shoes via the NHS at more cost to it. When the expert was first instructed, the respondent could not have foreseen the outcome, and it would not have known at that stage the claimant would find the shoes eventually provided through the NHS more comfortable than the shoes provided as a result of the advice given by an expert connected to Fazakerley Hospital, part of the NHS.

151.8 Looking at the overall factual matrix it is clear to the Tribunal that the claimant was aware the respondent intended and indeed did put in place other reasonable adjustments in order that she could continue working when it became apparent that she could no longer carry out her substantive role due to health and safety requirements as the claimant (who was an avid walker able to walk many miles with issue) was unable to wear her own shoes at work. The claimant complained about the lack of parking facilities (although does not form part of her formal claim before this Tribunal) and time was spent by Ms Niaz-Dickinson on cross-examining the witnesses on parking facilities to show that the claimant should have been provided with parking. The point to note is this; the claimant's disability was not that she could not walk. The claimant was able to walk long distances in the right shoes, and there was nothing to stop the claimant, who was able to wear comfortable shoes, walk from the car park into work. For the avoidance of doubt, had this been a complaint before the Tribunal (which it was not) it would have gone on to find it was not a reasonable adjustment to have provided the claimant with car parking, despite the numerous requests she had made during her redeployment.

151.9 The Tribunal did not accept on the balance of probabilities the requirement to work a different shift pattern at different locations and at short notice caused a substantial disadvantage to the claimant. She was given a considerable amount of leeway during this period, hours not worked were not claimed back from her and she was in the position to control and dictate she wanted to start and finish her work. The claimant, had she viewed the matter objectively, would have understood the requirement to work a different shift pattern was inevitable as she could no longer work nights following the reasonable adjustment made by the respondent when it took the claimant off the tolls and placed her elsewhere in the business. In short, the Tribunal does not accept the claimant was substantially disadvantaged by any of the reasonable adjustments carried out in providing her with alternative employment when it became clear to both parties that she was unable to remain working in the tolls without the proper health and safety footwear. It has dealt with the shift pattern above. In respect of short notice, the oral evidence before the Tribunal was that the claimant, on occasion, was asked to work at other locations, such as the ferry terminals across the Mersey

River. The undisputed evidence before the Tribunal was that she travelled in work time, and returned in work time i.e. on the ferry, and the Tribunal does not find she was caused any disadvantage.

151.10 There was no evidence before the Tribunal to the effect that her removal from post placed the Claimant, a disabled person, at a greater risk than non-disabled employees of finding suitable alternative employment, and this was borne out by the reality. Throughout the relevant period when the respondent made a variety of reasonable adjustments in tandem with sourcing a pair of suitable shoes, there was no suggestion the claimant was at risk of not finding suitable employment or that her medical suspension was anything other than temporary. There was no evidence suitable employment was available to be taken up by non-disabled employees that was not offered to the claimant. There was no evidence the claimant feared employment uncertainty and suffered from stress and anxiety over it; there was no basis for such fears the respondent having made it clear that they were going to find a resolution for the claimant, evidenced by the effort made to source shoes and the numerous reasonable adjustments enabling the claimant to work.

151.11 The fact is the claimant was provided with suitable alternative employment, and she was aware from the outset that this was the respondent's intention hence her completing the skills audit. The Tribunal does not accept the claimant was caused any substantial disadvantage by the respondent who had no option but to remove the claimant from her substantive post temporarily, suspending her on health grounds on full pay the claimant in the knowledge that it was seeking alterative employment for her as reasonable adjustment, which it did to the claimant's satisfaction. The Tribunal finds, looking at the evidence objectively, there was nothing to put the claimant on notice that her employment was not secure; the respondent took all possible steps to keep her in work and she was aware it incurred costs with a view to providing more than thirty-forty pairs of shoes throughout the entire period, and the managers were pressing for the NHS to produce the custom-made shoes, as indeed they had pressed Michael Vaughan.

151.12 There was no evidence the claimant suffered a financial detriment due to the removal from the overtime rota; she had no contractual right to overtime and as indicated above, there was no evidence overtime was available for her to take up during the relevant period. It is notable that overtime had been an issue since 2015 with occupational health advising against it on the basis of the claimant's disability. The Tribunal on the balance of probabilities did not find the claimant had suffered financial loss due to the loss of overtime; the burden of proof is on the claimant to show overtime would have been available for her to take up and was refused and she has not discharged this burden. Had the claimant discharged the burden of proof, Tribunal would have gone on to accept the explanation put forward on behalf of the respondent that it was untainted by discrimination, namely, the availability of overtime was not guaranteed, it depended on the needs of the business and was usually required in holiday periods (July and August) and to cover sickness.

151.13 There was no evidence of any increased pain and stress and anxiety due to the extended commute as alleged; the Tribunal found as indicated above the commute was not extended. The claimant had exaggerated her evidence on this point and the Tribunal was aware from its own experience the commute was light at 7am and not heavy as maintained by the claimant. In short, it would not have taken the claimant longer to come to work had she arranged her hours to commence work at 7am and leave before 4.30pm, when the traffic starts to build up. The same point applies to the claimant's allegation that she was unable to work a regular shift pattern and/or her contracted shift pattern due to the extended commute, which the Tribunal did not accept and found the claimant's evidence in this regard exaggerated and not credible.

151.14 As found by the Tribunal above, it did not accept the claimant had been isolation/segregation from colleagues and increased employment uncertainty, and did not find her evidence reflected the reality and it was not credible. The claimant's complaint is a reference to one day on 11 November 2017 when a reasonable adjustment was made by the respondent who placed the claimant in an office next to Mike Kerrigan. On the evidence before it, the Tribunal did not accept the claimant was isolated or segregated from colleagues, she was stationed near to the booths and could have contacted her colleague during breaks and vice versa. For health and safety reasons the claimant was unable to work in the toll booths or on the plaza, which she could see from the office. The Tribunal did not accept she had been placed at any disadvantage, working near to her colleagues on duties as set out in her PIP. The Tribunal panel is aware of the premises the claimant worked in for one-day when she undertook the task of reading and checking through the respondent's policies and procedures, and it cannot be said she was isolated or. The claimant's usual role was to sit in a booth by herself and give change to motorists. When needed she would get out of the booth and assist motorists. For the day in question the claimant worked in an office near her colleagues and managers, and there was no indication given to her that she could not talk to colleagues. The Tribunal did not accept the claimant experienced any employment certainty at any time during this period; there was no evidence to this effect and no objective basis for such fears on the part of the claimant.

PCP 2

151.15 The Tribunal does not accept PCP 2 resulted in the claimant experiencing increased stress and anxiety about an inability to make back any time owed to the Respondent because of her disability, given the fact that she had the freedom to manage her own hours and it is undisputed any time owned was not recovered from the claimant. The same point applies to the alleged inability to make pre-arranged appointments without taking annual leave.

151.16 The evidence before the Tribunal was the claimant was paid her full wage whatever hours she worked, she was aware the respondent was

flexible about how she worked those hours and when. It was in the claimant's power to arrange her working hours as she saw fit, and after she had completed the 4-week trial period at Hubs, she was able to request annual leave. Given the fact that either the claimant or respondent could have rejected the alternative employment at Hubs within the 4-week trial period, it was not possible for the claimant to book holiday during the trial period because the effect on other staff and their holiday requests. Holiday requests can be refused. There was no evidence before the Tribunal the claimant had raised with Gary Evans any issues concerning the 15 and 21 December pre-arranged dates she wished to work flexibly around; the evidence before the Tribunal was the claimant could dictate her own hours and it does not find the claimant was caused any prejudice because she chose to take one day as a holiday.

PCP 3

151.17 The Tribunal did not find there was a requirement to be physically capable of working in the Tunnel Tolls/Plaza and/or to have access to work emails in order to be able to participate in team meetings/votes affecting the team, and it did not accept the claimant's evidence that as a result of her working temporarily in other areas of the business, increased her employment uncertainty and this caused her stress and anxiety.

151.18 With reference to not having access to work emails in order to be enabled to participate in team meetings/votes affecting the team, the Tribunal accepts it is possible for an employee to be placed disadvantaged if they are absent from work for whatever reason i.e. ill, on maternity leave or suspended on the grounds of ill-health as a result of their disability and it would be good industrial practice to ensure that employees suspended on this basis have access to work-related emails if they want. There are some employees who are happy to remain at home on full pay without any access to work related activities, a number would complain if work-related emails were sent to them during their absence and others would not be bothered one way or another. It is the Tribunal's view that the claimant, based on the evidence before it, fell into the latter category. As indicated above, she had worked on tolls for nineteen years, she was aware of team meetings and how they arose and at no stage did she give any indication that she wanted to be kept informed of team meeting dates in order that she could travel into Liverpool, possibly during peak commuting times, and attend them.

151.19 The Tribunal finds the claimant should have been asked if she wanted to be provided with access to her emails and/or emails relating to the staff meeting and vote forwarded to her during the period she was off work medically suspended, but the respondent's failure did not constitute a breach of its duty to make reasonable adjustments. The substantial disadvantage claimed is increased employment uncertainty and stress and anxiety. Turning to the increased employment uncertainty, the Tribunal does not find the claimant's evidence credible for all the reasons it has already stated, not least, the claimant was aware of the steps taken by the respondent to get her back into work. The reference to stress and anxiety is also found not to be

not credible; the claimant was aware that team meetings regularly took place and she made no attempt to obtain information about dates or attend the meetings, and more importantly, she did not instruct her team or managers that she wished to remain in the loop and attend team meetings whilst not being required to work. There is no evidence before the Tribunal that the claimant sought to take part in work related meetings or any other work matters during the period of her medical suspension, except for dealing with the issue of sourcing the custom-made shoes and her grievance appeal.

151.20 Turning to the meeting which dealt with the vote, by the time the claimant became aware of it, the vote had been passed, nothing had changed and the status quo was suitable for the claimant with the result that she was not caused substantial disadvantage. Had the vote gone the other way, and the claimant unhappy with the outcome, the Tribunal may have gone on to find disadvantage depending on the facts of that scenario. It was remiss of the respondent not to inform the claimant of the vote prior to it taking place, which she was unable to participate in as a result, and conceivable this failure could have placed the claimant at a substantial disadvantage. By the time the claimant came to hear about the vote, it had taken place but nothing had changed, the vote went the way the claimant would have voted had she been invited to so, and in this regard, there was no substantial disadvantage as the status quo remained, and it could not be objectively reasonably for the claimant to have implied by the fact she had not been informed until her return to work was an indication that her employment was at risk against the factual background of this case.

Reasonable Adjustments:

151.21 The Tribunal accepts the claimant's contention that it would have been reasonable for the Respondent to provide custom footwear within a reasonable period to avoid the substantial disadvantage as a result of the PCP's. However, the claimant appears not to have taken into account the reasonable adjustments that were carried out in tandem, and had they not been, the claimant may well have succeeded in her claim.

151.22 It did not accept a reasonable adjustment would have been to permit the claimant work in her usual role at tolls wearing SRC non-weighted shoes as health and safety protection was paramount and had the claimant been allowed to wear non-slip shoes that had not been health and safety rated, and suffered a personal injury or caused an accident to others as a result, the respondent could have been exposed to a personal injury/negligence action. The evidence before the Tribunal was that the claimant was required to wear at all times health and safety complaint footwear, and to have permitted her to wear non-health and safety compliant footwear could have resulted in a health and safety breach. The reasonable adjustment sought by the claimant was custom footwear complying with health and safety; if it was the case that the claimant could work using her shoes that were not health and safety complaint, then the need for a reasonable adjustment would be obviated. The Tribunal observes that had the respondent accepted the claimant could use SCR (non-slip) weighted shoes that were not health and

safety compliant they need not have gone to the protracted and expensive route of instructing experts and providing the claimant with countless pair of shoes, including custom-made shoes, when all that was needed were a more easily accessible pair of non-slip soles shoes.

151.23 The Tribunal does not accept the respondent did not permit the Claimant to work overtime whilst unable to undertake the "full duties of a Customer Services Officer and subsequently following the removal from that post." Up until her medical suspension the claimant did undertake the full duties of a customer service officer, albeit, not at tolls, and as indicated above, there was no satisfactory evidence before the Tribunal that the claimant was not permitted to work overtime during this period. Clearly, the claimant could not work overtime during the medical suspension, and this would not have been a reasonable adjustment following the temporary removal from the tolls post. The evidence before the Tribunal was that the claimant did work overtime on occasion after she had successfully completed the trial period of the redeployment role, and she has failed to shift the burden of proof by providing evidence of dates when overtime was available and not offered to her. There was a period between 10 November 2017 and 13 January 2017 when the claimant was given a variety of different roles during which overtime was not an option for the claimant on tolls given the fact she had been removed from her substantive duties on the 10 November 2017 due the risk to her health and safety.

151.24 The Tribunal accepted a reasonable adjustment was to identify a suitable temporary post (pending the provision of suitable footwear) within a reasonable period, and the respondent was not in breach of this duty. The Tribunal found that a suitable temporary post was found within a reasonable period as set out in the factual matrix above. The respondent had 750 staff, there was no evidence before the Tribunal that any temporary post was available immediately when the claimant was taken off tolls and placed on medical suspension. A skills assessment was necessary to match the claimant up with a suitable position, the facts reveal that this was effective and the claimant worked happily in the Hub until she returned to her substantive post, which was a reasonable adjustment. The Tribunal accepted Mr Rogers' submission that the claimant had not identified any suitable roles that were available for her to take up during that period, save for the role in Hubs which was offered to her and accepted.

151.25 The Tribunal does not accept a reasonable adjustment was to remove Steve Maher from decisions regarding the Claimant's health, and there was no coherent basis put forward by the claimant how this adjustment would remove any substantial disadvantage she was put to as a result of the PCP's. It is uncontroversial that Steve Maher had little if anything to do with the claimant's health during the relevant period, and it is unclear how his removal would have assist the real issue in this case, which was the delay in the provision of suitable health and safety footwear. The evidence before the Tribunal was that the claimant dealt with Mike Kerrigan and Lynne Doherty. There was no evidence the claimant was unable to work due to any input Steve Maher may have had, and there was no requirement for a reasonable

adjustment to this effect. It is undisputed the claimant remained in employment, with no sickness absences until she was suspended for medical reasons.

151.26 The Tribunal does not find following the removal from her substantive post, it was a reasonable adjustment to provide the Claimant with a shift pattern that mirrored her existing pattern; and/or allowing the Claimant to honour existing shift pattern without requiring the use of her annual leave or her owing time to the Respondent. It was not possible to mirror the claimant's toll shift pattern for the reasons already stated, and the claimant was given the freedom to dictate when she worked, manage her shift pattern and decide whether or not to use annual leave. The claimant was working in the hub without issue, and there was no requirement for this adjustment to be made.

151.27 The Tribunal finds it was not a reasonable adjustment to forward information regarding the Claimant's substantive role to her personal email and/or home address during the period of her medical suspension, however, good employment practice should have dictated the claimant could have been asked, at the very least, if she wanted information forwarded to her during that period. It is notable that the claimant was in regular communication with the respondent during her medical suspension, and at no stage did she give any indication she wanted to be copied in or forwarded work-related emails. Nevertheless, the Tribunal accepts the respondent should have asked the question and then forwarded the information to the claimant; however, its failure to do so was not a failure to make a reasonable adjustment. The claimant was absent from work pending re-deployment, and this had nothing to do with internal email communications the provision of which would have made no difference to the claimant and her return to work. Mr Roger's correctly submitted the claimant was in the same position as a non-disabled person who was off on sickness absence or who had been medically suspended as they too would not be sent information regarding their substantive role to their personal or email address and therefore there was no substantial disadvantage.

151.28 The Tribunal finds it was not a reasonable adjustment to permit the Claimant to travel the whole or part of the extended parts of her commute (following the removal of her substantive post) within work time, it would not have resulted in a return to work by the claimant to her substantive role or during medical suspension. The Tribunal repeats its observations above concerning the less than credible evidence given by the claimant of the extent of her alleged expected commute, which the Tribunal did not accept. It accepted Mr Rogers' submission that the claimant's disability did not impact in her mobility outside work, and how she chose to commute was a matter for her, having been provided with a Walrus tag which allowed free travel on public transport at any time.

151.29 The Tribunal finds it was not a reasonable adjustment to ensure the Claimant could book leave having returned from medical suspension. There was no evidence the claimant was prevented from booking leave, the

requirement was that she needed to give 2-weeks' notice as set out in the 2 May 2018 email, following the claimant's request made on 1 May 2018. The Tribunal did not find the claimant required the holiday she sought on 1 May for 14 May as a reasonable adjustment, and it made no difference to the claimant's ability to work in her new role.

152. The claimant was not subjected to unlawful discrimination on the grounds of her disability and her claims of unlawful discrimination brought under section 15 of the Equality Act 2010 are not well founded and dismissed. The claimant was not subject to unlawful discrimination and the claimant's claim that the respondent had failed in its duty to make reasonable adjustments brought under Section 20 of the Equality Act 2010 is not well-founded and is dismissed. The claimant was not subject to victimisation and the claimant's claim for victimisation brought under section 27 of the Equality Act 2010 is dismissed.

Employment Judge Shotter

4 February 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

12th February 2019

FOR THE SECRETARY OF THE TRIBUNALS