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EMPLOYMENT TRIBUNALS

Claimant		***Respondent(s)***
Mr P Wood	**AND**	1. Lloyds Bank PLC 2. Ms R Ross

Heard at: London Central **On**: 5-7, 10, 11 December 2018

Before: Employment Judge Gordon
Ms T Breslin
Ms L Jones

Representation

For the Claimant: Mr R Owen-Thomas (counsel)
For the Respondent: Ms R Thomas (counsel)

Reasons provided following request pursuant to Rule 62(3) of the Employment Tribunal Rules of Procedure 2013.

REASONS

1. This claim was brought on an ET1 Claim Form on 22 March 2018. It was brought against Lloyds Bank but also originally against four named Respondents.

2. The original claim contained a number of different claims some of which were dealt with at an early stage. There was a direct disability discrimination claim under section 13 of the Equality Act 2010. There was a claim under Section 15 for discrimination because of something arising from disability. There was an indirect discrimination claim under Section 19. There was a failure to make reasonable adjustments claim under Section 21. There was a harassment claim under Section 26 and a victimisation claim. All those claims were in the Equality Act 2010. There was also a claim for unfair dismissal.

3. There was some delay in serving the claim. The Response on form ET3 was on 5 July 2018.

4. There was a preliminary hearing for case management purposes before Judge Snelson on 12 July 2018. At that hearing Mr C McDevitt (counsel) appeared for the Claimant and Ms R Thomas (counsel) appeared for the Respondent.

5. Judge Snelson recognised that the claims spanned events happening over a long period of time and he listed a Preliminary Hearing to consider the time issues which had been raised in the Response. He asked the parties to prepare a draft list of issues. He also directed that the final hearing of the matter, which was listed for 10 days in December 2018, should be liability only.

6. The parties then discussed the issues together and told the Tribunal on 27 September 2018 that they agreed how to resolve a lot of them. Also, meanwhile, on 14 September 2018, the Respondents informed the Tribunal that it was conceded that the Claimant was disabled for the purposes of the Equality Act 2010 as from 17 August 2016, arising from his depression and stress.

7. There was an amended grounds of resistance filed by the Respondent on 18 September 2018. That noted that the discrimination claim for something arising from disability and also the indirect disability claim were not being pursued by the Claimant.

8. The preliminary hearing which had been listed by Judge Snelson was heard by Employment Judge Isaacson on 28 September 2018. At that hearing Mr Owen-Thomas appeared for the Claimant and Mr R Thomas appeared for the Respondent. Three of the Respondents were discharged from the claim on the withdrawal of certain claims. Because of the reduction in the extent of the claim, the listing of 10 days was reduced to five.

9. The Judgment that day stated that the Claimant's remaining claims were limited to those set out in the list of issues which were attached. Those were the list of issues which the parties had agreed. It continued: "all other claims are dismissed following withdrawal by the Claimant". In the circumstances, we confine ourselves to those issues. One reason for this is that this is the Tribunal's earlier direction but we should point out that we do not regard ourselves as bound to consider only those issues: we would have received an application to amend them but no such application was made. The importance of the list of issues is that it identifies the scope of the proceedings as a matter of case management, and also so that the Respondent knows the case which it has to answer. That means that the evidence and submissions that we have heard over the last five days (which includes time in Chambers and also today) are with a view to our resolution of those issues.

10. To resolve the issues, we heard from four witnesses. We heard from Mr Wood himself who gave evidence first. We heard from Ms Rita Ross, who was the Local Director for the bank's West London Group at relevant times.

So she was the Claimant's line manager, in particular between January 2015 and September 2016. She says she was also his line manager from July 2017 to the end of his employment but did not have any contact with him at that time because he was off sick, and so his contact was with Mr Neil Smith. We also heard from Mr Smith. He was Local Director for the bank's West London Group from September 2016 and so was the Claimant's line manager from that time.

11. We read a statement from Ms Dina Patel, it being agreed that we could read that without her being called for cross-examination. She was Local Customer Manager for the bank's West London Group. We received a bundle of documents which was in three lever arch files, with about 1,000 pages in it. We were handed up some other documents. We were given a more legible copy of pages 939-955 of the bundle. We were also given a better copy of page 246 of the bundle, but page 246 was actually withdrawn from evidence by Mr Owen-Thomas on the Claimant's behalf having taken instructions about its origin, so we are not taking that into account in our decision. We received the Claimant's diary for 2017 which we marked C1.

The Law

12. We turn now to the law which we have applied to this case. We remind ourselves first of all, that discrimination is rarely overt, is often difficult to prove and may well not be done consciously. Hence the need for the burden of proof provision in section 136 of the Equality Act 2010. That provides that if there are facts on which the court could decide in the absence of any other explanation that the person A has contravened the provision concerned, the court must find that the contravention occurred, but that does not apply if A shows that A did not contravene the provision. That applies to any contravention of the Act.

13. In this particular case there is an allegation of direct discrimination within the terms of section 13 of the Act. That says that a person A discriminates against another B if, because of a protected characteristic A treats B less favourably than A treats, or would treat others. The protected characteristic in this claim is disability. The Tribunal has jurisdiction over such matters by section 39 of the Act.

14. Section 26 describes harassment and this is a form of discrimination. It refers in particular, relevant to this case, to unwanted conduct related to a relevant protected characteristic. In this particular case we will be concentrating on whether the conduct had the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. When considering the question of harassment, we must have regard to those things in sub-section (4) - that is the perception of the Claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

15. In this claim we also have to consider the duty to make reasonable adjustments. In section 21 of the Act there is a failure to comply with that

duty, if there is a failure to comply with the first, second or third requirement set out in section 20. We are concentrating on the first requirement, which applies where there is a provision, criterion or practice of the Respondents which puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. Then there is a requirement for the Respondent to take such steps as it is reasonable to have to take to avoid the disadvantage.

16. In the unfair dismissal claim we are looking at section 98 of the Employment Rights Act 1996. That requires us to look to the Respondent first to show the reason for the dismissal and then having regard to that reason, we must decide whether the dismissal was fair or unfair in all the circumstances of the case including the size and administrative resources of the employer's undertaking and we must decide that in accordance with equity and the substantial merits of the case.

17. We also have received submissions about the effects of section 212 of the Employment Rights Act which it seems to the Tribunal, means that when considering events which might come within the compass of both direct discrimination and harassment, we should look at whether it is direct discrimination first and then if it is, it cannot also be harassment. That we think, is the result of section 212(5) taken together with the definition of, and use of, the word detriment in section 39 of the Equality Act.

Outline of the facts

18. In a nutshell what happened here was that after 26 years of service with the bank, the Claimant was dismissed on the grounds of redundancy on 31 July 2017 with effect from 31 October 2017 as a result of a major restructuring of the branches of the bank. He had been off sick since August 2016 and the issues in the case are about the way in which the process was conducted which resulted in his dismissal.

19. The Respondent concedes that the Claimant was disabled from 17 August 2016 (for the purposes of the Equality Act 2010) with depression and stress. The Claimant tells us that he first had symptoms from this condition in 2010 and he considered it necessary to tell his then line manager, Ms Ross about it in December 2014. But it was not until 16 August 2016 when he had what he described as a breakdown, that the condition became bad enough to amount to a disability under the Equality Act 2010.

20. From that date he was off work and he did not return to work with the bank. There were a number of occupational health reports received by the Respondent. The first was on 5 October 2016, page 145 of the bundle. This reported that the Claimant was in low mood and rather unwell. It was said that he cannot return to work but it was hoped that a plan could be done within three months. The opinion was given then that he was not currently disabled under the Equality Act 2010. Of course, the parties have been able to reach the decision about whether he was disabled at that time with some hindsight in the light of later events.

21. On 19 January 2017, page 159 there was another occupational health report which in brief said that there had been little progress but the Claimant was undergoing some therapy.

22. On 1 March 2017, there was an occupational health report, page 165 which stated in brief that the Claimant was not fit to plan a return to work.

23. On 7 April 2017, there was another occupational health report, page 187. That said that the Claimant was still unfit but that he was under medication and receiving therapy. That report said that routine occupational health reviews were not recommended.

24. The Respondents also had a letter from the Claimant's own GP which we need to refer to later. The Claimant's GP's notes are in the bundle and we looked at those.

The facts in more detail

25. We give the relevant facts in more detail now and then we will turn to how we see the case for its resolution.

26. The Claimant joined the bank at the age of 20 on 4 March 1991. He had a successful career with the bank and it culminated in a position of Senior Bank Manager in various London branches.

27. When the Claimant was in the Fulham branch, Ms Ross took over as the Local Director and so became his line manager. That was soon after December 2014.

28. In January 2015, there was a meeting of bank managers in which the Claimant made quite derogatory remarks about his previous line manager in front of everybody. After the meeting, Ms Ross discussed the reasons for his comments with him on a one to one basis. This led to the Claimant telling her that he wanted to leave the bank. This resulted in a discussion about leaving voluntarily and a possible monetary compensation as a result of that. Ms Ross did enquire about this and figures were discussed with the Claimant but nothing came of it.

29. This event and the discussions around it were the beginning of a breakdown of the relationship between the Claimant and Ms Ross because the Claimant perceived it as demonstrating that she was not the nurturing manager that she had sought to portray.

30. In July 2015, the Claimant moved from the Fulham branch to the Earls Court branch.

31. We are now going to refer to the performance review process which was relevant to the way in which the Claimant was later assessed during the restructuring process. In 2015, there were monthly performance meetings

between the Claimant and Ms Ross as per the usual arrangement between bank managers and their managers. This was a form of continuous appraisal to feed into the mid-year and end-year rating. A "Balance Scorecard" was completed online over the year containing objectives and achievements relating to those objectives. The Claimant's scorecard for 2015 is on page 415 of the bundle.

32. By November 2015, Ms Ross was preparing to rate the Claimant as a "developing performer" which was the second rating from the bottom out of 5. Ultimately however, he was given the rating of "good" for that year, Ms Ross taking into account the fact that they had changed branches half way through the year (as we have said and a move from the Fulham branch to the Earls Court branch) and his successful response to that challenge and also that he had made other improvements.

33. In 2016, the appraisal process was not completed because the Claimant was unwell as from 16 August 2016. Prior to that on 5 July 2016, Ms Ross had sent to him some views about his performance so far that year for him to put in his workbook. Although Ms Ross was not asked about this when she gave evidence, we think these are in the online Scorecard for 2016. These comments were a recognition of his progress and also gave areas which required development. On our findings and what we have seen and heard, there was no actual performance rating given to the Claimant at that time.

34. Soon after the Claimant went off sick in August 2016, Ms Ross handed over to Mr Smith as Local Director. Because the Claimant was off sick, a method of contact with him was agreed between himself and Mr Smith. It was agreed that he would be texted in the first instance. Sometimes they had telephone conversations and they also met. Meanwhile, the Respondent obtained occupational health reports as we have said.

35. On 5 April 2017, the bank announced a restructuring process called Project Florence. This structuring involved about 1,000 bank employees overall but as far as the bank managers were concerned, over 200 branches were to be re-designated as a link or sub-branches with overall accountability for those affected branches moving to the bank managers of a "parent" branch. Also, there would be a closure of 54 branches. Overall this meant that there would be a reduction of about 160 bank managers. All bank managers at grade C, D and E would be required to take part in a preference and selection exercise for roles in the new structure. In other words, bank managers had to apply for a role in order to be sure of staying with the bank.

36. The Claimant was informed of the restructuring process by Mr Smith and a large number of documents were sent to him by post. He received these documents on 10 April 2017 which was a Monday. This was because he was out when they would have been delivered and they needed his signature. On 11 April 2017, he spoke to Mr Smith on the telephone and told him that he was not in a fit state to go through the process.

37. On 22 April 2017 Mr Smith again spoke to the Claimant on the telephone and informed him that on HR's advice, one of the forms which needed to be completed in the process, that was the profile form, would be completed on the Claimant's behalf. He read out parts of the email on page 197 (not page 195 as he said in his witness statement). We do not think that he mentioned in that conversation that it would be Ms Ross who would be completing the profile form. We say this because we think that the Claimant would have reacted adversely to this suggestion at that time (as he did later) if Mr Smith had told him that. We do not think that Mr Smith is right that he obtained the Claimant's consent in that telephone conversation for that to happen. We say this because, in his witness statement Mr Smith does not say that the Claimant consented to this. We think this was an afterthought. Also, our findings on this are consistent with later documentation. For example when the Claimant found out about the fact that Ms Ross had completed the profile form he immediately requested a copy of the form, here we have regard to page 241T on 21 June 2017. If he had known earlier, this would have happened earlier. It is also consistent with what the Claimant said to his GP, which appears from the notes in June 2017. It is also consistent with his later complaints in so far as we are permitted to regard those as corroborative.

38. The day after that phone call, on 23 April 2017, the Claimant posted one of the forms to the Respondent. This was his preference form which he himself had completed in paper form (page 191). He also sent a doctor's letter. Normally, the preference form would have been completed online but the Claimant did it on paper. On this form, bank managers were required to state their first, second and third job preferences in the organisation as restructured. These were bank manager jobs in the geographical area for which they wish to be considered.

39. Then there was this question on the form:-

> Please indicate whether you might be interested in being considered for voluntary redundancy if you are not matched to any roles,

To which the Claimant answered – "yes".

40. Then there was a box headed "Additional details". This asked for any additional details you wish to advise us of e.g. relevant personal circumstances. The Claimant answered that "see attached". He attached a piece of paper stating:-

> I am currently off work with severe depression caused by work related issues, which have been documented. I have enclosed a copy of a letter from my doctor to clarify this for you and also Neil Smith has the latest copy of my occupational health review. Because of my current state of mind I am unable to complete the process fully. I would like to be considered for VR.

41. The GP's letter attached stated:

> Whilst we remain optimistic about full recovery, Mr Wood remains very ill and is not currently able to do himself justice, moreover, the stress of the situation is having an adverse effect on his mood leading to a slower recovery. In essence, I would classify Mr Wood as having severe depression requiring the same consideration as for any serious illness like cancer, ischaemic heart disease. In my opinion, insisting on Mr Wood's participation in this exercise would adversely affect his mental health. I therefore recommend that his employer, remembering their duty of care towards their employees spare him this process or at the very least postpone it until such time as he is determined to be medically fit.

42. The second form that we referred to, that is the profile form which had been discussed on the telephone on 22 April, was sent to Ms Ross for completion (shown by the email on page 197). Ms Ross' approach to filling out the form was that it needed to be completed in order for the reorganisation process to proceed. She did not attempt to complete it in such a way as would maximise the Claimant's chance of achieving any of the bank manager's jobs. We note that she had not seen his preference form so she did not know what branches he had expressed a preference for. She understood from Mr Smith that the Claimant was only seeking voluntary redundancy and in her mind, this tied in with the conversation that she had had with the Claimant in 2015 when they discussed his possible departure on a voluntary basis. Ms Ross thought therefore that she was completing the profile form in order to achieve what the Claimant wanted, and that was voluntary redundancy rather than a serious application for a role.

43. As Ms Ross was aware, the answers she put on the form were not going to be sufficient for the Claimant to be reappointed in any of those roles. This was because the form required evidence based examples to be given to demonstrate the competencies required for the preferred job as bank manager. Not all the parts of the form needed to be completed with those evidence based examples for the bank manager's role but the sections headed Oral Communications, Self/Work Organisation, Performance Review and Development, Change Management and Procedural/Product/Specialist Knowledge did have to be completed. As Ms Ross herself recognised, this could not be done properly without the employee's input. Normally it would be the employee, if fit, who would complete this form, and we think it would not be possible to complete it properly on an employee's behalf without knowing the employee's preferences.

44. Ms Ross was unhappy about performing this task and queried it, but was told that she had to do it. Ms Ross completed the profile form on 25 April. We note that the deadline to complete it was the following day on the 26th.

45. The bank's evaluation process then started and continued over the next few weeks. It resulted in what is called the "washup report". From this we can see that the Claimant's application for the first job that he expressed a preference for, that is within the West London district, was assessed by Mr

Smith himself. Mr Smith found the Claimant's application to be unsuccessful stating (at page 941):-

> Based on evidence provided of the key and important skills and knowledge for this role, Paul has provided limited information and evidence and has resulted in relatively low scores …. The examples in (the key areas) do not evidence in sufficient detail the candidate's actions and impact. He has scored lower than other candidates overall and as a result has be not been placed.

46. The second preference was assessed by another manager. Again, it was said (page 947) that there was:

> Very limited and incomplete examples and evidence provided to confirm capability to do the role, therefore unsuccessful.

47. The third preference was assessed by a different manager again. The comment was (page 953)

> The examples within all competencies lacked sufficient evidence and detail. The candidate has scored lower than any other candidates overall and also within the key skills. As a result Paul has not been placed.

48. The overall scoring was made up as to 40% on performance rating and 60% on the answers to the profile form. We have dealt with the answers on the profile form. As for the 40% on performance rating, this was based on the performance rating for previous years. For employees who had worked for the whole of 2016, they would have had a full year rating for that year. The Claimant however, having been off work sick since August 2016, only had a half year rating. Mr Smith says in paragraph 52 of his witness statement that the full year rating was therefore extrapolated to the full year.

49. We will need to consider whether the Claimant was at a disadvantage because of the way the profile form was dealt with, and in particular because of the insufficient evidence of examples of competencies. We should explain that on 20 June 2017, Mr Smith informed the Claimant that he had not been successful in securing a role and was at risk of redundancy. He was told by Mr Smith that Ms Ross had completed the profile form. On our findings this was the first time he heard that. It came as a surprise to him and it was most unwelcome. He refers to it in his diary note of that day which is exhibit C1, which we accept was made at the time.

50. The Claimant subsequently received the letter on page 293 giving him notice of his redundancy. That letter was dated 31 July 2017 and gave the end of his employment as 31 October 2017.

Considerations

51. We shall now go through the list of issues and make a final determination as to whether any of the claims succeed.

52. We are not going to take the issues in the order in which they appear. We are going to start with the factual issues which we have to decide on page 2 of that list, that is, paragraph 4 - A, B, C and D.

53. For A, whether the Second Respondent, that is Ms Ross, completed an internal job application for the Claimant in the Claimant's name without consultation with him, this did happen. The only discussion with the Claimant about the profile form was, as we have said, on 22 April 2017 and also in June of that year with Mr Smith. As far as Ms Ross is concerned, she filled out that form without consulting the Claimant.

54. For B, whether the First Respondent claimed that the Claimant's post was redundant and replaced by him internally moving an employee to the Claimant's role, a non-disabled person. We had very little evidence about that but it does appear likely that the Claimant's former job was done by someone else as a result firstly of his sickness and secondly as a result of the restructuring.

55. For C, whether as a result of allegation 4A, the Claimant was disqualified from suitable alternative roles by the very poorly completed internal job application created by the Second Respondent, this did happen as we have said.

56. For D, whether the Claimant was dismissed without proper consultation, the consultation was limited. As we have said, the Claimant received a lot of paperwork concerned with the restructuring but once he had been notified that he had not been successful in being appointed for any of the preferred roles he had a discussion with Ms Patel in which he was informed that the notice documentation would be put in the post. This was a reference to the notice of redundancy of 31 July 2017 which stated that his employment would end on 31 October 2017. It suggested that over the notice period he could seek alternative employment through the Redeployment Team and stated that he was entitled to independent outplacement support paid for by the bank and that he could get help from the Employee Assistance Programme.

57. We think that D is a rather wider complaint than just that. In so far as it is a complaint about not being contacted again or informed about the restructuring process between 22 April 2017 and when he heard the outcome of the process on 27 June 2017, this is correct that did happen. In particular, the Claimant was not over that time given a copy of the completed profile form which had been submitted on his behalf nor was he informed when the profile would be considered.

58. Turning to the harassment claim, we are going to look at whether what happened would have been harassment were it not for section 212 which precludes us from finding, as we have said, that the same event is both harassment and direct discrimination.

59. The completion of the profile form by a person appointed by the bank that is to say Ms Ross who completed it and the inevitable lack of evidenced examples of competences, bearing in mind that it was done without consultation with him, together with the fact that it was done by Ms Ross without his knowledge, was bound we think to have been humiliating and degrading for him and a violation of his dignity and it was certainly unwanted. We also find that it did relate to his disability because it happened because the Respondents took the view that he should not engage in the process in the light of the medical opinion at that time and the view taken by the Respondent's officers that he was not genuinely seeking an appointment. Both these things arose from his disability and therefore relate to it. Were it not for section 212, we would have considered the effect of section 26(4) and in that respect, we note that the Claimant was in an extremely vulnerable state at the time. But even if he had not been in that state, we think that anyone faced with what happened would reasonably have been humiliated and degraded, and had their dignity violated because they were being put forward for appointment supported by a defective application which resulted in low scores, much lower than they could have been, with the result that he was unsuccessful for the three posts despite his long and unblemished service.

60. As for 4B which is someone being positioned in the post being in place of the Claimant we cannot see that this could add to the harassment claim under section 26 because it was an actual consequence of his absence and of the restructuring. We do not think that that would have reasonably created a degrading or humiliating environment for him or have violated his dignity.

61. As for 4C, we think that that comes within 4A and the two should be taken together for these purposes.

62. As for 4D, that is the lack of consultation, this was an upset to the Claimant and in so far as it involves the gap between April and June that we have referred to, we think that did cause him to feel his dignity violated and to create a hostile and degrading and humiliating environment for him. We also think that in the particular circumstances having regard to sub-section (4) that it was reasonable for it to have that effect.

63. We would emphasise that the completion of the profile form by Ms Ross, was bound to have the effect that it did, because the Claimant was not permitted to give any input to it.

64. We turning now to the direct disability discrimination claim, the elements of which appear in list of issues 5, 6, and 7. We concentrate first on the facts set out in 4A and 4C that is the completion of the profile form and the result of completing it. We regard the correct comparator as someone who was unable to complete the profile form for one reason or another but who was not disabled. In our view the Respondent would have treated such a person more favourably. The Claimant's treatment we think was because he was disabled, in particular because he was suffering from a mental illness. That

meant to the bank's decision makers, that it was best for him to receive voluntary redundancy. This was an assumption. It was an assumption made because it was thought that this was what the Claimant wanted and was therefore the best outcome for him. This assumption, we note, was strongly held by both Mr Smith and Ms Ross but the difficultly with it was, that the Claimant was never asked to confirm whether or not he really wished to be appointed to any of the roles for which he was applying and whether or not he really wanted voluntary redundancy despite being able to be appointed to one of those roles.

65. The information on which Mr Smith and Ms Ross relied which led them to make that assumption was insufficient to show them that that was the correct assumption to make. It was insufficient to show them that the Claimant did not genuinely wish to be appointed to one of the roles.

66. Because of that, it is our finding that completion of the form without his input and the inevitability of his failure to achieve any of the roles as a result of that (as set out in 4A and 4C) was less favourable treatment within section 13. And the reason why he received that less favourable treatment was his disability. Hence what happened was direct discrimination within section 13.

67. We are able to say that on the evidence that we have seen and heard. But we would have reached the same conclusion by applying the burden of proof provisions. We could make a finding of discrimination under section 13 on these grounds, and therefore we would look to the Respondents to show that there was no discrimination, in particular that the disability was not the reason for the relevant decisions, and that has not been done.

68. We need to explain why we say the information was insufficient for Mr Smith and Ms Ross to reach the assumptions that they did and for them to hold a view so strongly that the Claimant did not genuinely desire an appointment and that he only wanted voluntary redundancy. Firstly, the preference form itself only referred to voluntary redundancy applying if a role was not secured. So, the mere fact of expressing an interest in voluntary redundancy on the form did not mean that the Claimant had no interest in being appointed to one of the roles. Secondly, as far as Ms Ross is concerned, we do not think she was justified in relying on what happened in 2015 as supporting her belief that the Claimant wished to leave the bank. It happened so long ago and so many things had happened since then. Thirdly we think that the note on page 193 which Mr Smith relied on so much in his evidence, was insufficient. The Claimant only said that he would like to be considered for voluntary redundancy not that he wanted that outcome in any case even if he was successful in achieving one of the roles. Finally, there was nothing in the GP's letter which the Claimant sent with the preference form asking for voluntary redundancy either.

69. As for whether the less favourable treatment alleged in 4B amounted to direct discrimination, that is the replacement of the Claimant in his job, we

think that that was an inevitable consequence of the restructuring of the bank so we do not think that this is a further contravention of section 13.

70. As for 4D, that is the lack of consultation with him, whereas we do accept that this was unfavourable treatment and was less favourable treatment than somebody who was not disabled would have received, we do not think that the reason why this happened was the disability. We think there were other non-discriminatory reasons why this happened. So we do not think that this is disability discrimination under section 13 but as we have said, we do think that did amount to an act of harassment under section 26.

71. Turning to the claim in respect of reasonable adjustments. We do think that there was a provision, criterion or practice which was applied to the Claimant, that was the redundancy procedure as stated in the list of issues. And we do think that he was placed at a substantial disadvantage in relation to persons who were not disabled by reason of that PCP. We also think that the Respondents knew that the Claimant was being placed at that substantial disadvantage.

72. As to whether there was a breach of the duty to make the reasonable adjustments however, we are limiting ourselves to those reasonable adjustments mentioned in paragraph 15 of the list of issues for the reasons which we gave earlier. These were the ones that were closely examined during the hearing and the only ones which we think we are justified in dealing with.

73. As for (i) where it is said that a reasonable adjustment would have been to reappoint him to his role without application, we cannot see that it would have been reasonable to do this. Although the duty to make reasonable adjustments does mean in many cases that there will be positive discrimination in favour of a person, we think it would be going too far simply for the bank to have given the Claimant a role. If that had happened he would have achieved a significant advantage over other bank manager employees. We say this in the light of other possible alternatives such as removing him from the process altogether, at least until he was fit, as his GP had recommended.

74. As for (ii) it being said that it was a reasonable adjustment to give the Claimant more time to produce an application, that is referring an application with the preference form and profile form. The difficultly with this, is that there has been nothing to show that it would have avoided the substantial disadvantage that he was under which we think is essential for us to make such a finding, bearing in mind the words of the Act. We do not think that we can infer that a delay in his participation in the restructuring process would have avoided that disadvantage because there are so many possibilities of what would have happened if there had been such a delay. On behalf of the Claimant, it is said that the Respondent has the burden of proof to show that a delay would not have avoided the substantial disadvantage rather than for the Claimant to prove that it would have done. But we think that it must appear from the evidence overall or if it does not

appear from the evidence overall, it must be something that we can infer from the evidence. In this particular case, it does not appear at all from the evidence. And for the reasons we have given it is not right for us infer this.

75. As for (iii) where it is said that a reasonable adjustment was that the Claimant could have been assessed on his performance adjusted to take into account his disability, what this is a reference to is that he could have been assessed only on his previous performance as expressed in his rating but adjusted to allow for the disability. Again, this suffers from the same problem as (ii) as to whether it would have avoided the disadvantage that he was under. We do not think there was any evidence sufficient for us to make that finding. And we do not think we are able to infer from the evidence that we have heard that that is the case.

76. It follows therefore, that we do not find that the duty to make reasonable adjustments was breached in this particular case.

77. Finally, we turn to the unfair dismissal claim which is number 1 in the list of issues. We think that we need to look at this objectively having regard to the restructuring process which was imposed on the Claimant. We do accept that the reason for the Claimant's dismissal was redundancy.

78. But we think that his dismissal was inevitable once the decision was made and implemented by the bank (a) to put him through the restructuring process; and (b) to have someone complete the profile form on his behalf without any input from him. As we have found, the profile form completed in that way was never going to be sufficient for the Claimant to be appointed to any of the roles, so his dismissal was going to be inevitable once those things have happened. This means that he was never given a fair chance in the restructuring process to avoid dismissal. It must be unfair, bearing in mind the test which we must apply under section 98(4).

79. There may not have been any way to make the process fair to the Claimant but we do not think that that provides an escape from liability for the bank. The fact is that the restructuring process was done for the bank's benefit and it resulted in an employee, the Claimant, inevitably going to be unfairly dismissed because no fair process could be achieved to avoid that result in his own personal circumstances. So we do not think that liability for unfair dismissal can be eschewed. We find that the Claimant was unfairly dismissed.

80. We do agree with the submissions made on his behalf that that is a substantive unfair dismissal and not simply a procedural one.

81. Finally we have had to decide a time point, that is issue number 2. Although the unfair dismissal claim is in time, the other complaints about the completion of the profile form and the lack of consultation are probably out of time. We think it is just and equitable to hear those claims despite them being out of time. Our reason for that is of course the Claimant's illness would have made it more difficult to bring a claim than those who did not

have his disability but also because the unfair dismissal claim was in time it means that the Tribunal was hearing the factual basis of the claim anyway, and so it was just and equitable also to hear the other claims.

82. So that is our decision and we will hear from the parties as to the directions that they might need to result in a final determination on remedy in this matter.

83. After giving our decision on liability, we were asked by Mr Owen-Thomas on the Claimant's behalf whether we found that the Claimant had been discriminated against by his dismissal. We said that we had not. We should clarify that we did not regard that allegation as within the list of issues. If it is said that the allegation is in issue 4D, we regarded 4D as limited to a question about consultation.

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Employment Judge Gordon

Dated: 5 February 2019

Sent to the parties on:

5 February 2019

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For the Tribunal Office