EMPLOYMENT TRIBUNALS

Claimant: **Mr Simon Henry**

Respondent: **EE Limited**

HELD AT: **Leeds** **ON: 10, 11,12 and 13 December 2018**

BEFORE: Employment Judge Lancaster

Members: Mrs J Maughan
Mr I Taylor

REPRESENTATION:

Claimant: **Mr J Cook, counsel**
Respondent: **Mrs A Ditta, counsel**

JUDGMENT having been sent to the parties on 17 December 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided, taken form the transcript of the oral judgment delivered immediately upon the conclusion of the case:

REASONS

The Reason For Dismissal

1. We have reached a unanimous decision. The Claimant had worked for the Respondent, or its previous incarnations, for some 17 years. His title at the date of termination was content manager. He was a copywriter on the website. He had considerable experience, a distinguished academic history with two first degrees and a Master's degree from Oxford. There was no suggestion that his performance over that time had been anything other than good. His employment was terminated on 31 March of this year. That was, we find, a dismissal by reason of redundancy.

2. The Respondent had carried out a review of the areas of work including that of the contents team where the Claimant worked from the end of 2016 throughout 2017. It concluded that there was to be a restructure which would lead to the removal of the Claimant, his two equivalent contents managers, the five people who worked beneath them either in Leeds or London, his immediate manager Terry Cheshire and also a manager who sat alongside that team and had previously held the position of Ms Cheshire, that is Cate Nisbet who has also given evidence.
3. There were also three other potential redundancies at that stage in a related team.
4. The reason why it is a redundancy is ultimately because we accept the evidence of the Respondent that the establishment head count before this exercise was 52. After the exercise it was 48 and that included a redistribution of work and the addition of further roles within the new structure.
5. So far as the Claimant was concerned his role of content manager disappeared from the system. The work he had done either in copywriting or in the management of the AEM system or any other related work still fell to be distributed but it was distributed in such a way that ultimately it could be and was done by fewer employees. That meets the definition that there is a diminution in the requirement for employees to do work of a particular kind and of course redundancy can be, under section 139(6) of the Employment Rights Act, "for whatever reason". We are not concerned with the justification of why the Respondents came to that decision. It may have been a bad business decision. That matters not.
6. Because the Claimant's job had gone because there was a redundancy, his dismissal was by reason of that redundancy and is potentially fair.

The Redundancy Process

7. The Claimant was informed that he was at risk by an email sent around midnight on 6 December 2017. That was sent to him and to the other 12 people at risk. The following day, the 7 December, there had already been a diarised meeting to discuss the general review of "ways of working" within this part of the business. That was to be a meeting of the whole team based either in Leeds or London by way of video link. The contents of the email were on the face of it we accept innocuous. It referred to that diarised full team meeting and for the Claimant to attend an individual pre-briefing with his manager Mr Van der Lans
8. The other employees at risk also received similar invitations. All of those individual meetings were electronically diarised and the link to that diary was included within the emails so that slots were separately allocated to everyone in the morning before the team meeting in the afternoon. We accept that the purpose of that was to inform those individual employees at risk of redundancy of what was happening, to tell them it was the start of the collective consultation programme and also to advise of what support would be available to them. That was rather than simply inflict the news upon them at the full team meeting in the presence of their colleagues who were not to be placed at risk at that stage.
9. The Claimant suffers from PTSD. When he received that email at midnight (which in fact he did read then although it was not necessarily intended that he or anybody else should read it immediately) he put two and two together and came to the correct conclusion for that this was in fact an indication that there were

potential redundancies. Whether he already knew or ought to have known that that was a possibility as a result of the "ways of working" review in the previous year is still a moot point.

10. On the face of it the invitation to the meeting with Mr Van Der Lans was as we say innocuous. The Claimnt nevertheless, correctly as it transpired, interpreted its intent. We pause to observe that clearly what the Respondent did not do in that email was to announce in blunt terms in an inappropriate manner "you are at risk of redundancy". The intention was still to communicate that in a face to face meeting the following day.

11. The Claimant firstly alleges that the sending of that email at midnight amounts to a provision, criterion or practice ("PCP") which placed him as a disabled person at a disadvantage and therefore required a reasonable adjustment to be made. That disadvantage is that because of his PTSD he reacted very badly to the shock of being told that he was potentially to be at risk of redundancy.

12. We are not satisfied that that is a provision criterion or practice. It is right that that phrase within the Equality Act is not defined. It is also right, as is pointed out in the case of **Lamb v Business Academy Bexley UKEAT/0266/15** to which the Claimant has referred us that a one off event may in certain circumstances amount to a provision criterion or practice (a PCP). However that decision of **Lamb,** which was by the then president of EAT Dame Ingrid Simler, refers to an earlier authority of the previous president Sir Brian Langstaff, **Harvey v Nottingham City Transport UKEAT/0032/12.** But in quoting from Mr Justice Langstaff's Judgment it omits the part of his decision which refers to the fact that ordinarily a PCP would not be a one off event, would be something which occurs on more than a one off occasion and has an element of something of repetition about it.

13. So in the usual course a provision criterion or practice would either be a provision with which the Claimant cannot comply, a criterion which he cannot meet or a practice to which he cannot confirm. It would not ordinarily simply be something which the Respondent has done on one occasion, even where as in this case that is something that is done that affects more than one person.

14. This is simply how the Respondent chose to seek to give notice to employees if they were to be placed at risk of redundancy. It is not something it had done on earlier occasions. It is not something it had done when the Claimant was at risk of redundancy in 2010, nor something where there is any evidence that it had been applied generally to other situations. It was how it chose to inform the people in this particular circumstance and there is no element therefore of repetition about it.

15. In any event even if it had been a PCP furthermore we are satisfied that the Respondents could not reasonably have known that the Claimant would be placed at a substantial disadvantage by receiving that email sent at midnight.

16. The Claimant's mental impairment, which is admitted to be disability and has of course lasted for significant periods since he was a child,, had led to him having had previous periods of difficulty at or absence from work. There had been one of those at the time at an earlier redundancy exercise, which he had survived, in 2010 where he had been signed off work for a period of what is described as "anxiety and back pain". There had then been a further absence for anxiety in

2013. Subsequently he had been referred, at his own instigation it appears, to occupational health in 2015.

17. It is accepted that none of those previous instances were flagged up on the HR system and were not therefore known to the managers when they dealt with the redundancy exercise at this point.

18. It is accepted by the Respondent that it could reasonably have known the Claimant was in fact disabled, but even if they had that information it would not in our view have disclosed the fact the Claimant was likely to suffer the substantial adverse reaction which he did on the night of 6 December.

19. Although he had clearly been affected by the announcement of the earlier potential redundancy in 2010, it is accepted on his behalf that that reaction was not as extreme. If the Respondent had looked at the occupational health report from 2015, all that identifies is that although the Claimant did suffer from PTSD and that affected his ability to cope with change, ordinarily it would be expected that a short time for him to compose himself would be sufficient . Further it stated that, if changes were to be effected, the Respondent should simply ensure that he was allowed more time to adjust to those changes. None of that background information, even if the Respondent's had accessed it in advance, would have indicated a likelihood of a severe panic attack such as that which the Claimant actually suffered.

20. In any event we are not satisfied that there is any adjustment that could have alleviated that disadvantage to the Claimant. His immediate reaction to the receipt of the email which had distressed him was to point out that because of his condition he could not cope with shock. This was going to amount to a shock for the Claimant, unfortunately, whatever happened. We cannot conceive any alternative arrangement that would remove that factor.

21. At one point it was suggested that the Respondent might have taken medical advice as to how to break this news to the Claimant. However they could not have taken such advice about him without his consent. That would necessarily have disclosed the fact that they were seeking medical assistance in how to break bad news to him. It is also suggested they might have arranged appropriate support in advance, but again that would have put the Claimant on notice that something was in the offering. However this news was broken to him whether at this individual meeting, and whether he be given forewarning of that by email at not, at some point he would experience that shock.

22. So that claim for a failure to make reasonable adjustments in relation to the events of 6 and 7 December necessarily fails.

23. However there is no disputing the fact the Claimant was severely adversely affected by that incident and as a result he remained off work until his eventual dismissal.

24. The Claimant did manage to get in to speak to Mr Van Der Lans on 7 December but he was absent from that point onwards.

25. The Respondents did then at that same date initiate a collective consultation. It appears there was no statutory obligation to do so because the number of employees affected was less than 20 and there were not in any event at one single establishment. But there was a pre-existing employee representatives group who were consulted, and the Claimant was informed that would happen. It

does appear there were a number of meetings with that group: whether the Claimant and his colleagues were satisfied with the level of representation is another issue.

26. Concurrently with that more formal consultation with representatives one of the Claimant's colleagues Simon Ashberry, who also held the position of contents manager in Leeds, submitted - purportedly on behalf of the whole team- a counter proposal. That too was considered by the Respondents within the course of the collective consultation period which ran until 7 January 2018.

27. The Respondents did provide a response to Mr Ashberry's proposals. At that stage the individual consultation period was set to run. The Respondents had set a tight schedule. They were anticipating that the redundancies would be confirmed or otherwise by 19 January.

28. Having rejected the counter proposals and having confirmed their decisions that the pool of selection should be limited to the 13 already identified, both of which are on their face decisions that are still within the band of reasonable responses - whether they might be criticised on other grounds or not, the Respondents determined that in respect of the 17 vacancies within the new structure the 13 at risk were being required to apply and undergo a form of competitive assessment to consider if they were suitable for a new post.

29. Of the 13 in the event 5 did not apply for any new positions and therefore were made redundant. 4 of those left as of 19 January, the first date set. One of them the witness Miss Nisbet remained in employment until the middle of May. She agreed to stay on to undertake training under the new structure. There was another "at risk employee" who initially indicated that he would defer termination but was subsequently re-deployed in any event.

30. So for those 8 who were still wishing to be employed there were still a number of potential vacancies. The Claimant intimated (he was being assisted at this stage by Miss Nisbet who was acting as his intermediary) that he would be interested in applying for five particular positions. The deadline for notification of applications was 16 January and as we have said the first date for interview was the 19th. Originally it appears to have been anticipated that all interviews would take place by that date but that as this was not going to be practicable the Respondents therefore put back some of the interviews to the following Monday the 22nd.

31. On 17 January the Claimant was sent an email by Ms Ronson (Director of Digital Customer Relationship Management (CRM) and Insight), clearly in conjunction with advice from Mr Everson from HR. This email acknowledged the Claimant's application for the five positions and stated that if he wished to be considered he would need to apply by one of four methods. The first two of those were to undertake a face to face interview or to be interviewed by telephone. It was quite clear at this stage that neither of those was a viable option for the Claimant but there were two further alternatives. One was a video recording using software that would allow him to record his answers to the interview questions, the other was to provide a written response to questions that would be emailed to him within a given time frame. That time frame was ultimately confirmed as a four hour slot, considerably in excess of the one hour interview time allocated to face to face candidates.

32. The Claimant immediately agreed that he would undertake the written test. Given that he was quite evidently unfit actually to be interviewed (and indeed expressed the view that the thought of an interview sent him into "a downward spiral") on the face of it that would appear to have been offered by the Respondent as a reasonable adjustment to allow him to take part in the process.

33. But on 19th, the day when he was due to take the first of those written tests the Claimant indicated that he was simply too unwell to go through even with that written exercise. He has given a moving and compelling account of what happened. He accepts that rationally given his experience as a copywriter he would have been able to complete the written assessment,, certainly within that extended time but he then describes how in effect the irrational part of his brain, given his condition, took over. So that meant that as of the morning of the 19th he was not able to accept the alternative. He, quite reasonably, says that the option of the video equally was not viable for him because it would have placed him under similar stress to that of attending a telephone or face to face interview.

34. So that juncture, the morning of the 19th the Claimant was not able to comply with any of the prescribed methods of joining in the assessment process that had been set by the Respondent. And he had been told in the letter of 17th that the interviews for others would go ahead irrespective if he was not able to participate in the process.

35. We are satisfied, as it has been further defined and clarified, in the course of this hearing that the Respondents did in the circumstances apply a relevant PCP. In this instance that was a requirement that the Claimant participate in their assessment procedure for consideration for the new post only by one of four prescribed methods. It was also part of that PCP that that consideration, by interview or otherwise, should only take place within the already tightly set time frame of the 19th and 22nd. So if the Claimant was not able to participate by one of the prescribed means he would forego the opportunity of being considered for any of those five posts in which he had expressed an interest.

36. That is the context in which the Claimant had initially indicated his consent to the written process. This was just two days before he would have to go through that procedure if he were to be considered at all. Because three of the options were not reasonable he stated that he would try to undergo the written test but ultimately, as we have explained, he was not able to do so. Had there not been that pressure of time it is possible that there may have been a different outcome. If the Claimant had had more time to prepare and not been under the pressure of anticipating that question session on the 19th, he may have had more opportunity to rationalise his position. But faced with those time pressures we can well understand how as he says the irrational part of his brain became prominent. He had no time to reflect, consider and weigh matters up.

37. At that point therefore the Claimant was quite evidently as a disabled person subjected to a substantial disadvantage compared to his non-disabled colleagues. They were able to participate in the assessment process. He was not. At that point the Respondent was under a duty to consider a reasonable adjustment; that is to take such steps as were reasonable to alleviate that disadvantage to the Claimant.

38. As a panel we benefit from the long HR experience of Mrs Maughan and she described this as what should have been a "red flag warning" to the Respondent's

HR. They have, at this point, a disabled employee who is unable to participate in the interview process because of decisions they had previously communicated to him. It should therefore have been the clearest indication that they should then consider further alternatives. They did not.

39. There was a clear and reasonable means, as we find objectively, of allowing the Claimant to participate in the assessment process. That would be by way of what has generally been described as a "desktop assessment". That is either by consideration of his past record on his CV alone, or consideration of that in conjunction with reports of his managers, or consideration of his previous appraisals. Had he been assessed in that way that information about him could have been placed alongside that of other applicants and a decision made. He at least then would have been in the frame for any of these new jobs.

40. A similar process was envisaged under the Redundancy Procedure in the case of a redundancy selection exercise where there was to be a scoring mechanism and an employee was on long-term sick. Although that is not strictly the procedure that applied here it is a clear indication of the approach that might have been taken. In this case in fact the Respondents had no policy whatsoever as to how they would conduct interviews for new posts within the structure. What was going to happen, particularly for material purposes as they affect the Claimant, was that an interim manager, in fact a consultant Mr Brian Hoadley, would conduct interviews to assess what he considered the suitability of candidates. He alone would be making the decision, outside of any written guidelines or set procedure, as to who was or was not for a new role within what the Respondents described, though without any clear evidence of this, as an entirely different copywriting function to that the Claimant had exercised.

41. We are satisfied that Mr Hoadley could in fact have carried out that exercise with an input from other managers. That is common practice in a redundancy selection process when available managerial knowledge of performance is pooled and a score arrived at by the ultimate decision maker, and it does not make it unfair . Mr Hoadley of course had, himself, no prior knowledge of the Claimant (or any other interviewee) but there is no good reason why his assessment of the candidates should therefore have been limited solely to his own personal observation and not also take into account the reported views of those who did have direct involvement.

42. Similarly for the other roles that he had applied for the existing team leader, Mehta, could similarly have considered and carried out the exercise assessing those who she actually saw in interview alongside the information she could gleam from a desktop assessment of the Claimant.

43. We are satisfied that such a desktop assessment would have been reasonably practicable because it in fact had been mooted as a possibility even before 17 January. It had been discussed, we are quite satisfied, in conversations between Cate Nisbet the Claimant's intermediary and Jackie Ronson. On 15 January we have a clear note in an almost contemporaneous document from Mr Everson that a director - who must in context be Ms Ronson- had emailed to say that she *will* carry out the desktop assessment of the Claimant in consultation with his managers (emphasis added). And although Ms Ronson in her oral evidence said that she did not make such a statement the actual email itself has not been produced. So the best evidence we have is Mr Everson's noted recollection and

we are satisfied that that is indeed what Mrs Ronson did send by way of email to Mr Everson on 15 January.

44. This was certainly therefore something that was, in the view of Ms Ronsen, practicable. The adjustment would have been to have carried out that assessment and then fed it into the process to be conducted by Mehta or by Mr Hoadley. And that would have alleviated the specific disadvantage the Claimant of otherwise being excluded from the process. It does not necessarily mean that he would have got the job but he would least have been under consideration.

45. The Respondent's now make two objections to the reasonableness of that proposal. One is that it would be unfair on the other candidates. We do not accept that. The Claimant would still have been liable to have been assessed. The nature of a reasonable adjustment is, in any event, sometimes to treat the Claimant in a fashion which is, on the face of it, more favourable if that is the appropriate means of reducing the disadvantage that he would otherwise suffer.

46. The other objection is that any assessment by his managers would be biased. The implication is that the Respondent accepts that a review by those who had known and worked with the Claimant over many years as to his capabilities and skills would necessarily have indicated that he was indeed suitable for this role .If it did not wish that to be carried out it would seem to be because it would have preferred Mr Hoadley to have had carte blanche to assess in some unspecified and essentially subjective way whether he thought the candidates were suitable. This is not bias as it is ordinarily understood.

47. That allegation of bias we therefore consider to be without any foundation at all. Of the particular managers who might have had input into that process the most obvious was Terri Cheshire the Claimant's manager. She in fact was one of those at risk of redundancy but she remained in the business until 19 January. So she was still an employee at the juncture when this initial desktop assessment could have been carried out. If the Respondents are contending that she was biased we would observe that she was one of those apparently consulted in the "ways of working" consultation and whose input to that process was considered entirely reliable when she gave information about the work done by and the and job descriptions of her team. So at one point earlier in 2017 the Respondent are saying that Miss Cheshire is an entirely reliable witness about the way to working in the contents team, but when it comes to considering her possible input on to a desktop assessment of the Claimant they are saying that she would be biased and unreliable. The other potential manager who might have contributed is Miss Nesbit. She is of course not only a colleague but clearly also a friend of the Claimant but there is no good reason to impugn her integrity. She had previously managed the Claimant, she still sat alongside the contents team and she had knowledge of him.

48. But more particularly we refer again to the email that Jackie Ronson sent on 15 January where she had stated as recorded "I will carry out the desktop assessment". That means that she would take ownership of that process. Whilst consulting with other managers she personally would be the one who ultimately made the assessment and put it for consideration by Mr Hoadley or by Mehta. There can be no suggestion at all that Jackie Ronson, taking ownership of that desktop assessment process as she had said she would, was biased. This is

simply is a nonsensical attempted justification for a failure to alleviate this detriment to the Claimant.

49. Even if the offer of the written question and answer session would have been a reasonable adjustment up to and until that point, at the juncture when the Claimant was unable to go through that process it was incumbent upon the Respondent to look to make a further adjustment and they could have done that. It had knowledge of the realistic possibility of conducting a desktop assessment and their rationale for rejecting that is unsustainable.

50. The Claimant missed out on those interviews for all five positions. One of those positions, digital copywriter still remained unfilled after that process. At that point therefore the Claimant was the only employee at risk of redundancy who had expressed an interest in that new post, so any argument that it would be unfair to the fellow applicants at that stage to allow him to be assessed on the basis of his CV and input for managers has no substance whatsoever. And at that point we are quite satisfied that if the Respondent had done what it should have done and allowed the Claimant's suitability for that post to be examined by way of that desktop assessment he would have been given that job. The Claimant had many years' experience as a copywriter. The Respondent appears to accept that the input from his managers who knew his work would be positive. That would clearly indicate that he was capable of carrying out a role as described as digital copywriter and as we say we are still completely at a loss to understand, given this lack of evidence from the Respondent, what the purported difference is between this type of copywriting and that which the Claimant had carried out in the course of his long employment in this field.

51. The alternative at this stage might have been to defer the process slightly to allow the Claimant to be seen by occupational health. That process had been delayed but he was in fact seen by a doctor on 25 January. Whether the process were deferred for this soon-to-be received medical input or whether a decision to go to desktop assessment were made immediately on the 19th, as we consider it might well have been, that was a reasonable means of removing that disadvantage. So that claim of failure to make reasonable adjustments succeeds.

The Termination

52. Having denied the Claimant the opportunity of being assessed the Respondent continued to insist throughout the period of his further absence that he would only be considered for new posts if he were able to interview. Clearly at that stage he was still unfit to do so. And as a result of that on 27 February the Claimant we are find quite clearly indicated through Miss Nesbit that he would now effectively accept the redundancy.

53. That is clearly how the Claimant understood the communication that was sent on his behalf and we frankly failed to understand how the Respondents could have interpreted it in any other way. But it is right that there was then a final purported consultation meeting held with Mrs Ronson on 21 March by telephone. There it was confirmed that the Claimant would take the package on offer and he had a redundancy payment which was not at all ungenerous. And that meant that his employment concluded on 31 March. The Claimant was under notice of termination for redundancy and had from 27th February accepted the inevitability of that coming into effect. Whether he had given that indication or not he would

however have still had his employment terminate at the end of the notice period. That is a dismissal

54. That dismissal we are satisfied was unfair. And that is because there was a failure on the part of the Respondents properly to address alternative employment for the Claimant. This really ties in with our findings on the Claimant's failure to make reasonable adjustments in relation to the interview process. The Respondent throughout treated this as if it were effectively a recruitment to an entirely new role without any recognition of its obligations to employees who were at risk of redundancy. That was done although it is an obligation even under the Respondent's own policy to seek to allocate work to those that are at risk rather than go outside. Ad of course general considerations of fairness in redundancy also require the Respondent to look to alternatives to actually dismissing. So although the Respondents asserted on numerous occasions that it was committed to redeployment its practice belies that assertion.

55. Even as at 15 March when as we say the Claimant was invited to the so-called final consultation meeting it is accepted that there was still vacancies within the system for which he could have potentially been suitable. Had the Respondent been prepared to assess his suitability on the basis of his past experience and the desktop assessment a job would have been available for him. The digital copywriter roles, of which there were two according to Mrs Ronson, remained available and were filled temporarily by outside agency workers.

56. Of course the Respondent has more leeway when they are looking at genuinely new roles and are interviewing for those posts and not just scoring in a redundancy selection exercise, but there still must be an element of fairness. There still must be a proper appreciation of the obligations to a potentially redundant employee.

57. Our finding is only that dismissal was unfair for that reason. We should say that we are satisfied that other than that the Respondents did act within the band of reasonable responses in relation to the level of consultation, both collective and individually with the Claimant. As we say there was a collective consultation and consideration of the counter proposal outside of that formal process. The Claimant was absent throughout the whole of the individual consultation period which was assigned to his manager Terri Cheshire. Although she initially said she would engage with that process by email it does not appear she did so, but she did remain in contact with the Claimant. Clearly she considered that he was satisfactorily kept up to date with what was happening. It was a difficult situation particularly given the Claimant was not communicating freely with the Respondent because of his mental condition. We are satisfied that that level of individual consultation as well as of the voluntary collective consultation that had preceded it was reasonable in all the circumstances, but the failure to re-deploy was not.

58. That failure to re-deploy is also discrimination under section 15 of the Equality Act. That is unfavourable treatment because of something arising in consequence of disability.

59. Because of the Claimant's disability he was unable to participate in the assessment process for new jobs in the way prescribed by the Respondent. Because he was unable to participate in that process he was denied the opportunity of doing so. Because he was further unable to engage in an interview

process as insisted upon by the Respondents for any further jobs that became available he was also excluded from the possibility of re-deployment on their terms. That we are satisfied is why on 27 February the Claimant indicated that he would not pursue the matter further. He was being denied by the Respondent the opportunity of seeking alternative employment and therefore there was no realistic alternative but to accept the redundancy. Even though the Respondent had deferred the Claimant's redundancy date on two occasions there was realistically nothing that could happen within that extended time frame to allow him to apply for jobs if it were not prepared to accommodate and make reasonable adjustments as it should have done.

60. Even though the eventual decision was that the Claimant said he would not pursue matters further, it made no difference. Whatever he had said by the date of the extended redundancy period of 31st he would have been dismissed because there was no alternative employment available for him. There is no justification for that. There cannot be where there has been that abject failure to carry out the necessary reasonable adjustments.

Further Complaints

61. Within this time frame there were further claims. There is a claim of harassment in relation to a telephone call from Matt Everson on 16 January. The Claimant objected to the very fact that he was phoned at all when there was an agreement in place that ordinarily Ms Nesbit would act as his go between. But context is all. This was done at the point where Mr Everson was considering how to make possible adjustments for the Claimant in the interview process that was coming up in just a few days' time. He decided therefore to try and make direct contact with the Claimant. It was very soon apparent that that conversation was not going to be productive. It is common ground that Mr Everson got really no further than asking how the Claimant was and being answered in monosyllables. When it transpired the Claimant did not wish to talk, that phone call was ended and the information about what the Claimant could or could not do at interview was then communicated by email the following day. We consider it reasonable that Mr Everson should have tried to have that conversation in person so as, if at all possible, to explore the issues directly with the Claimant. Had there been anything hectoring or untoward in the actual content of that phone call it might have been harassment, but however the Claimant reacted to it - and he reacted quite violently towards Mr Everson whom he described in subsequent communications in very derogatory terms - objectively it does not meet the threshold of harassment.

62. On the face of it this was no more, at worst, than a misguided attempt at communication as a time when the Claimant was genuinely seeking to go through Ms Nesbit. Because it was ended so shortly and because there was clearly no ill intent it could not reasonably be construed as being likely to have a harassing effect upon the Claimant.

63. We have already referred to the final consultation meeting on the 15th. This was ineptly handled in that the letter in fact purports to be not the end but the start of an individual consultation process, as if the collective consultation had only just finished, where in reality it had concluded nine weeks before. Evidently nobody was sufficiently concerned to check that the content of the invitation letter was appropriate and not merely are-hash of the template that had gone out in January. And we are satisfied that the Respondents in fact knew that the Claimant was

intending to accept the final backstop date of 31 March and this was merely, therefore, to be a confirmation of the terms of the redundancy package.

64. At the same time as sending out that invitation letter on 15 March for a meeting originally scheduled for the 20th to be in person, the Respondent also sent out a letter under their sickness absence management policy. That was again for an attended meeting and which was to follow immediately from the redundancy consultation. The terms of that letter indicated that the Claimant was potentially at risk of a sanction and that if he failed to return to work in due course he might be liable to dismissal.

65. We consider the appropriate way of looking at those incidents is under again section 15 of the Equality Act. Of course there was a provision criterion or practice that employees on long-term sick were potentially liable to the capability process, but that did not in reality disadvantage the Claimant in these circumstances. Although invited to the meeting no action was taken. In fact there was a single telephone call on 21st to replace the two anticipated in-person-meetings and there was no discussion whatsoever of the sickness absence.

66. Nor do we consider it appropriate to deal with this as harassment. There is no contemporaneous evidence that the Claimant construed this as intimidating. He commented in private communication to Ms Nesbit that he had received this message and he did not understand it because he was quite clear in his own mind he was going to go at the end of March in any event, but it does not appear to have had any particular effect upon him. After discussion with Ms Nesbit it was agreed that she should enquire of Jackie Ronson whether the proposed in-person-meetings could be by telephone and he did that in a perfectly civil response to her, suggesting that it would be better if that happened, without saying that in any way upset or affected by the contemplation of the sickness absence meeting. That telephone conversation was agreed to.

67. But it does in our view constitute again unfavourable treatment because of something arising in a consequence of his disability. Being told that he was at the start of a capability process that might ultimately lead to his dismissal is unfavourable treatment. It clearly stemmed from something arising in consequence of his disability. That was his sickness absence. We are satisfied that it is not justifiable. Ordinarily the application in proper terms of a sickness absence policy will be easy to justify but not in these particular circumstances. There was no reason for the sending of that letter. The claimant was not in work. He did not have a job to go to. He had been excluded from the re-deployment process up to that stage so he equally could not be rehabilitated back into a new job unless and until it had the opportunity to be assessed for one and be given it. And the Respondent knew full well as from 27 February that it was anticipated that he would simply go on to a confirmed redundancy.

68. The Respondent could have taken proper account of the sickness absence policy in a non-discriminatory way by delaying the implementation of any policy until after the redundancy meeting had taken place. Because only if that were not confirmed and there was some reason why the period would be extended and the Claimant remained employed would there be any issue about managing his sickness. We can see an indication of what lay behind this letter in the emails from Mr Everson. He was clearly anticipating the Claimant would be made redundant as at the end of March but expressed the view that in case something occurred which meant that that did not happen he wanted to instigate the sickness

absence process. That is clearly to be understood as him saying that if the Claimant was not to go by way of redundancy there was to be an alternative method potentially of removing him speedily from employment. The net effect of receiving those contemporaneous invitations to a meeting would have been to reinforce that fact that if the Claimant, even though he had not intimated this in any way, was minded to try and prolong his employment before being made redundant then he was effectively then under threat of being managed with a view to possible dismissal in any event.

69. That unfavourable treatment could have been wholly avoided simply by delaying any notification of a sickness absence procedure. In reality it may give rise to very little injury to feelings. The Claimant as we say does not appear to have been unduly affected at the time. Also it was something that lasted for only a week from 15 March when the letter was sent to the 21st when it was clear that no action was going to be taken and he was indeed going to be redundant.

70. A number of other potential claims arise in agreed list of issues. None of them are in fact material as we have covered them, if appropriate, under alternative heads. The only final matter to consider is the time point. On the face of it as we calculate it, as set out in my original preliminary hearing order, anything that happened before 1 March potentially out of time. Of course that means that a complaint in respect of the dismissal, either the discriminatory dismissal under section 15 or the unfair dismissal, as at 31 March is in time. It also means that the section 15 discrimination in relation to the implementation of the sickness absence policy in the middle of March is in time. We are also satisfied that the Respondent remained under a continuing duty to make reasonable adjustments at all stages until the final termination of employment, even though the Claimant had intimated on 27 February that he would take the redundancy. We accept that had the Respondent in fact changed their mind and said "we are prepared to assess you by way of desktop assessment" that may have altered the position.

71. There is a continuing act and in any event we are satisfied that in these circumstances it would be just and equitable to extend time. There is no prejudice at all to the Respondents.

72. That leaves the issue of remedy which we of course we cannot address today. That may well be a difficult issue. Even if the Claimant as we have found should have been considered for other jobs, and in the case of the digital copywriter job actually offered that job as there was not any other candidate at that stage, it is still at the moment unclear whether he would have been able to take up that position because of his sickness. Also potentially, if the Respondent is right and the job was indeed so different to what he had done he may have been unsuitable. If that were indeed the case the Respondent should have considered a trial period. As it did not do so it is pure conjecture as to what might have happened. However potentially difficult as the issues are, they must await determination at a future date.

Employment Judge Lancaster
Date 14th January 2019