Case No: 3307641/2018

EMPLOYMENT TRIBUNALS

Claimant: Ms Adrienne Thorpe

Respondent: Drive Software Solutions Limited

HEARD AT: Cambridge: 13-17 May 2019

BEFORE: Employment Judge Michell
Catherine Smith
Colin Davie

REPRESENTATION: For the Claimant: In person
For the Respondent: Mr J Crozier (Counsel)

RESERVED JUDGMENT

(1) The Claimant was unfairly dismissed. Her claim under s 94 of the Employment Rights Act 1996 ("**ERA**") succeeds.

(2) The Claimant's claims of disability discrimination under ss 15, 21 and 26 of the Equality Act ("**EqA**") are not well founded, and they are each dismissed.

REASONS

BACKGROUND

1. The claimant was employed by the respondent as a software developer from 10 April 2012 until her dismissal on 5 February 2018 ("**EDT**"). By an ET1 presented to the tribunal on 6 June 2018, she asserted she had been unfairly dismissed. She also made claims of disability discrimination pursuant to EqA. All such claims are denied in the ET3.

EVIDENCE

2. We heard oral evidence from the claimant. We ensured that regular breaks were offered and taken during her and others' evidence, to ensure the process was not overly-demanding. The claimant was careful, focused and thorough in her evidence, and well prepared in her cross examination. She helpfully prepared both opening and closing written submissions, which we read.

3. For the respondents, we heard from Lorenzo Rodia (director), Sue Wheeler (HR manager) and Carlo Marrone (part of the SMT, and the claimant's line manager for some of the time). Mr Marrone presented as a fair and credible witness. Ms Wheeler was also credible, although she candidly accepted that numerous errors were made in the process which was followed, and that her knowledge of HR procedure was limited. Mr Rodia was honest enough, but we had some concerns about his somewhat ill-considered responses towards some issues raised by the claimant, as explained below.

4. We were referred to various pages from a 365 page bundle. We received oral closing submissions from both sides, when they addressed their own and each other's written submissions. We took all these into account.

5. During the hearing, and in response to questions from the tribunal, it transpired that some data forming part of the redundancy scoring matrix (namely, scores on a Skills Matrix which members of staff had each given themselves as part of a 'Modules Competency' grading) had in error been overlooked by the respondent in the case of the claimant and one other employee ("**employee 14"**). As a result, it became clear for the first time that the comparatively low score the claimant had received in the redundancy matrix was partly due to the (we accepted) accidental but erroneous non-inclusion of her 'Skills Matrix' marks relating to 'DRIVE Specific Product knowledge[1]'.

[1] 'Drive' had been an important product for the respondent. As a result, redundancy matrix marks in relation to Drive were heavily weighted.

6. This was a wholly unsatisfactory state of affairs. So, too, was the fact that the respondent had not disclosed prior to the hearing (a) the 1.9.17 and 8.9.17 emails under cover of which Ms Wheeler had sent the Skills matrix to the claimant together with a 'competency rating scale' for her to complete; or (b) the claimant's 3.11.17 email returning the completed skills matrix.

7. The claimant was given time to digest those additional documents. We also gave her time to consider two additional documents produced by the respondent (marked as "S7" and "S8") once the error referred to at paragraph 5 above had been appreciated. Those documents set out (amongst other things) the scores which Mr Marrone explained in his evidence (a) (in the case of the document at "S7") the claimant should in his opinion have received for Drive Specific Product knowledge etc after any appropriate moderation; and (b) (in the case of the document at "S8") might as a 'best possible case scenario' have received.

8. The claimant was given the opportunity to ask for further time to consider those documents (and if necessary, to ask for an adjournment), but she did not pursue this course. She duly cross examined the respondent's witnesses on the documents. Though she challenged some of the specific marks (e.g. under 'culture') she did not specifically dispute most of the material marks Mr Marrone attributed to her in S7 or S8.

HOUSEKEEPING AND ISSUES

9. The parties agreed that at this stage we would only deal with liability issues (and any deductions on **Polkey** bases), leaving remedy for later if necessary. The issues for us to determine were helpfully set out at paragraphs 24 to 40 of the notes of the Preliminary Hearing ("**PH**") which took place before EJ Warren on 17.12.18.

10. At the PH, the claimant's disability (depression) was conceded- albeit the date of actual/constructive knowledge remained in dispute. It also became clear at the PH that the ET1- which was compiled by the claimant's then-solicitors- did not include a claim of failure to make reasonable adjustments. As EJ Warren said, that was "a little

surprising". Accordingly, the claimant sought and EJ Warren gave permission at the PH to amend her claim to advance a s.21 EqA claim in the terms expressly articulated at paragraphs 35-39 of those notes. EJ Warren refused the claimant permission to amend her claim to include allegations relating to her being allegedly "required to work at a work station in isolation from colleagues".

11. The agreed List of Issues ("the List") is set out in full below for ease of reference, in italicised text and using the paragraph numbers used in the List:

Unfair Dismissal

*24. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("**ERA**")? The respondent asserts that it was redundancy. The claimant accepts that there was a redundancy situation but asserts that the reason for her dismissal was her disability, her sickness record and the impact or perceived impact of the same on her skill set and product knowledge.*

25. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called "band of reasonable responses"? The claimant says not because it did not:

25.1. adequately consult with its workforce on the selection process;

25.2. identify pools from which selection for redundancy would be made;

25.3. use objective selection criteria, (it relied on self-assessments);

25.4. weight criteria fairly;

25.5. apply scoring to the claimant fairly;

25.6. adequately consult with the claimant with regard to her scoring, as compared to her colleagues, and

25.7. did not consider alternative employment opportunities.

EQA, section 15: Discrimination Arising from Disability

26. Did the following arise in consequence of the claimant's disability:

26.1. her period of absence from October 2016 to October 2017;

26.2. a reduction to a three day week, and

26.3. a reduction or perceived reduction in her skill set and product knowledge?

27. If so, did the respondent treat the claimant unfavourably by:

27.1. changing her role from software developer to software tester;

27.2. selecting her for redundancy because of her sickness absence record;

27.3. dismissing her;

27.4. not offering her alternative employment;

27.5. not offering her retraining or alternative employment on appeal, and

27.6. not informing her of her right of appeal?

28. The respondent has confirmed that it does not rely upon a defence of legitimate aim.

29. The respondent does assert that it did not know and could not reasonably have been expected to know, that the claimant had a disability.

EQA, section 26: Harassment Related to Disability

30. Did the respondent engage in conduct as follows:

30.1. Mr Rodia telling Ms. Thorpe on 28 April 2017:

30.1.1. a phased return to work would not work for the business;

30.1.2. "if you cannot do the job, we will have to have another talk";

30.1.3. in reference to the claimant's sick leave, "this has to stop", and

30.1.4. "I just want this problem to go away and 90% of the problem lies with you".

30.2. Ms. Wheeler stating in an email dated 20 June 2017, "unfortunately, we cannot allow this situation to go on indefinitely".

31. If so was that conduct unwanted?

32. If so, did it relate to the protected characteristic of disability?

33. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

EQA, sections 20 & 21: Reasonable Adjustments

34. Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?

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

35.1. requiring that its staff work contractual hours or as proposed by the respondent;

35.2. applying redundancy selection criteria primarily referring to current knowledge and current skill set;

35.3. applying disproportionate "weighing" factors in the selection for redundancy process to current knowledge and current skill set;

35.4. requiring the claimant to work only her substantive role at or around the time of her dismissal/appeal, and

35.5. requiring the claimant to be employed only within the parameters of her existing skill set and/or work experience role at or around the time of her dismissal/appeal.

36. did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that she was placed at greater risk of taking additional sick leave and/or dismissal?

37. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

38. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

38.1. agreeing a phased return to work, (one quarter FT hours in week 1, half in week 2, and FT hours by week 4) and in line with the recommendation made in a report prepared by Sue Kendall on 22 March 2017, refused by Mr Rodia on 28 April 2017;

38.2. agreeing to selection criteria to take account of the impact of the claimant's sick leave on her product knowledge and current skill set;

38.3. amending the weighting factor to take account of the impact of the claimant's sick leave on her product knowledge and current skill set;

38.4. offering the claimant redeployment as an alternative to dismissal on 5 February 2018, including the role of Software Test Analyst, and

38.5. offering the claimant re-training and a trial period in any new role at or around the time of her dismissal/appeal.

39. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Time limits/limitation issues

40. Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the EqA? The claimant relies on there having been a continuing act or in the alternative, on it being just and equitable to extend time, in respect of any allegation that may be out of time.

Narrowing the issues

12. The respondent conceded that, notwithstanding para 29 of the List, it had actual knowledge of the claimant's disability from about the date of receipt of the Consultant Psychiatrist's report (i.e. about 25.8.17).

13. The claimant clarified:

    a. Para 26.3 of the List referred to her own (as opposed to the respondent's) perceived reduction in skill set etc.
    b. Para 35.4 of the List referred to her contention that she ought to have been redeployed.
    c. Para 35.5 of the List referred to her contention that she ought to have been retrained.

14. By closing, Mr Crozier conceded that in the light of the matters set out at paragraph 5 above, and the respondent's failure to provide the claimant with her scores during the redundancy process -which meant she could not herself appreciate the error- the dismissal was unfair for s.98 ERA purposes.

FACTUAL FINDINGS

15. The respondent is a global cloud-based solutions provider and strategic mobility company.

16. The number of permanent staff employed by the respondent has been steadily decreasing. In October 2017, it employed 67 permanent staff members. By May 2019, that number had fallen to 26.

Claimant's illness

17. The claimant was a valued and very competent worker throughout her employment. She had a series of unfortunate events in her personal life which took a heavy toll on her. In 2011, her husband was admitted to hospital after a nervous breakdown. The claimant found it difficult to cope with the situation. She took some time off as unpaid leave. Then, with the agreement of the respondent, in 2013 she reduced her 5 day working week to 3 days.

18. From about 2014 (and until her 2018 dismissal), the Claimant worked in the respondent's 'Software Factory' focusing on work on a project for Arval, which was a major client of the respondent.

19. She and her husband sadly had significant marital difficulties culminating in divorce, and in the marital home being sold in 2015. Her youngest child went to university in the same year. In late 2016, the claimant's mother became seriously ill.

20. All these events led to the claimant becoming increasingly unwell, and being signed off work on 31.10.16. In late 2016, she had a cancer scare. In February 2017, her mother died, putting further pressure on her.

21. The 'fit notes' at the time were for the most part for "stress", and signed her off for weeks at a time rather than months (which meant the respondent could not reasonably foresee that the claimant would be off work for such an extended period). However, as it transpired, she remained off work until 16.10.17.

22. Ms Wheeler wrote to the claimant on 3.1.17, seeking permission to obtain a medical report from her GP. Permission was duly given. On 10.1.17, Ms Wheeler wrote to the GP asking a variety of questions, including requesting an opinion as to whether or not the claimant was likely to be disabled within the meaning of EqA. (Of course, this was not an issue to be definitively determined by a GP.) The GP's report dated 18.1.17 does not answer many of the questions put to her. But it does record that the claimant found day to day activities "very difficult"; that the claimant's symptoms had improved, but that "she is nowhere near back to normal".

23. Ms Wheeler attempted to arrange a meeting with the claimant to discuss matters, but the claimant indicated she was not fit to attend.

24. By about this time, Fit For Work ("FFW") had been involved in an attempt to provide the claimant with support, following the respondent's referral. Sue Kendall of FFW made various recommendations regarding the claimant's return to work, including a phased return over a 3 week period, based on her long-established 3 day week work pattern.

28.4.17 meeting

25. Before the report had been finalised, on 28.4.17 the claimant met with Ms Wheeler and Mr Rodia for an update. The meeting took place at a neutral location, namely Stevenage Novotel. Although the claimant made various criticisms to us regarding the appropriateness of the location, she did not raise any of them with the respondent at the time, and we find that the location was -if not ideal- satisfactory.

26. This is the meeting at which the client alleges (as per para 30.1 of the List) Mr Rodia told her:
    a. a phased return to work would not work for the business;
    b. "if you cannot do the job, we will have to have another talk";
    c. in reference to the claimant's sick leave, "this has to stop", and "I just want this problem to go away and 90% of the problem lies with you".

27. As to (a) above, we accept Ms Wheeler's evidence that she (rather than Mr Rodia) told the claimant the fractional 3 day-week proposed by the claimant "would not work for the business". But -as is clear from the note taken of the meeting- Ms Wheeler proposed an alternative arrangement instead (based on a 5 day week). This alternative may well not have been practical (especially given that the claimant was used to working 3 days a week), but Ms Wheeler did not reject the idea of *any* phased return to work.

28. As to (b) above, Ms Wheeler's evidence was that a comment similar to this was made by Ms Wheeler in her 20.6.17 letter- see further below- but that it was not said at the 28.4.17 meeting. It is hard to be precise about such things. But given the claimant recorded in her note (to which we refer before) that she was told "if we can't sort problem need to have a discussion", we think a remark of this nature was probably said. However, we consider such a remark to have been inoffensive and apt. Ms Wheeler simply meant that if further issues arose, further discussion would be needed.

29. As to (c) above, Mr Rodia accepted that he made such remarks. He said "this has to stop" in the context of explaining that (as he put it in evidence) the "current obstacle" of the claimant being off sick had to be brought to an end. He probably meant that he wanted a mutually satisfactory resolution to have been reached. He probably was (as he told us) smiling and looking friendly at the time. But the comment was poorly phrased and apt to give potentially the wrong impression- especially to someone who was suffering from depression at the time.

30. Similarly, Mr Rodia told us (and we accept) he said "90% of the problem lies with you" -but whilst talking about the claimant's feelings of isolation at work, rather than her continued sickness absence. Such comment essentially repeats what Ms Wheeler had said to FFW in her 23.3.17 email: i.e. that the claimant needed to "make the effort" and "play a part" to improve matters, and that the respondent did not believe the claimant had "taken much of our advice/recommendations for improving" her feelings of isolation. It was made in that context.

31. Again, we do not doubt Mr Rodia meant well. There was also a need for the claimant herself to take reasonable steps to assist in ameliorating the issue. But the remark was, we think, badly phrased, and somewhat crass.

32. Ms Wheeler's notes of the meeting record that the claimant's "manner and appearance are concerning". This somewhat jars with the respondent's evidence before us (which we think was a bit overstated) that the claimant left the meeting "much happier". She left the meeting in a better state than when she arrived, but "much happier" goes too far. The claimant's clear vulnerability at that time made it all the more important for the respondent to be sensitive in its dealings with her.

33. The remark about "wanting this problem to go away" was, we think made by Mr Rodia. The context is not entirely clear, and we think it was probably made whilst Mr Rodia was talking about 'the problem' of agreeing a mutually agreeable phased return to work. Again, it could have been better phrased. Again, it was somewhat insensitive.

34. The claimant made some handwritten notes after the meeting which (amongst other things) recorded some of the above phrases used by Mr Rodia/Ms Wheeler. The fact she made such notes indicates that at least some of the comments made were not welcomed by her at the time, and that they caused her some disquiet.

Medical examination

35. On 13.6.17, Ms Wheeler wrote to the claimant, again setting out her plans for a phased return to work. Ms Wheeler also proposed -we think, perfectly properly given eth need for clarity as to prognosis etc- that the claimant be examined by "an independent medical practitioner appointed by the company", and she gave her an appointment date.

36. The claimant wrote in response on 18.6.17. Though she took issue with several of the points made by Ms Wheeler regarding the phased return to work, and though she said she only consented to the medical examination "under duress" -for the avoidance

of doubt, we find there was no such duress- she did not complain about any of the comments made in the 28.4.17 meeting. Indeed, she did not raise any issue in respect of any of those comments until her then-solicitors' pre-action letter dated 29.5.18. This, despite the fact that she had CAB assistance, and some legal input, for some time prior to the presentation of her claim.

37. On 20.6.17, Ms. Wheeler again wrote to the claimant stating (amongst other things) "unfortunately, we cannot allow this situation to go on indefinitely". We find there was nothing particularly inapt about this remark *per se*, which must be seen in context- i.e. explaining in response to the claimant's 18.6.17 letter that a return to work arrangement was needed, and that FFW's recommendations regarding the mechanics of a phased return were "guidance only". (We do think Ms Wheeler's proposal of a 5 day staged return to work was far from ideal – not least, because the claimant had worked a 3 day week for some years. However, as noted below, that proposal was eventually abandoned.)

38. The independent consultant psychiatrist duly examined the claimant on 28.6.17. Finalisation of his report was delayed by about 2 months because the claimant wanted changes to be made to it, but was reluctant to mark up any proposed amendments. He records the claimant as remarking that the respondent had been "supportive and caring". (The claimant asserted to us that she did not make any such remark. However, we think it unlikely such detail would have been made up by the consultant. Nor did the claimant seek to amend this part of the text when requesting changes.) He opined that she had suffered from a major depressive disorder. He proposed a change in her medication, and a few weeks' phased return to work thereafter.

Skills Matrix

39. On the morning of 1.9.17, Ms Wheeler wrote to all members of staff, asking them to fill in a skills matrix "to cover both Product and Technical Skills within the business". The email gave example 'rating statements' to indicate to which level of competency

marks 0-5 ought to relate. The guidance was reasonably clear. Ms Wheeler asked for the completed matrixes to be returned that day. She sent a further email to all staff on 6.9.17, asking for the attached spreadsheet to be updated as per the instructions she had forwarded. The claimant did not read these emails from Ms Wheeler whilst still off sick.

40. On 10.10.17, the claimant met with Ms Wheeler to discuss her return to work. It was agreed that she would come back on a phased basis, working 3 days a week with 0.5 days incorporated into the first 2 weeks. It was also agreed that the claimant would work in the testing department to help familiarise herself with the current version of the software, in a less demanding and stressful environment.

41. The claimant initially told us she hurriedly returned the skills matrix Ms Wheeler had sent her very shortly after receipt (on about 16.10.17) of Ms Wheeler's 1.9.17 email, because she felt compelled to respond quickly. Hence -she said- she rushed filling it in "the day I came back". In fact, once the respondent (very belatedly) disclosed the relevant emails, it transpired that the claimant did not send back her completed matrix until 3.11.17. But that time, the claimant had been back to work for about 3 weeks, albeit initially on a phased basis. So, her evidence about being in a 'rush' was overstated.

42. The claimant asserted to us that she received no 'in person' guidance in respect of filling in the matrix following her 16.10.17 return to work. However, she also accepted that she at no point sought such guidance. We think she could and would have done so, if she felt she needed it at the time. She also accepted in cross examination that a "fair degree of guidance' was provided in the paperwork. In so far as material, we also do not accept her evidence to the effect that she thought the matrix was to be used to identify the 'guru' or 'go to' people for the various skills sets. That is not what Ms Wheeler's correspondence says.

43. As it transpired, the matrix formed part of the material used by the respondent to make redundancy selections. However, this was not made known to staff before they filled in their 'scores'. The claimant's case was that this was unfair. We

disagree. First, we accept that redundancies -and, thus, use of the matrix for selection purposes- was not yet contemplated as at September 2017. Second, we also consider that in any event to inform staff that the matrix was to be used for such a purpose would inevitably have caused all or most staff artificially to inflate their marks -making the document somewhat worthless.

44. The claimant asserted that the filled-in documents were in any event overly subjective (because they were "self-assessed") and thus not something it was open to the respondent to use in a redundancy process. We disagree. We think it was within the range of reasonable responses to look to how staff marked themselves. This was especially so given that (we accept) the marks were generally moderated -save (due to oversight) in the case of the claimant and employee 14- by management.

45. The claimant asserted that her depression would have meant she may have unduly marked herself down by reason of her perceived reduction in skills set. Also, that because of her time off work in the preceding year, she would have been 'rusty'.

46. As to the first of those assertions, the claimant may have been somewhat lacking in confidence at the time she filled in the data. But we think she overstates the extent to which this made her unduly mark herself down. As to the second assertion, we accept Mr Marrone's evidence to the effect that, because of the nature of the work the claimant was doing, her skill set and experience would not in fact have been appreciably 'rusty' (because there had not been any radical developments during her absence). We also accept the factual matters set out at paras 29(a)&(b) of Mr Crozier's closing submissions regarding the claimant's Arval work. Most importantly, we accept Mr Marrone's evidence -which for the most part was not challenged by the claimant despite opportunity for her to do so- that having reviewed matters *ex post facto*, the figures at "S7" represented a fair assessment of the claimant's skills etc prior to her going off sick at the end of October 2016, and about 1 year later.

47. This is important, because had the claimant presented a matrix with the figures as set out at "S7" (or even as set out at "S8") -whether by moderation or otherwise- and had those figures properly been factored into the reckoning, she would still have

scored relatively poorly in her 'pool' as described below, and so would still have been earmarked for redundancy.

48. A primary reason for this was because the claimant had, as noted above, been working wholly or mostly on the Avral project for a number of years. As a result, her knowledge and skills (though deep) were -we accept- narrow in range.

Return to work

49. Upon her return to work the claimant was (as we have said above) asked to perform a testing role rather than a developer role. Although the claimant told us she was "not permitted" to return to development work, we find her allocation to testing was intended only as an interim measure to help the claimant to 'bed in' without being put under too much pressure. Moreover, at least for the first few weeks (during which she completed the skills matrix), we find that the claimant readily agreed to such an arrangement.

50. We reject any claim that the claimant was substantively 'demoted', or that her role was substantively changed, to a tester.

51. We also find that the claimant's interim placement as a tester did not put her at a disadvantage when it came to redundancy pools and selection -or otherwise- because she was placed in the developer (rather than the tester) pool. Hence we do not accept the claimant's assertion that she was 'reserved to the testing group' with "the express purpose" of making her redundant because "everyone in my testing group was made redundant".

Redundancy process

52. By early December 2017, it became clear to the respondent that various revenue streams from a French bank client would reduce significantly from 1.1.18- some 12 months earlier than had been expected. The company was already running at a loss due to the investment it had made on a new product, "ODO" (which was built on the Drive product). As staff costs represented over 80% of the business's expenditure, it was considered that a reduction in head count was needed. The possibility of some

other large prospects generating revenue, and the Xmas break, prompted the respondent to defer action until January 2018. In the interim, Mr Rodia, and other directors and shareholders, all stopped taking salaries or dividends.

53. Those other prospects did not materialise. Hence the respondent decided to start a redundancy process. The respondent's decision was "to keep the consultation period to a minimum". Mr Rodia told us this was because he wanted to "avoid unnecessary stress and anxiety to staff". It was a very short period indeed.

54. Selection criteria were drawn up, and 'pools' decided upon, without any prior discussion with staff. As to these:

    a. The respondent chose to put into a separate pool those staff who had been focused on ODO work. This was because of the value, looking forward, which the respondent placed upon such work. As a result, it placed a premium on those staff members who were already engaged in doing it.
    b. The respondent put some 'graduate workers' in a separate pool. This is because they were on lower salaries, and had more flexible work terms.
    c. The criteria gave only limited weight to length of service (years x 1), and gave significant weight to Modules Competency marks/Drive knowledge (applying x5 and x2 multipliers for Drive and other skills).

55. Although we accept that some employers might have applied a different criteria, or weighted the criteria differently, we consider these matters were all within the range of reasonable responses open to the respondent. We agree with the points made by Mr Crozier at paras 23-25 of his closing submissions in this respect. But it plainly would have been appropriate to discuss the proposed criteria with staff before imposing it. Ms Wheeler conceded as much "in hindsight".

56. Staff were not notified of the possibility of redundancies until 29.1.18. On that date, they were told the consultation process would last until 2.2.18 (albeit Ms Wheeler, the only member of HR staff, would be on holiday on 1.2.18).

57. A few staff (e.g. senior management) were excluded by the respondent from the redundancy process. We find it was open to the respondent to do this, in the light of their cardinal importance to the business. (We nevertheless understand the claimant's point that the respondent was inaccurate in saying -in the context of the redundancy appeal, discussed below- that "the whole company was at risk".)

58. The claimant (and most other staff) had an individual consultation meeting with Ms Wheeler and Mr Rodia in the week commencing 29.1.18.

59. In so far as the meeting was intended to convey to the claimant (amongst other things) how staff were to be selected, the meeting was wholly deficient. In particular:

    a. The claimant was not given an accurate description of the selection criteria used.
    b. No explanation was given as to the 'weighting' to be applied to the criteria.
    c. The claimant was not told how she (or others) had scored. As a result, amongst other things, the claimant had no idea that a significant part of her marks had simply been missed out. See further above.

60. Ms Wheeler and Mr Rodia may have had little or no experience in a redundancy process before. But we think it ought to have been obvious to them that the 'consultancy meeting' was no such thing in any meaningful sense. The same slapdash approach was taken in respect of the 'consultation' with other staff, too.

61. We accept the claimant raised no substantive questions (beyond enquiring whether or not voluntary redundancies would be considered). But this is hardly surprising, given the paucity of information given to her.

62. The claimant told us that she was pleased and felt confident when told that the selection criteria to be used included "skills" and "Drive knowledge (if applicable)". She did not, for example, tell Ms Wheeler and Mr Rodia at the meeting that she felt her skills or Drive knowledge were outdated or had materially suffered through her absence, or that her illness caused her to doubt her skills/knowledge.

63. The decision as to whom should be selected was made very quickly indeed. Some 18 employees -a third of the workforce- were made redundant, including the claimant.

64. By a letter dated 5.2.18, the claimant was given notice that she had been selected for redundancy, and was told she would receive (and she duly received) a PILON as well as a redundancy payment. Again, no detail was provided to her as regards how that selection had been made/what she had scored relative to others (or otherwise). Nor was she told she had the right to appeal her redundancy.

65. Other employees who were made redundant also received a letter in substantively the same terms. Like the claimant, they were not told of their right to appeal.

66. One of the few things for which we find the respondent cannot be criticised for at this point concerns alternative roles. The claimant asserts no proper consideration was given to finding her such a role. However, we accept the respondent's evidence that no such role existed. (The claimant's case that she "could have been offered a role as a tester" is hampered by the fact that all testers- other than one ('Employee 50') who was working on the ODO project- were made redundant.) We also accept the respondent's evidence that it had no need and chose not to replace the one remaining tester when he subsequently resigned.

67. Similarly, though it may have been that the claimant could have been trained to work on ODO -she had done very little work on that project- this would apply to many other members of staff (including staff with a higher score). Furthermore, we accept that the respondent did not at any material time need further staff to work on ODO, particularly given the need to cut staff costs.

68. By a letter dated 6.3.18, the claimant appealed her dismissal. In it, she asserted she had been unfairly selected, that she had been 'demoted' to testing; and that the process had been unduly rushed.

69. The 27.3.18 appeal hearing was presided over by Mr Rodia -which was inapt, given his role in the 'consultation process'. Once again, the claimant was not provided with proper clarity as to the criteria applied, their weighting, or her own marks. She ought to have been, as Mr Crozier sensibly accepted..

70. By a letter from Ms Wheeler dated 6.4.18, the appeal was dismissed.

MATERIAL LEGAL PRINCIPLES

(1) DISCRIMINATION

Failure to make reasonable adjustments (sections 20-21 EA 2010)

71. Actual or constructive knowledge is needed before a duty to make reasonable adjustments can arise. As to this:
    a. Knowledge (actual or constructive) of both disability and the likelihood of substantial disadvantage caused to the claimant by the relevant PCP is a prerequisite.
    b. Knowledge (actual or constructive) must be disproved by a respondent who seeks to assert absence of knowledge.
    c. The question of constructive knowledge is an issue of fact for the Tribunal (**DWP v Hall** EAT 0012/05).
    d. Although the employer should make reasonable enquires based on available information, the extent of this duty should not be overstated, as it goes only so far as what is reasonable (**Ridout v TC Group** 1998 IRLR 628, EAT; **Peregrine (deceased) v amazon.co.uk Ltd** EAT 0075/13).

Harassment relating to disability (section 26 EA 2010)

72. "A's knowledge or perception of B's characteristic is relevant to the question whether A's conduct relates to a protected characteristic" for s26 purposes, albeit "there is no warrant in the legislation for treating it as being in any way conclusive". **Hartley v Foreign and Commonwealth Office Services** 2016 ICR D17, EAT.

73. Harassment under EA 2010 protects claimants against sufficiently serious conduct, not just any unwanted conduct. **Henderson v General Municipal and Boilermakers Union** [2015] IRLR 451 EAT.

74. Conduct being "related" to disability requires that there is a connection between the conduct and disability, although not necessarily a causative one. Cf. **London Borough of Haringey v O'Brien** EAT 0004/16.

75. One-off acts are not equivalent to an environment, and therefore acts must be sufficiently serious if they are to be said to give rise to an intimidating, hostile, degrading humiliating or offensive environment for the claimant (**Henderson**). Equivalently, in the context of analysing section 26(1)(b)(i) EqA 2010, the EAT offered guidance that not every slanted adverse comment or conduct may constitute the violation of a person's dignity (**Richmond Pharmacology v Dhaliwal** [2009] ICR 724 EAT, UKEAT 458/08). Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. EA 2010 and the conduct which it protects against must not be trivialised.

76. The EAT in **Richmond Pharmacology** explained that when the Tribunal considers 'effect' it must first consider whether the claimant *in fact* perceived the environment was created. Only if the first stage is made out, it must then secondly consider whether that perception was a reasonable one.

77. All the circumstances are relevant to determining both what the claimant's perception was and whether it was reasonable for the conduct to have that effect. A bald assertion that a claimant feels a particular way should not be taken at face value if the facts demonstrate otherwise.

78. A lack of an intention on the part of the employer to create the environment is also material, albeit not determinative. Conduct has a different weight if it was enacted innocently compared to with an intention to hurt the Claimant. The assessment of

whether it was reasonable is vital to ensure that the Tribunal does not encourage "a culture of hyper-sensitivity" (**Richmond Pharmacology**).

Time issues

Conduct "extending over a period'

79. Section 123(3)(a) EA 2010 provides that conduct "extending over a period" is to be treated as done at the end of the period. That subsection applies to a continuing course of discriminatory conduct, as well as the maintenance of a continuing policy or state of affairs. See e.g. **Hendricks v. MPC**.[2] The correct test is whether the acts complained of are linked, and are evidence of a continuing discriminatory state of affairs -as distinct from "*a succession of unconnected or isolated specific acts*."[3]

Just and equitable extension

80. As regards any 'just and equitable extension' pursuant to s.123(1)(b) of EA 2010, the onus is always on the claimant to satisfy the ET that they should be treated as a suitable exception to the general rule that claims ought to be brought within their allotted time. See Auld LJ in **Robertson v Bexley Community Care**:[4]

> "It is… of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

Pleadings and process

[2] [2002] EWCA Civ 1686.
[3] *Per* Mummery LJ, para 52.
[4] [2003] IRLR 434, CA, at para 25.

81. As Elias J in **Law Society v. Bahl** [2003] IRLR 640, EAT (at para 90) makes clear, a tribunal should not make findings of unlawful discrimination in respect of any matter which was not in the originating application or the subject of subsequent amendment.

82. This ought to apply in particular to a case where case management has been used to define and narrow the issues.

83. The ET is tasked with deciding an adversarial contest between opposing parties. It is no part of its function to step into the arena and assume an inquisitorial role. **Lockwood v. DWP**. [2013] IRLR 941 CA, para 52.

(2) UNFAIR DISMISSAL

84. When considering whether or not a dismissal was fair for s.98(4) ERA purposes, a tribunal must not substitute its own judgment as to what would have been a fair outcome. Rather, it must consider what was within the band of reasonable responses reasonably open to the employer.

85. See **Williams v Compair Maxam Limited** [1982] IRLR 83: "*it is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted*" (*per* Browne-Wilkinson J).

86. It is generally not open to an employee to claim that his dismissal is unfair because the employer acted unreasonably in choosing to make workers redundant. The tribunals will not sit in judgment on that particular business decision. **Moon v Homeworthy Furniture (Northern) Ltd** [1976] IRLR 298. (It is, though, entitled to consider whether the redundancy situation is genuine. **James W Cook Ltd v. Tipper** [1990] ICR 716.)

87. The following is amongst the guidance given in **Williams v Compair Maxam Ltd**:

a. The employer will seek to give as much warning as possible of impending redundancies.
b. The employer will consult and will seek to agree the criteria to be applied.
c. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment. (Similar observations concerning the need to commence consultation "when proposals are still at a formative stage" is made by Glidewell LJ in **R. v British Coal Corporation and Secretary of State for Traced and Industry, ex p. Price** [1994] IRLR 72.)
d. These are not principles of law but rather standards of behaviour which may alter over time. Cf **Royce Motors Ltd v Dewhurst** [1985] IRLR 184.

88. Following the opinion of the House of Lords in **Polkey**: "*… in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected … and takes such steps as may be reasonable to minimise a redundancy by redeployment within his own organisation*".

89. The 'band of reasonable responses' test applies also to the selection criteria.

90. In the event of a finding of unfair dismissal:

a. If the tribunal is satisfied that the employee would or could have been fairly dismissed at a later date or if the employer had followed a fair procedure, this may merit a reduction, of up to 100%, to any compensatory award under s.123(1) of ERA.
b. Any redundancy payment is offset against the basic award which might otherwise be made.

APPLICATION TO THE FACTS

Unfair dismissal

91. We are satisfied the respondent has shown that the reason for the claimant's dismissal was redundancy for s.98(1) ERA purposes.

92. However, the dismissal was unquestionably unfair, for the reasons conceded by Mr Crozier, and because of the many other serious deficiencies in the consultation process set out above. The criticisms articulated at paras 25.1, 25.5. and 25.6 of the List are made out. Also -by reference to para 25.2 of the List- though we do think the respondent 'identified pools', it did not explain them to the claimant as it ought to have done.

93. As to the matters at paras 25.3, 25.4 of the List, we accept that the criteria for selection, the weighting applied, and the pools used, were within the range of reasonable responses open to the respondent.

94. We also accept that the respondent did not have to adopt, and would not have adopted, the changes to the criteria or weighting proposed by the claimant in her evidence, or the way she proposed that scoring was collated, had there been proper consultation.

95. This notwithstanding, the consultation process was hopeless, and rushed. Any proper consultation process ought, in our view, to have taken up about one month more than it did (thereby serving to push back the EDT). We reject the submission advanced by Mr Crozier to the effect that the situation was so desperate for the respondent that (in effect) an adequate consultation period could be dispensed with.

96. Nevertheless:
    a. For the reasons set out at paras 46 & 47 above, we find that had the claimant's marks been properly applied, she would still have been one of the developers selected for redundancy. (In fact, she would still not have been the highest scoring person to have been selected for redundancy in the developers' pool.)
    b. We also accept the illustrative 're-mark' carried out at paras 36-38 and Appendix 1 of Mr Crozier's submission demonstrates that, allowing for an even more favourable re-assessment of her scores, the claimant would still have received an overall lower mark than all other retained developers.

c. It is not feasible to assert that the respondent was obliged to retrain the claimant – the respondent did not have vacancies into which, post-retraining (or in any event), she could have been slotted.

d. A 100% **Polkey** deduction must, in our view, therefore apply- albeit subject to the 'lost month' point we have made at para 95 above.

Disability discrimination

97. We find as follows in relation to the disability discrimination claims (and by reference to the paragraph numbering from the List).

Section 15 EqA claim

98. Para 26.1: We accept that the claimant's period of absence from late 2016 to October 2017 arose in consequence of her disability.

99. Para 26.2: We consider the reduction to a 3 day week happened long before the claimant could have be said to have been disabled (i.e. about October 2016 at the earliest[5]), and that it was implemented because of her husband's disability rather than her own. But even if we are wrong about this, it makes no odds to the 'unfavourable treatment' the claimant relies on at para 27 of the List. See below.

100. Para 26.3: We accept the claimant may perhaps have thought a bit less of her own skill set and product knowledge by reason of her disability when completing the skills matrix. But even if she undermarked herself somewhat as a result -despite the clear written marking guidance given, and opportunity to ask any questions- this did not affect the substantive outcome (i) because the respondent did not factor in her 'lost' scores (by reason of accident, rather than for disability-related reasons); and (ii) had

[5] We appreciate, of course, that she had had issues before this. However, we did not have evidence before us to show that such issues (assuming they had the requisite substantial adverse effect on her ability to carry out normal day-to-day activities in the short term) were -or would have appeared- 'likely' to recur so as to fall within para 2(2) of Schedule 1 to EqA. As Underhill J observed in **J v. DLA Piper UK LLP** [2010] ICR 1052, it is "a common-sense observation" that reactions to "adverse live events" are not normally long-lived. We do not think the respondent had actual or constructive knowledge of 'likely' recurrence, and hence of disability, at the time- even if recurrence was in fact 'likely' in retrospect.

her scores been taken into account and properly moderated, she would still have been one of the 5 employees in the 'developer pool' selected for redundancy. See further paras 46 & 47 above, and para 102 below.

101. Para 27.1: We do not accept that the claimant's role was "changed", or that her interim placement as a tester amounted to 'unfavourable treatment' in any event, for the reasons set out above (in particular, she was still pooled with the developers.)

102. Paras 27.2 & 27.3: We reject the assertion that the claimant was selected for redundancy because of her sickness absence record, or dismissed by reason of any of the matters set out at para 26 of the List. She was selected for redundancy, and dismissed, because of her comparatively low scoring in the matrix- which as set out above, was not because of anything arising in consequence of disability.

103. Paragraph 27.4 & 27.5: We reject the assertion that the claimant was not offered alternative employment, or not retrained, because of any of the matters set out at para 26 of the List. The reason she was not offered another role/retraining is instead as set out above. (Moreover, none of those individuals who were selected for redundancy were redeployed or retrained.)

104. Para 27.6: The claimant was not informed of her right of appeal, as she ought to have been. But this had nothing to do with anything arising as a consequence of her disability. No other material employees were told of their right to appeal, either. See further para 65 above.

Section 26 EqA claim

105. Para 30.1: The respondent knew the claimant had been ill for some months, and that (as at the 28.4.17 meeting) she did not appear to be in a good state of mind. See further para 32 above. However, given the series of relatively short-term fit notes received, the absence of detail provided by the claimant's GP by that time, and given the respondent had not yet received the consultant's report, we are not persuaded the respondent knew at this stage that the claimant was disabled. This is relevant to

the issue of whether or not the respondent's conduct "related to" disability. See further para 72 above.

106. Even assuming (which we doubt) that it did so relate, we reach the following conclusions in relation to paras 30.1.1-30.2 of the List:

a. We find that, in each case, the *purpose* of the remarks made -in so far as we found them to have been made- was not one proscribed by s.26 of EqA, as set out in para 33 of the List. In fact, the claimant did not seek to suggest otherwise to either Mr Rodia or Ms Wheeler when she questioned them.

b. Para 30.1.1: The respondent did not say a phased return from work "would not work for the business". Rather, it said the arrangement proposed by the claimant would not work. See further para 27 above. Taking into account:

   i. the matters in parentheses at para 33 of the List;
   ii. the circumstances as set out above; and
   iii. the caselaw recited at para 73-78 above

   we do not consider that the words had (or that it was reasonable for them to have had) an effect proscribed by s.26 EqA.

c. Para 30.1.2: We repeat what is said at para 28 above. Again, we do not consider -taking into account the matters set out at (i)-(iii) above- that the remark had (or that it was reasonable for it to have had) a proscribed effect.

d. Para 30.1.3: This remark was ill-judged, as we have said. But we do not think it had (or that it was reasonable for it to have had) a proscribed effect, taking into account the matters set out at (i)-(iii) above.

e. Paragraph 30.1.4: These comments were ill-considered, as set out above. But, albeit with some hesitation (and having also looked at the 28.4.17 conversation 'in the round' as we must, as well as the other matters set out at (i)-(iii) above), we do not think they had (or that it was reasonable for either of them to have had) a proscribed effect.

f. Paragraph 30.2: We do not accept, in the light of the matters set out at (i)-(iii) above, that the words Ms Wheeler used had (or that it was reasonable for them to have had) a proscribed effect.

107. Even if we had found that any of the matters relied upon in fact amounted to harassment for s.26 EqA purposes, there is (as we have found) no later act/omission constituting discrimination under s.15 or 21 EqA and taking place within the primary limitation period to assist the claimant for s.123(3)(a) EqA purposes. It follows that the harassment claim is long out of time. In the light of the chronology set out above, we do not think the claimant would have persuaded us (had it been necessary to do so) that it was just and equitable for s.123(2)(b) EqA purposes to extend time so as to allow her s.26 claim to proceed (the burden being on her to do so).

108. The claimant's assertion in her submissions that she was "not well enough to bring a claim of harassment at that time" might well apply to the period April-September 2017. But thereafter she was well enough to work and, we think, to bring a grievance and claim.

Section 21 EqA claim

109. Para 34: *Actual* knowledge after about 25.8.17 is rightly conceded. We do not accept the respondent had *constructive* knowledge of the claimant's disability before about that date[6], in the light of the matters set out at paras 21-23 and 35-38 above (which meant that the respondent, despite reasonable efforts, had not yet obtained sufficient clarity early in 2017 as to the claimant's condition and its long term effects.)

110. Para 35 & 36: Below, we will assume all the matters relied on amount to PCPs (although we are not wholly convinced the requirements specified at paras 35.4 or 35.5 amount to PCPs). However, we do not think the PCPs specified at 35.2-35.5 put the claimant at a comparative substantial disadvantage on the facts of the case. Nevertheless, we deal with each of those PCPs below, for the sake of completeness.

[6] The respondent did not seek to assert that it did not have knowledge at any point of the likelihood of substantial disadvantage being caused to the claimant for the purpose of para 20 of Sch. 8 to EqA.

111. Para 38.1: On 28.4.17, Mr Rodia refused to allow the claimant a phased return on the terms she proposed. However, by 10.10.17 the respondent had agreed to a phased return based on a 3 day week. In the interim, the claimant was signed off sick in any event. Even if she suffered a material disadvantage by initially being refused a phased 3 day week on 28.4.17, and even if the respondent had constructive knowledge of her disability at this stage, she is long out of time to pursue this as a freestanding claim.

112. Paras 38.2 & 38.3: We do not think it was a reasonable adjustment to require the respondent to agree "selection criteria" or to "amend the weighting factor" so as to take into account "the impact of the claimant's sick leave on her product knowledge and current skill set".

113. (It might well have been reasonable to require the respondent to take into account the impact of the claimant's sick leave when moderating the scores, and adjust the claimant's scores, *if* there had been such an impact. But this point is academic, because 'moderation of scores to take into account impact' is not pleaded as a reasonable adjustment relied upon by the claimant. See further to this paras 81-83 above. In any event, moderation would have made no difference to the question of whether or not the claimant would have been retained, for the reasons set out at paras 46 & 47 above.)

114. Paras 38.4 & 38.5: We do not consider that there were any roles into which the claimant could have been redeployed, or any roles for which she could have been re-trained, as a reasonable adjustment. See further above.

115. All EqA claims are therefore rejected.

Remedy hearing

116. Given our findings above, we expect that the question of remedy in relation to the unfair dismissal claim can be resolved between the parties without the need for a

further hearing. Otherwise, the parties are at liberty to apply for a remedies hearing to be listed.

13 June 2019

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Employment Judge Michell, Cambridge

JUDGMENT SENT TO THE PARTIES ON

.....27 June 2019.....

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FOR THE SECRETARY TO THE TRIBUNAL