EMPLOYMENT TRIBUNALS

Claimant: Mrs T Kemble-Smith
Respondent: Tunstall Healthcare Limited

ON: 14 to 16 May 2018
BEFORE: Employment Judge Rostant
Mrs E M Burgess
Mr A J Senior
REPRESENTATION:
Claimant: In person
Respondent: Mr S Robinson of Counsel

JUDGMENT having been sent to the parties on 30 May 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:

REASONS

1 . By a claim presented to the Employment Tribunal on 23 November 2017 the claimant brought complaints of unfair dismissal and disability discrimination. The respondent defended the claims. The matter came before Employment Judge Keevash at a preliminary hearing to define the issues by telephone on 15 January 2018. At that preliminary hearing the claimant was in person but her claim form had been settled by her legal representatives DAS Solicitors Limited.

2. At the preliminary hearing the parties agreed what issues were to be determined by the Tribunal and they are set out at paragraphs 10 to 15 of Employment Judge Keevash's case management summary. The claims in addition to that of unfair dismissal were harassment related to disability, direct discrimination because of disability, discrimination contrary to section 15 for something arising from disability. There was also the question as to whether or not any of the claims raised issues of time.

3. Judge Keevash made case management orders which were in large measure complied with the parties exchanging witness statements and the respondents producing an agreed file of documents for the hearing.

4. At the outset of the hearing, Mr Robinson for the respondent applied to introduce a witness statement which had been exchanged later than the date provided for by Judge Keevash's order and not until 4 May 2017. That was a witness statement of Miss Blatherwick, whose importance to the case was that she was relied upon by the claimant as her comparator. After discussion the claimant did not object to the introduction of Miss Blathemick's witness statement and at the same time was content to permit the addition of certain relevant documents to the file those documents being pages 404 to 408 in the file of documents. At the same time a job description for Mr Bain was added, (see page 409) although its relevance was not entirely clear and remained unclear throughout the hearing.

The issues

5. The complaint of unfair dismissal raised the following issues. First, could the respondent prove that the reason for the claimant's dismissal was redundancy. It was the claimant's contention that the real reason for her dismissal was the fact of her disability. The respondent's contention was that it had a reduced need for somebody to do the claimant's job since the majority of the job had either been automated or was in the process of being automated at the time of the claimant's dismissal. If, which the claimant denied, the Tribunal accepted that the real reason for her dismissal was redundancy, the claimant contended that the dismissal was nevertheless unfair and relied on the complaint that she ought to have been pooled with Miss Blathenvick in a selection pool and that she ought to have been offered suitable altemative employment.

6. On closer examination it became apparent that that latter point related to her contention that a colleague of hers who had also been placed at risk, namely Mr Lonsdale, had been slotted directly into a duty manager's role and the claimant contended that she ought to have been given the opportunity of applying for that post.

7. Finally the claimant asserted that the procedure adopted by the respondent was unfair without being specific about what the nature of the unfaimess was. In her claim form however, the claimant complained that she was given insufficient information to support the contention that there was a genuine redundancy situation during the course of her consultation process and that since Mr Bain the claimant's line manager had been able to refer to her impending redundancy in January 2017 it was clear that her dismissal had been pre-determined.

8. The complaint of harassment related to disability centred on four events where Mr Bain spoke to the claimant and the details of those will be set out when the Tribunal gives its conclusions on each of those matters. The fifth event relied on, an event involving Miss Mundy in July 2017, was the claimant accepted, not an event where Miss Mundy's conduct related to the claimant's disability and was therefore not an issue which the Tribunal needed to determine.

9. The complaint of direct discrimination because of disability relied upon Miss Blatherwick being the comparator. Miss Blathetwick does not have a disability. The less favourable treatment was the dismissal of the claimant and the fact that the claimant was placed in a pool by herself for selection when the claimant contended Miss Blatherwick ought to have been placed in the same pool and a choice made between the two of them. The claimant contended that it was

appropriate to pool her with Miss Blathemick because at the time of the dismissal she and Miss Blatherwick were doing the same job.

10. The complaint of section 15 discrimination relied on two matters said to be arising in consequence of the claimant's disability. Those were the fact that after an initial period of phased retum the claimant needed a further extended period of phased retum (which she was permitted) and the second was that on a single occasion the claimant needed to attend hospital for an urgent examination. The unfavourable treatment was the requiring of the claimant to take holiday to enable her to work part time for the second period of phased retum and not reinstating that holiday allowance and also requiring the claimant to use time off in lieu in order to attend the urgent hospital appointment.

The law

11. The claim of unfair dismissal js brought under sections 94 and 98 of the Employment Rights Act. It js the respondent's initial task to prove a potentially fair reason for dismissal (in this case that of redundancy). Should the respondent fail in that the claim must succeed. If, however the burden of showing a potentially fair reason is discharged, the Tribunal must go on to consider whether in all the circumstances (set out in S98(4) the respondent was reasonable in treating that reason as grounds for dismissal.

12. The claim of harassment js pursued under sections 26 and 40 Equality Act 2010 (EQA). The claimant must show that she was subjected to unwanted conduct, which had the purpose and effect proscribed by S26(1). If so, the issue for the tribunal was whether that conduct related to the claimant's disability. The claimant is obliged to provide sufficient evidence to allow the Tribunal to presume a relationship with the protected characteristic and to shift the burden to the respondent to provide an explanation which has no such relationship.

13. The claim of direct discrimination is brought under sections 13 and 39 EQA. The claimant must show that she has been treated Jess favourable than an actual or hypothetical comparator (in this case the actual comparator Ms Blatherwick). The claimant must also provide sufficient evidence to allow the Tribunal to presume that the treatment was because of the claimant's sex and thus to shift the burden to the respondent to provide a non-discriminatory reason for the treatment.

14. The section 15 claim requires that the claimant show that for a matter arising from her disability she was subjected to unfavourable treatment. If that is the case it js for the respondent to show that the treatment was justified.

The agreed facts

15. The respondent company runs a 24-hour, seven day a week, emergency response centre, employing 113 staff largely focused on inbound emergency call from vulnerable people.

16. The claimant worked for the respondent as workforce intra-day planning manager from 5 December 2005.

17. The claimant was diagnosed with ovarian cancer on 27 June and the respondent concedes that from that date she was a person who met the definition of disability within the meaning of section 6 of the Equality Act. The claimant was off work from 27 June until 4 January 2017 when she began a period of six weeks phased return.

18. By the end of February, the claimant was back at work full-time.

19. The claimant reported to Mr Bain during this period.

20. On 13 February, Mr Bain went on sick leave for 10 weeks.

21. On 15 March, the claimant realised that she was unable to continue working full time and contacted Mr Bain to be permitted to revert to part time hours.

22.0n 16 May 2016, the claimant had to attend hospital for an emergency appointment.

23. In the early part of April 2017, the claimant had a week's holiday and on her retum to work she was called into a meeting with Mr Bain and his direct line manager Miss Miller to discuss Mr Bain's difficulties in being able to access certain information to provide management information to Miss Miller during the claimant's absence.

24. The claimant went off sick again on 26 June 2017, and met with the respondent's doctor on 25 July 2017 for a work place assessment.

25. On that same day the claimant instigated a grievance which largely complained about the failure of the respondent to make proper arrangements for the claimant to retum to work after her cancer treatment.

26. On 17 July 2017, the claimant received a letter putting her at risk of redundancy.

27. Whilst the claimant had been off ill her work had been covered by Miss Blatherwick and although some of her work was retumed to her upon her retum to work, with increasing amounts going back over the time from January onwards, by 17 July Miss Blatherwick was still undertaking some of the claimant's tasks.

28.

29. The claimant was invited to a series of consultation meetings presided over by Mr Bains' line manager Miss Miller. The first of those took place on 20 July, the second on 1 August and the claimant's employment was terminated on 24 August 2017. There was no appeal against the decision to dismiss the claimant.

<u>The Tribunal's conclusions on the contested issues</u>

The decision to dispense with the claimant's services and re-distribute what remained her work amongst other people and whether that was essentially a reason related to redundancy.

29. On the face of the evidence in relation to the consultation meetings, the respondent was saying to the claimant that automation of the claimant's task was the reason why she had been put at risk (see 116 to 119).

30. Of course, it might be that that was a sham. It might be that that was an elaborate exercise on the part of the respondent to justify the claimant's dismissal when there was another real reason. There is no doubt that the claimant did take issue with the respondent's view in relation to what aspects of her job were and were not being done manually. However, it is also clear that the claimant never disputed that some automation had taken place and she appears at some point not to have seriously challenged the possibility of up to 70% of her job had gone (see page 170).

31. Furthermore, the claimant's own estimate that up to 35 hours a week of her job remained seems unlikely in the view of the fact that it was undisputed evidence of the respondent that the claimant has not been replaced. The claimant's explanation for that is that she believed that those 35 hours have been redistributed between Mr Bain and Miss Blatherwick with Miss Blatherwick doing about one hour a week. The claimant accepted that Mr Bain is now engaged in a job supplying business information. She accepted that that is a role that she would have been unqualified to take and is a senior role. She also accepted that Miss Blatherwick's role is junior to the role that she was occupied and that there is the relevant disparities of salary associated with the difference in roles. What the claimant essentially believes is that the respondent dismissed the claimant only to retain Mr Bain at a higher salary to do her same job. The Tribunal takes the view that that is inherently improbable.

32. The claimant also raised some question marks over who it was that decided that the claimant's role was being sufficiently automated to justify dismissal and when that decision was taken. It certainly is the case that Miss Miller who came into the business in January 2017 and even by July 2017 knew relatively little of the claimant's role. At the outset of the consultation process the claimant was even sent a pack of information that was entirely inappropriate for the process by which she was to be consulted over redundancy and related instead to some other employees engaged in the service delivery team who were at risk by virtue of a separate decision to merge the service delivery team and the response team. She brought that to the attention of the relevant human resources business partner Miss Greenwood who in tum raised that with Miss Mundy and Miss Miller and drew to their attention the necessity to be in a position to explain to the claimant with rigour what it was about the changes to the claimant's job that justified a conclusion of dismissal. At that point it is apparent that Miss Miller began carrying out an exercise which produced document 116 and that exercise was carried out in consultation with Mr Bain. Document 116 to 119 is a document which sets out all of the claimant's job functions in coloured type and incorporates the opinion of Mr Bain as to their actual or likely fate in view of automation and other changes to the claimant's job.

33. The background to all of this exercise however, was the fact that Miss Miller as a director had inherited a budget which had already identified the claimant's role as potentially redundant in the light of automation. That appears to have been decided upon as early as October 2016. In October 2016, the claimant was already off ill and it might be said that the timing of that decision is rendered suspicious given the fact that it was taken whilst the claimant was off ill with cancer. In other words, it might be that there is a connection in the then director Ms Galant's mind between a desire to make the claimant's post redundant and the fact of the claimant's illness. On the other hand, we also know that there was a first phase of automation of the claimant's role which was carried out in September 2016. Absent any other evidence we find that that process is at least as likely to have informed Ms Galant's thinking as the fact of the claimant's disability. Ms Galant was not here to give evidence and Miss Miller's evidence, that the budget already identified the claimant's role as potentially redundant by the time of Miss Miller's arrival, was corroborated by Miss Greenwood who in October 2016 happened to be acting up as human resources director and saw the relevant budget. Although it is regrettable that we were unable to speak to Miss Galant and therefore speak to the person who originally earmarked the claimant's role as potentially redundant, the Tribunal takes the view that on balance the evidence about the origins of the decision to dismiss the claimant do not assist us either way in supporting or challenging the respondent's evidence now that the decision to dismiss her was founded on an automation based redundancy.

34. The claimant also asked us to take into account the events of January and April 2017 which she relies on in her complaint of harassment. The claimant asserts that her relationship with Mr Bain was deteriorated on her retum to work and that she ascribes that deterioration, which she said produced four instances of harassment, as being brought about by the fact of her illness. The Tribunal has concluded that no harassment took place and we will give our detailed reasons for that later in our Judgment. However, at most if it were the case that the difficult relationship between the claimant and Mr Bain was the true reason for Miss Miller deciding to put the claimant's job at risk, that would be a complaint not of direct discrimination but of section 15 discrimination, that is to say unfavourable treatment for something arising out of the claimant's disability, the something arising being the difficult relationship. In any event, the possibility and it is only a possibility with no real evidence pointing to it, that the claimant's relationship with Mr Bain was a contributory factor to the decision to put the claimant at risk does not outweigh what the Tribunal considers to be the more persuasive evidence that the true reason for the claimant's dismissal was the automation as asserted by the respondent.

35. Finally on this subject, we were also influenced by a piece of evidence that came to our attention almost by accident when it was shown that the respondent has employed, and still does employ, another female employee who has had cancer, namely Miss Pickering. There seems no obvious reason why the claimant should be treated differently from Miss Pickering other than the reason advanced by the respondent.

36. The Tribunal rejects the contention that the dismissal is automatically unfair for want of a potentially fair reason.

37. We also reject the first limb of the claimant's section 13 complaint, which is to say that the real reason for the claimant's dismissal was her disability. In so doing we have adopted an approach to the burden of proof of asking the treason why the respondent decided upon the allegedly less favourable treatment. That seemed to us to be the better approach in the absence (for this part of the claim) of an actual comparator.

The question of pooling and the role of Miss Blatherwick

38. This aspect of the claim is based, in the Tribunal's view, on a fundamental misconception. The misconception is that because Miss Blatherwick was, for a period of time, doing some or all of the claimant's job functions it was appropriate in July 2017 to pool her with the claimant for selection for redundancy. Miss Blatherwick's substantive post was a grade lower than the claimant's with a different salary doing a different job. The claimant accepted, and indeed during a meeting in April 2017 reiterated, the fact that she was doing a unique role. That role, the respondent decided, was, all but a few hours a week had, or was about to, disappear by reason of automation. Miss Blatherwick's only connection with that role was that whilst the claimant had been off ill she had taken over 100% of the role and after the claimant's retum had retained some aspects of the role for a variety of operational reasons. Part of those reasons was the fact that the claimant began her work on a phased return. The claimant agreed in evidence that that led to a situation in which various parts of her job were handed back to her gradually over time. Another part of the reason for Miss Blatherwick retaining some part of the claimant's functions was that whilst the claimant had been off ill a new function had been created (albeit heavily automated) and Miss Blatherwick trained on how to do the limited manual part it. A decision was taken that it was most appropriate for Miss Blatherwick to continue doing that part of job. In those circumstances it cannot be said that Miss Blatherwick was doing the same job as the claimant. Neither theoretically or actually, was Miss Blatherwick the same as the claimant and for that reason the respondent was entirely justified in not pooling the claimant with Miss Blatherwick. Indeed, Miss Blatherwick would have been entitled to complain of unfaimess had she found herself competing for what was essentially her own job when it was the claimant's job that was being made redundant. For the same reason, Miss Blatherwick does not provide an appropriate comparator for claimant. Miss Blathemick's circumstances were materially different to the claimant's circumstances. Even if we were to conclude that they were sufficiently similar to allow a comparison to be made we would have decided that the reason for the difference of treatment was not the fact that Miss Blatherwick did not have a disability and the claimant did, but the fact that the respondent viewed them as essentially different as to function and grade. For those reasons we reject the complaints of unfairness and direct discrimination associated with the pooling question.

The other grounds of alleged unfairness.

39. The first of those grounds is the claimant's complaint that the process of consultation was carried out in a way that she was starved of adequate information and was therefore unable to engage properly with it. We consider on

the evidence that that complaint cannot be made out. The process started off badly when the claimant being sent the wrong pack. However, the claimant very sensibly drew that to the respondent's attention ahead of her first consultation meeting and by the time of the first consultation she and Miss Mundy who conducted the consultation were armed with the document. That allow3d Ms Mundy to go through the claimant's functions job by job giving what she understood to be the position in relation to automation or whether the role was being done. That was something she did based on having the information supplied to her by Mr Bain the claimant's line manager. It is evident that throughout that process the notes show that the claimant engaged with each point by taking issue with the accuracy or disputing matters of detail. At the end of that meeting a further consultation meeting set, and at the second consultation meeting a revised version of the document was available and again the claimant took issue with various aspects of detail, with a discussion centring on the percentage of the role that had been automated.

40. The Tribunal's view is that the claimant well understood and knew her own role and having the document supplied by the respondent with the comments under each job role allowed her fully to understand what the respondent said was being done to her role and to challenge those conclusions if she thought that right to do.

In the circumstances, the Tribunal takes the view that the claimant's real unhappiness is not that she was unable to challenge the thinking of the respondent but that her challenges were not accepted by the respondent and that the respondent nevertheless took the view that sufficient automation was happening to justify dismissing her. Of course, the claimant is entitled to her unhappiness but that does not mean that the process by which she was consulted was essentially unfair, merely that she disagrees with the conclusions.

41.1t is not the role of the Tribunal to substitute its own view or approach when considering a question of unfair dismissal but simply to decide whether the approach adopted by the respondent falls outside the reasonable range of responses. The Tribunal takes the view that the consultation process adopted by the respondent, once it had corrected the initial error, comfortably met its requirements within the reasonable range of responses and we take the view that there was a full consultation or at least as full as is required to be fair.

42. We would add at this point that there is only one area where we have felt it necessary to take the view that evidence given to us by the claimant seemed improbable. That is the questions to what was or was not said by the claimant during the course of the two consultation meetings as to her desire to leave the business. That becomes important when we consider the next aspect of the claimant's complaint of unfaimess which was the failure by the respondent to consider the possibility of extending her employment at least until October, which is the date which Miss Blatherwick reverted to her old role and salary. This was a relatively new point, raised for the first time properly during the course of the hearing and Mr Robinson understandably complained that if the claimant wished to raise this as a ground to complaint she ought to have applied for leave to amend. The difficulty for the claimant is that even if leave to amend had been granted, at no point did the claimant raise a desire to remain in employment right up until the end of the process of automation. Even had she done so we take the view that the

respondent would have been perfectly justified in saying that that was not an appropriate way of dealing with the claimant's redundancy. More to the point however, not only did the claimant not raise that, but to the contrary, she made it plain that she wished to leave the business as soon as possible.

43. We specifically reject the claimant's evidence that the notes of the two meetings where she is recorded as saying exactly that are inaccurate. Our reasons for rejecting that proposition is that we think it unlikely that such an important inaccuracy would not have been dealt with in the claimant's witness statement and would not have been put to Miss Mundy and Miss Greenwood when they gave evidence about those consultation meetings. The only reasonable explanation, in the view of the Tribunal, is that the claimant's memory is at fault t and that the notes are an accurate reflection of what went on in that meeting. It may well be that the claimant's upset in the course of that meeting has caused her not to remember accurately and it is evident that at other points of the meeting she was clearly distraught. It seems unlikely to the Tribunal that the respondent would put invented words into the claimant's mouth when in other respects, even when the claimant was being critical of the respondent, the notes report her accurately, as the claimant confirmed in evidence.

44. Finally, we deal with the question of altemative jobs. Again, this is not an aspect of the claim that featured in the claim form and Mr Robinson's case was that the claimant would need to have applied for an amendment to allow that point now.

In the event it was clear that the evidence to deal with the matter was available during the hearing and there was little prejudice to the respondent in allowing such amendment as was necessary to permit the claimant to raise this aspect of unfaimess. The claimant's complaint is that she ought to have been offered an alternative job or at least an opportunity to compete with Mr Lonsdale and possibly Mr Bain when they were offered altemative jobs.

45. The facts behind this aspect of the claim are simply set out. Both Mr Lonsdale and Mr Bain were put at risk of redundancy but were no longer at risk of redundancy by the time the claimant received her letter putting her at risk of redundancy. The reason why they were no longer at risk is that each of them had been found an altemative job. We are not entirely clear whether the claimant believes that she should have been offered the opportunity of taking up the role that Mr Bain was offered. At any rate, it seems to us unlikely that the respondent would have given the claimant the opportunity to apply for that role since the claimant accepts that it is a role at a senior management level reporting directly to a director and above the grade that she was employed at by the respondent. We are clearer however about the claimant's contentions in relation to Mr Lonsdale. It is an accepted fact that Mr Lonsdale was found a job as a duty manager and thus avoided the necessity of having to go into a selection pool caused by the merger of two parts of the phone response team. The respondent's explanation is that some capacity for duty manager time was lost by an existing duty manager reducing her hours and deciding to work only at weekends and the merger of the two departments made it useful for the respondent to increase the amount of duty manager capacity. Mr Lonsdale, said the respondent, was the obvious person to take up the extra duty manager's job having already performed the role on a number of occasions in an acting capacity and not requiring any training. Miss Mundy agreed that the

claimant would have been capable of doing the job provided she had been offered necessary training. The claimant did not challenge the suggestion that Mr Lonsdale had been doing the job on an occasional basis and could be moved into the job without the necessity for training. In the circumstances, the Tribunal takes the view that even if the claimant were permitted to amend to include this claim to complain about the decision not to allow her the opportunity to compete with Mr Lonsdale for the duty managers job, that decision is not one that renders this dismissal unfair.

46. It is possible that the claimant could have been given that opportunity. It seems likely that that job cropped up at a time when the claimant's name was at least in the frame for a potential redundancy, if not subject to a formal process, but we can find nothing unfair and certainly nothing outside the range of reasonable responses in a respondent deciding that it was more sensible to move the obvious and qualified candidate into the role than to allow two people to compete for a role where the outcome was predictable. For all of those reasons the Tribunal dismisses the complaint of unfair dismissal.

The complaints under section 15

47. As Mrs Robinson rightly points out these complaints had been put on the basis that the respondent placed a requirement on the claimant that she "pay' for an extra period of reduced hours and one visit to the hospital by using, in the first instance holiday and the second instance time off in lieu. That was the "unfavourable treatment' relied upon. No such requirement is evident on the facts. In each instance, the claimant, for reasons best known to herself, applied for the time to be covered by holiday time. True it is that she was not corrected and advised that she could treat the balance of the time as sick leave. We do not know why she was not corrected and since the complaint was never put on the basis that she had not been put straight by anybody the respondent did not call the witnesses that could have dealt with that. The relevant witnesses who were called were never challenged on that aspect of the case and were never invited to explain themselves. The Tribunal was therefore no further forward on that point and all that is possible for us to say is that the way in which the claim was actually put in the claim form cannot be made out since the claimant volunteered for the matters to be dealt with in that way and her application for time off was put on those terms. Nor can it be said in the circumstances that the claimant did not know that it was possible for the time to be covered by extended sick pay since she had already asked for that in relation to her first period of phased retum and had had that granted. For those reasons the section 15 claims are dismissed on the grounds that the claimant cannot show the factual basis from which she relies in order to make them out.

The complaints of harassment

48. These complaints are unquestionably out of time. However, it is evident that the claimant has complained not just to this Tribunal but also to Miss Miller and to Ms Mundy during the consultation process about her relationship with Mr Bain in the early period of 2017 and had the Tribunal concluded that the complaints were made out on their face it might have been a difficult matter to decide whether or not it would have been appropriate to extend time. However, we have not and for the following reasons.

49. There are four complaints. The last of those complaints is the one best supported by evidence. The other three complaints relate to conversations between the claimant and Mr Bain for which there is no corroboration and where the Tribunal's findings of fact have to depend entirely on which of those two witnesses we found to be more credible. We shall retum to those shortly.

50.0n 18 April the claimant met Mr Bain and, for a period of time, Miss Miller to discuss problems that had arisen whilst the claimant was off on holiday. The claimant's complaint essentially is that during both the first part of the meeting, when Miss Miller was present, and in the second part of the second (longer) part of the meeting when Miss Miller was not present, Mr Bain was unfairly and unreasonably critical of her performance. The Tribunal has had the opportunity of listening to the recording of the first part of that meeting. We did so because there was a dispute between the claimant and Miss Miller as to whether or not the claimant was evidently upset in that meeting. Miss Miller took the view that the claimant was not upset but was rather annoyed, angry or irritated. The Tribunal's own view that the recording evidently shows that the claimant was upset and distressed. There is enough in her tone of voice to make it plain that she was upset to be in that meeting. Perhaps that is not surprising since the meeting had been convened to deal with the fact that Mr Bain had found it difficult to supply to Miss Miller information that Miss Miller needed and that Mr Bain was ascribing that difficulty to the fact that, in the claimant's absence, he had been unable to find basic information he needed to explain how the claimant had carried out an may have happened was a perfectly normal exchange between the claimant and Mr Bain which the claimant had misread or been unnecessary sensitive about. Both of those possibilities remain and the fact that claimant did complain about these matters later does not add substantially in the Tribunal's view in the claimant's side of the scale when deciding whose version of events we prefer. There is one other matter which has weighed rather more heavily with the Tribunal and that is the claimant's evidence that on the first two occasions Mr Bain not only spoke to the claimant in an unpleasant way but that he actually shouted. This is suggestive of a manager on a short fuse, capable of losing his temper over relatively minor matters. The Tribunal's view was that Mr Bain, as t is evidenced by the lengthy conversation on 18 April is not a person prone to losing his temper in that way. Indeed, despite the evident confusion and possibly even frustration that is evidenced by the transcript of that conversation it is clear that Mr Bain remained extremely calm. Indeed, we have little doubt that if Mr Bain had shouted at the claimant during the course of that part of the meeting the claimant would have quite understandably insisted that we listen to the recording of that part of the meeting, which had been made clandestinely. She did not. The claimant was content to rest upon the transcript as the evidence she needed. There is no evidence in the transcript of Mr Brain losing his temper, speaking intemperately or shortly with the claimant. Quite to the contrary. In our view that makes it inherently less probable that Mr Bain, over much less cause, would lose his temper in the way the claimant suggests and for that reason we prefer Mr Bain's evidence about the two incidents of harassment (a) and (b) in the claimant's claim form.

54. This leaves only the third incident of harassment where there is a straight disagreement by Mr Bain about whether or not he wamed the claimant that she might not have a job in the future. We take the view that because of our findings on the other

matters we are entitled to conclude that the claimant has failed to discharge the burden resting on her to prove the fact that that conversation happened. For that reason that claim must fail.

55. For all of those reasons outlined above the Tribunal rejects the claims brought by the claimant and therefore dismisses them.

Employment Judge Rostant

Date 18 June 2018