THE EMPLOYMENT TRIBUNALS

Claimant: **Miss Rachel Brook**

Respondent: **Tyneside Cinema Ltd**

Heard at: **North Shields Hearing Centre** **On:** **14 & 15 October 2019**
Deliberations:16 October 2019

Before: **Employment Judge Arullendran**

Members: **Ms D Winship**
Mr G Gallagher

Representation:

Claimant: **In person**
Respondent: **Mr A Scott (counsel)**

RESERVED JUDGMENT

The unanimous Judgment of the Employment Tribunal is as follows:

1. The claimant's claim for discrimination pursuant to section 15 of the Equality Act 2010 is well-founded and succeeds.

2. The claimant's claim for the failure to make reasonable adjustments pursuant to section 20 and 21 of the Equality Act 2010 is well-founded and succeeds.

3. The claimant's claim for victimisation pursuant to section 27 of the Equality Act 2010 is not well-founded and is dismissed.

REASONS

1. The issues to be determined by the Employment Tribunal were provisionally set out by the respondent in the document entitled "list of issues" which can be seen at pages a to c of the Tribunal bundle. However, these issues had not been agreed between the parties and the

claimant did not have copy of this document in her Tribunal bundle. The Tribunal advised the parties that the list of issues, as drawn, appears to be deficient in identifying the "something" arising from the disability and in the identification of the PCPs and, as the claimant was in person and was not in a position to deal with these matters at the beginning of the hearing, it was agreed that the Tribunal would make their findings on the correct formulation of the issues and the relevant points once of the evidence had been heard.

2. The issues to be determined by the Employment Tribunal, as set out by the respondent at pages a to c of the bundle are as follows:

2.1 Did the respondent fail to respond, whether adequately or at all, to the claimant's local resolution request of 9 April 2018?

2.2 Did the respondent, in relation to the recommendations from the occupational health assessment:
- 2.2.1 fail to implement all reasonable adjustments?
- 2.2.2 fail to carry out a risk assessment?
- 2.2.3 fail to carry out an ergonomic risk assessment?
- 2.2.4 place the claimant at risk of redundancy in June 2018?
- 2.2.5 fail to support the claimant during the consultation process?
- 2.2.6 fail to follow a request by the claimant to allow a three-day period focusing on work on 8 August 2018?
- 2.2.7 fail to allow the claimant to attend work for 2 ½ weeks in August 2018?
- 2.2.8 dismiss the claimant?

2.3 If so, was the treatment unfavourable?

2.4 Was the local resolution request or need for reasonable adjustments "something arising from" the claimant's disability?

2.5 Was the treatment because of "something arising from" the claimant's disability?

2.6 Was the alleged treatment in pursuit of a legitimate aim?

2.7 Was the alleged unfavourable treatment a proportionate means of achieving the legitimate aim?

2.8 Were any of the following a provision, criterion or practice (PCP) deployed by the respondent:
- 2.8.1 not properly, if at all, implementing all the recommendations of the occupational health?
- 2.8.2 not properly, if at all, responding to local resolution request?
- 2.8.3 not making adjustments to the type of role carried out?

2.9 Did any of the PCPs by the claimant at a substantial disadvantage in comparison with nondisabled employees?

2.10 Did the respondent know, or ought reasonably to have known, that the claimant was put to said substantial disadvantage?

2.11 Has the claimant established that any of the following alleged adjustments were reasonable and that the respondent failed to take the steps:
2.11.1 implement all occupational health recommendations?
2.11.2 permit adjustments to the type of role and working arrangement?
2.11.3 introduce, implement and comply with the policy relating to local resolution request?

2.12 Was the claimant's local resolution request of 9 April 2018 a protected act the purposes of section 27 (2) of the Equality Act 2010?

2.13 Was local resolution request made in good faith?

2.14 Was the claimant subjected to a detriment by being placed at risk of redundancy and/or being dismissed?

2.15 Did the respondent subject the claimant to the aforementioned alleged detriment because of the alleged protected act?

3. We heard witness evidence from the claimant, Holli Keeble (CEO), Sharon Coull (former director of finance) and Lucy Smyth (former director of finance). We were provided with a joint bundle of documents consisting of 307 pages, the majority of which were not referred to by the parties.

The Hearing

4. The claimant explained to the Tribunal the effects she experienced from narcolepsy, cataplexy and depression and requested that she be allowed to take breaks during the hearing as a result of her disability. The Tribunal agreed that the claimant could request as many breaks as she wished and we advise the claimant to inform us of any other ways in which we could help her with the process of this hearing. On the second morning of the hearing the claimant was feeling unwell and required a short nap and the Tribunal agreed to postpone the start of the hearing to 11 am so that the claimant could have a rest and so that her medication would have time to work. The claimant informed us that she was sufficiently rested at 11 am in order to continue with the hearing.

5. Mr Scott advised the Tribunal that, as a diabetic, he required breaks throughout the day and sought permission from the Tribunal to eat sweets during the course of the hearing, which was granted.

6. The Tribunal and the claimant found some of the cross examination on the first day of the hearing rather confusing and Mr Scott was asked to modify his questioning to ask simple and short questions, without referring to matters which were external to the facts of the case, such as football analogies. We asked Mr Scott if he was familiar with the Advocates

Gateway, which he said he was not. The Judge gave a brief overview of the information available in relation to questioning vulnerable witnesses and Mr Scott was given the opportunity to take a break in order to read the relevant information on the Advocates Gateway prior to continuing with his cross examination on the second day hearing, however he declined stating that he had no need to look at the information.

7. The claimant complained that Mr Scott entered the room where she had been having a nap, on second morning of the hearing, in order to speak to her and she also complained that Mr Scott was discussing the case in the public waiting area which caused her some distress. Mr Scott said that he was merely enquiring after the claimant's welfare and the Tribunal asked him to refrain from approaching the claimant directly as communication was being handled through the Tribunal clerk. Mr Scott said that he had not discussed this case in the public waiting area and, as a compromise, the Tribunal made available two private interview rooms for both parties to use for the duration of the hearing, but Mr Scott indicated that he would continue to sit in the public waiting area and only use the interview room if he needed it.

The facts

8. These findings of fact are made on the balance of probabilities.

9. The claimant began her employment with the respondent on 14 December 2016 and she was employed as a PA to the chief executive and finance director under the line management of Sharon Coull, who was the finance director at the time. Ms Coull left the respondent organisation in August 2017 and the claimant was then line managed by Holli Keeble, the chief executive. It is common ground that, at this time, the claimant took over the responsibilities for HR administration and new terms and conditions were agreed between the parties in October 2017 for the claimant's dual roles as PA and HR administrator, as set out at pages 117-8 of the bundle.

10. The respondent is a registered charity and is a company limited by guarantee. It is an independent cinema which operates in Newcastle upon Tyne and employs approximately 120 people. It is common ground that the respondent did not have a dedicated human resources department at the time the claimant was employed by them, but used the services of an external HR consultant.

11. It is common ground that the claimant has a number of medical conditions including narcolepsy, cataplexy and depression. The respondent accepts that the claimant was a disabled person throughout her employment with them. Is common ground that the claimant declared her narcolepsy and cataplexy as a disability when she began her employment with the respondent, but she withheld information about her depression as she claims she had been previously discriminated against and did not want to disclose this medical condition to the respondent. The claimant's uncontested evidence is that, throughout her employment with the

respondent, she was upset at work on several occasions and was assisted by her colleagues at her request, such as by telephoning a colleague and asking her to help her to enter the building because she was too upset to enter unaided. It is also the claimant's uncontested evidence that Ms Keeble spoke to her about her emotional outbursts at work.

12. The claimant was attending appointments with a clinical psychologist from March 2017 and it is common ground that the claimant attended these appointments every two weeks on Monday mornings. The claimant's evidence is that she brought the letter at page 104 of the bundle into work and showed it to Sharon Coull and Ms Coull accepted in cross-examination that the claimant was attending the appointments with the psychologist every other Monday, however she says that it was agreed between her and the claimant that she would not disclose this information to anybody else as the claimant wanted it to be kept confidential. The claimant placed a copy of the appointment letter in her personnel file as she was the HR administrator and it was her job to collate these documents. The claimant says that when Holli Keeble took over as her line manager in August 2018 she had to explain that she could not attend Monday morning meetings at work because she was attending appointments with the psychologist every fortnight. Ms Keeble's evidence is that, although she knew the claimant was attending the appointments with the psychologist, she did not know what the appointments were for and she assumed that they were in connection with the narcolepsy.

13. It is common ground that the claimant's consultant suggested that the claimant would benefit from a 20-minute power nap at lunchtime to assist with her narcolepsy and she spoke to Ms Keeble about this which resulted in a risk assessment been carried out on 12 October 2017 by the head of operations, Phil Scales. A copy of the completed risk assessment can be seen at page 121 of the bundle. In addition to the matters agreed on the risk assessment, the claimant was allowed to delay a scheduled start work if her sleep was interrupted.

14. It is common ground that the respondent issued data protection and consent forms to their staff in February 2018. A copy of the claimant's completed data protection form can be seen at pages 124a-d of the bundle. The claimant indicated on this form that she did not have a disability and she listed narcolepsy and cataplexy as medical conditions. It is common ground that the claimant did not disclose her depression on this document as she did not want to give this information on a formal data capture form.

15. The claimant completed a medical declaration form for the respondent company on 28 December 2017, a copy of which can be seen at page 271 of the bundle, which lists the claimant medical conditions as narcolepsy, cataplexy, a skin condition, depression and anxiety. This information was collated by the respondent in a separate file so that it could be accessed quickly by first aiders, as and when required. It is common ground that the claimant made up a separate file to keep the medical declaration forms in

and she placed her form, along with the others, in that file. The respondent's evidence is that they did not look at this file and that they only discovered the existence of it and the contents of the file on 14 March 2019 as a result of this litigation.

16. The claimant stopped attending sessions with her psychologist on 29 January 2018, as set out pages 122-3 of the bundle. The claimant's evidence is that she showed the letter at pages 122-3 to Ms Keeble before placing it on her personnel file. However, Ms Keeble's evidence is that she was not shown this letter at all and that it was just placed on the personnel file. We are unable to make any findings whether Ms Keeble was ever shown this letter by the claimant as it is one person's word against another's.

17. It is common ground that the respondent company had accumulated a deficit of £-81,000 as at 31 March 2017, as set out in the reorganisation proposal at page 127 of the bundle, and that the respondent was continuing to make trading losses. As a result of this, Holli Keeble produced a new business plan for the period 2018 to 2022 which was signed off by the governing board in November 2017. It is common ground that the plan recommended a reorganisation which would lead to some redundancies and this is set out at pages 127 to 130 of the bundle. The board approved the restructuring proposal on 9 March 2018 and Ms Keeble had started to draft a new organisational structure in or around December 2017 and January 2018, as set out at page 131a of the bundle. A full list of the proposed redundancies is set out at the document at page 132 of the bundle and this consists of 17 different roles, of which the claimant's role as PA and HR administrator was one.

18. On 28 March 2018 the claimant attended a consultation meeting as a note taker for the chief executive in respect of the proposed redundancy of the head of operation. During this meeting, the respondent set out the proposed restructuring which would result in the appointment of the new HR manager. The claimant became distressed and upset after realising this had potential implication for her post. As a result, Ms Keeble agreed that the claimant need not attend as a note taker for any further redundancy consultation meetings.

19. The following week, on 4 April 2018, Ms Keeble sent to the claimant her appraisal documents, which can be seen at pages 138, including the draft summary and feedback on claimant's performance from other staff members (pages 152-3). The claimant was unhappy with the appraisal because it refers to her emotional resilience, personal branding and behaviour as she believed these all related to her mental health issues and that it was unfair to mark her performance down on that basis. As a result, the claimant attended a GP appointment that afternoon and sent an email to Ms Keeble to state she was taking 2 and half days off as sick leave for mental health issues triggered by work related stress (pages 154-5). Ms Keeble emailed the claimant on 9 April 2018 scheduling a return to

work interview (page 158) and she asked the claimant to complete a stress at work questionnaire, as set out at page 158 of the bundle.

20. The claimant completed the stress at work questionnaire and she also submitted a Local Resolution Request on 9 April 2018 (pages 161-3) in which she requested an occupational health assessment so that reasonable adjustments could be made for her mental health. Ms Keeble met with the claimant on 10 April 2018 to discuss the local resolution and it was agreed that a referral would be made to occupational health. Ms Keeble explained that the language used in the appraisal documents was written without the people knowing about the claimant's mental health.

21. On 24 April 2018 the claimant attended a meeting with Ms Keeble to discuss the outcome of the stress at work questionnaire, which turned into a very long meeting and they had to reconvene on 21 May in order to finish it. As a result of these meetings, the claimant and respondent agreed 17 actions arising from the occupational health report and the stress questionnaire. A copy of the suggested reasonable adjustments from the occupational health report can be seen at page 173 of the bundle. The claimant accepted in cross examination that all of the reasonable adjustments were implemented by the respondent with the exception of the ergonomic assessment and the risk assessment. The actions following the Local Resolution are set out at pages 179-180 of the bundle.

22. The claimant and Ms Keeble met on 21 May 2018 to discuss the list of reasonable adjustments and the claimant attended a further occupational health appointment on 4 June 2018.

23. On 13 June 2018 Ms Keeble emailed the claimant, as set out at pages 275-6 of the bundle, asking the claimant to attend an at-risk meeting. The claimant replied to Ms Keeble stating that she wanted to discuss the outcome of the occupational health assessment and finalise the local resolution process before commencing the redundancy consultation. Ms Keeble replied that they could use the meeting of 15 June to discuss the occupational health outcome and closing off the local resolution with a view to starting the consultation on 20 June 2018 instead.

24. The claimant attended the at-risk information meeting on 20 June 2018 and Ms Keeble gave the claimant the handout at page 181 of the bundle explaining the reasons for the restructuring. The parties agreed 2 reasonable adjustments arising from this meeting, i.e. that the claimant would be allowed to take some time out from work and could take up to 2 hours off work, if required.

25. On 21 June 2018, Ms Keeble and the claimant agreed a set of ground rules for the redundancy consultation, as set out at page 189 of the bundle.

26. On 22 June Ms Keeble emailed a copy of the proposed HR manager's job description to the claimant, as set out pages 183-5 of the bundle and the

respondent agreed to keep the claimant advised of any vacancies that came up.

27. On 27 June 2018 the claimant attended her first consultation meeting, the minute of which are at pages 193-5 of the bundle. They discussed the possible expansion of the HR administrator's role and the claimant indicated she would be applying for other roles. The claimant told the respondent that she was finding the consultation stressful and asked whether it was possible to go straight to the decision rather than have a second consultation meeting. They also discussed strategies for dealing with stress.

28. The claimant attended a second consultation meeting on 5 July 2018, the minutes of which are at page 200 to 203 of the bundle. The parties discussed alternative roles. The claimant proposed a modified HR administrator's role to the respondent but the respondent could not make a decision about it as Ms Keeble was due to go on 2 weeks holiday. They therefore decided to wait until Ms Keeble returned from holiday before a decision would be made and that Lucy Smyth would be the claimant's point of contact in the absence of Ms Keeble. The alternative to this was that the respondent would say no to the claimant's proposal of a modified HR administrator's role, so it was agreed that it was better to wait for Ms Keeble to return from holiday before making any decisions.

29. After the consultation meeting, the claimant emailed a list of questions to the respondent on 17 June 2018, as set out at page 204 of the bundle, asking for information published on the ACAS website, and the external HR consultant replied to the claimant with the information requested on 18 June 2018, as set at page 206.

30. On 18 July 2018 the claimant spoke to the chair of the board about the proposed new structure and her mental health which she felt might be adversely affected by the redundancy process. She also spoke to Lucy Smyth raising concerns about how her role could be made redundant when the finance department had not been restructured, as set out at page 208.

31. On 19 June 2018 the claimant was absent from work and submitted a self-certification, as set out at page 212 of the bundle, stating that the claimant had hyper mania, insomnia, intrusive thoughts and self-harm.

32. As a result of the claimant approaching Ms Smyth and the chair of the board, on or around 25 June 2018, Ms Keeble telephoned the claimant from Croatia, whilst on holiday, to discuss potential vacancies in the respondent company and the redundancy process.

33. On 26 July 2018 the claimant sent an email to the respondent (page 215) stating that she was still not well enough to attend work and submitted the self-certification at page 216, which was followed up by a GP fit note for work related stress, which is at page 218, for 1 week. The claimant

wanted to return to work before the end of the sick note, however the respondent emailed the claimant (page 222) on 30 July 2018 and advised the claimant to stick to the period of 1-week sickness absence as set out on the sick note.

34. The claimant was due to return to work on 8 August and emailed the respondent on 8 August 2018 (page 225) asking to complete her normal duties for a few days from 8 August, rather than attending the third consultation meeting. The respondent agreed to this and asked the claimant what she wished to do. The claimant replied on 8 August (page 224) asking for a couple of days to decide whether she wanted a further consultation meeting or a final meeting. At this stage the respondent decided to pause the process and carry out a risk assessment.

35. On 9 August the claimant was absent from work on sick leave and self-certified for stress and anxiety due to the consultation, as set out on page 230, and emailed the respondent, as set out at page 229 stating that she did not want to be at home and wanted a period of time and emotional space to get on top of work. Ms Keeble took the decision to give the claimant 2 weeks compassionate leave on full pay in order to reduce her levels of stress and anxiety and the respondent took on a temporary HR manager to undertake the claimant's duties. The claimant emailed the respondent on 9 August 2018, as set out at page 227, asking the respondent to correspond with Craig Barnes at ACAS and not with her directly.

36. On 10 August 2018 ACAS emailed the respondent, as set out at page 234, and stated that the claimant felt having a risk assessment and another consultation meeting was not an option at that time and that she wanted a decision about the redundancy.

37. On 24 August 2018 Ms Keeble decided that the claimant's role would be made redundant and she sent an email at page 247advising the claimant that her role was redundant and informing her of 2 events coordinator posts which they were recruiting for. The letter of redundancy is at page 248 of the bundle which stated that the claimant was not required to work her notice and her last day of employment would be 24 September 2018. The claimant was given the right of appeal but chose not to do so. Following the redundancy, the respondent recruited a temporary HR officer who was CIPD qualified, which the claimant was not. The respondent made 17 posts redundant in total, with 8 of the individuals being redeployed in alternative roles.

<u>The Law</u>

38. We refer to section 15 of the Equality Act 2010 which provides:
(1) A person (A) discriminates against a disabled person (B) if
    (a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that it was a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

39. We refer to section 20(3) of the Equality Act 2010 with regard to the duty to make reasonable adjustments, which provides the following:
The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

40. Section 27 of the Equality Act 2010 provides the following:
(1) a person (A) victimises another person (B) if A subjects B to a detriment because
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

41. The Code of Practice on Employment 2011 makes the important point that knowledge of a disability held by an employer's agent or employee — such as an occupational health adviser, personnel officer or recruitment agent — will usually be imputed to the employer.

42. In the case of A Ltd v Z EAT 0273/18 it was held that it was incumbent on the employer to make enquiries where an employee had periods of certified sickness absences which should have alerted the employer to nature of the claimant's illness. However, the Tribunal is also required to take into account what the employer might reasonably be expected to have known about the claimant's disability had it made those enquiries.

43. We refer ourselves to Smith v Churchills Stairlifts plc 2006 ICR 524, CA, in which the Court of Appeal confirmed that the test of reasonableness in the context of what is now S.20 Equality Act 2010 is an objective one, and it is ultimately the Employment Tribunal's view of what is reasonable that matters. A claim of a failure to make reasonable adjustments may therefore require a Tribunal to take the unusual step of substituting its own view for that of the employer, in marked contrast to the approach taken in respect of unfair dismissal, where such an approach amounts to an error of law.

Conclusions

44. Applying the law to the facts we find that the claimant was a disabled person throughout her employment with the respondent company. We are satisfied that the claimant disclosed her mental health diagnosis to Sharon Coull in March 2017 when she explained that she would be attending fortnightly appointments with her psychologist. We accept that the claimant asked Ms Coull to keep the details about her mental health

confidential, which is consistent with the claimant's own evidence that she did not disclose the information when she started her employment and she did not disclose it on any data capture forms because she did not want the respondent to know about it. However, applying the guidance from the Code of Practice on Employment, we find that, as the director of finance had this knowledge, it must follow that the respondent company had the knowledge that the claimant had a mental health impairment which qualified as a disability and that they had this knowledge from March 2017. Even if we are wrong about that, we find that the claimant's uncontested evidence was that it was general knowledge in the workplace that the claimant had difficulties with her emotions and required the help of colleagues and the claimant had to be spoken to about her outbursts in the workplace, all of which should have been sufficient to place the respondent on notice that they needed to make further enquiries into the claimant's mental health, particularly as she was taking time off work every fortnight to attend appointments with her psychologist. In all the circumstances, we find that the respondent had constructive knowledge of the claimant's mental health, but if it did not have that knowledge, it was reasonable to expect the respondent to make the necessary enquiries and reasonable to expect this respondent, as a result of those enquiries, to know that the claimant had a mental health illness which constitutes a disability under the Equality Act 2010.

45. We find that the respondent did not have a set timetable to restructure the claimant's post and there is no evidence that the respondent needed to start the consultation process when they did in June 2018. The document at page 137 was produced by the respondent and this sets out the proposed new structure of the organisation; the claimant's position is shown as being potentially redundant with 2 accounts assistants and a finance assistance and the respondent's evidence was that this was stage 2 of the restructuring/redundancy. However, the respondent's plan, at page 130 of the bundle, lists the claimant's post as one of the posts which would be restructured during the stage 1 to achieve the agreed efficiency savings. It is clear that the respondent company was restructuring its business for financial reasons and that the claimant was part of a genuine redundancy exercise, but there was no deadline by which the claimant's consultation had to begin.

46. We find that the respondent did adequately support the claimant during the consultation process and did not subject the claimant to a detriment by not allowing her to attend work for two and a half weeks in August 2018 during the period she had a sick note from her GP, particularly as the respondent had a duty of care to the claimant and the rest of the respondent's staff. We also find that the dismissal was not a detriment or unfavourable treatment as this was a genuine redundancy situation, which the claimant accepted in evidence. We are satisfied that there is sufficient evidence that the respondent dealt with the claimant's local resolution adequately and implemented the findings from the occupational health assessment, save for the risk assessment and ergonomic assessment. We accept that there was a delay in carrying out the risk assessment, but we find that

there is insufficient evidence that the reason for the delay had anything to do with or was connected to the claimant's mental health. Similarly, there is insufficient evidence that the failure to carry out an ergonomic assessment was connected in any way to the claimant's mental health and, therefore, we find that the claimant was not subjected to a detriment in respect of these issues. We find that the claimant was not subjected to a detriment at the time of her appraisal as it is permissible for staff to raise genuine concerns about a colleague's performance and behaviour in the workplace as a part of an appraisal. There is no evidence in front of this Tribunal that those concerns led to any action being taken against the claimant.

47. We find that putting the claimant through the consultation process was unfavourable treatment. The claimant made demands of the respondent in needing to know what was happening to her post after she found out from the head of operations' consultation meeting that her post was also at risk of being made redundant and we find that this was something arising in consequence of the claimant's disability as it was a direct result of her mental health which compelled the claimant to make these demands. Ms Keeble's evidence to this Tribunal was that she started the redundancy consultation process with the claimant because the claimant was demanding answers and there is no evidence in front of us that it was imperative that this process had to be carried out in June 2018, as submitted by Mr Scott, and we note that this was not the evidence of Ms Keeble.

48. We find that the redundancy was a legitimate aim of the respondent organisation, particularly as the claimant accepts that it was a genuine redundancy situation. However, we find that beginning the process on 13 or 20 June 2018 was not a proportionate means of achieving that aim as there was no urgency on the part of the respondent to start the consultation in June 2018 and it would have been possible for the respondent to delay the start of the consultation by a short period of time to allow the claimant to improve her mental health. Therefore, we find that the claimant's claim under Section15 Equality Act 2010 is well founded as she was subjected to a detriment by being placed in the redundancy consultation in June 2018 just because her mental health was such that she felt compelled to ask repeatedly what was happening to her post and it was not proportionate for the respondent to proceed with the process on 13 or 20 June 2018 when it was not imperative to start the consultation at that point and it would have been possible for the respondent to delay the start of the process and, therefore, use a less discriminatory method of commencing the consultation which would have allowed the claimant to start feeling better and be better able to handle the consultation process.

49. We find that the relevant PCP in this case was the requirement for the consultation process to begin on 13 or 20 June 2018. We find that this requirement placed the claimant at a substantial disadvantage compared with non-disabled people. We find that the respondent knew that the claimant was placed at such a disadvantage as they had an occupational

health report and a risk assessment at this point. We find that a reasonable adjustment would have been to delay the start of the consultation process for a short period of time so that she could start feeling better able to deal with the process and this would have avoided the deterioration in the claimant's mental health which led to her being unable to cope with the consultation process and taking time off sick. Therefore, we find that the claimant's claim of failure to make reasonable adjustments, pursuant to Sections 20 and 21 of the Equality Act 2010, is well founded.

50. We find that the raising of the local resolution by the claimant was a protected act as it is essentially an internal grievance. There was no evidence that this was not made in good faith and we accept that it was a genuine complaint of discrimination made by the claimant at a time when she believed she had been treated unfairly because of her mental health. However, we find that the claimant was not placed at risk or dismissed as a detriment for carrying out the protected act, particularly as the claimant accepts that the real reason for her dismissal was redundancy and that the decision to restructure the organisation had been made months before the claimant raised the local resolution. Therefore, we dismiss the victimisation claim, pursuant to Section 27 of the Equality Act 2010, as being not well-founded.

51. As this is a case where the claimant was dismissed for reasons of redundancy, we must consider the application of the principles in the case of Polkey v AE Dayton Services Ltd [1988] ICR 142. We find that there is sufficient evidence that the claimant would have been dismissed as redundant at some point by the respondent even if they had delayed the start of the redundancy consultation process by way of a reasonable adjustment. No evidence was presented that the delay in the consultation would have resulted in the claimant retaining her job or being employed in an alternative position. In fact, the claimant did apply for alternative posts, but was unsuccessful in any of her internal applications. Therefore, in terms of remedy, the Tribunal is concerned with how long the start of the consultation process should have been delayed by way of a reasonable adjustment to allow the claimant enough time to deal with the process with better mental health. There was insufficient evidence on this point at this hearing and, therefore, we are unable to make any findings on the length of the delay at present. The Tribunal shall need to hear evidence on the length of this delay at a remedy hearing in order to determine the loss of earnings for that period of time, along with the evidence on injury to feelings.

EMPLOYMENT JUDGE ARULLENDRAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
.....11 November 2019….....

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