THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	***Respondent***
Ms H Rawlins	Multiple Sclerosis Society

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central **ON:** 3-9 September 2019

EMPLOYMENT JUDGE: Mr J Tayler

MEMBERS: Ms S Campbell
Mr J Carroll

Appearances
For the Claimant: In Person
For the Respondents: Mr D Brown, Counsel

1. By a Judgment sent to the parties on 11 September 2019 it was decided that:

   1.1. The remaining claims failed and were dismissed.

   1.2. The Respondent's application for costs was refused.

REASONS

Introduction

1. By a Claim Form received by the Employment Tribunal on 31 October 2018, the Claimant brought complaints of unfair dismissal, race discrimination and disability discrimination.

2. The claim of unfair dismissal was struck out because the Claimant did not have two years' qualifying employment entitling her to bring such a claim.

3. The issues for our determination were decided at a Preliminary Hearing for Case Management held before Employment Judge Wisby on 7 March 2019. The issues were set out as in the Annex to this Judgement (with the exception of the unfair dismissal claim):

4. At the outset of this hearing we agreed with the parties that the issues as set out in the note of the Preliminary Hearing for Case Management were the issues for our determination.

5. We were provided with an agreed bundle of documents to which a limited number of further documents from the Respondent and the Claimant were added by agreement.

Findings of Fact

6. The Respondent is a charity. The Claimant first worked for the Respondent from 12 May 2015 on an agency basis as an Administration Assistant. On 9 September 2015 her job title was changed to Information Resource Officer.

7. On 18 July 2016, one of the Claimant's witnesses, Somanah Achadoo, became Interim Head of Information and Support. While he held that position he had a role in the management of the Claimant.

8. In August 2016 the role that the Claimant was undertaking was advertised as available for a permanent employee. The Claimant applied and was successful. She was provided with terms and conditions of employment which she signed in January 2017.

9. The Respondent has a number of Human Resources policies. There is a Managing Change Policy that sets out the way in which redundancies are to be dealt with. The policy is specifically aimed at medium to large-scale redundancies, but is not expressly limited to such situations. The policy is stated to be designed to facilitate fair treatment of staff and to ensure that there is adequate consultation. At paragraph 2.5. provision is made for various steps that may be undertaken in an attempt to avoid compulsory redundancy. There are provisions for consultation with the Joint Negotiating Council and engagement with unions.

10. The Sickness Absence Policy provides for return to work interviews after a period of absence due to ill health. There are various trigger points that give rise to management action. There is a formal stage that applies after informal action been taken.

11. The Respondent also has an Equal Opportunities Policy, an Inclusion Policy, a Dignity at Work Policy and a Grievance Policy.

12. On 1 August 2017 Mrs Walker was appointed to a new role as Assistant Director Information and Support. The new role incorporated the role that had previously been undertaken by Mr Achadoo, but at a higher level.

13. On 1 September 2017, Mr Achadoo returned to his substantive role as Grants Manager.

14. In October 2017 the then Information Resources Manager, Alex Morton, left the Respondent.

15. In December 2017 the Claimant took a lengthy period of annual leave.

16. During the Claimant's absence, in January 2018, Carmel Barrett was appointed as Information Resources Manager.

17. The Claimant returned to work on 11 January 2018. She met Ms Barrett for the first time. The Claimant contends that she was criticised for having failed to prioritise the shop email inbox for which she had logon details and was responsible for monitoring. We do not accept that this incident occurred on the day the Claimant returned to work. The incident occurred a little later. It resulted from an email dated 25 January 2018 in which Lauren Barry, the Respondent's Supporter Service Centre Officer, wrote to Ms Barrett expressing concerns that some emails that had been sent to the shop email inbox had not been dealt with. Shortly thereafter Ms Barrett raised the matter with the Claimant and said that they would need to meet to discuss the issue. The Claimant was very unhappy about this suggestion. She felt that Ms Barrett's approach was abrupt.

18. The Claimant was off sick on 29 January 2018.

19. There is a record of a telephone conversation between the Claimant and Mrs Walker on 30 January 2018. The Claimant appeared to be tearful. She said that she felt stressed and did not like the way Ms Barrett had spoken to her. The Claimant alleged that Ms Barrett had shouted at her. While Ms Barrett raised the issue of the inbox with the Claimant, we do not accept that she shouted at the Claimant. Mrs Walker suggested that the Claimant should meet with Ms Barrett and discuss any areas of concern.

20. Ms Barrett attempted an "at desk" meeting with the Claimant on 12 February 2018. The Claimant expressed concern that Ms Barrett wished to have access to the shop inbox because she thought it was "her" inbox. Ms Barrett decided that the matter would best be dealt with away from the desk at a one-to-one meeting.

21. The meeting took place on 13 February 2018. Ms Barrett raised her concern that some emails sent to the shop inbox had not been dealt with. The Claimant worked four days a week; not working Fridays. The Claimant had also been absent for some periods due to ill health. Ms Barrett asked for credentials so that she could have access to the inbox to ensure emails were not missed in the Claimant's absence. That was a reasonable suggestion. Unfortunately, the Claimant felt that the suggestion was undermining and was very reluctant to agree to it. She unreasonably felt that the inbox was hers and that others should not have access to it.

22. Ms Barrett also raised the subject of a publication called Team Spirit that is provided to volunteers and those who work for the Respondent. Ms Barrett suggested that she should have overall responsibility for it. She suggested that the Claimant should be involved in more administrative duties such as filing articles. The Claimant was very troubled by this and felt that her duties were being reduced. Ms Barrett did, however, suggest that the Claimant should undertake some other additional duties.

23. The Claimant alleges that Ms Barrett regularly interrupted her conversations with colleagues and that Ms Barrett said that she was “very argumentative”. While we accept that that happened on occasion, we do not accept it was regular. Had that been the case the Claimant would have raised the issue at the time. Even when the Claimant raised a grievance it was not a matter that she raised specifically, although she did suggest that the redundancy exercise arose out of Ms Barrett's dislike of her.

24. The Claimant was absent on sick leave from 13 to 30 March 2018. The Claimant provided a Fitness for Work Certificate after an assessment on 19 March 2018. The Claimant was stated to be unfit for work from 19 to 25 March 2019. The cause was stated to be a respiratory tract infection.

25. After a further examination on 23 March 2018 a Further Fitness for Work Certificate was provided signing the Claimant as unfit for work until 29 March 2018, referring to chest infection. There was no reference on the Fitness for Work Certificates to any involvement of the Claimant’s diabetes in causing the absences

26. The Claimant had to complete a computerised form giving the reasons for her absences. She did so on 17 April 2018. The Claimant stated that the Dr’s certificates had been sent to Ms Barrett. The Claimant responded “no” to the question “is the absence related to disability”. The Claimant contended in evidence that she did not complete this section of the form. She said that the form had been returned to her repeatedly by the computer system. We consider that it is more likely than not that the Claimant did complete that the drop-down menu and state that the absence was not related to disability, because that reflected her view time. The form was repeatedly returned to her until she completed it.

27. On 23 April 2018, the Claimant attended a return to work interview as required under the Respondent's policy. Ms Barrett told the Claimant that she was entitled to have a work colleague with her. That was an error on the part of Ms Barrett. It was an informal meeting and there was no requirement under the policy to allow a work colleague to be present. The Claimant challenged this and spoke to a human resources officer, who confirmed her view. Ms Barrett accepted that there was no need for a colleague to attend. The Claimant was troubled by the suggestion that a colleague might attend as she thought that this suggested that Ms Barrett was moving immediately to the formal stage of the procedure. Ms Barrett had not properly read the procedure and erroneously believed that a colleague should be present, when it was not required under the relevant stage of the procedure. We accept that this was a genuine mistake.

28. In April 2018 Mrs Walker produced a consultation document. She suggested the possibility that the Claimant's role was redundant in that there was insufficient work for the Claimant. She stated that her periods of absence had highlighted the fact that her duties could be subsumed by other members of the team. She suggested that there should be a period of consultation about the possible redundancy. A similar exercise was undertaken in respect of the librarian, a white woman. It was also suggested that there was insufficient work for her.

29. On the 31 May 2018 Mr Achadoo completed an exit interview. He produced an initial draft of the exit interview form in which he set out in very considerable detail his unhappiness about the working conditions during the latter period of his employment with the Respondent. He was highly critical of the Respondent, but did not allege that Mrs Walker had made homophobic comments, as alleged at paragraph 13 of his witness statement, or that on one occasion Mrs Walker said that “she had had enough of angry black women that there was always one in the organisation's structure”. That allegation was not raised by Mr Achadoo before he left the Respondent's employment. He did not raise the matter with the Claimant at the time. In his evidence to the tribunal Mr Achadoo was unclear as to when the comment was made; stating that contrary to his usual approach he did not make a note of the comment because he was so concerned with his own treatment at the time. He suggested the comment was made some time towards the end of his employment. He said that Mrs Walker said the words under her breath, turning away from him, in a way that he thought was designed so that he would not hear the comment. On balance of probabilities, we do not accept the comment was made. Had the comment been made we consider it is highly likely that it would have been included in the detailed comments Mr Achadoo provided for his exit interview. He was prepared to be highly critical of the Respondent in that document and we could see no reason why he would not have raised alleged racist language. Similarly if such a comment was made we find it extremely surprising that he made no note at the time, did not complain, did not challenge Mrs Walker and did not tell the Claimant. On balance of probabilities we do not accept that the comment was made.

30. The Claimant was called to an initial consultation meeting on 5 June 2018. She was provided with a copy of the consultation document and told that her role was at risk of redundancy. She was provided with a list of vacancies that she could apply for.

31. The Respondent did not give any significant thought to the possibility of job matching and slotting the Claimant into either the Digital Development Officer or Administration Officer roles that were potentially available at the time. That being said, we accept that the Digital Development Officer role was one for which specific funding had been obtained on the basis that it should be recruited to in the near future and required someone with substantial relevant experience that would allow them to "hit the ground running". The Administration Officer post, on the face of it, seemed a more appropriate fit for the Claimant. However, consideration of the Job Description establishes that the title of the job does not accurately described the role which is one involving, in particular, liaison with volunteers. On balance, we accept that it was not so similar to the Claimant's existing role that that she should be slotted into the role under the Respondent's procedure. In any event, that was not a matter that the Respondent gave any significant thought at the time that the redundancy exercise was undertaken.

32. The advice that Ms Walker obtained from HR, from Ms Fellows, was that this was to be a reduced process, one she described as "small r small c" which could be flexible and allow the Claimant the opportunity to put forward any suggestion she had to avoid her dismissal. The Respondent suggested that this was advantageous to the Claimant; although we consider that the reality of being in a pool of one limited the options available to the Claimant and resulted in no real thought being given to the possibility of slotting her into an alternative role.

33. A further consultation meeting was held on 13 June 2018. There was some discussion of the roles available including the Administration Officer role. It was suggested that this involved some health and safety element, although it appears it was minor. The Claimant was told that the Digital Development Officer role was likely to require someone with significant experience who could "hit the ground running". The Claimant was asked to consider the job descriptions and decide which roles she wished to apply for.

34. The Claimant applied for the Administration Officer role.

35. The Claimant was not required to come to work in the period up to the second consultation meeting. Thereafter she was on holiday in June 2018.

36. On 25 June 2018, Ms Fellows wrote to the Claimant asking her to confirm whether she wished to be interviewed for the Digital Development Officer role and for confirmation of whether she would be able to attend the interview for the Administration Officer role. The Claimant responded that day stating that she would respond fully later, and stated:

> "Thanks for the email, could you please confirm if I should be in the office this week."

37. We consider that the most natural reading of the email is that the Claimant did not wish to be in the office if she was not required. She was asking whether she was required to come in to the office. Ms Fellows responded on 25 June 2018:

> "I've checked with Sam in Carmel and then not expecting you at work this week."

38. We considered that that was because it was thought that the Claimant did not wish to be at work, rather than the Claimant being excluded from work.

39. On 3 July 2018, the Claimant attended an interview for the Administration Officer role. She was interviewed by Harley-Quinn Abigail Johnson, Directorate Support Manager. Ms Johnson interviewed 10 applicants. The Claimant arrived late for the interview and did not explain the reason. Ms Johnson considered that the Claimant appeared very underprepared and did not appear to be taking the interview seriously. Ms Johnson felt that the Claimant had not prepared her answers and made at some rash comments; including when asked how she would assist the Respondent in encouraging inclusion, she stated "I would not swear" and then muttered "out loud" under her breath. The Claimant did not suggest that she was subject to any discrimination by Ms Johnson. She did not challenge Ms Johnson's evidence to any significant extent. We accept that the Claimant was not offered the role of Administration Officer because she performed very poorly in the interview and gave the impression that she did not wish to be appointed.

40. The final consultation meeting took place on 9 July 2018. The Claimant had been unsuccessful in her application for the Administration Officer. She did not apply for the Digital Development Officer role. The Claimant was informed that she was to be dismissed.

41. On 9 July 2018 the Claimant submitted a letter she described as a grievance in respect of the decision to dismiss her. The letter almost entirely related to the dismissal process. The Claimant alleged that she was told at the initial consultation that the process was being undertaken because of her absences. We do not accept that that is the case. The Claimant was told the fact that her work could be easily redistributed when she was absent was a factor in it being decided that there was insufficient work for a dedicated job role.

42. The Claimant at raised numerous complaints about the operation of the Respondent's policies and stated that she believed she was being selected because "my new manager does not like me, I don't fit the team any longer, I'm black, I work 4 days per week, my health, family commitments". The Claimant did not specifically allege that Ms Barrett had criticised her for being argumentative or specifically raise the suggestion that her treatment related to disability.

43. There was very lengthy correspondence during which the Claimant contended that her complaints should be dealt with under the grievance procedure, whereas the Respondent contended that as it was essentially a challenge to the decision to dismiss her by reason of redundancy, it should be treated as an appeal against the decision to make her redundant. Eventually, Mr Prince decided that it should be treated as an appeal. We can see the logic in that

decision as the complaint was essentially about the decision to dismiss the Claimant and was naturally something that should be dealt with as an appeal.

44. The Claimant attended the appeal meeting chaired by, Ed Holloway, Executive Director of Services and Support, on 3 August 2018. There was considerable discussion about whether her letter should have been treated as a grievance about the redundancy exercise and the Claimant's contention that she had been systematically de-skilled.

45. By letter dated 9 August 2018 Mr Holloway dismissed the appeal. He concluded that the Claimant's role was redundant, that she had been fairly selected for redundancy. The Administration Officer role fell within Mr Holloway's division of the organisation. He did consider the possibility that the Claimant might be slotted into the role, but decided that the job was significantly different to the Claimant's, particularly because the need to work directly with volunteers and those with MS. It was not a job that the Claimant could properly be slotted into. It had required competitive interview.

The Law

46. Race and disability are protected characteristic for the purposes of the Equality Act 2010 ("EqA").

47. Discrimination during employment is rendered unlawful by section 39(2) EqA;

> (2) An employer (A) must not discriminate against an employee of A's (B)—
>
> (*a*) as to B's terms of employment;
>
> (*b*) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
>
> (*c*) by dismissing B;
>
> (*d*) by subjecting B to any other detriment.

48. The Employment Appeal Tribunal in the **Law Society v Bahl** [2003] IRLR 640, made this simple point, at paragraph 91:

> "It is trite but true that the starting point of all tribunals is that they must remember that they are concerned with the rooting out certain forms of discriminatory treatment. If they forget that fundamental fact, then they are likely to slip into error".

49. The provisions are designed to combat discrimination. It is not possible to infer unlawful discrimination merely from the fact that an employer has acted unreasonably: see **Glasgow City Council v Zafar** [1998] ICR 120.

50. Tribunals should not reach findings of discrimination as a form of punishment because they consider that the employer's procedures or practices are unsatisfactory; see **Seldon v Clarkson, Wright & Jakes** [2009] IRLR 267.

51. Direct discrimination is defined by Section 13 EQA:

> **13 Direct discrimination**
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

52. Section 23 EQA provides that a comparison for the purposes of Section 13 must be such that there are no material differences between the circumstances in each case. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 Lord Scott noted that this means, in most cases, the Tribunal should consider how the Claimant would have been treated if she had not had the protected characteristic. This is often referred to as relying upon a hypothetical comparator.

53. Since exact comparators within the meaning of section 23 EQA are rare, it is may be appropriate for a Tribunal to draw inferences from the actual treatment of a near-comparator to decide how an employer would have treated a hypothetical comparator: see **CP Regents Park Two Ltd v Ilyas** [2015] All ER (D) 196 (Jul).

54. The Courts have long been aware of the difficulties that face Claimants in bringing discrimination claims and of the importance of drawing inferences: **King v The Great Britain-China Centre** [1992] ICR 516. Statutory provision for the reversal of the burden of proof is now made by Section 136 EQA:

> 136 Burden of proof
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

55. Guidance on the reversal of the burden of proof was given in **Igen v Wong** [2005] IRLR 258. It has repeatedly been approved thereafter: see **Madarassy v Nomura International Plc** [2007] ICR 867. The focus is on the facts established at the conclusion of the hearing rather than on those "proved" by the Claimant. Taking that into account the guidance may be summarised in two stages: (a) there must be established from the totality of the evidence, on the balance of probabilities, facts from which the Tribunal 'could conclude in the absence of an adequate explanation' that the Respondent had discriminated against her. This means that there must be a 'prima facie case' of discrimination

including less favourable treatment than a comparator (actual or hypothetical) with circumstances materially the same as the Claimant's, and facts from which the Tribunal could infer that this less favourable treatment was because of the protected characteristic; (b) if this is established, the Respondent must prove that the less favourable treatment was in no sense whatever on the grounds of race or gender.

56. To establish discrimination, the discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of a significant influence: see Lord Nicholls in **Nagarajan v London Regional Transport** [1999] IRLR 572 at 576.

57. There may be circumstances in which it is possible to make clear determinations as to the reason for treatment so that there is no need to rely on the section: see **Amnesty International v Ahmed** [2009] ICR 1450 and **Martin v Devonshires Solicitors** [2011] ICR 352 as approved in **Hewage v Grampian Health Board** [2012] ICR 1054. However, if this approach is adopted it is important that the Tribunal does not fall into the error of looking only for the principal reason for the treatment but properly analyses whether discrimination was to any extent an effective cause of the reason for the treatment.

58. Discrimination because of something arising in consequence of disability is defined by section 15 EQA:

> 15 (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 the treatment is a proportionate means of achieving a legitimate aim.

59. The approach to section 15 EQA was considered in **City of York Council v Grosset** [2018] IRLR 746 (CA). The tribunal has to consider what, if anything was the "something" the employer treated the employee unfavourably because of. The Tribunal then must consider whether that "something" arose in consequence of the employee's disability Sales LJ held:

> "The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant 'something'. In this case, it is clear that the respondent dismissed the claimant because he showed the film. That is the relevant 'something' for the purposes of analysis. This is to be contrasted with a case like *Charlesworth v Dransfields Engineering Services Ltd,* EAT (Simler J), UKEAT/0197/16/JOJ, unreported, 12 January 2017, in which the reason the claimant was dismissed was redundancy, so no liability arose under s 15 EqA, even though the redundancy of the Claimant's job happened to be brought into focus by the ability of the defendant employer to carry on its business in periods when he was absent from work due to a disability. In that case, therefore, the

relevant ‘something’ relied upon by the claimant was the claimant’s absence from work due to sickness, but he was not dismissed because of that but because his post was redundant.”

Analysis

60. We have considered whether the Claimant has established facts from which we could conclude, in the absence of an adequate explanation, that she was subject to race discrimination, in the sense of her race forming a material part of the reason for her treatment.

61. On balance of probabilities we did not accept the evidence of Mr Achadoo that might have provided direct evidence to suggest that the Claimant's race was a cause of her treatment. We did not accept his evidence for the reasons set out in our findings of fact above.

62. We have also considered whether Claimant was repeatedly referred to as “argumentative” by Ms Barrett in a way in which involved stereotyping her as a black woman. The Claimant suggested that this would be a similar stereotype to that of black people being “aggressive”. While we do not think there is so clear a potential stereotype we can understand the argument the Claimant made. However, we do not accept that Ms Barrett raised this subject nearly as often as the Claimant suggests. It was raised was when the Claimant was being argumentative in respect of the email inbox for the MS Society shop. Her approach was that it was “her” inbox and she did not believe that Ms Barrett should have access to it. The Claimant's position in this regard was unreasonable as there was no good reason why Ms Barrett as her manager should not have access to the inbox to see how correspondence was being dealt with, and to ensure that it was responded. The Claimant was criticised for being argument in circumstances when she was being argumentative. We do not consider that the evidence about this issue supports an inference of race discrimination.

63. During the consultation period there were occasions when the Claimant was not working a due to it being her day off. She did not attend work on Fridays. There days when she was absent on holiday and because of ill health. The Claimant contrasts her treatment to that of the librarian. She contends that the librarian was permitted to remain work during the consultation period whereas she was not. However, as set out in our findings of fact above, we do not consider that the Respondent was preventing her from attending work. Their approach was that that they were prepared to allow the Claimant have time of prepare for her interview for the Administration Officer post and for consultation meetings. We accept that they believed that the Claimant wanted time off and were agreeing to her request. We do not consider that the situation of the Claimant and the Librarian were comparable.

64. Ms Barrett selected the successful candidate for the Digital Development Officer role, who discussed with her and the fact he was of Kenyan Asian origin. He spoke proudly of his descent. That was not something that Ms Barrett considered to be an impediment to his engagement.

65. Overall we are not persuaded that there are facts from which we could conclude that the Claimant was subject to race discrimination.

66. Considering the specific allegations of direct race discrimination in the list of issues; the Claimant first alleges that she was criticised for not prioritising shop emails immediately on her return to work. We found as a fact that the matter was raised at a later date. The Claimant complains about being criticised for not answering emails at a one to one meeting. While we accept that this was done see no evidence whatsoever to suggest that it was done in any sense whatsoever because of the Claimant's race. There had been a genuine complaint raised about certain emails not having been dealt with. Ms Barrett discussed the matter with the Claimant to ensure that they were dealt with properly in future.

67. The Claimant complains about being removed from involvement in producing copy for Team Spirit. While we accept Ms Barrett did take over the primary responsibility for production of Team Spirit we do not consider that there is any evidence to suggest Claimant's race played any role whatsoever in that decision. Ms Barrett thought it was a role that was appropriate to her as a manager and that it was appropriate for her to undertake the role of supervising and providing copy rather than Claimant.

68. The Claimant contends Ms Barrett often interrupted and criticised her for being very argumentative. As set out above we accept this happened on occasion, but much more limited occasions and the Claimant contends. We do not accept the evidence suggests that this had anything whatsoever to do with the Claimant's race. The Claimant was criticised for being argumentative when she was being argumentative about matters such as the shop email inbox.

69. The Claimant alleges that her dismissal was an act of race discrimination. Again, see nothing to suggest that this was the case. We consider that the librarian, who is white, was in an equivalent position in that it was decided that her role was no longer required and she was consulted about redundancy in a pool of one. We do not accept that the librarian was allowed to attend work, whereas the Claimant was not. It was thought that the Claimant did not wish to attend work and so the respondent was acting as she wished in agreeing that she need not come into work. We see no evidence whatsoever to suggest that the Claimant's race played any part in the decision to dismiss.

70. While there are criticisms to be made about the approach the Respondent adopted to its policies. It can be argued that more consideration should have been given to slotting the Claimant into an alternative role and/or treating the matter as a general reorganisation, we see nothing to suggest that this had anything to do with the Claimant's race and note that the librarian was treated in a similar manner.

71. The Respondent accepted that the Claimant was disabled by reason of diabetes.

72. However, see nothing to suggest the decision to undertake a formal return to work interview was because of the Claimant's disability. Ms Barrett accepted she was aware that the Claimant was diabetic, but we see no evidence suggest that that the decision that there should be a return to work meeting, which was required under the Respondent's policy, or stating that the Claimant could have a colleague in attendance, which resulted from Ms Barrett's misunderstanding of the policy, had anything whatsoever to do with the fact that the Claimant is disabled.

73. The claim of discrimination because of something arising in consequence of disability rests on the Claimant establishing that her ill health absences, particularly those in April 2018, arose in consequence of her disability. The Claimant relied on the letter from her General Practitioner dated 14 March 2019 in which it is suggested that diabetes may have an effect on the human immune system and may make people more liable to an infection. It was stated in the letter “it is accepted, but not definitely proven, better diabetic control can help mitigate against this tendency to infection”. However, there is no medical evidence that the chest infections the Claimant had in April 2018 resulted from her diabetes. Indeed, the contemporaneous evidence suggests that she did not herself think that was the case. She ticked the box “no” in the box next to the question whether the absences resulted from her disability. We do not accept that the Claimant has established that her absences were something arising in consequence of her disability. Accordingly, on that ground alone, the section 15 at claim must fail.

74. In any event, we do not accept that the Claimant was called to a formal return to work interview. She was invited to an informal meeting. Ms Barret mistakenly thought that the Claimant was entitled to have a colleagues present. The format of the meeting was because of this mistake rather than the Claimant’s absences. Further, we do not accept that the absences were taken into account as part of the reason why the Claimant was selected for redundancy or that she was dismissed for ill health as alleged. This was a situation in which the absences brought to the fore the fact that the Claimant's role was no longer required. That was because the work done by her could be done by others. The reason for the dismissal was redundancy. The absences were only the circumstances in which it became apparent that the Claimant’s role was no longer required. We adopt the approach of Simler J, as she then was, in **Charlesworth v Dransfields Engineering Services Ltd** UKEAT/0197/16/JOJ; that reasoning having been approved the by the Court of Appeal in **City of York Council v Grosset** [2018] IRLR 746.

75. For these reasons, the claims of race discrimination and of disability discrimination fail and are dismissed.

Costs

76. At the conclusion of the hearing the Respondent made an application for costs based on a letter sent by Respondent's solicitors on a without prejudice save as to costs basis on 20 August 2019 in which they offered the Claimant the opportunity of withdrawing claim, in which case an application costs would not

be made. The letter carefully set out set out the reasons why the Respondent contended it was likely that the Claimant would fail in her case. They suggested it was likely that Ms Barrett's treatment of the Claimant would be be seen as an exercise in management. They contended that the Claimant would not establish evidence from which race discrimination could be inferred, not be able to establish that her absences were arose because of her disability or that the dismissal was primarily because of her sickness records. These were reasonable points and, in large part, mirror key points of the Judgement that we have given.

77. It was also contends that the claims had no reasonable from their inception.

Costs Law

78. The power to make an order for costs are set out in section 76 of the Employment Tribunal Rules 2013.

> 76.—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
>
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
>
> (b) any claim or response had no reasonable prospect of success.

79. The rule includes a power to award costs where the claim had no reasonable prospects of success and where the Claimant is guilty of unreasonable conduct of the litigation, which can include unreasonably rejecting an offer to settle the dispute.

80. The test of a claim having no reasonable prospect of success is high: see in the context of strike out applications **Balls v Downham Market High School & College** [2011] IRLR 217 in which Lady Smith held at para 6 in considering whether a claim has no reasonable prospect of success "no means no". However, a claim that is merely fanciful will be likely to be considered to have had no reasonable prospect of success.

81. If the claim had no reasonable prospect of success the threshold has been crossed allowing a costs order to be made. However, the Employment Tribunal still has a discretion as to whether the order should be made.

82. Cost orders are at the exception rather than the rule. That was emphasised in **Gee v Shell UK Ltd** [2003] IRLR 82 at paras 22, 35 and **McPherson v BNP Paribas** (London Branch) [2004] EWCA Civ 569, [2004] ICR 1398.

83. A significant feature in costs applications is the position of litigants in person. In **Gee**, Lord Justice Sedley, stated at para 35:

> "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that – in sharp distinction from ordinary litigation in the United Kingdom – losing does not ordinarily mean paying the other side's costs. … the governing structure remains that of a cost-free user friendly jurisdiction in which the power to award costs is not so much an exception to as a means of protecting its essential character."

84. His Honour Judge Richardson held in AQ Ltd v Holden [2012] IRLR 648, EAT at para 32:

> "A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As Mr Davies submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Tribunals must bear this in mind when assessing the threshold tests in rule 40(3). Further, even if the threshold tests for an order for costs are met, the Tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice."

85. There are a number of matters where we have found against the Claimant on balance of probabilities. If we had found otherwise the position might have been very different. For example had we accepted the evidence of Mr Achadoo the position might have been very different. That could have been evidence that could lead to an inference of discrimination. Similarly, we concluded on balance of probabilities that Ms Barrett referred to the Claimant being argumentative, but not as regularly as the Claimant contended. If we had accepted the Claimant's evidence this might have been seen as stereotypical and supportive of the race discrimination claim. We do not consider that the claim can be said to have had no reasonable prospect of success.

86. In the case of the disability discrimination claim there was no real evidence to suggest that the return to work interview was held because of the Claimant's disability. It was just arguable that by suggesting a colleague could attended suggested a wish to deal with the matter formally and might suggested a wish to move to a possible dismissal because of the likelihood the Claimant having absences in the future.

87. We take into account the fact it is not appropriate to expect a Claimant to demonstrate the same and legal analysis, when representing themselves, as an advocate could. Much of this case stems from the Claimant's feeling that she has been treated unfairly. She considers that the Respondent has failed to comply their policies. Indeed as we set out above there are a number of respects in which Respondent failed to consider the various options in their

policy that might avoid a redundancy situation arising in the first place. Further the Claimant found herself in a pool of one. She felt she was unfairly treated. We accept that she genuinely thought that was, at least in part, due to her race. When reference was made to the fact that her absence and had brought to light the fact that her job was no longer required the Claimant thought it was being suggested that she had been dismissed because of her ill health.

88. The Claimant advanced a case that she believed had merit. The only offer was one of withdrawing her claim for which the Respondent would agree not to pursue costs. The claim was arguable and could have resulted in a significant award of successful. We do not consider her approach was unreasonable.

89. We do not consider that this is a case merits an award of costs. Even if we had thought that an award of costs might have been appropriate we would have considered it appropriate to take account of the Claimant's means in deciding whether to award costs. The Claimant is on universal credit. The Claimant has no savings. She has her overdrafts on her current accounts of £400.71 and £891.10. She credit of £100.87 in an accountant into which monies paid for her participation in a guardianship programme. The Claimant does not own her property. She is renting. She has no other savings. The Claimant's means are such that we would, in any event, exercise our discretion to take means into account an refuse the application for costs.

EMPLOYMENT JUDGE TAYLER

28 NOVEMBER 2019

.....
REASONS SENT TO THE PARTIES ON

29/11/2019

.....
FOR THE TRIBUNAL OFFICE

ANNEX

Liability Issues (with the exception of the unfair dismissal claim but retaining the original numbering)

Limitation (discrimination) (s.123 Equality Act 2010 (EqA})

2) Have any of the Claimant's allegations of race discrimination and/or discrimination arising from a disability been presented out of time?

3) If so, do any of the complaints constitute conduct extending over a period?

4) If so, was the claim presented within the relevant time limit from the end of that period?

5) If not, was the claim submitted within such other period as the Tribunal thinks just and equitable?

RACE DISCRIMINATION

Direct race discrimination (s.13 EqA)

14) Has the respondent subjected the claimant to the following treatment:

a) The matters set out in paragraphs 8, 9, deskilling the claimant as alleged in paragraph10, the matters set out in paragraph 11 and in relation to being asked to attend a formal return to work meeting as per paragraph 12 of the further particulars of claim;

b) Terminating her employment (dismissal is not disputed)

15) Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators.

16) If so, was this because of the claimant's race (the claimant relies on being a person of colour) and/or because of the protected characteristic of race more generally?

DISABILITY DISCRIMINATION

Disabled status (s.6 EqA) and knowledge

17) Was the claimant a disabled person in accordance with the Equality Act 201 0 ("EQA") at all relevant times because of diabetes.

18) Did the Respondent know, or could the Respondent reasonably have been expected to know that the Claimant was disabled? The Claimant's position is that she told the

respondent about her diabetes when she started working for them and that she told Ms Barrett around February 2018.

Direct disability discrimination (s.13 EqA}

19) Has the respondent subjected the claimant to the following treatment

a) The matters set out in paragraphs 11 in respect of being asked to formal return to work meeting.

20) Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators.

21) If so, was this because of the claimant's disability and/or because of the protected characteristic of disability more generally?

Discrimination arising from disability (s.15 EqA)

22) Did the claimant's sickness absence 13 - 30 March 2018 arise in consequence of the claimant's disability

23) Did the respondent treat the claimant unfavourably as follows:

a) Inviting the claimant to a formal return to work meeting?
b) Selecting the claimant for redundancy because of her sickness absence?
c) Dismissing the claimant?

24) Did the respondent treat the claimant unfavourably in any of those ways because of her sickness absence?

25) If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The respondent relies on absence management as its legitimate aim.

26) Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

The issues refer back to certain paragraphs of the Claimant's Claim Form; in particular paragraphs 8 to 12 which set out key factual allegations:

“8 . On my return to work I was introduced to our new manager, Carmel Barrett. Ms Barrett immediately accused me of not prioritising the shop email because a complaint had been received and I felt that she had a problem with me.

9. I attended a one-to-one meeting with Ms Barrett on the 13th February. The issue of the complaint about an unanswered email was raised again by Ms Barrett and I was able to confirm that the email was sent to another section and was not received in the in box for the shop. She requested access to the online

shop inbox on the basis that she would deal with emails as they come in when I wc1s not in the office. I don't believe there was a need for this because I had agreed to monitor the in box on Fridays
even though I was not at my desk.

10. Ms Barrett also took the decision to take away my involvement in producing copy for Team Spirit, the publication that dealt with achievements of the team as well as general information that was useful to team. The aim was to encourage team performance and provide updates that were relevant to the team. It was my responsibility to ensure that I have given all the information regarding publications that had been updated; removed from circulation or new ones that were currently being worked on were featured in the current edition. I would also give updates on the events that the team would be attending like the British Medical Association (BMA) awards where we could receive an award for a particular publication. Once the copy was complete, I would send to the editors for confirmation. This task had completed by me without any problems since 2016. I was happy to liaise with Ms Barrett, but I do not believe
there was any justification for removing this task from my role. I felt disappointed, confused and let down in circumstances where I knew I performed my duties competently and was able to use my initiative in an intelligent manner. It had a devastating impact on my morale but, nonetheless l continued to perform my duties to the best of my ability.

11. Ms Barrett was in the habit of interrupting my conversation with other members of staff by commenting that I was "very argumentative". This was demeaning because her constant comments had the effect of treating me like a child. I believe she chose to treat me this way because I was black, and this is how she treated black people, even though I was over 50 years. By contrast, she treated other members of the team with respect.

12. I was on sick leave from the 13th to the 30th March. I had a cold, but it developed into a chest infection as a result of a compromised immune system owing to diabetes. On my return, Ms Barrett invited me to attend a return-to-work meeting and also informed me that I could bring someone to the meeting if I wished. I felt uneasy and decided to check with HR whether there were any issues, either with my sick leave or with my post and I was assured that neither had been highlighted. I sensed that Ms Barrett was singling me out and wanted to get me out of the organisation.”