Case no. 2358072/2012

THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH
BEFORE: EMPLOYMENT JUDGE ELLIOTT
MEMBERS: MS S DENGATE
MS B BROWN

BETWEEN:

Mr P Mefful

Claimant

AND

Citizens Advice Merton and Lambeth Ltd

Respondent

ON: 6 and 7 January 2020
IN CHAMBERS ON: 23 January 2020

Appearances:
For the Claimant: In person
For the Respondent: Ms Y Montaz, consultant

JUDGMENT ON REMITTED POINT

The unanimous Judgment of the Tribunal is that the claims for unfair dismissal and disability discrimination succeed.

REASONS

1. This case was heard by the Employment Tribunal on 17, 18, 19 and 20 October 2017. It has been the subject of the claimant's appeal to the Employment Appeal Tribunal in case number *UKEAT/0160/18/OO*. It has also been the subject of a previous decision of the EAT which is not part of the matter currently under consideration.

The remitted point

2. The EAT ordered that the matter be remitted to this tribunal for consideration of the following question: *what was the real reason for the appellant's dismissal (see terms of remission set out below), unless in the view of the learned Regional Employment Judge factors emerge which render such an arrangement impracticable or impossible in which case the matter be remitted to be heard by a differently constituted*

tribunal as directed by the Regional Employment Judge. It was possible to remit to the original tribunal which heard the case in October 2017.

3. The terms of remission were set out in the EAT's Order made on 4 July 2019 as follows:

> *The ET is to reconsider the question: what was the real reason for the claimant's dismissal? In determining that question, the ET will need to decide; who made that decision and when. It will need to keep in mind that the existence of a redundancy situation is not determinative of the question whether the claimant was dismissed by reason of redundancy – a question that will need to be answered in the light of the statutory definition (section 139 Employment Rights Act 1996) and upon the determination of what was in the mind of the decision-taker at the relevant time. In this case, the ET will need to engage with the question whether the business manager position was in fact substantially the same as the claimant's post, such as to counter the suggestion that there was a diminishing need for employees to carry out work of the particular kind the claimant was employed to do. Even if it is found that the position was not simply the claimant's role under a different title, the ET will need to determine why it had then been decided that the claimant would not be permitted to trial the role when it was conceded before the ET that this should have been done? Was this by reason of his protected act, his protected disclosure or by reason of disability discrimination (direct or under section 15 Equality Act 2010). As the parties agree, there is no need for the ET to revisit the other findings of fact already made or the conclusions that are undisturbed by the EAT's Judgment on this appeal.*

4. As a result of the Order set out above, we do not revisit our original findings of fact save as required to do so. We rely on those original findings of fact as applicable and they are not restated here.

Procedural matter on documents

5. Just before the start of the hearing on 6 January 2020 we were shown an email from the respondent's side saying that their representative Ms Montaz was unwell and "hopeful" of being at the tribunal by 2pm. We were told there would be no live evidence, just submissions and that the respondent was hopeful that we could conclude within the time. Unfortunately the respondent's representative did not arrive at the tribunal until the afternoon and as such we were not able to start until 2:50pm. We found that the parties had not exchanged written submissions and needed time to read these and there was a preliminary issue as to the claimant's reference to documents that had the potential to attract litigation privilege.

6. We heard from the parties on that matter but the respondent's representative needed time to check the pages in more detail and we

asked the claimant to produce copies of certain pages that did not appear to be in front of us. He told us that he had referred to these documents in his closing submissions from the full merits hearing and we asked him to bring further copies of these on day 2, which he did.

7. On day two, 7 January 2020, we had further submissions from the parties on the issue of the privileged documents. Due to the passage of time and although there were bundles available to the tribunal, it appeared that these were not the final versions of the bundle that had been used at the full merits hearing in October 2017. We asked the respondent's representative for her position on the claimant's reliance on documents that had the potential to attract litigation privilege.

8. The parties confirmed that they each had a copy of the final version of the bundle that was in use at the full merits hearing. Tribunal Member Ms Brown asked the respondent's representative whether she had marked the pages in her bundle as having been referred to at the full merits hearing. Ms Montaz said that for example she had marked pages 293a and 293b and these were from a Peninsula adviser named Mr Roger Berry. Ms Montaz said that she "*withdrew her comments about the privileged documents*" referred to in the claimant's submissions for this hearing. No application was pursued by the respondent as to whether we should disregard these documents.

9. The documents under discussion at this hearing were separate to those referred to in the section of our liability decision headed "*The parties' applications*" paragraph 23 onwards.

Documents for this hearing

10. We had written submissions from both parties to which they spoke. These submissions have been fully considered even if not expressly referred to below, together with any authorities relied upon.

11. We had no witness evidence at this hearing.

The requirement for further findings of fact

12. In this case, the EAT held that we had not demonstrated that we had tested the respondent's reason for dismissal in the light of the statutory definition of redundancy set out below and that we made no finding as to who made the decision to dismiss and when.

13. Key to this case was the respondent's concession that the claimant should have been offered the alternative role of Business Manager on a trial basis. This concession inevitably led to the conclusion that the dismissal was unfair under section 98 ERA.

14. It was therefore necessary for us to make further findings of fact as to whether the redundancy situation across the organisation genuinely

applied to the claimant's own post or whether that was a sham given his case that his work was to continue to be undertaken by a new Business Manager.

15. It was necessary for us to make a finding of fact as to who took the decision to dismiss and when and whether the Business Manager role was in fact substantially the same as the claimant's post. Even if it was not the claimant's role under a different title, was it because of his protected act, his protected disclosure or because of his disability or something arising from that disability?

16. The EAT took the view that the claimant's failure to cross-examine the respondent's witnesses was not material given that we had rejected their evidence as to their knowledge of the protected act and protected disclosure and their knowledge of disability. The burden of establishing the reason for dismissal under section 98 ERA, rests with the respondent.

Further findings of fact

Relevant background to the restructure

17. In November 2011 the Personnel Sub-Committee of the respondent produced a document titled "*Notes on Proposed Organisation Structure"* (page 213). It referred specifically to the claimant's role of Specialist Manager Grade PO2 and said: "*Delete post redeploy present post holder".* It also said under the heading "*Potential Redeployments*" – at paragraph 2.1: "*One full-time Specialist Manager to Operations Manager role; skills require redefining with more emphasis on quality of advice; achieving funder performance targets and less focus on strategic business development*".

18. We find that this was a reference to the claimant's role. The document went on to talk about potential redundancies and mentioned administrator / office manager and 2 adviser roles but nothing at a more senior level such as at the claimant's grade.

19. We agree with the claimant's submission and find based on this document (page 213) and there being no evidence to the contrary from the respondent, that in November 2011 they intended to delete his role and redeploy him as the present post-holder into the newly created role.

20. The claimant raised a grievance against Ms FP the Chief Executive. On 11 November 2011 Trustee Ms Maggie Bartlett sent an email to the claimant (page 251) acknowledging his grievance which she said she had received on 28 October 2011. It had taken some time for the grievance to reach her. The grievance had originally been sent by the claimant to Ms FP on 21 September 2011. We find on a balance of probabilities, bearing in mind that we did not hear from Ms FP, that the delay in Ms Bartlett acknowledging the grievance was because of a delay

on the part of Ms FP in forwarding it to the Trustees.

21. We found (liability decision paragraph 64) that the grievance hearing took place on 17 November 2011 and was heard by Trustees Ms Bartlett and Ms Dawkins. At that hearing the claimant made a complaint of bullying and harassment on the part of Ms FP. He made a link between that bullying and harassment and his past sexual relationship with FP. We also found that he said that it might be a form of sexual harassment. We found (paragraph 146) that his complaint was a protected act.

22. We found that Ms FP was off sick from 16 December 2011 for six months. This meant that the claimant's grievance was put on hold. The notes of the Personnel Sub-Committee of 9 January 2012 (page 272) stated that the grievance was put on hold until FP returned from sick leave and the claimant was informed but was not happy about it. They said nothing could be done until she returned. We found (paragraph 72 liability decision) that Ms FP returned on 11 June 2012. The claimant's grievance was not progressed and he has never received a grievance outcome.

23. In the notes of the Personnel Sub-Committee of 9 January 2012, the respondent gave a Restructuring Update, saying that the current plans from November 2011 needed to be better costed and the roles needed to be clearly defined. It said that after a long discussion with Peninsula (their advisers) they needed to do a revised structure.

24. As we have previously found, the claimant was on leave in March 2012 and then went off sick in April 2012 and did not return until 9 July 2012 (paragraph 80 of the liability decision).

<u>The claimant at risk of redundancy</u>

25. We found (paragraph 83) that Mr Davidson, the Interim CEO, wrote to the claimant on 18 April 2012 to confirm that he was at risk of redundancy and invited him to consultation meetings. The claimant did not engage with this. Despite the submissions made to us at this Remitted hearing as to the respondent's reason for dismissal being the claimant's lack of engagement and lack of commitment to the organisation, we found at paragraph 83 that the letter of 18 April 2012 said: "*I wish to assure you that this is no reflection on your ability or commitment to the company*".

26. The respondent complained about the claimant's non-engagement with the restructure process. We find that this was because he was off sick and unfit for work with a disability related condition (liability decision 147-150).

27. The claimant took us, in his written submission, to page 303 of the bundle, an email dated 19 March 2012, in which Mr Davidson said to Trustee Mr Gold on the subject "*Depleted Reserves…*" that he had made a number of assumptions, one of which was – "*we lose PM in Apr but*

retain additional staff costs for ….[others]". There was no option or assumption in that email of retaining the claimant and the cost consequences of this. The plans were based on "losing" the claimant in April.

28. The claimant submits that this email shows a prior decision to dismiss him and we agree. This email of 19 March 2012 was sent before the claimant had been sent the Job Description and Person Specification for the newly created Business Manager role. It was on 23 March 2012 (letter page 310) that the claimant was invited to interview for this role, which was to take place on 4 April 2012. On 19 March 2012 Mr Davidson had already plans based on an assumption that the claimant would not remain in post. We find that the decision to dismiss was made no later than 19 March 2012. We make further findings below as to the reason for dismissal.

29. On 10 May 2012 Mr Davidson sent an email to Ms Bartlett, who was the Chair of the Personnel Sub-Committee, saying amongst other things: "*On PM [the claimant], I am conscious that we are pushing toward redundancy and a key factor will be whether we are able to require him to work his notice or not. Obviously we would pay in lieu and terminate on a given date…."* (page 343).

30. On 12 May 2012 (also page 343) Ms Bartlett replied saying that whilst there were lower grade jobs available she doubted the claimant would want them and they should not redefine those roles until "*the PM matter is fully 'concluded'*". We find based on these emails that they were working towards the claimant's dismissal and that the decision had already been made.

31. It is telling that on 14 May 2012 Ms Bartlett emailed Mr Davidson saying: "*We need to review/update the PM strategy either on Friday 18th or Monday 21st May."* (page 351). This shows us and we find that Mr Davidson and Ms Bartlett had a strategy in relation to the claimant and we find that this strategy was to progress towards his dismissal.

32. We found (at paragraph 84 liability decision) that on 22 May 2012 Mr Davidson sent an email to the Trustees saying "*PM has 9 lives and delay is costing us £££'s."*

33. As we found (paragraph 87) there was a redundancy panel meeting on 28 May 2012 where the Trustees decided that the Business Manager role was not comparable to the claimant's role. This was a meeting at which Mr Davidson attended as notetaker. This meeting was set against the background of Mr Davidson and Ms Bartlett working towards the claimant's dismissal.

34. We found (paragraph 72) that Mr Davidson had been engaged as Interim Chief Executive to implement the restructure to ensure greater compliance, accountability and efficiency. This was the very purpose of

his engagement and we find that this, together with his strategy in relation to the claimant, meant he was not a neutral attendee at the 28 May 2012 meeting.

35. Mr Davidson's evidence at paragraph 27 of his witness statement supports our finding that he was not neutral at this meeting because he outlined to the panel the reasons why he thought the claimant should not be retained, in a supporting document he had prepared titled "*PM – Redundancy Overview*" (pages 227-229). This paper set out Mr Davidson's criticisms of the claimant, including poor performance, failure to engage with the redundancy process and comments on his sickness absence, including (page 228) that the claimant was "*attempting to bring disability into play".*

36. Mr Davidson's Redundancy Overview document also said that they had not implemented an OH assessment for the claimant "*on the basis that this could be misconstrued by PM".* We could not understand how an OH assessment of a long term sick employee could be "misconstrued". It is a measure that is intended to be helpful to both parties. We find that the respondent and in particular Mr Davidson, as the line manager, did not do this because they did not wish to keep the claimant in employment. They did not wish him to take view and thus misconstrue their intentions, that they may need to make adjustments in order to retain him in employment. This underlines our finding that there was a "*PM strategy*" to dismiss him.

37. Trustee Mr Geoff Chapman said that they considered the claimant's role and the Business Manager role to be "*significantly different*" (email 28 May 2012 page 371), but this is not supported by the notes of the 28 May meeting (at page 374) in which it was accepted that the Business Manager's role "*encompasses all of the Specialist Services Manager role"* and included additional items. It is also not supported by the concession that the claimant should have been allowed to trial the role. The Business Manager role was to include deputising for the CEO. The claimant had been in a role where he had been the number 2 to the CEO as he had been one of three members of the Senior Management Team. The others were the CEO and the Operations Manager who had left in 2011. This meant that the claimant was the next direct report to the CEO.

38. We find, based on this note of the redundancy panel meeting, that the requirement for the work carried out by the claimant had not ceased or diminished because the Business Manager role was intended to encompass <u>all</u> of the claimant's role. The requirement for the claimant's work continued and we find that although there was a redundancy situation within the respondent organisation, the claimant's role was not redundant. The Business Manager's role was also sufficiently similar for the respondent to concede that the claimant should have been allowed to trial it.

39. At paragraph 14 of his witness statement Mr Davidson said that whilst

there had been complaints concerning the claimant's management of his duties "*it was considered that this would not be looked into until after the redundancy process".*

40. As to the appeal against dismissal we found Ms Harris, the dismissal appeal officer, unsatisfactory as a witness on this. She could not tell the tribunal who made the decision to dismiss, whose decision she was considering and we found that despite saying she had, she did not carry out any appeal investigation.

41. On 23 June 2012 (page 383) Mr Davidson sent an email to a former Trustee with the subject title "*Apologies – PM does not know you are no longer with MLCAB TB [respondent Trustee Board] – please ignore this infuriating email"* with the first line "*I have no idea how the Trustees will dismiss him."* This did not ask <u>whether</u> the Trustees would dismiss the claimant, but <u>how</u> they would dismiss him.

<u>The HR Committee meeting of 27 June 2012</u>

42. The claimant also took us to notes of an HR Committee meeting on 27 June 2012 (page 386) at which Ms Harris, Ms FP, Mr Davidson, Ms Bartlett, Ms Dawkins and one other were present and at which Ms FP raised the issue of the claimant going on garden leave. The claimant was due to return from sick leave on 9 July 2012. We find from this that Ms FP was looking at ways of the claimant not returning to work and thus his employment being terminated. Ms FP was the person against whom the claimant had made complaints of bullying and sexual harassment. At the meeting on 27 June 2012 (notes page 387) it was confirmed that FP could not be on the redundancy panel because of what was described as the "*PM v FP Grievance".* We find that the grievance was in their minds at this HR Committee meeting in relation to the claimant's continued employment.

<u>The decision maker on the dismissal</u>

43. We find based on the matters set out above, that the decision maker on the decision to dismiss was Mr Davidson. Although the respondent submitted that by the date of the claimant's dismissal, Mr Davidson had gone (by end of June 2012), in practice he overlapped with Ms FP for about two weeks. Ms FP returned to work on 11 June 2012 and she implemented his decision. As we have found above, she was keen to see that the claimant did not return to work. It was Mr Davidson's brief to turn the organisation around and he had given the redundancy panel the reasons why he believed the claimant should not be retained. He had a strategy in relation to the claimant which was to dismiss him.

44. There was no evidence of the redundancy panel being reconvened after the claimant's telephone interview for the Business Manager's role on 26 July 2012. We find that this did not happen because the decision had already been made by Mr Davidson.

45. The claimant's submission was that the respondent was embarrassed by his grievance against Ms FP and that they wanted to "*sweep it under the carpet*". He submits that they engineered the redundancy situation to facilitate his dismissal. The respondent submitted that it was "*far fetched in the extreme*" to consider that the respondent's Trustees would make someone redundant rather than consider a grievance and relied upon a grievance against an employee with the initial J who also had a grievance against the Chief Executive and whose grievance also remained outstanding (page 471, appeal outcome letter to the claimant from Ms Harris – 7 December 2012).

46. We find that no steps were ever taken to progress or resolve the claimant's grievance issue after Ms FP returned to work on 11 June 2012. We find that this was because the strategy was to dismiss him. The grievance was sensitive, involving allegations of sexual harassment at the most senior level in the organisation. It would have involved a great deal of time and management when Mr Davidson had already decided to dismiss. We find that senior management used the purported redundancy dismissal as the reason not to deal with it.

Interview scores for the Business Manager role

47. In the telephone interview for the Business Manager's role on 26 July 2012 the interviewers, Mr Nicholas and Ms Dawkins, found in the main, that the claimant partially met the criteria for the role (page 408 onwards). The scores they used were "M" for met, "P" for partially met and "N" for not met.

48. In an email between the interviewers on 26 July 2012, Ms Dawkins suggested that they should have scored numerically 1 – 5, with 1 being "poor" and 5 being "great". She asked Mr Nicholas to score in that way, giving her scores as 1 for all of the criteria (email page 412).

49. Out of the job criteria the claimant met 3, did not meet 3 and partially met 14. We find that as the claimant partially met most of the criteria, this would lead to a score somewhere in the middle, around 3, rather than scoring 1 for everything as Ms Dawkins had directed. We find that this was Ms Dawkins following through on the "*PM strategy*" towards dismissal by telling Mr Nicholas to record her scores as 1 for everything, even though this did not mirror the scores actually given at the interview.

The law

50. Redundancy is a potentially fair reason for dismissal under section 98(2)(c) of the Employment Rights Act 1996 (ERA). Under section 98(4) where the employer has established a potentially fair reason for dismissal, the determination of whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) depends upon whether in the circumstances (including the size and administrative

resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.

51. Section 139 ERA sets out the statutory definition of redundancy:

> *(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*
>
> *(a) the fact that his employer has ceased or intends to cease—*
>
> *(i) to carry on the business for the purposes of which the employee was employed by him, or*
>
> *(ii) to carry on that business in the place where the employee was so employed, or*
>
> *(b) the fact that the requirements of that business—*
>
> *(i) for employees to carry out work of a particular kind, or*
>
> *(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,*
>
> *have ceased or diminished or are expected to cease or diminish.*

52. In ***Shawkat v Nottingham City Hospital NHS Trust 2001 IRLR 555*** the Court of Appeal held that the mere fact of a reorganisation of the business, as a result of which the employer requires one or more employees to do a different job from that which he or she was previously doing, is not conclusive of redundancy. The tribunal must go on to decide whether that change had any, and if so what, effect on the employer's requirements for employees to carry out work of particular kind. It does not necessarily follow from the fact that a new post is different in kind from the previous post or posts that the requirements of the employer's business for employees to carry out work of a particular kind must have diminished. Nor does the fact that an employee of one skill was replaced by an employee of a different skill compel the conclusion that the requirements for work of a particular kind have ceased or diminished. That is always a question of fact for the tribunal to decide.

53. Section 13 of the Equality Act 2010 provides that 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.

54. Section 23 of the Equality Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

55. Discrimination arising from disability is found in section 15 Equality Act 2010:

(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,

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.

56. If the prima facie case is established and the burden shifts, the employer can defeat the claim by proving either:

a. that the reason or reasons for the unfavourable treatment was not in fact the 'something' that is relied upon as arising in consequence of the claimant's disability; or

b. that the treatment, although meted out because of something arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.

57. The approach to be taken in section 15 claims is set out in ***Pnaiser v NHS England 2016 IRLR 170 (EAT)*** by Simler P at paragraph 31. This case also addresses the burden of proof in section 15 cases. Under section 136, once a claimant has proved facts from which a tribunal could conclude that an unlawful act of discrimination has taken place, the burden shifts to the respondent to provide a non-discriminatory explanation. In order to prove a prima facie case of discrimination and shift the burden to the employer, the claimant needs to show:

a. that he or she has been subjected to unfavourable treatment;

b. that he or she is disabled and that the employer had actual or constructive knowledge of this;

c. a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment;

d. some evidence from which it can be inferred that the 'something' was the reason for the treatment.

58. Section 136 of the Equality Act deals with the burden of proof and provides that 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. The leading burden of proof authorities are set out in our original judgment of October 2017.

59. Showing that conduct is unreasonable or unfair is not, of itself, enough to transfer the burden of proof - ***Bahl v Law Society 2003 IRLR 640***

(EAT).

60. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage.*** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

61. Section 27 provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act. A protected act is defined in section 27(2) and includes the making of an allegation (whether or not express) that there has been a contravention of the Equality Act.

Automatically unfair dismissal - whistleblowing

62. For the purposes of automatically unfair dismissal section 103A ERA 1996 provides that an employee who is dismissed shall be regarded…… as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

Conclusions

63. We found in our decision of October 2017 that the claimant made a protected disclosure in the 17 November 2011 grievance hearing. We also found that this was a protected act for victimisation purposes. We also found that the respondent had knowledge of disability at the material time.

64. Ordinary unfair dismissal was conceded by the respondent as it accepted that the claimant should have been offered the role of Business Manager and allowed to carry it out on a trial basis.

65. We reminded ourselves of our finding that the claimant was Specialist Services Manager being one of three members of the Senior Management Team, the other two being the Operations Manager and the Chief Executive. The other Operations Manager had left the organisation in September 2011 and was not subject to the restructure. The claimant was in effect the number 2 to the Chief Executive.

66. The claimant submitted that his situation was in many ways synonymous with ***Shawkat*** (above). We agree with that submission. The respondent combined the responsibilities of two service managers to create a Business Manager's role. We have found above that the claimant's role was not redundant according to the statutory definition in section 139 ERA 1996. The requirement for the work of the particular kind that he was employed to do had not ceased or diminished. It was "*all*

encompassed" within the Business Manager role, plus some additional duties.

67. We have found above that the person who made the decision to dismiss was Mr Davidson, the interim Chief Executive and he made that decision by 19 March 2012.

68. Mr Davidson had a strategy to dismiss the claimant. We have considered the reason for that dismissal.

69. In written submissions the respondent said that the reasons for the claimant's dismissal were as follows (submissions paragraph 36):

    a. The claimant's position had been deleted
    b. The respondent had no confidence in his capabilities nor commitment.
    c. He had refused to provide any evidence of his capabilities to perform the role
    d. He performed badly at the interview for the role

70. It is not in dispute that his role was deleted but we have found that it was encompassed within the Business Manager role which they admit they should have allowed him to trial. The respondent said that they had no confidence in his capabilities or commitment and that he produced no evidence of his capabilities and did not do well at interview. We have also found that Ms Dawkins deliberately sought to downgrade his interview scores. This on our finding was part of the "PM Strategy".

71. There was a PM Strategy towards dismissal. They chose not to refer him to OH because they did not wish to give the claimant the impression that they may be prepared to engage with reasonable adjustments and thus retain him. They did not wish him to "misconstrue" the referral. They did not intend to consider the extent to which his ill health and therefore his disability, may have impacted upon his performance or engagement. The reason the claimant was not engaging with the redundancy process was, as we have found above, because he was off sick with a disability related condition. We therefore find that the claimant's disability had a significant and substantial influence on the decision to dismiss. We therefore find that he was dismissed both because of his disability and because of something arising from his disability, namely his absence.

72. In wider terms respondent did not wish to deal with the managerial issues raised by the claimant's continued employment, had he been allowed to trial and succeed in the new role. Those managerial issues also included his grievance which we found to be both a protected act and a protected disclosure. We find that the primary reason for the dismissal was their view that he lacked capability and engagement which they did not wish to manage, for example with an OH referral which we find was a disability related reason.

73. If we are wrong about this, we find that the need to deal with the grievance which was a protected act and protected disclosure, was a further reason for his dismissal.

74. We find that the claimant established a prima case of discrimination because there was the concession on the failure to allow him to trial the role when he was off sick and this was attributed as failing to engage. He had never been appraised or told of any poor performance, yet we were told that his poor performance was the reason for dismissing him. The burden of proof passed to the respondent and as our findings above show, they did not provide a non-discriminatory explanation for their treatment of the claimant.

Remedy hearing

75. As the claim for unfair dismissal succeeded and a remedy hearing has not yet taken place this will be listed.

76. The parties agreed at the end of this remitted hearing to propose directions for the Remedy hearing and submit this to the tribunal for approval.

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Employment Judge Elliott
Date: 23 January 2020