EMPLOYMENT TRIBUNALS

Claimant: Ms R Graham

Respondent: NHS Property Services Ltd

Heard at: Manchester **On:** 10-14 February 2020

Before: Employment Judge McDonald
Ms S Khan
Mrs S A Humphreys

REPRESENTATION:

Claimant: In person
Respondent: Ms Del Priore (Counsel)

JUDGMENT

The judgment of the Tribunal is that the claimant's claim that the respondent directly discriminated against her because of disability in breach of section 13 of the Equality Act 2010 fails and is dismissed.

REASONS

1. This case concerns the claimant's selection for redundancy by the respondent which led to the respondent dismissing her from her post as a Senior HR Business Partner. The claimant had been employed by the respondent for less than two years and so cannot bring a claim that her dismissal was an unfair dismissal. The claim that she brings is that the dismissal was an act of direct disability discrimination in breach of section 13 of the Equality Act 2010 ("the 2010 Act"). It is accepted that the claimant has Type 1 Diabetes. The respondent accepts that she is a disabled person for the purposes of section 6 of the 2010 Act. It denies, however, that the

relevant decision makers in the redundancy selection process knew that the claimant was a disabled person at the time when they made the decision to select her for redundancy.

2. We heard evidence from the claimant in support of her case. For the respondent we heard evidence from Mr Michael Routh (the respondent's Head of Compensation and Workforce); from Ms Rina Pandya (the respondent's Head of HR for Asset Management and Corporate Services); and from Ms Jennifer Davie (the respondent's Head of HR Operations). Each witness had provided a written witness statement as their evidence in chief. The claimant was cross examined by Ms Del Priore and answered questions from the Tribunal. Each of the respondent's witnesses was cross examined by the claimant and answered questions from the Tribunal.

3. There was an agreed bundle of documents which at the start of the hearing consisted of 85 items ending at page 343. References in this judgment to page numbers are to page numbers in that bundle. During the course of the hearing the following further documents were added:

- Data from a spreadsheet relating to changes to the respondent's iTrent employee record system (pages 140E-104H);
- Internal emails explaining iTrent data (pages 314A-314C);
- A typed transcript of Mr Routh's handwritten notes of the interview with the claimant on 23 November 19 (page 284A);
- The job description for the claimant's role of Senior HR Business Partner (pages 320A-320F);
- Emails sent in January 2019 between the claimant and Mr Goldacre who signed her grievance/appeal outcome letter (pages 309A and 309B).

4. The first two items were produced by the respondent but not objected to by the claimant. The latter three items were produced by the parties at the request of the Tribunal.

5. The respondent also prepared a cast list and chronology. Having taken the first day of the hearing as a reading day, the claimant confirmed at the start of the second day that the chronology and cast list were agreed.

6. Having taken the first day as a reading day we then heard evidence from the claimant on the second day, from Mr Routh and Ms Pandya on the third day and Ms Davie's evidence in chief and cross examination on the afternoon of the third day. Ms Davie then answered the Tribunal's questions on the morning of the fourth day of the hearing. We heard oral submissions from Ms Del Priore for the respondent and from the claimant on the afternoon of the fourth day of the hearing. We then deliberated on the morning of the fifth day and this Judgment was delivered in the early afternoon on that fifth day.

7. The claimant requested a written record of the reasons for our judgment. The Employment Judge apologises to the parties for the delay in providing these reasons which has been exacerbated by the impact of the current pandemic.

The Issues in the case

8. At the start of the hearing we agreed a List of Issues with the parties. We indicated that we would deal with liability only leaving remedy to be dealt with on the fifth day of the hearing if it was necessary to do so. Ms Del Priore kindly produced a written version of the agreed List of Issues. It being conceded that the claimant was at the relevant time a disabled person by reason of having Type 1 Diabetes, the matters in issue were therefore:

(1) Did the respondent treat the claimant less favourably than it treats or would treat others (who do not share her protected characteristic and whose circumstances are not otherwise materially different) by selecting her for redundancy?

(2) Who is/are the claimant's correct comparator(s)?

(3) Did the fact that the claimant has Type 1 Diabetes form a material part of the conscious or unconscious reason why she was selected for redundancy?

(4) Having regard to (4), did Jennifer Davie and/or Rina Pandya have actual knowledge that the claimant had Type 1 Diabetes at the material time?

9. During the hearing the claimant confirmed that the comparators on which she relied were the individuals named in the respondent's list at page 338-340, i.e. the other Senior HR Business Partners subject to the redundancy process.

10. In relation to number (5), the claimant confirmed at the end of her cross examination of Ms Pandya that it was not part of her case that Ms Pandya knew about her diabetes.

Relevant Law

11. The claimant's claim is of direct disability discrimination.

12. Section 13 of the 2010 Act says that:

"(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."

13. Section 23 of the 2010 Act says that on a comparison for the purposes of s.13 there "must be no material difference between the circumstances relating to each case".

14. In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** Lord Nicholls said that:

> "employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others."

15. Disability is a protected characteristic (by virtue of section 4 of the 2010 Act). As already noted, the respondent conceded that the claimant was a disabled person for the purposes of section 6 of the 2010 Act.

16. Section 39(2) of the 2010 Act provides (so far as relevant) that:

> "(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."

17. The 2010 Act provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> "(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."

18. This means that it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the 2010 Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

Findings of Fact

19. A number of facts relating to this case were not in dispute. We will set those out briefly. Before doing so however we set out views on the relative credibility of the claimant and the respondent's witnesses. It is necessary to do so because there are some factual disputes which turn on whose oral evidence we prefer.

<u>Credibility</u>

20. When it comes to the claimant, we found her to be a truthful and honest witness. She did on occasion say that she could not recall whether some things had happened or not. We do not think that she at any point deliberately misled the Tribunal. We do think, however, that on occasion her perception of the unfairness of what had happened to her led her to overstate or reinterpret in a way which we did not find plausible. The most obvious example would be the suggestion that the redundancy process was not a genuine redundancy process. As Ms Del Priore submitted, taken to its logical extreme, that would require us to find the whole redundancy process was set up in order to dismiss the claimant because of her disability. We agree that claim was not plausible. That tendency aside, however, we did find the claimant to be a credible and reliable witness when it came to what factually happened.

21. We found Mr Routh to be a credible witness, however we found the same could not be said of the respondent's main witnesses, Ms Pandya and Ms Davie. We found Ms Pandya's live evidence to be muddled, vague and inconsistent, specifically when it came to the process surrounding the selection for redundancy and subsequent slotting into roles. Her evidence also contradicted that of Ms Davie on a number of points. We did not find her to be a very reliable witness.

22. Ms Davie's evidence was often definite but frequently self contradictory. It also contradicted Ms Pandya's evidence. When it came to her evidence about the scoring system and how the selection process was carried out in particular, her evidence to us was confused and contradictory. For example, at times it was suggested that the only factor that was taken into account was scoring at the interviews whereas at other times she clearly suggested she had taken into account her perception of the claimant based on events prior to the selection interview. Ms Davie also at times said she had very little contact with the claimant while at other times made it clear that she had had a number of conversations with the claimant sufficient to assess the performance of the claimant. We found parts of the evidence from Ms Davie to be implausible, for example the suggestion that she and the claimant's line manager had discussed the claimant's performance in an email but without naming the claimant. That was her explanation for that email not being included in a response to the claimant's subject access request. In summary, we did not find her a reliable witness and where there was a direct conflict of evidence between her evidence and that of the claimant, we preferred the claimant's evidence.

23. Introductory facts and overview

24. The claimant started employment with the respondent as a Senior HR Business Partner on a fixed term contract on 10 August 2017. The claimant had been diagnosed with Type 1 Diabetes in 1999, a number of years before she began working for the respondent. On 7 August 2017 the claimant filled in a new joiner's form. On the first page of that form there is a box asking: "Disability declared?" The claimant circled "no". Her evidence was that she did not want to disclose her disability at that point because she was worried it might result in a disadvantage to her. Ms Del Priore submitted that it was to the claimant's discredit that she had not declared her disability when she had signed the declaration at page 109 in the bundle to confirm that the information provided was correct and complete. The claimant submitted that the declaration at page 109 related to the DBS form at pages

108 and 109 and did not apply to the new joiner's form at page 103. We find as a fact that that is correct. The new starter form runs from page 103-105 and ends with an offer response form at page 105. We find the confirmation form on page 109 which the claimant signed related back to the DBS "Mandatory Declaration Form B", hence the wording of that confirmation which refers back to "this declaration". In other words, we do not find anything damaging to the claimant's credibility in her signing the confirmation form at page 109.

25. The claimant's manager was Clair Norton. We did not hear evidence from her. The documents in the bundle indicate that she left the respondent through voluntary redundancy as part of the redundancy exercise which led to the claimant's dismissal.

26. The claimant was made a permanent employee on 18 January 2018. Ms Norton sent her a letter dated 24 January 2018 confirming that (p.111). The letter also noted that both she and the respondent were required to give three months' notice to terminate her employment. Under her fixed term contract, the notice period had been one month. The post to which she was appointed was that of Senior HR Business Partner. At that time there were 14 Senior HR Business Partners and three HR Admin Administrators. Those roles were spread out between the respondent's offices across England. The claimant was based in Stockport.

27. On 3 January 2018 Jennifer Davie joined the respondent as Head of HR Corporate. Ms Davie decided that it was appropriate to restructure the HR function within the respondent. In brief, the effect of the restructure was to increase the size of the HR team, to replace the Senior HR Business Partner and HR Admin roles with the roles of HR Business Partner and HR Advisor. There was a dispute as to whether the HR Business Partner role was in fact the same as the Senior HR Business Partner role which the claimant was appointed to. We will return to that later.

28. It was accepted that the formal consultation with the group at risk of redundancy started by way of a Skype conference call on 19 October 2018 conducted by Ms Davie and members of the HR team at risk of redundancy. The claimant attended a one-to-one consultation meeting on 25 October 2018 and on 7 November 2018 Ms Davie and Ms Pandya carried out redundancy selection interviews at Stockport. They had previously carried out an interview with an affected employee in London and subsequently did so in the respondent's other offices. By 12 November 2018 the interviews were complete.

29. The claimant had scored the lowest of the Senior HR Business Partners in the North West, scoring an average of 15: 17 from Ms Pandya and 13 from Ms Davie. There were two HR Business Partner roles in the Stockport area and one HR Advisor role. The benchmark for being appointed to an HR Business Partner role was 21. It was decided that the claimant was not appointable to that role. She was also not appointed to the HR Advisor role at Stockport. Instead Emma Collinson, one of the other Senior HR Business Partners, was appointed to that role. She had scored 15.5 in the redundancy selection process.

30. There was a vacancy for an HR Advisor in the North East and the claimant had indicated that she would be willing to be appointed to a role in the North East.

However, she was not appointed to that role. Ms Davie told us that that was because the HR Business Partner in the North East was not a particularly strong appointment and it was felt it would need a strong HR Advisor to work with them. Ms Davie decided the claimant was not a sufficiently strong HR Advisor candidate. As a result, the claimant was dismissed.

31. There are events prior to the start of that formal consultation process which are relevant to the issues which we need to decide. For convenience therefore we will set out our findings of fact under three headings:

(1) Events at and leading up to the HR Away Day on 27 June 2018;

(2) Events between that Away Day and the formal consultation starting on 19 October 2018;

(3) The redundancy selection process and the claimant's dismissal starting with the Skype call on 19 October 2018.

Away Day on 27 June 2018

32. There was no dispute that the claimant had attended an HR Away Day on 27 June 2018. The evidence was that she had spent overnight at the hotel to which she had had to travel for the conference. What happened at the Away Day and leading up to it are centrally relevant to the claimant's case, because she says that it was at this point she told Ms Davie about her Type 1 Diabetes. She says that she did this in two ways. First of all, she said she responded to the email invitation to the conference by indicating that she had dietary requirements because her diet was restricted due to her Type 1 Diabetes.

33. The bundle included (at page 135) the claimant's acceptance of the invitation to the Away Day. The acceptance itself does not refer to dietary requirements but the claimant said that she had emailed to set out those dietary requirements. The respondent's evidence was that they had recovered all relevant IT information around the calendar invite and there was nothing from the claimant setting out her dietary requirements. We were not convinced by the respondent's evidence that it had recovered all there was to recover in relation to the invitation email trail. We do not find the absence of any response from the claimant in the bundle to be conclusive. We turn instead to the witness evidence.

34. Ms Davie's evidence was that she did not receive anything from the claimant relating to dietary requirements. She did recall receiving a response from one of the other attendees, Hena, indicating that she was a vegetarian. Ms Davie said that dietary requirements were something she took particular note of because she herself is lactose intolerant. She was adamant in her evidence that had the claimant raised any dietary requirements, she would have remembered it.

35. We prefer the claimant's evidence and find the claimant did respond to the invitation to alert Ms Davie to her dietary requirements. As we have made clear, we found the claimant a more reliable witness than Ms Davie. We accept that as a diabetic she would have very real concerns about her dietary requirements particularly on an overnight stay. We also find, as we explain later, that by the time

of the Away Day the claimant's line manager was aware of the claimant's diabetes. We therefore do not find a contradiction between her raising the issue at this stage and her failure to include it in her new joiner form. That is even more the case given that by June 2018 the claimant had been confirmed in post as a permanent employee. The concerns she had abut disclosing her disability when she joined the respondent on a fixed term basis had, we find, significantly reduced by this point.

36. The second point at which the claimant said that she had alerted Ms Davie to her Type 1 Diabetes was during a conversation at lunch during the Away Day. When it comes to that conversation the claimant alleged it took place between her and Ms Davie, and we have a direct conflict of evidence between the witnesses. The claimant and Ms Davie were agreed on some points. It was agreed that the lunch at the Away Day was a buffet style lunch and that people would grab their food from the buffet and then go and find a table to sit at. There were three tables reserved for the respondent's employees. It was also agreed that there was a freezer with a variety of flavours of ice cream. It was also agreed that there was some conversation about the ice cream.

37. Ms Davie's evidence was that her involvement in any conversation was limited to telling people where the ice cream freezer was when asked. The claimant's evidence was that she had said to Ms Davie that she could not have ice cream because of her Type 1 Diabetes and that Ms Davie had asked her whether her diabetes had an impact on her lifestyle and health. The claimant's evidence was that she had responded to say it did not because it was well controlled and had little impact on her. Ms Davie denied the claimant told her that. In her witness statement she went further and said it would be a strange thing for the claimant to declare her disability, as it were "out of the blue". We do prefer the claimant's evidence on this point. We do not think it would be strange for the claimant to mention the fact that she could not have ice cream because of her diabetes if there was a conversation about ice cream going on. The claimant's evidence was that her colleagues knew that she had Type 1 Diabetes by this point, and as we have said we also found that her line manager knew about it by that point. As indicated earlier, we found the claimant to be a more reliable witness and we prefer her version of the conversation at the Away Day.

38. Whilst we accept the claimant's evidence that she did tell Ms Davie about her Type 1 Diabetes in that ice cream conversation, we also find as a fact that the information did not register as significant for Ms Davie. We mean no disrespect to the claimant when we say that at that point the claimant was not of significant interest to Ms Davie. Ms Davie was not her line manager and on her own evidence and that of the claimant did not at that point have that much contact with her.

39. The impression we formed of Ms Davie from hearing her evidence was that she was very focussed on driving through the transformation of the respondent, including the HR team. That was understandable as this was the primary purpose for which she had been appointed to the respondent. The impression we formed from her evidence was that she was not someone who was deeply interested in her team on a very human level. To give one example from her own evidence, she accepted that at the presentation where she first introduced the proposed reorganisation on 27 June 2018 she may well have said that some of those present

would not have the capability to fulfil the roles in the new structure. There is a dispute with about the words actually used, with the claimant suggesting that Ms Davie had said that "most" of those present would not be capable of filling roles. However the dispute does not seem to be significant to us: the main point is that Ms Davie was very clear about what she saw as the failings of those currently working in the HR team at that meeting when she first informed the team about the proposed redundancies.

40. As we have said, therefore, we find it eminently plausible that even if the claimant had mentioned in conversation that she had Type 1 Diabetes and could not have ice cream, that would not have registered with Ms Davie as a particular significant piece of information. That is particularly given on the claimant's own version of events which is that she told Ms Davie that it did not have an impact on her on a day to day basis because well managed.

41. We also take into account that Ms Davie's evidence, which we accept, was that at that lunch she was trying to flit from table to table to introduce herself and make sure that she was visible to all her team, therefore she would not have spent a great deal of time or attention on any particular conversation. That was even more the case, as submitted by Ms Del Priore, because her main focus at that point was on the information about the restructure which she was due to deliver after the lunch session.

42. Pausing there to deal with the question of the knowledge of the claimant's disability within the respondent more generally, the first question we asked ourselves was whether the claimant's line manager knew about the claimant's disability. We find that she did. Indeed, Ms Davie herself accepted that it was likely that Ms Norton did know about the claimant's disability (paragraph 18 of her statement). We note in the bundle that there was evidence from January 2018 of the claimant attending a diabetes eye appointment.

43. We reject the submission by Ms Del Priore that the fact that Ms Norton did not raise the claimant's diabetes through a formal process and reference to Occupational Health suggested that Ms Norton did not know about the disability. Although Ms Davie's evidence was that Ms Norton would refer employees to Occupational Health if there were any health concerns, we accept the claimant's evidence that her own experience of taking employees through Occupational Health processes meant that she was to say the least ambivalent about either self referring or being referred to them. We therefore find it plausible that she did not press her manager to refer her, especially later in 2018 when there was an impending restructure in the air. In any event, Ms Davie's own evidence in answer to the Tribunal's question was that when she checked with Ms Norton in December 2019 whether she had been aware of the claimant's diabetes Ms Norton confirmed that she was so aware.

44. We find as a fact that the claimant's line manager, Clair Norton, did know about her Type 1 Diabetes from January 2018. We also find, however, that Ms Norton did not formally or informally raise the issue of the claimant's disability with Ms Davie.

45. The claimant also suggested that information about her diabetes was on the respondent's employee record system. There was a migration of information from one system to the other in or around July 2018. The first system was called ERS and the second was called iTrent. The claimant seemed at points to suggest that there was information on the ERS system which confirmed that she was diabetic. We find that is not the case. The documents in the bundle confirmed to our satisfaction that the first time the claimant's diabetes was noted on the employee record system was on the new iTrent system on 10 September 2018. We find therefore that at the latest that information was on the system and available to the HR team by 10 September 2018, which was some five or six weeks before the formal consultation process began.

46. Although the claimant suggested that Ms Davie was responsible for the migration of employee information from one system to the other and therefore would have checked the information relating to employees, we accept Ms Davie's evidence that she would not have checked each individual's information on the system when the migration took place. We do not therefore accept that Ms Davie would have known about the claimant's disability from either of the employee record systems through being responsible at the most senior level for the migration of the employee information.

47. The final point which is convenient to deal with now is whether there was any checking of the employee record system prior to the redundancy selection process. Ms Davie accepted that there was checking of some information to the extent that the length of service of employees had been checked. She said that this was in order to provide the Department of Health with information about the potential redundancy costs for each employee. The claimant suggested that it would have been reasonable HR practice to also check the protected characteristic of each employee subject to the redundancy selection process. On the evidence we heard, however, we accept that that was not done. Even if the information about the claimant's diabetes was on the system as at 10 September 2018, our finding is that the decision makers at the redundancy selection meetings did not check the system and therefore did not derive knowledge of the diabetes from that system.

<u>Events between the Away Day and the formal consultation starting on 19 October 2018</u>

48. There are two main events. We deal with these fairly briefly. We find that it was during this time, and especially from July onwards, that Ms Davie had more direct contact with the claimant. That arose out of the claimant taking on work relating to a large scale TUPE transfer. Specifically the claimant was involved in ensuring the employer liability information was made available to the transferee so the transfer could take place on a timely basis. She was working with a contractor engaged to deal with the TUPE process. The claimant very candidly accepted that she did have some issues with that contractor. We find that the transfer was particularly significant because it involved Ms Davie reporting back directly to the Department of Health.

49. We accept the respondent's evidence that it was Ms Norton rather than Ms Davie who decided the claimant should deal with the matter. The claimant

suggested in submissions that there was an attempt to overload her or possibly to set her up to fail: if that was the case then it seems to us that when it came to the TUPE transfer work that could not have been a decision on the part of Ms Davie. She had, we accept, asked Ms Norton to find someone to carry out that work, and it was Ms Norton who decided that the claimant should do so.

50. We accept that there were delays in providing the Employer's Liability Information which was needed to conclude the TUPE transfer. We do not make a finding as to whether that was solely or wholly the claimant's fault. The emails she sent to Ms Davie on 19 and 20 July 2018 provide evidence that she had taken steps to ensure that it was provided. What we do find is that the delay directly impacted on Ms Davie who had to explain the delay in the TUPE process to the Department of Health. We find that because of that she felt that she had to directly intervene in the work that the claimant was doing. We find she was not happy about that. The claimant's evidence was that there were challenging phone calls, specifically on 10 September and 19 September, during which Ms Davie made it clear that she held the claimant personally responsible for the failings in the process. The claimant said that Ms Davie did not give her an opportunity to respond. Having observed Ms Davie giving evidence, that seems to us a plausible version of how those phone calls would have gone.

51. It was put to the claimant by Ms Del Priore that those phone calls were an opportunity for her to raise her disability with Ms Davie. We accept the claimant's evidence that the nature and the way those phone calls were conducted by Ms Davie meant that there was no real opportunity to do so.

52. Ms Davie also criticised the claimant for her handling of a collective grievance. She criticised the delay in holding an initial meeting, though during her live evidence she seemed to accept that the delay was not unreasonable, and she also criticised the claimant for not sending an outcome letter to each individual person who had raised a grievance rather than sending the outcome letters to their representatives. The claimant said in response that it had been agreed with the representatives that she would respond to them. Given that, it did not seem to us unreasonable of the claimant to have provided feedback to the representatives. Indeed, had she been seen to have gone behind the back of the representatives by communicating directly with each individual that might itself have caused other problems.

53. We find that the criticism of the claimant by Ms Davie related less to the correctness of the steps the claimant had taken on an objective basis but to the consequences for the respondent and to Ms Davie personally as the person charged with ensuring the transformation of the business occurred. It seemed to us that it was the consequent delay rather than the action itself which was the cause of Ms Davie's criticism of the claimant. Nonetheless we find that Ms Davie genuinely believed that the claimant was at fault for these matters.

54. The other incident which happened before the start of the redundancy consultation period in 19 October 2018 was the carrying out of the claimant's mid-year review. Very briefly, the claimant's previous Performance Development Review (PDR) in had rated her as 5. That was the top mark possible. She had received a bonus related to her performance. However, the review carried out on 18

October 2018 resulted in a mark of 2. The claimant said that she had responded to the draft mid-year review by making handwritten comments on it. Specifically, she said that she had reminded her manager, Ms Norton, that they had had discussions about her health issues. The version of the mid-year review in the bundle (162-174) had no such handwritten annotations and made no reference to health issues.

55. While we accept the claimant's evidence that she may well have annotated the draft version prepared by Ms Norton, we also find that it was the version of the mid-year review in the Tribunal bundle which was relied on by Ms Pandya and Ms Davie in the redundancy selection process. We do note that in her line manager's comments at page 173 there is reference by Ms Norton to a dip in the claimant's confidence and to her taking on too much and being unable to say no to things.

56. We find that by the end of September Ms Davie, through the two incidents described above i.e. the TUPE transfer incident and collective grievance incident, had formed the view that the claimant was not the sort of HR practitioner she wanted in her team. This stemmed, we find, from the extent to which Ms Davie had had to intervene in relation to the grievance and TUPE matters, which she genuinely believed should have been sorted out by the claimant. It was also, it seems to us, partly a result of what Ms Del Priore in her submissions referred to as the contrasting personal styles of the claimant and Ms Davie. Ms Del Priore did not put a label on those styles but it does seem to us from observing them giving evidence that there is some force in this point. Ms Davie is much more forceful and obviously assertive in her manner than the claimant, as evidenced by her remarks to the team at the Away Day when announcing the restructure. The claimant we observed to be much quieter and not so obviously assertive in her approach. It was noticeable that Ms Davie's evidence was that her first impression of the claimant was that she was quite quiet: we find that that was a view which she maintained up to and including the redundancy selection process.

Events from 19 October 2018

57. During the hearing we heard evidence about a number of matters relating to the redundancy selection process. This included evidence about the differences and/or similarities between the Senior HR Business Partner role which the claimant carried out and the HR Business Partner role in the revised structure. As we understood it, it was part of the claimant's case that this was not a genuine redundancy situation. Instead the Senior HR Business Partner role had been, in the claimant's submission, re-badged as an HR Business Partner role as a means of justifying getting rid of some of the existing Senior HR Business Partners including the claimant.

58. Ultimately we have not made a decision about that point. The reason is that the claimant's claim is one of disability discrimination rather than unfair dismissal. We would only have to decide whether there was a genuine redundancy situation if it was part of the claimant's case that the whole process had been concocted so the respondent could get rid of her because of her disability. We do not think that is plausible and ultimately do not think that was at the heart of the claimant's case. It was an understandable feature of the claimant's case given her HR background that she approached this case as if we were testing the fairness of the redundancy

process. As we have said, that was not what we were deciding. The situation may have been very different had the claimant been employed for two years and therefore been entitled to bring a claim of unfair dismissal. Ultimately, however, the central issue for us was why the claimant was selected for redundancy rather than whether this was a genuine redundancy situation and whether the redundancy process was conducted fairly.

59. We accept Ms Del Priore's submission that the redundancy process itself, that is the decision to carry out the redundancy, impacted on all the Senior HR Business Partners and indeed others in the HR team, and it cannot therefore be said that the redundancy or restructure process as a whole consisted of less favourable treatment of the claimant. Whether or not what happened in the re-shaping of the HR team was a genuine redundancy or reorganisation, the fact is that the decision to restructure was not what resulted in any less favourable treatment of the claimant. Instead any such less favourable treatment arose from the way that the restructuring was implemented, and in particular the way that those selected for redundancy were identified. While meaning no disrespect to the parties, therefore, we do not make findings about whether this was a genuine redundancy situation in the technical sense set out in the Employment Rights Act 1996 because that is not a question which we need to decide.

60. There is a great deal of agreement about the outline of the redundancy process as it unfolded. The initial announcement was made at the Away Day on 27 June 2018 but nothing formal then happened until 19 October 2018 when, in that Skype group conversation, the redundancy process itself was announced. Once again we accept the submission by Ms Del Priore that the way the announcement was made at the Skype meeting was not something that can amount to less favourable treatment of the claimant; she was not singled out or treated any differently to any other of the attendees at that conference. Although we as a Tribunal might well have views about the way that initial meeting was conducted, therefore, it does not seem to us that it led to less favourable treatment of the claimant or that it assists the claimant's case in any way. There was no evidence that she was treated differently to the others attending that meeting. We therefore do not make detailed findings of fact about that meeting.

61. The next step in the process was the one-to-one meetings. In the claimant's case this took place on 25 October 2018. It was agreed this was a brief meeting with the evidence being that it lasted about 15 minutes or so. We make the following findings of fact about that meeting which are relevant to the issues which we need to decide.

62. First, we accept the respondent's case that the claimant did not at that meeting raise the fact that she was a disabled person or that she had Type 1 Diabetes. The pro forma interview form from that meeting has a box which can be completed to indicate whether adjustments need to be made because of disability. That box is marked "no". The claimant did not in her evidence suggest that she had raised her diabetes at that meeting or requested any adjustment.

63. The second finding we make is that the respondent did not ask the claimant about any disability at that meeting. Ms Davie's evidence was that although she had

the electronic pro-forma template open on her laptop she took handwritten notes on her paper notepad then transposed those notes on to the online template form. It does seem to us slightly surprising that she did not go through the questions in the pro-forma. That, it would seem to us would have led to her to ask the claimant whether there were any adjustments necessary because of disability. However, neither Mr Routh nor the claimant herself suggested she had done so. It might be argued that was bad practice but again we remind ourselves we are not testing the fairness of the dismissal only whether the claimant was treated less favourably because of her disability.

64. The third finding of fact is in relation to the consistency of the approach taken by Ms Davie in that meeting. The claimant submitted that the approach taken in her case was different to that taken in other meetings. Specifically, she suggested that in other meetings Ms Davie had entered information directly onto the electronic pro forma rather than noting it in handwriting as it was in her case. Ms Davie's evidence was that she had used her paper notebook to make handwritten notes for all the meetings at Stockport. She confirmed, however, that for later meetings at other venues she had typed the information straight onto the pro forma.

65. The claimant had to accept that she could not provide direct evidence to challenge that because she had not been present at any of the other one-to-one interviews. She did suggest that a colleague had told her that in that colleague's interview, Ms Davie had used the online pro forma form rather than making handwritten notes. We find that Ms Davie did adopt the same approach to taking notes at all the Stockport one-to-one meetings. There is no evidence we could find that there was less favourable treatment in the way that the claimant's interview was conducted. As we say, the more significant finding we take from that meeting is that the claimant did not at that meeting mention her diabetes or the fact that adjustments might be needed because of a disability. We accept that that was because neither Mr Routh nor Ms Davie gave her a specific opportunity to do so. At most, Mr Routh suggested, there were open opportunities for the claimant to raise anything that was relevant proactively.

<u>The factors taken into account in scoring the redundancy candidates</u>

66. The respondent conducted redundancy selection interviews with those affected by the redundancy process between 30 October 2018 and 12 November 2018. The claimant's interview took place on 7 November 2018 at Stockport: hers was the first interview of the day at 10.00am. The interview was conducted by Ms Davie and Ms Pandya. Both the scoring sheets from her interview were in the bundle (pp.229-238) as were those from the comparators' interviews. There was also a "Consultation Tracker" (p.321) which was a spreadsheet capturing the times and scores for each person interviewed. By way of shorthand we will refer to that document as "the scoresheet".

67. The claimant suggested that she had been treated less favourably in the way that she was scored. As we have said, Ms Pandya scored the claimant at 17, Ms Davie scored her at 13. She suggested that the 4 mark discrepancy between the marks given to her by Ms Davie and Ms Pandya was the largest discrepancy between the two interviewers' scores on the scoresheet. That is not entirely

accurate. There is another case of a variation of 4 marks on the scoresheet, namely that of Nick Hunter. In that case it is Ms Davie scoring 4 marks higher than Ms Pandya did.

68. Although in her witness statement and in some parts of her evidence Ms Davie sought to say that the selection process was an objective one based on performance at the interview, we find as a fact that this was not the case. Specifically, having heard Ms Davie's evidence we are firmly of the view that she had by the time the redundancy selection process began formed an adverse view of the claimant's capabilities. That, as we have already said, was derived from her direct interaction with the claimant in the context of the TUPE and collective grievance issues earlier in 2018. We find that pre-existing adverse view influenced the score Ms Davie gave the claimant.

69. Ms Davie's evidence about the extent to which the scoring process was based solely on performance at interview and the extent to which it was influenced by her direct knowledge of those being interviewed from past performance was markedly inconsistent. At times she had suggested that she had very little interaction with the claimant so could not have been influenced by a pre-conceived view of her capabilities and performance. She suggested in response to the Tribunal's questions that she was surprised about how poorly the claimant did perform during her interview. At other times, however, she had to accept that she had directly intervened in matters with which the claimant was dealing. Both the claimant's evidence and Ms Davie's evidence referred to a number of conversations between them. Ms Davie's evidence was also that she had had a number of conversations with the claimant's line manager about the claimant's performance. We find that by the time Ms Davie came to score the claimant she had decided that she was not cut from the cloth which she wanted her new HR team to be made of. We find this directly affected the scoring that she gave the claimant at the interview.

70. We do think it is significant that there is a 4 mark divergence between the scoring of Ms Pandya and Ms Davie in relation to the claimant. We note that Ms Pandya, who had had no previous encounters with the claimant, had scored her at 17. While accepting that there may be a divergence in what interviewers are looking for in an interview process, we think that Ms Pandya's scoring probably provides a better reflection of the claimant's performance at the interview. We find that the relatively low score given by Ms Davie was influenced by her preconceived notions about the claimant's abilities.

71. The claimant also suggested that marks of some other potential redundancy candidates had been altered to ensure that she had scored a lower average mark and so would not qualify for appointment to a role in the new structure. She said specifically that the scores for Emma Collinson, who was appointed to the HR Advisor role at Stockport, had been altered resulting in her having a final mark of 15.5 which was 0.5 higher than the claimant. Ms Davie in her evidence said the changes to the scores for Ms Collinson was merely a recalibration of her own score which she had carried out on reflecting on her initial score at the end of Ms Collinson's interview. She rejected the suggestion that there was any conferring between her and Ms Pandya about scores at the end of each interview.

72. Ms Pandya's evidence contradicted that. She said that she and Ms Davie did have discussions at the end of the interviews, what she called a "chat", about each of the candidates. Ms Davie's evidence was that they had scored the sheets without looking at each other's sheets, i.e. with no conferring about scores. We find that there was discussion between Ms Davie and Ms Pandya after each interview and that this is what led to a changing of the scores of Ms Collinson.

73. Our findings are in our view supported by the fact that both Ms Pandya and Ms Davie re-scored Emma Collinson to increase her scores and that the increase in scores for Emma Collinson was significantly greater than those for other candidates. Of the other candidates, there were three whose scores were adjusted. In none of those cases did both the scorers alter their scores. In addition, the maximum change in any criterion scored for those three other candidates was one point. Elouise Lyford was re-scored by Ms Pandya from 16 to 17; Katie Hamilton's score increased from 19 to 21 because two criteria were rescored by one point by Ms Davie; Mr Hinton's score was increased by 1 by Ms Davie.

74. When it comes to Ms Collinson, Ms Pandya's score for her increased by 1½, Ms Davie's score for her increased by 6 from her initial score of 10. Five out of the seven criteria were changed and in one case the increase was from a score of 1 to a score of 3. It does not seem to us credible that those alterations were simply minor recalibrations made by Ms Davie having taken a moment to think about the interview. We think it is far more likely that, as suggested by Ms Pandya, there was discussion which resulted in Ms Collinson's score being higher than the initial score given to her. We find that part of the motivation behind that was to ensure that the score better reflected what Ms Davie saw as Ms Collinson's capabilities. However, we also find that part of Ms Davie's motivation was to ensure that Ms Collinson scored higher than the claimant had.

75. If, as Ms Davie suggested, the re-scorings were merely the effects of second thoughts or moderation at the end of each interview, it strikes us as surprising that there was no such moderation of the claimant's mark. Ms Davie suggested that the claimant was the benchmark, although we note that she was not the first person to be interviewed. That was Vanya Allen who was interviewed on 30 October 2018. It would seem to us to be more logical that later scores might lead to the claimant's score being recalibrated if anything. There was however no sign that the claimant's score had been altered in light of subsequent interviews.

76. As we have said, there was a great deal of inconsistency between Ms Pandya and Ms Davie as to the scoring process. They both indicated they filled in their scores at the end of the interview. Ms Pandya suggested that there was some discussion about the scores by way of moderation of scores at the end of each interview. She also suggested that the scores might have been moderated a week or two later when she and Ms Davie met again to discuss them. Ms Davie was adamant that was not correct. She said the scores had been fixed at the end of the interview process. She did accept that there was a subsequent meeting which took place in Starbucks but did not accept there was any/any further moderation of the scores at that point.

77. There were other contradictions between Ms Davie and Ms Pandya's evidence about what happened at that meeting in Starbucks. Ms Davie's evidence was that at that meeting they had read and discussed the PDR forms for each of the candidates and had then discussed and agreed slotting in the candidates to relevant vacancies. Ms Pandya suggested that she had taken no part in the slotting in process. There were no notes of that meeting.

78. We accept that the redundancy process briefing said that PDRs would be taken into account. However, we find it implausible that there would have been sufficient time in the one or two hour Starbucks meeting described by Ms Davie to read the PDRs of all the candidates in any detail. At most it seems to us the scores of the PDRs might have been used. That, it seems to us, would have given no proper additional insight into the capabilities of the candidates. For example, in the claimant's case the overall score of 2 might seem fairly damning but a reading of the narrative would indicate that her performance had dipped but there were reasons for it, including the claimant overcommitting to taking on work.

79. When it comes to the moderation process at the meeting in Starbucks it seems to us much more likely and consistent with our findings that Ms Davie had decided already who she wanted in which role and who she wanted out, and that the evidence from the PDRs played little if any part in the decision.

80. When it came to slotting people into available roles, Ms Pandya said that it was Ms Davie who had done that. Ms Davie said that was wrong and that she and Ms Pandya had both done that at the meeting at Starbucks. Ms Davie did accept that she probably took the lead because most of those who were affected were in her team. We find that it was Ms Davie who drove the process and the decision making. That seems to us logical to a certain extent given it was her team that was mostly affected. It also seems to us to be a result of her being the dominant personality and of her commitment to ensuring the transformation of the organisation.

81. In terms of what happened next, post the selection process there was a follow-up meeting with the claimant. We do not make detailed findings about that meeting nor what happened next because it seems to us they postdate the crucial issue in this case, which is the selection for redundancy at the interview on 7 November 2018 and at the subsequent Starbucks meeting.

82. We do, however, find that there was no attempt to place the claimant in suitable alternative roles. As we have already mentioned the claimant had stated a willingness to work in the North East and there was an HR Advisor role available in the North East. Ms Davie made a decision that the claimant was not a strong enough candidate to be appointed to that role. We point out at this stage that that seems extremely surprising to us given that barely 11 months earlier the claimant had been given a bonus for her performance at her Senior HR Business Partner level.

83. We did hear evidence about the notice entitlement to which the claimant was due under her contract and also the extent to which the claimant or the respondent was responsible for curtailing the notice period. There was a suggestion that the decision by the respondent to create a second HR Advisor role at Stockport had

happened because the claimant had left the business. We note, however, that it was the claimant who decided to curtail her notice. We do not therefore think that that decision to create that second role assists the claimant's case in any way.

84. We do not criticise the claimant for bringing her notice to an end at an early date in order to start other work she had found. We accept that the respondent had given an indication that it would seek to release her from her notice if at all possible, although there is a subsequent letter from Ms Davie which indicates that 18 January 2019 would be the earliest date the respondent could release her. To the extent that Ms Del Priore criticised the claimant for taking a bank job rather than staying to work out her notice, we find that criticism is unfair. Given the nature of the process the claimant had gone through we can understand why she might want to move on and seek opportunities elsewhere. She might also legitimately feel that starting a new role, albeit on a bank basis, offered better prospects than working out the notice at the respondent which she knew was due to come to an end in a few months.

Discussion and Conclusions

85. Turning then to the issues we have to decide and applying the law to our findings of fact, the issues identified at the start of the hearing were:

(1) Did the respondent treat the claimant less favourably than it treats or would treat others by selecting her for redundancy?

(2) Who is or are the claimant's correct comparators?

(3) Did the fact the claimant has Type 1 Diabetes form a material part of the conscious or unconscious reason why she was selected for redundancy?

(4) Having regard to that, did Jennifer Davie and/or Rina Pandya have actual knowledge the claimant had Type 1 Diabetes at the material time?

86. Having heard the evidence and submissions it seems to us that this is a case where, to quote Lord Nicholls in the case of **Shamoon**, it is preferable for us to avoid arid and confusing disputes about the identification of the appropriate comparator by instead concentrating primarily on what the claimant was selected for redundancy. Was it because of her disability?

87. In order to decide that we need first to decide whether the relevant decision makers, Ms Davie and Ms Pandya, knew the claimant had Type 1 Diabetes. In practice that means we are deciding issue (4) and then issue (3) from the original List of Issues, but taking them in reverse order.

<u>Issue (4) – Did Jennifer Davie and/or Rina Pandya have actual knowledge the claimant had Type 1 Diabetes at the material time?</u>

88. Dealing first with Ms Pandya, during the Tribunal hearing the claimant accepted that Ms Pandya did not have actual knowledge of her Type 1 Diabetes. However, during her submissions she stepped back from that to the extent of saying that she ought reasonably to have known about her diabetes. We asked her on what basis she made that assertion. She pointed out that the respondent accepted that

her diabetes was recorded on the respondent's iTrent system at the latest by 10 September 2018. She submitted that it would have been reasonable for Ms Pandya to have checked the information on that system about employees that she was going to be interviewing as part of the redundancy selection process. Although we accept those points are valid, they are not enough to our mind to mean that Ms Pandya ought to have known about the claimant's disability.

89. We have found as a fact that neither Ms Pandya nor Ms Davie did check the iTrent system for information about protected characteristics prior to the interviews. The fact that they could have done so is not sufficient. We find that Ms Pandya did not known about the claimant's disability at the relevant time nor should she reasonably have known about it.

90. When it comes to Ms Davie, we have found the claimant did mention her diabetes in a conversation which involved Ms Davie during the Away Day on 27 June 2018. We have also found that she raised it in her response to the invitation to that meeting. We find that Ms Davie did know about the claimant's disability at the relevant time.

91. The key question it seems to us is that in issue (3) i.e. whether the fact that the claimant had Type 1 Diabetes formed a material part of Ms Davie's conscious or unconscious thought processes in selecting her for redundancy.

Issue (3) Did the fact the claimant has Type 1 Diabetes form a material part of the conscious or unconscious reason why she was selected for redundancy?

92. As will be clear from our findings of fact, we do not accept (to quote paragraph 78 of Ms Davie's statement) the claimant was selected for redundancy due solely to objective scoring by two senior managers. We found that the scores of Emma Collinson, the other candidate for the one North West HR Advisor role which could have been offered to the claimant, were altered and this was to ensure that she scored higher than the claimant. Ms Davie's own evidence was that she had also decided that the claimant could not fulfil a role which was available as an HR Advisor in the North East. Her explanation was that she felt the new HR Business Partner in the North East was not particularly strong and therefore needed a stronger HR Advisor.

93. The question is why that was done. The claimant says it was because of her diabetes. Having reviewed the evidence we have decided that was not the case. Instead our firm view is by the time the redundancy selection interviews started Ms Davie had formed an adverse view of the claimant's capability and decided that she did not fit into the HR team she wanted in place after the restructuring had taken place. That view was based primarily on the direct interaction between her and the claimant over the TUPE information and grievance matters in July to September 2018. It was also, as we have said, partly a result of what Ms Del Priore in her submissions referred to as the contrasting personal styles of the claimant and Ms Davie.

94. We have considered carefully whether Ms Davie's view of the claimant was influenced subconsciously by the ice cream conversation in June 2018, when we have found the claimant mentioned her diabetes. We have decided it was not. We

did not hear any evidence which suggested that this played any part in Ms Davie's motivation for not wishing to continue to employ the claimant. We have approached this issue in this case by answering the question: why?

95. Since this is a discrimination case, we have also looked at it through the lens of the burden of proof provisions. In short, what we have found is the claimant has not proved sufficient prima facie facts from which we could conclude that she was treated less favourably because of her disability. The highest the claimant's case can be put, we think, is that Ms Davie knew about her disability, treated her less favourably by ensuring she scored the lowest out of the North West based HR staff and decided she was not suitable for appointment to the North East HR Advisor post. That does not seem to us to go further than showing a difference in treatment and a difference in protected characteristic, and that is not in this case sufficient to pass the burden of proof.

96. If however we are wrong about that and that the burden does pass to the respondent, our view is that it has proved an adequate non discriminatory explanation for the treatment, namely Ms Davie's genuinely held view that he claimant did not have the capability and personality to fulfil a role in the HR structure she envisaged for the future.

Conclusion

97. Our conclusion, therefore, is that the respondent did not treat the claimant less favourably because of her disability.

98. As we have previously stated, we are not deciding whether the dismissal in this case was a fair or unfair dismissal. The claimant cannot bring that claim because she did not have sufficient length of service. As we hope is clear from our findings of fact, however, we did find that the redundancy selection process was anything but objective and thorough. We were surprised that a process carried out by two senior HR business people in a large organisation was lacking in the sorts of checks and balances we would have expected, e.g. the presence of an independent person on the interview selection panel; a proper and independent score moderation process; and proper records of decisions being made. We were also surprised that a meetings was held in a public space (Starbucks) during which, according to Ms Davie's evidence, copies of PDRs relating to named individuals were openly discussed. That seems to us to give rise to a real potential for breaches of data protection obligations. On a more human level the consequence of that discussion being overheard would seem to us significant for the individuals whose future employment was being discussed and decided.

99. At times during the Tribunal hearing it appeared to us that the word "process" became a term of abuse. It seemed to us that "process" was seen as something with hampers progress from an HR point of view rather than something which can be at the core of achieving it. We are clear in our minds that in this case there was no fair, objective and transparent process when it came to selection for redundancy. As we say, we cannot give the claimant a remedy for that because she cannot claim unfair dismissal. We would not want the respondent to think, however, that the fact that the claimant's claim has been successfully defended means we exonerate them from culpability in terms of their behaviour.

100. In terms of the judgment of the Tribunal, it is that the claimant's claim that the respondent directly discriminated against her because of disability in breach of section 13 of the Equality Act 2010 fails and is dismissed.

Employment Judge McDonald

Date: 5 May 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
5 May 2020

FOR THE TRIBUNAL OFFICE