EMPLOYMENT TRIBUNALS

Claimant: Ms. J Baptiste

Respondent: Wellbilt UK Limited

HELD: By CVP **ON: 25-28 January 2021**

BEFORE: Employment Judge Rogerson
Mr D. Eales.
Mr P. Kent

REPRESENTATION:

Claimant: Mr M. Rudd (Counsel)
Respondent: Mr J. French (Counsel)

RESERVED JUDGMENT

1. The complaint of unfair dismissal is withdrawn and is dismissed.

2. The complaints of direct sex discrimination and disability discrimination (direct discrimination, failure to make reasonable adjustments and disability related harassment) and of victimisation, fail and are dismissed.

REASONS

Issues

1. The claimant brought complaints of direct sex discrimination and disability discrimination (direct discrimination, a failure to make reasonable adjustments, disability related harassment) and victimisation.

2. It is admitted that the claimant is a 'disabled person' by reason of a degenerative back condition, which is the physical impairment the claimant relies upon for the disability discrimination complaints. The parties agreed the following issues were to be determined in this claim: the terminology used to identify each

alleged discriminatory act comes from 'further and better particulars' of the claim provided by the claimant.

Direct Discrimination

2.1 Was the claimant directly discriminated contrary to section 13 of the Equality Act 2010("the EA 2010") because of her sex and/or disability by the respondent subjecting her to the following less favourable treatment in comparison to her comparator, Mr L. Webster.

2.1.1 being selected as scoring the lowest as part of the redundancy exercise.

2.1.2 using the scoring matrix to benefit Mr Webster using alleged irrelevant factors.

2.2 Was the claimant directly discriminated on the grounds of her sex in the way the respondent afforded her access to training pursuant to section 39 (2) (b) 'EA2010', by the claimant being subjected to the following detriments

2.2.1 being selected for redundancy and subsequently redeployed as Sub-Assembler on 20 February 2020.

2.2.2 being informed on 20 February 2020 that her previous role of Manufacturing Technician was redundant and receiving confirmation that she had been redeployed, after accepting a suitable alternative role of Sub Assembler, whilst awaiting the grievance outcome (received on 2 March 2020).

Failure to make Reasonable Adjustments

2.3 Did the respondent fail to make reasonable adjustments by applying a statutory trial period ("PCP") which put the claimant as a disabled person at a substantial disadvantage in comparison with persons who are not disabled by:

2.3.1 Failing to extend the statutory trial period from four weeks to 3 months. It is alleged this put the claimant at a substantial disadvantage because the claimant would not be able to revert to being redundant and claim a redundancy payment, in the event the job proved unsuitable because of her back condition.

Harassment

2.4 Was the claimant harassed pursuant to section 26 of the 'EA2010'? Did the respondent engage in unwanted conduct related to the claimant's disability/sex which had the purpose or effect of violating her dignity or creating an intimidating hostile, degrading, humiliating or offensive environment for the claimant by the following specific alleged acts:

2.4.1 The relocation of the claimant's workstation, requiring her to engage in alleged additional walking in March 2019.

2.4.2 The frequent references made by Mr Sawyer to the claimants back problems at a return to work meeting on 12 December 2019.

2.4.3 The delay in the claimant's return to her normal role from) October 2010 to January 2020.

Victimisation

2.5 It is admitted that the claimant's grievance was a 'protected act'. Was the claimant victimised pursuant to section 27 of the 'EA2010' by being informed on 20 February 2020, that her previous role of Manufacturing Technician was redundant and receiving confirmation that she had been redeployed after accepting a suitable alternative role of Sub Assembler before she was given the grievance outcome which was received on 2 March 2020?

Findings of Fact

3. The Tribunal heard evidence for the claimant from the claimant and for the respondent from the following witnesses:

   3.1 Mr M Lee (Operations Manager who conducted redundancy consultation meetings and dealt with the claimant's grievance).

   3.2 Mr D Sawyer (Materials Manager and claimant's line manager between October 2018 to February 2020)

   3.3 Mr D McHugh (UK Operations Systems Manager (includes Health & Safety)

   3.4 Mrs K Miller (nee Halstead) (HR business Partner(UK)

   3.5 Mr C Lacey (Vice President and Managing Director of Merry Chef. Conducted the claimant's grievance and redundancy appeal).

4. The Tribunal also saw documents from an electronic agreed bundle of documents produced by the parties. From the evidence the Tribunal heard and saw the following findings of fact were made:

5. On 1 October 2012, the claimant was employed by the respondent as a Warehouse Operator. In March 2014, after successfully applying for an internal vacancy, the claimant was promoted to the role of Manufacturing Technician.

6. The claimant is currently employed by the respondent as a Sub- Assembler at the respondent's Sheffield site.

7. The respondent manufacturers professional foodservice equipment for the food and beverage sector operating in more than a hundred countries globally.

8. On 19 April 2018, the respondent acquired "CREM' a coffee machine brand. Under previous ownership CREM's UK presence was limited to a small site at Burnley, employing seven employees. After acquiring CREM, the respondent continued to trade at the Burnley site until 2019, when it decided to cease trading at that site and to integrate the work within the existing sites at Sheffield and Guildford. Some employees chose not to transfer with the work.

9. Mr L Webster (the claimant's comparator for the sex discrimination complaint) chose to transfer with the work. As a result of that transfer Mr Webster's continuous employment with the respondent was treated as having commenced on 1 April 2013. Mr Webster's background was that he had started as an assembler on the Merry Chef lines then as a tester and fault finder. In January 2016, he was promoted to a supervising testing role as Value Stream Leader ("VSL") which involved using additional skills in organising labour and fault diagnosis. Although Mr Webster had experience in the VSL role, from February 2019, for personal reasons, he stopped performing the VSL role. Unlike the claimant who was appointed into the Manufacturing Technician role to fill an internal vacancy, Mr Webster was appointed to the Manufacturing

Technician role by agreement with the respondent to fulfil the business needs following the acquisition of the CREM contract.

10. Both the claimant and Mr Webster had received training for certain aspects of the role. For example, they had both received health and safety training and forklift truck driver training through training courses/qualifications provided by the respondent. For all other aspects of the role, the claimant and Mr Webster were expected to acquire the skills on the job by working on different product lines gaining experience and knowledge of the product by identifying and fixing faults specific to each product line. If a product line was lost then that specific knowledge was no longer required. A material difference in Mr Webster's skills and the claimant's skills were that the claimant had no supervising testing experience and had never performed any 'VSL' duties as a team leader supervising within the testing area.

The relocation of the claimant's desk requiring her to engage in alleged additional walking in March 2019.

11. From the 4- 23 March 2019, the claimant was absent from work for three weeks for planned surgery to have a hearing aid fitted.

12. During that absence Mr Webster joined the Department. To accommodate both Technicians in the same work area, and the CREM work, the area was reorganised. Additional water and electricity supply is also required for testing the CREM coffee machines. As a result, the claimant's work station was moved to a slightly different location within the same work area. The claimant kept her desk and computer and Mr Webster worked from his laptop on the bench.

13. While there was a dispute about the precise distance involved in the relocation, the claimant's complaint was that the relocation involved 'additional walking' which aggravated her back. In cross-examination, the claimant accepted that the additional walking did not aggravate her back. The real issue for her was: "*why move me*" and the fact that it was her desk that was relocated. She accepted the reason for the move was to accommodate both Technicians in the same work area so they could work together. She had in her mind made a link between the timing of the move with her absence from work to infer there was some other motive when it was accepted that there was no other reason for the relocation. She agreed Mr Lee was responsible for the decision made based on having to recreate the 'setup' that had existed in the Burnley factory for the CREM work transferred to the Sheffield Site.

14. From April 2019 to July 2019 Mr Webster and the claimant were working as a cross functional manufacturing technician team and were expected to train each other on products they were unfamiliar with which was why the work area had to be reorganised. It was expected that during that transition, CREM work would come in so that Mr Webster could train the claimant on that work. Unfortunately, in that period, very little of that work came in.

The delay in the claimant's return to her normal role from) October 2010 to January 2020.

15. In March 2018 the claimant had an accident at work and injured her back. She was assessed by her GP as 'unfit' for work with lower back pain from 24 July 2019 - 14 October 2019. On 31 July 2019 the claimant was assessed by the respondent's Occupational Health Physician, Dr Moran who provided a report on 2 August 2019.

16. On 16 October 2019, after a period of disability-related absence, the claimant returned to work. The return to work meeting was conducted by the claimant's line manager, Mr Sawyer and Mr McHugh, the Health and Safety representative. The claimant attended with her union representative. The claimant explained that she needed to be mobile not static and was still having treatment with a physiotherapist who had warned her about not being in one position for more than 10 minutes. The concerns raised by the claimant and her manager are recorded in the return to work meeting notes (pages 114-117).

17. The respondent wanted to make sure it was safe for the claimant to return to her role, which involved some lifting and twisting. It was agreed with the claimant that further enquiries would be made with Dr Moran. In the interim and until the report was received the claimant was placed on alternative light duties to meet the limitations identified in the risk assessment, to minimise any risk of injury. While the claimant's line managers were later considered to have been 'overcautious' in their approach, they acted out of concern for the claimant's welfare to ensure she could safely return to her work.

18. The claimant performed the alternative duties until the 23 October 2019, when she told her manager the light duties were unsuitable and she left work. On the same day she was assessed by her GP as unfit to work for 'stress at work' and was issued with a fit note for 3 months from 23 October 2019 until 20 January 2020.

19. The claimant attended an Occupational Health assessment with Dr Moran on 22 October 2019. Although the meeting took place quite quickly, due to Dr Moran's personal circumstances, the report was not received by the respondent until November 2019. After considering the managers concerns and reassessing the claimant, Dr Moran recommended that the claimant could safely return to her normal role as a Manufacturing Technician. The respondent accepted the recommendation and agreed the claimant could to return to work in her substantive role when she was fit to return to work.

20. The claimant complains that the delay in returning her to her normal role was unwanted conduct related to her disability that had the purpose or effect of violating her dignity or creating an intimidating hostile degrading humiliating or offensive environment for her. In cross-examination it was put to her that the context in which the decision was made was by the claimant's manager and the health and safety representative was out of concern for her safety following a risk assessment during which the claimant had expressed her own concerns about returning to work based on her physiotherapist's advice. The claimant agreed further advice from Occupational Health should be obtained. The claimant had attended the Occupational Health assessment before her GP assessed her as unfit to return to work for 3 months with stress at work. Dr Moran's report was delayed for personal reasons outside the control of the respondent. The respondent was taking the reasonable steps it had agreed with the claimant to enable her to safety return to work. It was difficult to see how this conduct was viewed as disability related harassment. In response the claimant said she felt that she was being passed from 'pillar to post' and should just have been able to return to work in her role without further investigation. The claimant did not challenge any of the context explaining the delay, most importantly the fit note issued by her GP which assessed her as unfit for any work from 23 October 2019-20 January 2020. In her answers she could not explain how it was deliberate unwanted conduct, or how it related to her sex or

how it could from those agreed facts reasonably be interpreted as disability related harassment.

Mr Sawyer's alleged frequent reference to the claimants back problems.

21. By a letter dated 5 December 2019, sent during the claimant's sickness absence, she was informed that she could return to work to her normal role and she was provided with a copy of Dr Moran's report. The claimant was also invited to attend a meeting on 12 December 2019 to discuss her sickness absence, how her return to work could be supported and to inform and update her of the changes taking place in the business.

22. The claimant complains that at the meeting on 12 December 2019, Mr Sawyer made 'frequent' references to the claimants back problems. The notes (at page 156) and the claimant's witness statement (paragraph 27) identify the entry the claimant relies upon as "*I was asked how my back was by David Sawyer and I explained it was fine, that I was currently off sick with stress and this was due to*

23. In cross examination Mr Sawyers evidence, which I accepted, was that given the previous history, he had asked the claimant about her 'back' problem out of concern and to enquire about her well-being, as part of a return to work discussion. Prior to this discussion, it had already been agreed with the claimant that she would be returning to her role and he had no issues with that. Other than his initial enquiry he did not initiate any further discussions about the claimant's back which were instigated by the claimant, not Mr Sawyer. The claimant was clearly still aggrieved by the decision Mr Sawyer had made in October 2019 to put her onto alternative duties while further advise was sought and used this meeting to express her dissatisfaction with that decision.

Redundancy Process and Selection

24. In November 2019, the respondent lost one of its contracts (Nando's) to a competitor.

25. At the meeting on 12 December 2019, the claimant was informed that the role of Manufacturing Technician was at risk of redundancy (pages 156 to 159). Mr Sawyer read out a script of the business changes headed 'Crem Convert Team'. The script explained the reasons why a business decision had been made to reduce the team from 2 Manufacturing Technicians to 1. The reasons included the loss of the Nando's contract, a reduction in CREM work and the fact that Merry Chef had also been tasked with reducing costs. The briefing states: *"The intention is that the role will be mainly focused on the Merry Chef brand with 10% of time reserved for backup for Merry Chef test VSL"*.

26. The briefing continues "*a selection process will be followed to identify one individual for the manufacturing technician position.* ***If you are not identified for the position, we will consult with you*** *to discuss the opportunity for you to move to a production position or any other suitable roles we may be recruiting for currently that you may want to put yourself forward for so potential redundancies not the only outcome*. ***We have drawn up a selection skills matrix which will analyse the match between an individual skill and experience and the ongoing and future work needs of the Department" (highlighted text our emphasis)***

27. The claimant was shown the matrix and was initially happy with it recognising that it was based upon a version of a training matrix that Mr Sawyer had put

together with her input, modified to reflect the business needs going forward. The claimant did however question why she was at risk when she had 'trained' Mr Webster. She did not think deputising VSL should be included in the matrix. It was clear from the meeting notes that the claimant felt that the remaining Manufacturing Technician job was hers. She felt she had more of a right to the role rather than Mr Webster.

28. In Mr Sawyers unchallenged evidence (paragraph 30 of witness statement) he explained why he included 'deputising as test VSL' in the matrix. When the Nando's contract was lost it became very clear that there was not enough work for two Manufacturing Technicians and the remaining work may also be insufficient to keep one technician fully occupied. A gap was however identified in that the business required VSL cover in other areas. Rather than create a new VSL role it made perfect sense that the Manufacturing Technician would cover this role when needed. The VSL role was intended for backup purposes to cover other VSL's in sickness or holiday. While the claimant thought the scoring was drafted intentionally to favour Mr Webster, that was not the case. This was one of the criteria included to meet the ongoing and future needs of the department and was not created to disadvantage the claimant. If the claimant had VSL skills and could deputise when required, that score would have gone in her favour. It was a skill the business required the remaining Manufacturing Technician to have, regardless of their sex. The facts were that the business needed to change and adapt the role to the work and unforeseen changes going forward. The loss of a contract and a general loss of profits across the business were confirmed in the business case that had been presented which had identified a redundancy situation prior to this meeting.

29. Mr Sawyer carefully considered the claimant's concerns about the scoring matrix and amended the importance rating for some of the matrix (Covotherm, P3 and P4) Merry chef was (and remains) the more heavily worked brand than other brands. While he adjusted some parts of the scoring matrix, it had to reflect the needs of the role going forward.

30. On 16 December 2019, Mr Webster was informed that his role was also at risk of redundancy. He was not informed at the same time as the claimant because he was on holiday.

31. On 17 December 2019, the claimant raised a formal grievance via email to Mr Lee (page 205). She alleged that she was discriminated against in that the matrix had been constructed to deliberately favour Mr Webster particularly by the inclusion of "Supervisory VSL Tester". She complains it was deliberately done to put Mr Webster at an advantage and to disadvantage the claimant.

32. On 18 December 2019 Mr Sawyer undertook the scoring. Mr W Matthews (Value Stream Manager for cutting and warehouse) reviewed his scoring to ensure fairness. Mr Sawyer also sought input from Mr McHugh on the "Stop Look Access Manage", (SLAM's) Audit Awareness Criteria. Based on the computerised records available from 2016, Mr McHugh was able to objectively verify that Mr Webster was involved with 168 'interactions' compared to 28 for the claimant. The respondent has prioritised and used Health and Safety awareness in other redundancy selection criteria, illustrating that its inclusion was not unique to this redundancy selection and justified the importance rating of five.

33. Mr Webster scored 446 (114 before weighting) the claimant scored 379 (107 before weighting). Mr Sawyer explained how he approached the scoring and how he assessed the scores at paragraph 41 of his witness statement. He explained the main differences were the claimant scored higher under the "Covotherm" category but slightly lower under Merrychef consistent with the previous training matrix where the claimant had herself identified there was a training need. The Manufacturing Technician role that the claimant had successfully interviewed for in 2014 was not the same role that the business needed in 2019/2020 or going forwards. This was not just because the business had lost the Nando's contract (of which the claimant had primarily focused), but also other factors (including a reduction in CREM work and less volume generally with Convotherm and gas conversions). This was explained to the claimant during the redundancy process. It was not suggested that the was not capable of performing the remaining manufacturing technician role, she was simply not successful because she scored lower than Mr Webster.

34. I accepted Mr Sawyer approached the scoring with an open mind. As the line manager, he scored the claimant and Mr Webster based on his subjective assessment of their individual skills and experience and the ongoing and future work needs of the department. He used the objectively verifiable (health and safety) data that was available. In closing submissions Mr Rudd attacks that assessment suggesting the weighting was deliberately skewed in favour of Mr Webster, on the grounds of the claimant's sex. It was suggested that Mr Sawyer should have considered whether training could be offered to the claimant in the areas where she lacked the skills and scored less. The scoring was based on the actual skills the claimant and Mr Webster had acquired by the date of the assessment. They each benefitted on the scoring where they had the skills or lost out in areas where they lacked the skills/experience as at the date of assessment. Mr Sawyer made a fair and genuine assessment of their skills using the scoring matrix. I do not agree that there was evidence to show or draw inferences that Mr Sawyer deliberately skewed the weighting in favour of Mr Webster on the grounds of the claimant's sex.

35. On 18 December 2019, the claimant was informed by telephone by Dave Sawyer that she had scored the lowest and was therefore risk of redundancy.

36. On 20 December 2019 the claimant was sent a letter confirming she had been put at risk of redundancy. The letter included her matrix scores (pages 170 to 174). In the claimant's witness statement (paragraph 42) she says: "*I believe that L. Webster was not put under consultation and the skills audit matrix were done prior to decision on who would be put at risk of redundancy with extra supervisory duties have been put into that role which meant I could not succeed in that exercise not having previously had supervisory experience and that this was unfair".* The claimant and Mr Webster had already been informed that the person provisionally selected for the role would not be consulted including any consultation about alternatives to redundancy (see paragraph 16). This was the reason Mr Webster was not 'put' under consultation and if the claimant had been selected for the role she would not have been 'put' under consultation.

Redundancy Consultation

37. On 21 January 2020, the claimant returned to work from long term sickness absence for work-related stress.

38. On 23 January 2020, the claimant's grievance was heard by Mr Lee as the Operations Manager. Mr Lee went through each comment or ground that the claimant had raised in her grievance and the many issues that the claimant had raised about scoring matrix. Mr Lee explained to the claimant why the skills matrix was focused on the role going forward as the claimant did not appear to accept why the one remaining role needed to adapt to the changing circumstances the business was facing. The claimant requested to see Mr Webster's scores. Mr Lee's position was that the scores were confidential but he agreed that if the if Mr Webster was content for his scores to be disclosed they could be disclosed to the claimant. He was unaware Mr Webster had already disclosed his score directly to the claimant.

39. On the same day Mr Lee conducted the redundancy consultation meeting accompanied by Ms Halstead. The claimant was accompanied by a union representative. The notes (pages 179 to 181) were not challenged. A detailed letter confirming the discussions of the first redundancy consultation meeting was sent the claimant on 28 January 2020. The claimant had been provided with a copy of the business case and the letter confirming the reasons why the business no longer required 2 manufacturing technicians and was treating it as a redundancy situation.

40. On 30 January 2020, the claimant received the detailed grievance outcome response rejecting her grievance. Mr Lee found no evidence of discrimination or that the claimant had been mistreated in any way. (Pages 207 to 210).

41. On the same day the claimant had a further redundancy consultation meeting. At that meeting she was consulted about redeployment and the current vacancies including Sub Assembler. It was agreed risk assessments for the new role would be undertaken (page 182-183)

42. On 3 February 2020, a detailed follow-up letter was provided to the claimant regarding the consultation meeting on 30 January 2020 (pages 184 to 186).

43. On 4 February 2020 the claimant appealed the outcome of the grievance (pages 211-214).

44. On 13 February 2020 the claimant's grievance appeal hearing was conducted by Mr Lacey (Vice President and Managing Director of Merry Chef).

45. On the same day the claimant had a further redundancy consultation meeting (pages 188 to 190). The claimant and Mr Webster were both re-scored (page 199) Mr Lee reviewed the scores as part of the consultation and increased the claimant score to 409 (113 before weighting) and reduced Mr Webster's score to 424 (102 before weighting). Mr Webster's score was reduced for some criteria (e.g. Convotherm) and made equal for CREM work despite the claimant having limited experience in CREM. Mr Lee checked and reviewed the health and safety data and the other scores. He also reduced the importance of the VSL supervisory requirement from 5 to 3, to reflect the amount of time likely to be spent undertaking this task in the future. Although the claimant thought this should not be considered at all, Mr Lee disagreed for the same reasons Mr Sawyer, had already provided to the claimant. Although the final scores remained close, Mr Webster still scored higher than the claimant.

46. Mr Lee confirmed that the redundancy criteria had been drafted around the business requirements going forward using the existing skills matrix. Both Mr Webster and the claimant had the basic electrical knowledge needed to work in

the ongoing role. Mr Walker had a lot more fault-finding experience which had been built up over the years together with his ability to deputise in the role of VSL when required to cover for holidays/sickness. I accepted Mr Lee's evidence that he was genuinely prepared to change the scores if he disagreed with the rationale or they were wrong. If, his rescoring had resulted in Mr Webster scoring lower than the claimant, Mr Lee would have selected the claimant for the role, instead of Mr Webster. The highest scorer would retain the post to reflect the business need which had nothing to do with the claimant's sex or her disability.

Trial Period in Alternative Role

47. When Mr Lee informed the claimant that her role was redundant she questioned why she was being given the outcome when her grievance appeal has not been concluded. Ms Halstead confirmed that the consultation process was now finalised although the claimant could still appeal the decision. The claimant was offered an alternative role as a Sub Assembler as an alternative to redundancy and was given a '1' month (statutory) trial period to assess the suitability of the role.

48. The claimant's representative asked if the claimant could have a three-month trial in that role as a reasonable adjustment given her back issues. Mr Lee agreed that the role would be reviewed from a Health and Safety perspective and a risk assessment would be carried out to ensure it was suitable. He could not see why 3 months would be required but agreed to check the position. The claimant was also given details of the redundancy package if she chose not to accept the alternative role. The claimant was asked to confirm her decision by 20 February 2020.

49. On 20 February 2020, the claimant accepted the Sub Assembler role working at the same location, working the same hours but at a slightly lower salary than her previous role (page 192 to 194)

50. On the same date, the claimant was issued with a detailed outcome letter in relation to her grievance and the redundancy. In the letter Mr Lee confirmed that the trial period would not be increased from the statutory '4' week trial period to three months but assured the claimant she would be provided with as much support as required in the trial period to help her transition into the new role. If any difficulties were highlighted by the claimant they would be addressed. It was confirmed that the claimant would receive her previous salary during the trial period. The reason why a three-month trial period was not required or agreed was because the respondent formed the view that by undertaking a risk assessment before the claimant started in the role it was an effective and practical step to achieve the same purpose as a longer trial period. The statutory trial period would still enable the claimant to satisfy herself that the role was a suitable alternative. The respondent would have regard to any difficulties the claimant had in performing the role before and during the trial period during which the claimant reserved the option to take redundancy, if she felt the role was not suitable for her. It was more important for the respondent to keep the claimant in work with them rather than lose her with a redundancy payment (page 196 to 198).

51. On the 21 February 2020, the claimant appealed the decision despite the fact she was not being made redundant. She was informed her appeal would be

dealt with by Mr Lacey who had no prior involvement in the grievance or the redundancy process.

52. On the 24 and 25 February 2020 risk assessments were carried out for the claimant's new role of Sub Assembler (pages 222 235). The new role did not involve manual handling of heavy items. The claimant remains in this role and has not indicated that she has any difficulty performing the new role during the trial period or subsequently, which puts into some doubt whether a three-month trial period in the role would have in fact been necessary.

Grievance Appeal

53. On 2 March 2020 the grievance appeal outcome letter was sent to the claimant finding no evidence of discrimination (220-221). Mr Lacey found the claimant had formed a strong view from the outset that the Manufacturing Technician role was her job and could not understand why she had not be selected. Mr Lacey investigated the redundancy and the grievance paperwork. He spoke to Mr Sawyer Mr Lee, and Ms. Halstead. In summary, he concluded there was a reduced workload and genuine need to reduce costs within the claimant area of work. The business needs meant the respondent could no longer justify having two individuals working as Manufacturing Technicians. He found the selection process was fair and consistent and the decision made was not based on the claimant's disability or her sex or part of any planned approach to remove her from her post. Mr Lacey could understand the claimant's frustration about her return to work in October 2019. While he thought her managers may have exercised "a little too much caution" it was understandable for the respondent's duty of care to the claimant's health and well-being to be fully observed. He therefore upheld the decision made by Mr Lee and rejected the grievance.

Applicable Law

54. Section 13(1) Equality Act 2010, ('EA2010') provides that *"a person (A) discriminate against another (B), if because of protected a characteristic, A treats B less favourably than A treats or would treat others".*

55. Section 23(1) 'EA2010' provides that on a comparison for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

56. The Equality and Human Rights Commission Code of Practice on Employment (2011) ('EHRC' code) at paragraph 3.4 explains that to decide whether an employer has treated a worker 'less favourably', a comparison must be made with how they have treated other workers or would have treated them in similar circumstances.

57. 'Because of' a protected characteristic means the characteristic needs to be a cause of the less favourable treatment but does not need to be the only or even the main cause. The question can be phrased as what was the effective cause of the treatment? Lord Nicholls in Nagarajan London Borough regional transport 1999 ICR 877HL identified the crucial question in every case was more simply "*why the complainant received the less favourable treatment…. Was it on the grounds of race (here sex) or was it for some other reason, for instance because the complainant was not so well-qualified for the job"*

58. Paragraphs 3.12 and 3.13 of the EHRC code explain that in some instances the discriminatory basis of the treatment will be obvious from the treatment itself and in other cases the link between the protected characteristic and the

treatment will be less clear and it will be necessary to look at why the employer treated the worker less favourably to determine whether this was because of a protected characteristic.

59. In the Supreme Court case of R (on the application of E)-v-Governing Body of JFS and the Admissions Appeal Panel of JFS 2010 IRLR 136 SC Lord Phillips provided useful guidance on the approach to take to decide direct discrimination. In deciding what were the 'grounds' for discrimination a Tribunal is simply required to identify the factual criteria applied by the respondent as the basis for the alleged discrimination. Direct discrimination can arise in one of two ways where a decision is taken on a ground that is 'inherently discriminatory' or where it is taken for a reason that is 'subjectively discriminatory'.

60. "*In some cases, there is no dispute at all about the factual criteria applied by the respondent, in other words it will be obvious why the claimant received the less favourable treatment (inherently discriminatory). The question is what were the facts that the discriminator considered to be determinative when making the relevant decision. In other cases, it may not be immediately apparent i.e. the act complained of is not inherently discriminatory where it is necessary to explore the mental processes, conscious or subconscious of the alleged discriminator to discover what facts operated in his or her mind (subjectively discriminatory)"*.

61. Section 26 'EA2010' provides that "A person (A) harasses another(B)if-

(a) "A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of-

(i) violating B's dignity, or

(ii) creating an intimidating hostile, degrading, humiliating or offensive environment for B."

62. In deciding whether conduct has the effect 26(4) provides that each of the following, must be taken into account:

(a) the perception of B:

(b) the other circumstances of the case:

(c) whether it is reasonable for the conduct have that effect.

63. The EHRC code at paragraph 7.18 considers what is required and in summary provides; "*(a) is subjective and depends on how the worker regards the treatment Did the worker regard it as violating their dignity or creating and intimidating etc environment for them? (b) 'other' circumstances that may be relevant include the personal circumstances of the worker experiencing the conduct. (c) is an objective test. A Tribunal is unlikely to find unwanted conduct has the effect, for example of offending a worker if the Tribunal considers the worker to be hypersensitive and that another person subjected to that same conduct would not have been offended"*.

64. In Richmond Pharmacology-v- Dhaliwal 2009 ICR 724 EAT the assessment to be made requires that "*Not every racially slanted adverse comment or conduct may constitute a violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory particularly if it should be clear any offence was unintended*". In Betsi Cadwaladr University Health Board-v- Hughes EAT 0179/13. The Employment Appeal Tribunal

observed that "*"violating" is a strong word. "Offending against dignity, hurting it, is insufficient". "Violating" maybe a word the strength of which is sometimes overlooked. The same thing may be said of words such as intimidating etc. All look for effects which are serious and marked, and not those which are although real, truly of lesser consequence*.

65. Section 27 'EA2010' provides that *"a person(A) victimises another person(B)if A subjects B to a detriment because B does a protected act"*.

66. Sections 20 and 21 'EA 2010' deal with an employer's failure to comply with the duty to make reasonable adjustments. Section 20 provides that "*the first requirement is a requirement, where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable have to take to avoid the disadvantage"*.

67. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case. Ultimately the test of the 'reasonableness' of any step an employer may have to take, is an objective one and will depend on the circumstances of the case. A factor which might be taken into account, is whether taking any particular step would be effective in preventing the substantial disadvantage. (paragraphs 6.23,6.28,6.29 of the 'EHRC' code)

68. Section 136 'EA2010' sets out the burden of proof provisions which apply to any proceedings relating to a contravention of this Act and provide 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"

Conclusions

69. Firstly, dealing with the complaint of direct discrimination complaint. Was selecting the claimant for redundancy less favourable treatment than Mr Webster because of the claimant's sex? The alleged less favourable treatment is that the scoring matrix was used to benefit Mr Webster by using alleged 'irrelevant' factors to score the claimant lower than Mr Webster so that he was selected for the remaining Manufacturing Technician position.

70. While the claimant considers the inclusion of and weighting of some factors in the selection matrix, particularly, 'irrelevant' the factors included in the matrix were not 'irrelevant' to the business. Mr Sawyer made it clear from the outset that he had "***drawn up a selection skills matrix analysing the match between an individual's skill and experience and the ongoing and future work needs of the Department"*** The factors/criteria were relevant to the business needs having regard to the reduced workload and the skills and experience required to make full and effective use of that role in the future. My findings of fact (paragraph 34) set out the reason why "*deputising as test VSL*" was included. It was originally weighted at 5 to reflect the importance of this factor and on upon review was reduced to 3. The rescoring had the effect of reducing Mr Webster's score but did not change the claimant's (nil) score. It was not an irrelevant factor used to treat the claimant less favourably because of her sex. If the claimant had had VSL experience and could "deputise as test

VSL" when cover was required to meet the business need, she would have received the same score as Mr Webster. The only reason the claimant received no points for this 'relevant' criteria was because she could not 'deputise as test VSL'.

71. The redundancy matrix that was used was based upon a training matrix prepared by Mr Sawyer with input from the claimant, not from Mr Webster. The claimant was familiar with the training matrix having helped to create it before Mr Webster joined the team. The Health and Safety criteria had been used in previous redundancy exercises. Compliance with Health and Safety was important to the respondent and was a relevant criterion to include. The scores awarded to the claimant and Mr Webster were objectively verifiable. Mr McHugh used 4 years of computerised records to make the fairest possible assessment. Mr Sawyer genuinely applied the criteria to make a fair assessment of the claimant and Mr Webster before scoring them. The initial assessment was then reviewed by Mr Lee and some of the scores were adjusted for the reasons set out at paragraph 45-46. Unfortunately, that adjustment did not change the 'end' result. The claimant scored lower than Mr Webster and that was the reason why she was not selected for the role and was instead offered and accepted a suitable alternative role. If, the rescoring had resulted in Mr Webster scores being lower than the claimant, Mr Lee would have selected the claimant for the remaining role, instead of Mr Webster. The highest scorer retained the post to meet the business need going forward which had nothing whatsoever to do with the claimant sex or her disability.

72. As to the alleged discriminatory act of not affording the claimant access to 'training' the claimant has not advanced any primary facts to support a complaint that she was less favourably treated in comparison to Mr Webster in relation to access to opportunities for training. The claimant has not identified any training opportunities offered to Mr Webster that were not offered to her. The claimant and Mr Webster received training on Health and Safety and Forklift Truck driving. Other training opportunities were on the 'job', based on the exposure they each had to working on the product lines as the work came in. It is for the claimant to establish a prima facie case of discrimination, from which the Tribunal could conclude the respondent discriminated against her in relation to access to training and subjected her to the 2 detriments she relies upon. She has failed to establish any primary facts to support a prima facie case of a contravention of section 39(2)(b) Equality Act 2010.

73. Dealing then with the disability/sex related harassment. In the list of issues, the claimant's 'sex' and disability were relied upon as the 'protected characteristic' for the purposes of the harassment complaint. At this hearing the alleged unwanted conduct was not linked to sex but was said to be related to disability. The first alleged act of unwanted conduct related to disability was the relocation of claimant's desk in March 2019, when as part of a TUPE transfer, Mr Webster moved to the Sheffield site to share the same workplace as the claimant. My findings of fact about the relocation of the claimant's desk are set out at paragraphs 11-14. The reason the claimant's desk was moved was because the respondent needed to accommodate the CREM work and Mr Webster in the same work area as the claimant. While the claimant took the decision personally ('why move me'), the respondent explained to the claimant at the time, that her desk was moved to accommodate the CREM work as well as Mr Webster. That reason had nothing whatsoever to do with the claimant's

disability. Objectively viewed it was not unwanted conduct related to the claimant's disability that violated her dignity or created an intimidating environment. It was a business decision made to accommodate another employee and the CREM work into a shared work area following a TUPE transfer. The claimant was hypersensitive and another person subjected to that same conduct would not reasonably have been offended by the relocation when the reason for the move had been explained.

74. The second alleged act of unwanted conduct related to disability is Mr Sawyers alleged 'frequent' references to the claimant's back impairment during the return to work meeting on 12 December 2019. My findings of fact are set out at paragraph 21-23 and do not support the allegation made. There was only one reference the claimant relied upon not 'frequent references'. It was a reference made at the beginning of a return to work meeting asking the claimant how her back. It was a reasonable enquiry made by the manager out of concern, given the claimant's previous history of a back injury and disability related absence. The claimant's response ('fine') indicates that she understood that the purpose of the reference, was to make an 'enquiry' about the claimant's health in a return to work meeting. It was not unwanted conduct related to disability. Objectively viewed the effect of Mr Sawyer's enquiry about the claimant's back problem, made from concern about her well-being could not reasonably be perceived as having the effect of 'violating' the claimant's dignity or of creating an intimidating environment.

75. The third alleged act of unwanted conduct related to disability is the delay until January 2020 in the claimant returning to her role as a Manufacturing Technician. The reason for the delay is explained in the findings of fact made at paragraphs 15-20. The primary reason for the delay was the claimant's sickness absence from 23 October 2019- 20 January 2020. The claimant's GP assessed the claimant was unfit to work for 3 months. It is difficult to see how in those circumstances the claimant can blame the respondent for the delay, or alleges that by following the GP's advice, the respondent is subjecting the claimant to unwanted conduct related to her disability which had the purpose or effect of harassing the claimant. Objectively viewed it did not have that purpose or effect and it was not reasonable for the claimant to treat that conduct as harassment related to disability.

76. The next complaint is the reasonable adjustments complaint in relation to the respondent's failure to extend the statutory trial period from 4 weeks to 3 months. The PCP is the respondent's application of the statutory '4' week trial period as set out in section 138(3) of the Employment Rights Act 1996. It is alleged this PCP put the claimant at a substantial disadvantage as a disabled person compared to a non-disabled person in that the claimant would not be able to revert to being redundant and claim a redundancy payment '*in the event*' the job proved to be unsuitable because of her back condition. The hypothetical disadvantage that is relied upon 'in the event' the job is not suitable did not actually 'put' the claimant at a substantial disadvantage. Section 20(3) requires that the PCP applied 'puts' the claimant at a substantial disadvantage in relation to a relevant matter (not being able to revert to redundancy and claim redundancy pay). The claimant has not shown she was put at a substantial disadvantage and was able to assess the suitability of the Sub Assembler role during the statutory trial period. The very practical and reasonable step that was taken by the respondent when that alternative role was accepted was to carry

out a detailed risk assessment of that role before the claimant started the job and monitor any difficulties the claimant experienced during the trial period. The claimant had no concerns about the suitability of the job in the '4' week trial period and was not put at risk of losing a redundancy payment. The claimant has failed to establish the necessary primary facts to establish liability to succeed in her complaint of a failure to make reasonable adjustments.

77. The final complaint the claimant makes is of victimisation. It is admitted that the claimant did a protected act when she raised a grievance alleging discrimination. The alleged detriment is "*being **informed** on 20 February 2020, that her previous role of Manufacturing Technician was redundant and receiving confirmation that she had been redeployed after **accepting a suitable alternative role** of Sub Assembler before she was given the grievance outcome which was received on 2 March 2020"*. That is a statement of the undisputed facts and does not identify any detriment. On 20 February 2020, when the claimant was informed she had been made redundant from her role as Manufacturing Technician and was offered and accepted a suitable alternative role, Ms Halstead confirmed that the consultation process had come to an end. She informed the claimant of her right of appeal which the claimant exercised, receiving an outcome of her appeal and grievance on 2 March 2020. On those facts, the claimant was not subjected to any detriment because of her protected act. She was simply being informed of the outcome of the redundancy consultation process. The claimant has failed to establish the necessary primary facts to establish liability to succeed in that complaint. For all those reasons the complaint of victimisation and all the other complaints of sex or disability discrimination fail and are dismissed.

Employment Judge Rogerson
16.3.2021

JUDGMENT SENT TO THE PARTIES ON
22nd March 2021