EMPLOYMENT TRIBUNALS

Claimant: Ms P Austin

Respondent: Mears Group plc

Heard at: Watford Employment Tribunal

On: **11, 12, 13, 18, 19, 21, 22 October 2021 and (in chambers) on 10 November 2021**

Before: Employment Judge Quill; Ms J Hancock; Mr D Wharton

Appearances
For the claimant: Mr D Hodson, counsel
For the respondent: Mr E Kemp, counsel

RESERVED JUDGMENT

(1) It was not direct disability discrimination for the Respondent to appoint Richard Hughes as Head of Bid Management without giving the Claimant an opportunity to apply.

(2) The dismissal was not an act of direct disability discrimination.

(3) The failure to give the Claimant an opportunity to apply for Head of Bid Management was unfavourable treatment because of something arising in consequence of the Claimant's disability. It was disability discrimination within the definition in section 15 of the Equality Act 2010 (EQA), and was a contravention of section 39(2)(b) EQA.

(4) The dismissal was unfavourable treatment because of something arising in consequence of the Claimant's disability. It was disability discrimination within the definition in section 15 EQA, and was a contravention of section 39(2)(c) EQA.

(5) The dismissal was an act of victimisation and was a contravention of section 39(4)(c) EQA.

(6) The Respondent had conceded that the dismissal was unfair. There is no Polkey reduction because there is a 0% chance that the Respondent would have dismissed the Claimant had it acted fairly.

REASONS

Introduction

1. In 2007, the Claimant commenced employment with the Respondent as a Bid Manager, and later became Senior Bid Manager, and then Head of Bid Management (North). On 26 July 2015, the Claimant sustained serious spinal injuries. The Respondent admits, in relation to those spinal injuries, that the Claimant has had a "disability", within the definition in section 6 of the Equality Act 2010 ("EQA"), ever since that date. In 2017, the Claimant ceased to be Head of Bid Management (North) and became Bid Manager.

2. In March 2019, the Claimant was informed that she was being dismissed by the Respondent. Her complaints arise out of that dismissal and also out of the Respondent's appointment, earlier in 2019, of a Head of Bid Management.

3. ACAS early conciliation was between 17 June and 17 July 2019. The claim was presented on 13 August 2019.

The Hearing and the Evidence

4. The hearing was conducted fully remotely by video (CVP).

5. We had an agreed main bundle of 1533 pages and a supplemental bundle of 103 pages.

6. We had written statements from each of the following, each of whom attended the hearing, swore to their statements and was cross-examined.

   6.1 For the Claimant: the Claimant (main statement plus supplementary) and Tom Gregorek (whose statement included an exhibit)

   6.2 For the Respondent: Tanya Nugent-Wadsworth; Richard Hughes; Declan Farrell; Ian Watson; Kevin Woodcock; Jo Fry; Ashley Gough; Alan Long; Colin Middlemass and Lucas Critchley.

7. The hearing had been scheduled for ten days 11-15 and 18-22 October 2021. We were grateful to the parties for their co-operation in ensuring that all the evidence and submissions could be completed by 22 October, despite the fact that the tribunal was only able to sit on 7 of those planned 10 days. On 22 October, we informed the parties that we would require some time in chambers to conclude our deliberations and that we were therefore reserving our decision.

The Claims and The Issues

8. The Claimant brings claims for unfair dismissal; direct disability discrimination; discrimination arising from disability; victimisation.

9. During closing submissions, it became clear that there was a difference of opinion between the parties as to how the draft list of issues should be finalised / interpreted. This dispute therefore required decisions from the Tribunal, which we

made at the time and communicated to the parties with oral reasons. Our decision was that those of the Equality Act claims which complained about the dismissal were not limited only to situations where the tribunal decided that the dismissal was for a sham reason. While it was true that the Claimant was arguing that the Respondent had given sham reason(s) for the dismissal, the claim form did make sufficiently clear (despite some clumsy wording) that the dismissal complaints were not *only* that the stated reason was alleged to be a sham. Furthermore, as we made clear to the parties, for the unfair dismissal claim, the Respondent had admitted unfair dismissal and so the findings we were being asked to make about the Respondent's "reason" or "principal reason" for the dismissal were relevant to remedy, but it was wrong in principle to invite us to decide that, if a fair reason had been "available", then it followed that the dismissal had been for a fair reason. Finally, the claim that the Claimant's sickness absence was something arising from her disability was not limited only to the situation where the tribunal decided that she had a mental impairment which would – in and of itself – satisfy the definition of "disability" in Equality Act 2010. Subject to those points, the list of issues was:

1. Disability

a. The Respondent concedes that at all material times from 26th July 2015 onwards the Claimant had a spinal cord injury amounting to a disability.

b. Did the Claimant also have anxiety and depression over the same period (or over any lesser period)? The Claimant's case is that she did have these mental impairments over the whole period and relies upon the OH report on 30th September 2016.

c. Did the Claimant's anxiety and/or depression amount to a disability within the meaning of Section 6 of the Equality Act 2010?

2. Unfair Dismissal

The Respondent has conceded that the dismissal was unfair for the purpose of Section 98(4) of the Employment Rights Act 1996 ("ERA") as a result of the Respondent failing to carry out a fair procedure in respect only of the meeting held on 29th March at which C was dismissed (paragraph 69 of the original GOR, and 71 of the amended version).

The tribunal was asked to:

a. make factual findings as to the Respondent's reason for dismissal;

b. decide whether the reason for dismissal was that the Respondent had a reduced need for work of a particular kind within Bid Management and that state of affairs caused the dismissal

c. if, so, decide whether that reason falls within section 98(2)(c) ERA ("that the employee was redundant"), or failing that, does it fall within section 98(1)(b) ("some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held").

d. decide whether the reason for the dismissal was the "some other substantial reason" as communicated to the Claimant at the time of her dismissal and whether the Respondent had the fair reason of "redundancy" available to it for the purposes of 98(1) ERA, as it stated in its appeal outcome letter dated 24th October 2019

e. decide whether, in the event that the Respondent had no fair reason under s.98(1) ERA at the time of dismissal, the Claimant would have been dismissed shortly after 29th March 2019 by way of redundancy

f. decide whether the reason(s) (at the time of the dismissal and/or later) for dismissal put forward by the Respondent was or were effectively a "sham"

3. Direct Disability Discrimination (s.13 Equality Act 2010 ("EQA")

The tribunal is being asked to determine:

a. Whether, because of the Claimant's disability, the Respondent treated the Claimant less favourably than it treated her comparator, Richard Hughes, or a hypothetical comparator, by failing to give the Claimant the opportunity to apply for the Head of Bid Management role and/or appointing Richard Hughes into that role

b. Whether Mr Richard Hughes is an appropriate comparator for the purposes of EQA

c. Whether, by dismissing her, the Respondent directly discriminated against the Claimant by treating her less favourably than it would treat others without her disability contrary to s.13 EQA

4. Discrimination Arising from Disability (s.15 EQA)

The tribunal is being asked to determine:

a. Whether, in failing to give the Claimant the opportunity to apply for the role Head of Bid Management role, the Respondent discriminated against the Claimant by treating her unfavourably because of something arising (any of a to e from list below) in consequence of her disability, contrary to s.15 Equality Act 2010

b. Whether, by dismissing her, the Respondent discriminated against the Claimant be treating her unfavourably because of something arising (any of a to f from list below) in consequence of her disability, contrary to s.15 Equality Act 2010

Alleged "*something arising in consequence of the Claimant's disability"*:

a. her loss of mobility;
b. her difficulty accessing the Respondent's offices;
c. the actual or perceived difficulty of making reasonable adjustments for the Claimant both in terms of access arrangements and generally, as referred to specifically in the one to one meeting on 12th March 2019 or otherwise;
d. her reduced hours;
e. her periods of time off work on sick leave;
f. the ongoing cost to the Respondent of covering the Claimant's income protection payments.

5. Victimisation (s.27 EQA)

The tribunal is being asked to determine:

a. Whether, by dismissing her, the Respondent was subjecting the Claimant to a detriment because she had done protected acts contrary to s.27 EQA.

b. Whether as a matter of fact the Claimant carried out the actions set out in paragraph 52 of her Grounds of Claim ("GOC").

c. The Claimant relies of the acts set out in paragraph 52 of her GOC as being the protected acts for the purposes of s.27 EQA.

Alleged protected acts

a. Stating in the one to one meetings on 12th March 2019 and 22nd March 2019 that she considered the failure to notify her of or consider her for the Head of Bid Management Role was because of her disability (paragraph 21 above).
b. Stating in the one to one meeting on 12th March 2019 that she considered that the Respondent's reasonable adjustments were and had been inadequate (paragraph 22 above).
c. Stating in the one to one meeting on 22nd March 2019 that her earlier loss of the role of Head of Bid Management, and her subsequent demotion in 2017, were decisions taken against her because of her disability.
d. Stating in the one to one meeting on 22nd March 2019 that the decision to place her at risk of redundancy had been taken because of her disability.

6. The Respondent takes the position that the following issues relating to Jurisdiction (out of time) need to be considered by the tribunal, although these have not been specifically raised in the Response to Claim

a. The Claimant started the ACAS Early Conciliation process on 17th June 2019 (Day A).

b. The Claimant issued proceedings on 13th August 2019.

c. Whether any alleged act or omissions which are alleged to have occurred before 18th March 2019 (being 3 months less a day before C contacted ACAS) are time barred under s123 of EQA.

d. If so, whether any such alleged act or omissions constitute a continuing course of discrimination under section 123(3) of EQA.

e. If not, whether it is just and equitable to extend time to permit the Claimant to bring any claim that is out of time.

7. Polkey

If the Claimant was unfairly dismissed, would she nevertheless have been fairly dismissed in any event had a fair procedure been adopted by the Respondent?

The findings of fact

10. The Respondent provides services, including housing management and housing repair services, to other organisations ("clients"). It enters into contracts with clients that can potentially last for several years at a time, and can potentially require large numbers of the Respondent's staff to work on the contract, and can potentially be valued at several million pounds. In order to be appointed to perform a contract on behalf of a client, the Respondent has to first successfully persuade the client that it is well-suited to fulfil the client's needs, and potentially has to compete against other organisations in order to win a particular contract from a particular client. Thus, amongst its employees, as well as those actually engaged in performing (and overseeing the performance of) particular contracts which the Respondent had already entered into, the Respondent had employees whose

duties were concerned with ensuring the Respondent was able to successfully obtain contracts. The latter work includes, amongst other things, monitoring which potential clients have put work out to tender, deciding which tenders to "bid" for, and then preparing such bids. "Bidding" is the formal process by which the Respondent seeks to demonstrate to the client that it can meet the client's requirements (especially those set out in a formal invitation to tender) and that it can do so better than any other organisation which is also bidding.

11. Prior to working for the Respondent, the Claimant had experience of working in teams preparing bids across various industries including Housing, Environmental, Facilities Management, Highways, Education, but came to specialise in managing bids for Housing Repairs and Maintenance. She liked this work and became interested in the possibility of working for the Respondent, which she regarded as a leader in this field. In 2006, she successfully applied for the role of Bid Manager.

12. The Claimant's employment with the Respondent commenced around January 2007. She was good at her job and well-thought of by the Respondent. She was promoted twice and had a clean disciplinary record. Her first promotion was in 2010 to the role of Senior Bid Manager.

13. The bid management team was responsible for the management and delivery of the housing bid strategy, objectives and targets for the Respondent. All Bid Managers and bid support staff reported directly to her and she was responsible for managing their work and their development needs.

14. At this time, the way in which the Respondent carried out the bidding process was:

    14.1 There was a pre-sale process where potential bid opportunities were identified and targeted;

    14.2 This was followed by a pre-bid qualification stage where the potential customer requests information from the Respondent. This is the "PQQ" or "SQ" stage.

    14.3 This was followed by the live bid stage, where the Respondent set out what it would do for the client and at what cost

15. The Claimant's team got involved at the live bid stage. Another team, the "Commercial" team also got involved at that stage, with other teams becoming involved earlier. A Bid Manager was responsible for the overall bid, including ensuring the bid got submitted in time, and generally complied with the client's requirements. However, Bid Manager's did not make pricing decisions on behalf of the Respondent; a Commercial Manager supplied the Bid Manager with details of the pricing information to be included in the bid.

16. In 2014, the Claimant became Head of Bid Management - North. Her pay was increased but she was not issued with a new job description. There was an internal promotion for one of the Bid Managers, who became Head of Bid Management – South. The bid team was split into two geographic regions. The Claimant worked predominantly from home and from one of the Respondent's premises near to her home (WGC).

17. The Claimant was well thought of, and when she informed the Respondent of her intention to leave to take up a new job outside the company, the Respondent increased her salary to persuade her to stay. The team that she managed secured large volumes of work for the Respondent, and met its targets, and the Claimant met her personal targets.

18. Initially, the Head of Bid Management – North and Head of Bid Management – South had had different line managers. However, in 2015, a change was made so that they both reported to Ray Blundell, Development Director. The PQQ Team also reported to him.

19. On 26 July 2015, there was an incident which resulted in life-changing injuries for the Claimant, and which affected the use of all 4 limbs to some extent.

20. The Claimant was in hospital until November 2015. During that time, she regained some movement in her right leg, and her ability to use her hands improved. She required a wheelchair and became able to transfer herself from the bed to the chair (albeit this required a significant amount of effort on her part).

21. During this time, she also filled out some documents for an income insurance protection scheme (UNUM). There is a dispute between the parties about UNUM that may potentially be resolved in separate litigation. The Claimant believes that she gave the completed documents to Mr Blundell around September 2015.

22. The Claimant had kept the Respondent updated as to her progress. In February 2016, the Claimant informed Mr Blundell that she believed that she believed that she was ready to return to work, on reduced hours, and working from home.

23. In April 2016 an Occupational Health Assessment took place at the Claimant's home. This suggested that she was not yet fit to work (at least pending further action by the Respondent). The Claimant continued to seek a return to work and a further referral was made. The Claimant instructed solicitors to write to the Respondent. Their letter dated 20 September 2016 stated, amongst other things:

Our client has in the past suggested the following:

1 . She returns to work on a part-time basis working a number of hours over 3 days a week. This can be reviewed with the hope of returning to work on a full time basis

2. She is given the following facilities in her home in order to assist her in her job:

a. A Docking Station

b. A full sized computer screen

c. A keyboard

As her work was largely home based, this seems to be reasonable.

3. If there are meetings where she would need to be present and which would require travel on her part, these can be addressed by either arranging for a computer link up (via Skype for example) or by arranging travel by rail with taxis to and from the stations

being arranged. Our client can drive for approximately 1 hour at a time. However travel will need to be minimised as far as possible.

24. A dialogue continued, on the one hand between her solicitors and the Respondent's HR team, and, on the other hand, between the Claimant and Occupational Health and line management. The Claimant was not formally challenged on what she says in her witness statement about this period. In her view, the Respondent was unreasonably slow to action the things that needed doing, and part of the reasons for the delays were that the Respondent gave inaccurate information to its OH advisers. The Respondent's stance at the hearing before us is that it does not concede the Claimant's criticisms, but states that, in any case, the events of this time period are irrelevant to the matters which we need to decide, because the relevant decision-makers (and advisers) were completely different to those involved in the matters set out on the list of issues.

25. The Claimant remained on full pay during her absence. At the time, this was paid by the Respondent, not UNUM.

26. The Claimant recommenced work the following year. By the time of her return to work, the Claimant was able to stand, with some difficulty, and to walk short distances (for example to get out of the wheelchair in order to use toilet facilities). She was also able to drive, provided the journey was less than an hour and that she was able to rest prior to making a return or further journey.

27. Starting in February 2017, she worked from home. She worked about 12 hours per week on average, usually over 3 days. The OH report in December 2016 itemised the recommended equipment and suggested that the Claimant might require a chauffeur for certain appointments. The equipment was not all ready as of her start date, but the Respondent had made attempts to obtain it. the Claimant was not seeking to work often or regularly at WGC. In any case, the Respondent informed her that she could not work there until appropriate risk assessments were completed for that location. This requirement was noted in HR's letter to her of 18 October 2017 – page 316-317 of bundle. The same letter stated: "*There may also need to be risk assessments carried out for specific client buildings you may be required to visit in the course of carrying out your role*". She continued to work in the same job.

28. Between 3 and 7 August 2017, the Claimant chased up the risk assessment in an exchange of emails with Mr Blundell. During August and September 2017, the Respondent looked into what was required for the Claimant to attend WGC for occasional meetings. On 24 August 2017, Mr Blundell forwarded to the Claimant a copy of an email itemising steps which had been taken and which were planned (pages 401-402) in relation to emergency evacuation procedure, and confirmed that the risk assessment was still to be done.

29. The Claimant was unable to attend a Senior Management Team Meeting in August 2017 due to the fact that the Respondent failed to make the relevant checks and adjustments that would have enabled the Claimant's attendance at WGC the office. No alternative arrangement was made, such as allowing her to participate by phone or video, for example, or else changing the venue from WGC to a location which was accessible for the Claimant. There were other internal meetings which

took place without the Claimant for similar reasons. Furthermore, training was given to all of the bid team, apart from the Claimant, on In Design software. The Claimant was invited to attend, this training session at Mears newly opened training centre, but it took place on an upper level of a building which had no lift access. She was therefore unable to attend the training session with her colleagues and no alternative training was arranged for her.

30. In November 2017, the Claimant and her colleagues on the bid team were informed that the Respondent was considering a restructure was to take place. A meeting to discuss the proposals took place on 7 November 2017 and the Claimant was invited to attend on 31 October 2017 (page 468). The meeting was to take place on the first floor, but the Claimant was not informed of that fact until the day of the meeting. It was the need to arrange the meeting for the first floor which prompted Mr Blundell to make enquiries, on 31 October 2017, to find out if the arrangements for emergency evacuation had been finalised. (Page 469). He was told on 1 November 2017 that evacuation equipment had been received, and the relevant team was being trained on how to use it, but did not contact the Claimant to discuss with her what, if any, adjustments might be required to enable her to attend a first floor meeting at WGC or to inform her that the Respondent believed that the evacuation plans were now adequate. This meant that, on the morning of the meeting, after being told that the meeting was on the first floor, she had to chase for details of the arrangements for access, and of the evacuation plan. The Claimant was told:

> *On arrival to the building please contact one of your team to assist you with opening any doors etc... and speak to Jane at reception who will give you access to the buildings lift.*

31. Mr Blundell had attempted to arrange for a parking space, but, for whatever reason, it was unavailable on the Claimant's arrival, and there was a delay while a space was arranged. The Claimant was informed that the Respondent would not give her the code to access the lift area, and that any time she wanted access to that area she would need to ask to be let in. She was also informed that she could not use the lift unsupervised (for safety reasons); since the lift was too small to accommodate another person (as well as the Claimant and her chair), she was required to make arrangements for someone to be there as she entered the lift, and for that person to then use the stairs so as to meet her exiting the lift. For these reasons, even though the Claimant had arrived at the site in good time for the meeting, she arrived at the meeting late, and very upset. These events led the Claimant to believe that the Respondent was not willing to make arrangements even for her to attend an important pre-planned meeting at her own base office, let alone meetings at other offices and/or more regular day to day meetings.

32. The restructure proposals included requirements for the Bid Team to attend the Respondent's premises in Enfield (a significant distance from the Claimant's home address and from the WGC location). It also included proposals for an overall reduction in staffing numbers. Even after voluntary redundancies, etc, there was still a need for a selection process which resulted in one person being made redundant. The Claimant was retained within the new structure. Her job title changed from Head of Bid Management – North to Bid Manager.

33. The person with overall responsibility for the restructure was Lucas Critchley, Group Executive Director, and one of the witnesses as the hearing. We are not persuaded that this exercise had been designed to attempt to exit the Claimant from the business, or to make things more difficult for her. The reasons for the exercise were as set out in Mr Critchley's witness statement and the consultation documents (including the need to make savings, and the reduced demand for the work of the bid team) and the Respondent genuinely perceived a need for the Bid Team to meet regularly in person, and genuinely believed that its Enfield premises were the most suitable location for that.

34. The restructure resulted in the work of the Bid Team being divided into what the Respondent designated tiers 1, 2 and 3.

    34.1 Tier 1 was to focus entirely on the highest levels of bid work, such as bidding for work from large central government departments. This was to be led by Mr Blundell. There were only a small number of such bids each year.

    34.2 Tier 2 was for services to be provided over a reasonable period of time and a value in the region of, perhaps, £1 million per year or so.

    34.3 Tier 3 was to be led by Mr Middlemass (also one of the witnesses for the hearing). These were the simpler bids and for lower value contracts.

35. The Claimant was appointed to work in Tier 2. This was to be led by a Senior Operational Lead who would lead and manage the Tier 2 bid team and PQQ/SQ team.

36. The Respondent's requirements for the Senior Operational Lead included that they represented the Respondent at competitive dialogue meetings, site visits, and presentations and that they hosted and spoke at various industry events. In addition, it imposed a requirement - which it did not impose for Mr Blundell, the Tier 1 lead – that the Senior Operational Lead five years' operational experience in a senior director role. (By "operational", the Respondent was referring to the part of the business which actually performed the contracts for its clients, as opposed to the part of the business which was involved in succeeding in bids for such contracts.) The Claimant asked to be appointed to role of Senior Operational Lead, and pointed out that there would have to be reasonable adjustments made to the proposed duties if she was to take that post. The Respondent declined, citing her lack of five years' operational experience in a senior director role. Mr Critchley had direct knowledge of the Claimant and her work. His response included the following passage:

    I would like to reiterate what I said at the time that you are very much a valued member of the Mears team and the current process that we are going through is no reflection on the quality of your work, or indeed of that of anyone in the team. You made it clear that you are keen to remain with the company and I thank you for your commitment and pragmatism at such a difficult time.

37. The new structure was implemented from 2018. In fact, the Respondent was unable to fill the role of Senior Operational Lead. The Claimant briefly was the de facto stand in, and then Darren Pace, Group Commercial Director, was acted to

perform the duties of Senior Operational Lead, in addition to his own, pending permanent recruitment (which never occurred).

38. The Claimant made no formal complaint at the time about the restructure, or her non-appointment to Senior Operational Lead. She had had lawyers write to the Respondent in 2016 about her return to work requests, and in 2017 about (amongst other things) the potential restructure. She had the opportunity, therefore, to challenge this exercise (and its outcomes) at the time, but she chose not to do so. In this litigation, the 2017 exercise is not amongst the complaints which we have to decide, but we are invited by the Claimant to take it into account as background material. We do so. However, we do not draw any inferences adverse to the Respondent. It is not obvious to us why five years' operational experience in a senior director role was a requirement to lead Tier 2, and we do not infer that the Claimant necessarily agreed with the explanation given to her at the time. However, ultimately it was a business decision made by Mr Critchley, and we are not persuaded, on the evidence, that it was a sham reason that was put forward just to provide an excuse to keep the Claimant from stepping into the role. If the Claimant believed that there were grounds to challenge Mr Critchley's decision/reasoning, then she could and should have pursued that at the time. For the avoidance of doubt, we are not suggesting that the Claimant is somehow now exaggerating her opinion that she was genuinely capable of doing the Senior Operational Lead role (with adjustments).

39. As will be discussed below, the Respondent later came to argue to the Claimant that the fact that it had not made her redundant in 2017 was evidence that there had been no discrimination when she was dismissed in 2019. However, from an objective point of view, the facts do not support that proposition. Firstly, the individuals who carried out the exercise in 2017 were different to those who made the decisions in 2019. Secondly, there was no plausible justification for making the Claimant redundant in 2017. She scored best of six in the desktop selection criteria which assessed who should be retained (and second of six ignoring length of service). See page 612. Five of the six were to be retained. We are not suggesting that the Respondent or Mr Critchley had been trying to exit the Claimant and were thwarted by the scoring and/or by the voluntary redundancies; we are simply stating that the fact that she was not dismissed in 2017 is not relevant (or, at least, does not provide evidential support for the Respondent's case) in relation to the issues which we have to determine.

40. The Claimant's mother lived near to the Claimant and had provided a great deal of assistance to the Claimant following her 2015 injuries. In around January 2018, the Claimant's mother was informed that she had terminal cancer. She died in August 2018. Even prior to the Claimant's mother's diagnosis, the effects of the Claimant's injuries, and the knowledge that the situation was lifelong, had had an effect on her mental health. For example, the OH report following a consultation on 30 September 2016 – pages 79 to 83 of bundle – mentioned that the Claimant was tearful and had symptoms of anxiety and depression related to her accident and resulting injuries, amongst other things. It suggested an assessment suggested moderate to severe depression and moderate to severe anxiety. Her mother's diagnosis increased the Claimant's anxiety and depression; these effects were directly related to her physical disability because in part they flowed from the

Claimant's opinion that her physical disability prevented her doing things for her mother that she would have wished to do.

41. From April 2018 onwards, the Claimant was absent from work due to ill health. The immediate reason was that her mental and emotional fitness was not such that she could carry out her duties. Her mother's illness, and her bereavement following her mother's death were contributing factors to that. However, a significant factor was the spinal cord injury (sometimes abbreviated to SCI) and this was stated in the fit notes produced by her GP which were supplied to the Respondent. This is what those notes meant by "exacerbation of symptoms" and many (though not all) the notes referred to "SCI" or "spinal cord injury" when stating the reason that the Claimant had been assessed as not fit to work.

42. The Claimant did not resume her duties prior to dismissal, and the Respondent accepted (both for the purpose of these proceedings, and at the time) that her absence was for genuine ill-health reasons (other than some short periods when she was classified as being on a different type of leave).

43. On 23 August 2018, Mr Pace corresponded with HR (Sue Burton) about the Claimant (pages 594-596). In the email, he mentioned that he was now seeking to recruit a Head of Bid Management, and that he was aware that the Claimant had no access to the Respondent's IT systems at home, and that he had not been able to speak to her about the recruitment. He referred to her "previous role (Head of Bid Management)". [This is clearly a reference to the Head of Bid Management – North post, and it is not significant that Mr Pace either did not know, or had forgotten, or did not think it worth mentioning, the "- North" part of the title.] He sought advice about whether he should put the recruitment on hold if Ms Burton considered it to be "a risk". We infer from this that Mr Pace thought either that the Claimant would potentially wish to have the opportunity to apply for this new "Head of Bid Management" post, or that she might bring a grievance or legal complaint if not offered the opportunity to apply, or both. He seems to have got as far as drawing up draft job descriptions for such a post, which would report into him, as Group Commercial Director. The duties and responsibilities were analysed and a salary band set. See pages 599-601 and 602-605. Required qualifications included:

    - Experience of managing a bid team in a company providing services to the public and private sectors.
    - Experience of delivering best in the market business development experience
    - Proven delivery of innovative solutions

44. In September 2018, Ms Burton gathered more information about the 2017 restructure, especially from Mr Blundell and Mr Critchley. A significant reason for her doing this was to liaise with UNUM in relation to the claim to them. However, the Respondent was also actively considering at the time that it was potentially about to recruit a Head of Bid Management, and was actively considering what rights the Claimant would have in that scenario.

45. In October 2018, there was a discussion between Mr Pace and Mr Middlemass, Chief Operating Officer. Mr Middlemass was Mr Pace's line manager, though Mr

Pace was very senior and had significant autonomy and, as mentioned, Mr Pace had been manging the Tier 2 bid and PQQ/SQ team (on an interim basis, given the lack of a Senior Operational Lead), whereas Mr Middlemass headed up Tier 3. By this time, Mr Middlemass was aware that Mr Pace was leaving the Respondent in the first quarter of 2019. It was agreed that the new Head of Bid Management post would (temporarily, at least) report directly to Mr Middlemass. Mr Pace's suggestion was to appoint one of the Claimant's colleagues, a Bid Manager, WS. Mr Middlemass, following advice from Jo Fry, the Respondent's Group HR Director and a witness in the hearing, told Mr Pace that he should speak to the Claimant and make her aware of the vacancy and that she could apply for it.

46. Although it was Mr Middlemass's recollection or understanding that the discussions in October only arose out of the handover arrangements being put in place for Mr Pace's departure, and that the possible Head of Bid Management was only a vague plan, he is mistaken about that. Mr Pace (who was not a witness) had communicated with Ms Burton (who was not a witness) in August about his present intentions ("I am now trying to recruit for a Head of Bid Management") at that time, and sought her advice about whether, for reasons connected to the Claimant, he should put that on pause.

47. In October or November 2018, Mr Pace and the Claimant had a telephone discussion.

    47.1 The Claimant's account is that he told her that was leaving Mears and that he was already on garden leave. He told her that he was proposing to appoint someone as Head of Bid Management Role and that he thought it should be WS. The Claimant did not, in express terms, say that she formally wished to be appointed to the role. However, she did make clear that she thought that any discussions about a Head of Bid Management role should take account of her situation, and that no appointment should be made without taking account of that. Mr Pace implied that Ms Fry would contact the Claimant to discuss further.

    47.2 The Respondent relies on an email exchange between Mr Middlemass and Mr Pace. On 12 October, Mr Middlemass wrote "I spoke with [Ms Fry] re [WS] and the position with Pauline. Can we agree between us on what needs to happen, think it's just a conversation with Pauline informing her of what is being proposed." On 15 November, Mr Pace replied to say "Colin, All done, I will resurrect the internal vacancy". These emails were cc'ed to Ms Fry.

    47.3 It is notable that Mr Pace's email did not say, "when I told Pauline that she could apply, her reply was …". Further, Mr Middlemass's reply ("Thanks Darren") does not indicate that he had been expecting to receive any such information from Mr Pace and nor did Ms Fry ask for any information about the Claimant's response.

48. We accept the Claimant's account of the conversation. We are satisfied from the evidence that Mr Pace did not expressly say to the Claimant anything similar to, "You can apply for the Head of Bid Management role if you want to. Do you want to?" In fairness to Mr Pace, if the only instruction from Mr Middlemass is that contained in the 12 October email, then he was not asked to say that expressly.

Rather the 12 October email is entirely consistent with the Claimant's account that Mr Pace informed her that he believed that WS should be appointed, without commenting on whether the Claimant was potentially eligible. We infer that his "resurrect the vacancy" remark refers back to plan to recruit that he had mentioned to Ms Burton the previous August (albeit the role would, temporarily at least, report to Chief Operating Officer rather than Group Commercial Director). This recruitment it appears, had been put on hold some time after his request to HR for advice (though not necessarily exclusively for that reason, given Mr Pace's change of circumstances at around the same time). Mr Pace's opinion was that, whatever had caused a delay to his recruitment plans for the last 3 months, was now cleared off, and the Respondent could proceed.

49. In fact, at senior level within the Respondent, and confidential from other staff for entirely legitimate commercial reasons, the Respondent had been in negotiations to acquire the Repair Services Division of the Mitie Group ("MPS"). This acquisition was announced in November 2018, not long after Mr Pace's 12 November email. It created a TUPE transfer in which MPS employees transferred to the Respondent, including staff whose duties were bid management. One of the consequences was that any plans to appoint someone to the specific Head of Bid Management job description drawn up in August 2018 were abandoned.

50. Mr Alan Long, Executive Director of the Respondent was a witness. He was involved in the discussions for the takeover of MPS. He discussed with the Respondent's CEO, David Miles, that, post-transfer it might be appropriate to create a new post, which would be in charge of the bid functions formerly carried out by MPS and those formerly carried out by the Respondent (both Tiers 2 and 3, though not including Tier 1) and also being responsible for the SQ/PQQ team and the commercial team and business development team. SQ/PQQ teams and commercial teams were operated by both the Respondent and MPS pre-transfer. However, only MPS had a specific business development team. The CEO approved this. Mr Long decided that this new role would be called "Head of Bid Management".

51. MPS had an employee, Richard Hughes (one of the witnesses in this hearing). Mr Long had worked with him previously (though they had not had the same employer) and thought he had good attributes. Mr Long decided that Mr Hughes had all the skills and knowledge that the Respondent required for the new "Head of Bid Management" position. No formal job description or list of required qualifications/experience was drawn up. It was Mr Long's opinion that Mr Hughes was someone who could handle overall management responsibility of everyone within the Central Business Development Team moving forward. His opinion was that no-one else within the bid, Commercial or SQ Teams had that sort of level of experience and skills. He decided that it was not necessary to conduct a recruitment exercise, or to invite expressions of interest from anyone else. He decided that the Respondent would appoint Mr Hughes to the post.

52. Mr Long was aware that the Claimant had been Head of Bid Management – North, and aware of the 2017 reorganisation. He was aware of her absences and her disabilities and had been involved in the Respondent's decisions to keep the Claimant on full pay. He was aware that she worked from home and had not resumed full-time hours. He did not seek to find out any information about the

Claimant's experience of business development (that is liaising with potential clients at an early stage, before they issue any questionnaires for completion by the SQ/PQQ team).

53. In February 2019, the Respondent announced that Mr Hughes had been appointed as Head of Bid Management. Given the seniority of the role, we are satisfied that the Group HR director, Ms Fry, was aware of the plans to offer the post to Mr Hughes. Given the comparatively short lapse of time, we are satisfied that she had not forgotten the fact that Mr Pace had planned to recruit to a post with the title Head of Bid Management, had asked HR whether that was a "risk", had put the recruitment on hold, had been advised to have a conversation with the Claimant, had had a conversation on the Claimant and had subsequently advised her and Mr Middlemass that, following the conversation with the Claimant about his plans for Head of Bid Management, he was proceeding.

54. We are not satisfied that Ms Fry had any reason to believe that the Claimant had said she was not interested in applying for the post of Head of Bid Management that Mr Pace had mentioned to her.

55. Mr Hughes opinion of the job description drawn up by Mr Pace in August 2018 is that it is a "true" Head of Bid Management description and is restricted only to narrow elements of the bid process. Although he has received no written job description from the Respondent, his opinion was that the de facto role that he was appointed to was substantially different, and wider, given that it included management of the teams mentioned above.

56. Between 11 and 28 February 2019, there was an exchange of emails between the Claimant and Ms Burton. Mr Pace had left and the Claimant supplied her new fit note to Ms Burton. From this exchange of emails, the Claimant became aware that the Respondent's records did not contain all of the fit notes which she had supplied to Mr Pace, and so she supplied further copies of those that HR / Ms Burton did not have.

57. In February 2019, Mr Hughes began having internal discussions about a potential restructure. Amongst other people, he discussed with Mr Middlemass, and with Tanya Nugent-Wadsworth. Ms Nugent-Wadsworth was a Senior HR Business Partner, reporting to Ms Fry, and she was given the task of being the lead HR support to the restructure.

58. On 14 February 2019, Mr Middlemass wrote to the Claimant. This was the first time that the Claimant was formally informed of the MPS acquisition by the Respondent (though she had seen it announced in the media) and the first time she was informed of Mr Hughes' appointment. On 13 February, Mr Hughes had emailed Ms Nugent-Wadsworth. He and Ms Nugent-Wadsworth had already come up with proposals and a timescale, and he was informing her that Mr Middlemass was content with the proposals, but had a concern about communications with Ms Austin. We infer that it was the fact that Mr Middlemass was informed about the proposed restructure which prompted him to send his 14 February letter. On Friday 15 February, Mr Hughes wrote to the Claimant (mentioning that he was aware of Mr Middlemass's letter) and informing the Claimant of a meeting on Monday 18 February, by conference call, to begin consultation on restructure. He

referred to the Claimant's ill-health absence and stated that he would update her in writing if she was unable to attend.

59. The Claimant was unable to attend, and the written update was sent on 19 February 2019 (page 694 of bundle). It informed the Claimant that she was at risk of redundancy and included a copy of the presentation that had been made the previous day at the meeting. It informed the Claimant that there would be individual consultation meetings. The presentation explained that the Respondent's bid team had 6 employees (including the Claimant) and the former MPS team had 3. The proposal was for a combined bid team of 5 employees. That is going from 9 to 5, so potentially 4 redundancies. There were also reduced numbers in the proposed combined Commercial teams and SQ teams respectively and there was to be a Business Development Manager. It was anticipated that, within the 5 bid team employees, one would be a more senior role and would manage the remainder of the team and report directly to Mr Hughes. The proposed location for the team was to be WGC. However, there was flexibility for the location of Business Development Manager. The schedule was for employee representatives to be appointed, and for individual meetings and interviews to take place in March 2019, with decisions confirmed that month and the new structure to be in place by April 2019.

60. After he had sent the 19 February letter (but before the Claimant had received it), Mr Hughes phoned the Claimant. During the discussion, the Claimant reminded him that they had met some years earlier. He told the Claimant that he knew little of her exact circumstances. The Claimant's opinion was that the discussion was a positive one in which they had a general discussion about the history of the team, and of Mr Hughes plans for the future. He did not give her details about the headcount in the proposed new structure, and she was surprised when she noted the extent of the reductions.

61. A meeting with employee representatives took place and minutes were forwarded to the Claimant. On 12 March 2019, Mr Hughes and Ms Nugent-Wadsworth attended the Claimant's home for a one to one consultation meeting. The Claimant had been informed that the purpose of the meeting was to give her an opportunity to discuss the process and business case and that it was not a selection meeting. She was updated that rather than 9 bid team staff competing for 5 posts, it would be 8 competing for 5.

62. During the meeting, the Claimant asked about Mr Hughes appointment as Head of Bid Management, and the process which had been followed for that. She expressed the opinion that the new role matched the Head of Bid Management – North role that she had had up to 2017, and asked why she had not been considered for the new role. She was informed that the new role was different to her old role; in response to that, she asked if she could see the job description for the new role, and also pointed out that the new role was significantly different to what Mr Hughes had been doing prior to February 2019. She also referred back to the discussion she had had with Mr Critchley in which she had asked to considered for the Lead role and had been informed that there was a rigid qualification requirement that she did not meet. She asked if there had been such a rigid qualification requirement applied to Head of Bid Management. She was

informed that her questions were not relevant, and that the Head of Bid Management was not being considered as part of the restructure.

63. The Claimant made it expressly clear that she was stating that she should have been given information about the Head of Bid Management role, and a chance to apply for it, before Mr Hughes was appointed. She was asking that, if the Respondent disagreed with that, it should give her some specific information about why it disagreed; that is, why it had decided that there was no need to give her the chance to apply, and/or which (if any) qualification criteria she failed to meet. She did not say that she was doubting Mr Hughes' abilities (and made it expressly clear that that was not her point). Her opinion, stated clearly and expressly, was that, regardless of Mr Hughes' abilities, she should have had the opportunity to be considered and that the lack of opportunity to apply for that post was relevant in the circumstances in which she was being informed that her current post was at risk of redundancy. Mr Hughes was offended by the Claimant's remarks and decided that the Claimant was "bitter that she hadn't been appointed".

64. In the meeting, the Claimant mentioned the difficulties that she had previously experienced when attempting to attend meetings at WGC and asked what adjustments would be made for that. She also mentioned that she did not have access to the Respondent's IT systems, and that she did not have voice-activated software that worked on those systems. She asked about what adjustments would be made to the process, and how her absence since April 2018 would be dealt with.

65. By his own admission, Mr Hughes formed the opinion, based on this meeting, that the Claimant was disgruntled. Other than the fact that he regarded her as "bitter" over her non-appointment to Head of Bid Management, he states that he regarded her disgruntlement as being specifically because she was being put at risk again less than 18 months after the 2017 exercise. However, we are satisfied that his opinion that the Claimant was "disgruntled" was reached as a totality of what she said. Her comments about the 2017 exercise were not just that it had been fairly recent; she suggested that there were inconsistencies between what Mr Critchley had said then, and the justification that was given to her on 12 March 2019 for the Respondent's process in appointing Mr Hughes. Her comments about problems accessing WGC made clear to him that the Claimant would expect and require adjustments if she were to attend that site, whether semi-regularly or on one off occasions. Her comments about problems with software made clear that she was dissatisfied with what the Respondent had implemented to date, and she would require further investments of time and money in the future if she was to be set up fully to be able to work from home. Further, just as it had been clear to Mr Pace and Mr Middlemass in 2018 that appointing a Head of Bid Management while the Claimant was absent might be a risk (at least, unless the Claimant was consulted), we are satisfied that, from the totality of what the Claimant stated during the meeting, Mr Hughes perceived an implication that part of the reason that she was unhappy about the way that Mr Hughes appointment had been handled was that she believed that her absence and/or her need for adjustments (including less than full-time hours and working largely from home) had potentially influenced the Respondent's decision to make the appointment without offering her any opportunity to apply.

66. The Respondent argues that the Claimant behaved badly during the 12 March 2019 meeting and that, at the end of the meeting, she realised that she had behaved badly and acknowledged it by apologising. We reject that. Our finding is that the apology was as the Claimant states. That is that she was acknowledging that it was not Mr Hughes or Ms Nugent-Wadsworth who were personally responsible for the past difficulties she had had with accessing WGC and/or accessing the Respondent's IT systems, and that she regretted the fact that they were being asked to pick up matters when, as they had stated to her, they had no knowledge of those past issues. Our finding is that the Claimant conducted herself reasonably during the meeting. Her questions were probing, but the questions were not unreasonable or irrelevant given the stated purpose of the meeting.

67. During consultation, the proposed new structure evolved so that the 5 person bid team would consist of 2 Senior Bid Managers and 3 Bid Managers. The Claimant was informed of that and expressed interest in all those roles as well as the role of Business Development Manager. In email exchanges with Ms Nugent-Wadsworth, the Claimant reiterated that she was seeking adjustments to ensure that she was not disadvantaged by her absence since April 2018. Ms Nugent-Wadsworth stated that she was confident that absence would not disadvantage the Claimant.

68. The plan (which the Claimant agreed to, and was content with) was for both the second individual consultation meeting and her selection interviews to take place on the same day and at the same location, being a meeting room which the Respondent had booked at a hotel. The date was 22 March 2019. Mr Hughes met the Claimant in the car park and escorted her to the meeting room where Ms Nugent-Wadsworth was waiting. There was some polite small talk before the meeting began. During the consultation meeting, the Claimant showed a hard copy of a draft structure. Mr Hughes pointed out it did not include MPS, and the Claimant stated that she had originally produced the document in 2017, but, because she did not have access to IT systems, she had been unable to access the electronic version and update it, but it was an outline draft that she thought worthy of discussion. There was also a wide-ranging discussion about how the Respondent had made decisions in the past about which contracts to bid for (and not to bid for) and why. During the discussion each of the Claimant and Mr Hughes made comments which stated/implied that – at least with hindsight – some past decisions or strategies (or lack of strategies) had not worked out well. The context of the meeting was about what was the best approach going forward. In this part of the discussion, the Claimant made some specific reference to specific decisions by named senior employees and suggested that she disagreed with some of those decisions. She did not make any such comments in the subsequent selection interview. There was also a further discussion about the Claimant's request for reasonable adjustments so as to alleviate any disadvantage resulting from her absence which had lasted around 11 months by then.

69. By the time of the 22 March consultation, Mr Hughes and Ms Nugent-Wadsworth were aware that there were now just 5 bid team members to compete for 5 roles in the new structure. They did not inform the Claimant of that.

70. The events of the 12 March meeting significantly affected Mr Hughes' opinion of the Claimant and the decisions which he made about her. The selection interview

panel was to be 3 people. In addition to Mr Hughes and Ms Nugent-Wadsworth, the third person was more senior, Mr Farrell, Managing Director and Head of Transformation. After 12 March, and before 22 March, Mr Hughes and Ms Nugent-Wadsworth informed Mr Farrell that, in their opinion, the 12 March meeting had been difficult. He formed the opinion that they were, in his words, "not looking forward" to future meetings with her.

71. After the consultation meeting was concluded, Mr Farrell joined the other 3 and the selection interviews began. Mr Farrell's perception when he joined the others that there was a bad atmosphere. Our finding is that his perception was not based on anything the Claimant said or did, but was because, in advance of the interviews, Mr Hughes and Ms Nugent-Wadsworth had informed him that the Claimant was a difficult person to deal with.

72. During the interviews, each interviewer gave two sets of marks. One was for Business Development Manager and one was for Senior Bid Manager. The scoring system was: 5 – outstanding; 4 - more than competent; 3 – competent; 2 – requires development; 1 – poor.

73. The Respondent argues that the reason there were (only) two sets of marks is that the marks noted as being for Senior Bid Manager doubled up as being marks for Bid Manager as well. In other words, the argument is, that there were three potential selection decisions, and that a potential outcome was that one (or more) of the existing bid team members could have been told that they had not been successful for any of the posts in the new team and would be made redundant. On the balance of probabilities, that was not the plan. Taking account of the fact that there were 5 employees competing for 5 posts, and taking account of the lack of any contemporaneous record that the "senior bid manager" mark doubled up, and taking account of the fact that there was no pre-planned pass mark (which someone had to achieve to be appointed as Bid Manager) and that there was no meeting after the interviews to decide whether anyone had been unsuccessful in an application for Bid Manager, our finding is that, for the bid team, the plan was to score all 5, and to make the 2 highest scorers Senior Bid Managers and to automatically retain the other 3 as Bid Managers (assuming they had not been appointed to, say, Business Development Manager). We also note that Ms Nugent-Wadsworth states in her paragraph 28 that the roles within the new structure were, in the main, the same as current. Business Development Manager was new/different, but we infer that the Respondent did not regard Bid Manager in the new structure as different in any relevant way (ie any differences were not such that the Respondent was contemplating dismissing existing postholders and going to external recruitment to fill resultant vacancies).

74. In any event, even if we are wrong that that was the intention, as of 22 March 2019, it remains the case that there was never, on or after 22 March 2019, any meeting of the interview panel (or anyone else) to compare the various scores and to make a decision that a particular person had either done enough to be appointed Bid Manager, or else not done enough to be appointed Bid Manager. The only selection decisions made were about who should be appointed to the 2 Senior Bid Manager posts (as well as Business Development Manager).

75. There is a dispute about what happened during the selection interview. As we will discuss below, the Claimant received a letter on 5 April 2019. Because of what is stated in that letter, it is necessary for us to make findings of fact about what the Claimant said during the interview. The 5 April letter included the following:

> *After careful consideration, during our meeting on 29 March 2019, we advised that the outcome to your application for all 3 roles within the new Business Development structure was that you had been unsuccessful in all applications. You had previously advised that you were not interested in other opportunities. Consequently we advised you dismissal for Some Other Substantial Reason (SOSR) and details of which would be confirmed in writing the following week.*
>
> *The decision was reached based on the way in which you conducted yourself within the selection meeting, where it became apparent that there was a total and absolute lack of regard for the company from yourself. You answered questions in a manner where you were dismissive of senior management and the business as a whole, being clear that you had no respect or desire to support the business in what are challenging times. Given you role in the Business Development team requires the support, enthusiasm and commitment to securing new work for the group, whilst this was my decision, this was supported by those who witnessed your complete disregard for the business that demonstrated a complete break down within any current or future employment relationship.*
>
> *All assessments were made by three separate individuals in varying degrees of management level within Mears who have previously not had prior knowledge of working with you in the past, who were solely focused on the future success of the business. The new team will involve new ways of working that understandably will involve buy in and strong stakeholder management which there is no evidence to indicate that you would work towards.*
>
> *Unfortunately as a result of the reasons given above, Mears cannot not sustain your continuing employment resulting in my confirmation that your employment with Mears is terminated.*

76. All 3 interview panel members gave evidence and were subject to detailed cross-examination which took each of them through the notes and asked each of them to highlight anywhere were they had made a note of the Claimant doing or saying anything which supported the comments made in the second of the paragraphs we have cited.

    76.1 In the case of Ms Nugent-Wadsworth, her opinion was that the Claimant had made comments that supported the allegations in the 5 April letter. She could not recall any examples, other than what she referred to in paragraphs 66 and 67 of her statement. As she was asked about each section of her notes (that is, the answers given to each interview question), she gave more or less the same reply each time, which is that she could not remember whether, in response to that particular question the Claimant had said something inappropriate, and that it was her evidence that it was a long time ago and she could not remember details, but she believes that the Claimant made comments of the type described in the 5 April letter several times and in response to various questions. Her stated reasons for not making notes of such comments during the interview is that that was not the purpose of such notes. The purpose of such notes was rather to note what the Claimant had

said which would "score" her points and it was unnecessary and inappropriate to record negative comments about the company or anything else that did not go to being a "good" answer to the question. She was asked why there was no record made shortly after the meeting of precisely what the Claimant was alleged to have said and done, either in specific case notes, or in internal email correspondence, and had no specific answer to that other than that she had not considered it to be necessary.

76.2 In the case of Mr Hughes, his opinion was that the Claimant had made comments that supported the allegations in the 5 April letter. He could not recall any examples. As he was asked about each section of his notes he gave more or less the same reply each time, which was broadly the same as Ms Nugent-Wadsworth's response. His stated reasons for not making notes of such comments during the interview is that he believed that the Claimant could see what he wrote down and did not wish to put her off her answers by making allowing her to see that he had noted that she had said something negative. This was an answer he gave in answering cross-examination questions. It was not in his written statement and we reject it as implausible, and as being inconsistent with the notes that he did make. According to his evidence:

> Her comments about senior managers were derogatory and completely shocking. (para 59 of statement)
>
> We were astonished about how she had conducted herself during the interview. I've never been in an interview environment and seen anyone act the way she did. (para 66)
>
> We were all flabbergasted at her arrogance and rudeness, and frankly it was bizarre. (para 67)
>
> However, I would have very serious concerns because of her conduct during the interview that she would be a risk to any other part of the Group. (para 74)

76.3 In the case of Mr Farrell, his evidence was that he had made no notes quoting the Claimant making comments that showed a lack of regard for the company or were dismissive etc. He said that he made no notes of such comments because he did not believe she made any. His opinion was that her demeanour and body language and tone of voice led him to believe that she had a low opinion of the company. After the meeting, he had voiced surprise that she had not been dismissed already. He also suggested that there should be some without prejudice discussions with her about termination of employment. However, he had not been involved in a decision to dismiss the Claimant (for any reason) and had not found out that she was dismissed until he was contacted at the appeal stage.

77. On the Claimant's case, she was not negative. She answered the questions which were asked which included, amongst other things

> Can you give an example when you have challenged 'the norm', how you did so and how you managed the resistance?

Senior: Have you examples of ‘managing upwards' as well as team members to achieve a desired result?

What strategic plans do you feel we need and have you adopted before to concentrate our focus in what will be a large geographic region?

Tell me about something that did not go to plan in the past year and how you dealt with it?

78. On Claimant’s evidence, the only things that she said during the interview which spoke about things having gone wrong in the past, or what needed to be put right, were in her responses to questions of that nature, which required her – in her opinion – to be able to demonstrate that she had an analytical view of what an “ideal” might look like, and of how the Respondent might not have achieved the “ideal” in some way in the past, and what might be done to help it do better in the future.

79. The scores given to the Claimant where:

79.1 Ms Nugent-Wadsworth

Motivational -— 2/5

Empowering - 2/5

Customer Focus — 2/5

Role Model - 3/5

High Standards — 2/5

The total score therefore was 11/25.

79.2 Mr Hughes

Motivational — 2/5

Empowering — 3/5 or 2/5

Customer focus — 2/5

Role model — 2/5

High standards — 3/5

He scored her 12 out of 25 for Senior Bid Manager (and his evidence is that was the same for Bid Manager) and 11 out of 25 for Business Development Manager

79.3 Mr Farrell

Motivational — 1/5

Empowering — 3/5

Customer focus — 2.5/5

Role model — 3/5

High standards — 3/5

Therefore she scored 12.5 out of a score of 25

80. In relation to Ms Nugent-Wadsworth's specific examples:

80.1 Her paragraph 66 refers to comments made about past decisions of Mr Middlemass and Mr Long. On balance of probability, this refers to a part of the discussion that was in the consultation meeting, not the selection interview, and was not heard by Mr Farrell.

80.2 Her paragraph 67 implies that the Claimant was someone who was unwilling to follow instructions from senior management and/or unwilling to do what was best for the business by not disciplining someone having been instructed to do so. However, when she was asked if she agreed with the Claimant's account of that answer in para 152d of the Claimant's statement, Ms Nugent-Wadsworth said that she did agree that that was what the Claimant had said. In other words, the Claimant's answer rather than saying that she had "refused" an instruction to discipline a junior member of staff, was that the Claimant had given an explanation to her manager of the circumstances, explained why the junior staff member should not be disciplined, and said that she, the Claimant, took full responsibility and if anyone was to be disciplined it was her. Ms Nugent-Wadsworth confirmed that she did not regard that answer as demonstrating an inappropriate attitude to the Respondent.

81. In relation to Mr Hughes' opinions cited above from his statement, our finding is that if Mr Hughes believed at the time that the Claimant had actually made comments which were so shocking, then he would been able to recall some examples. Rather than a discussion about an SOSR dismissal, the discussion would have at least touched on the possibility of disciplinary action. In any case, details of what the Claimant had said would have been included in, at least, internal emails. In 2019,

81.1 when interviewed by Mr Woodcock, in July (so 4 months after the interview), the worst specific example he could give was that she compared the Respondent to a sausage making machine (but gave no context for the alleged remark/analogy).

81.2 When interviewed by Mr Watson on 3 June 2019 (so around 10 weeks after the interview) he used a lot of general words such as "toxicity" and "clear bitterness, severe bitterness", he was unable to give specific examples, despite claiming that the decision had been made after a lot of care had been taken over it.

82. Furthermore, there was only one score of 1 (meaning "poor"), which was that given by Mr Farrell for motivational. The fact that there were no scores of "1" from Mr Hughes is at odds with what he claims he thought at the time. He did not give her

a 1 for customer focus, and both Ms Nugent-Wadsworth and Mr Farrell scored 3 for Role Model.

83. The panel members were satisfied that the Claimant was able to do the Bid Manager job. Mr Hughes and Ms Nugent-Wadsworth were each aware that, if not appointed Senior Bid Manager or Business Development Manager, there were sufficient Bid Manager vacancies in the new structure for her to slot in.

84. Mr Hughes decided that he did not wish the Claimant to have a post in the new structure. It was his opinion, and it was the advice given to him by Ms Nugent-Wadsworth that there were no grounds to fairly dismiss the Claimant by reason of redundancy. To the extent that a hypothetical ground for dismissing her as Bid Manager was performance capability, he was aware that that would first require a process to be followed. In the tribunal hearing, he referred to the fact that he wanted the Bid Managers to attend meetings with customers, but there was no specific discussion about the reasonable adjustments which the Respondent would implement either to enable her to do that, or to remove that from her duties (or, failing either, to dismiss her on the specific grounds that she was unable, because of her physical disability, to carry out the duties of the post.)

85. Having decided not to appoint her as either Senior Bid Manager or Business Development Manager, Mr Hughes spoke to Mr Long on 27 March 2019 about the possibility of dismissing her rather than keeping her as Bid Manager. Mr Long was supportive of the possibility and so Ms Nugent-Wadsworth was asked to outline the justifications in an email advice. She sent that email on 27 March 2019 at 18:43 to Mr Long, cc'ing Ms Fry and Mr Hughes.

85.1 In the email, it was asserted that there was a "behavioural issue" but did not specify what that was. It stated that the Claimant being appointed as Bid Manager "does not address" that "behavioural issue".

85.2 The second option mentioned was a redundancy dismissal. The email stated:

> *this would carry the risk of an unfair dismissal claim plus discrimination as she has operated in a higher role previously and has service and therefore it would be difficult to state she would not be competent for a lesser role when there has not been any previous / recent performance management in place.*

85.3 The third option was

> *3 - Dismiss for other substantial reason - this is where we would say that due to the nature of the role, the behaviour in which she has displayed - acknowledge that this was following the redundancy process and as she has only identified roles within the restructure - dismissal with notice. She would have a right of appeal to this - so could address any further issues at this point.*

85.4 The email also added

> *With all of the options above we could run a concurrent without prejudice conversation - 1 would recommend that if this is the case, this is someone else therefore the two processes are kept separate, this may give you an idea of value if she was to entertain this. Alternatively it may be that we wait to hear an appeal if we proceed with either option 2 or 3 and see if a claim is submitted*

> *In all of the above, I believe there will be a risk of a discrimination claim. We have tried to ask her what adjustments she feels she needs for the business and will not detail this, therefore even if she gets her current role in the structure - she may potentially argue that she has been discriminated against for grounds of disability for the higher role as she has held a similar post.*

86. As mentioned already, while it is correct that Mr Farrell had suggested a without prejudice termination discussion might be appropriate, he had not given any opinion (and had not been asked to) on the option of terminating the Claimant unilaterally. Thus, to the extent the email advice to Mr Long suggested that the panel had decided that the Claimant should be made redundant (or terminated as a result of the reorganisation itself) that is not accurate. However, we are satisfied that Mr Long already knew from his discussion with Mr Hughes, and from the email, that it was not being suggested that the Claimant should be made redundant. Further, Mr Long was aware that he was only being invited to formally sign off on Mr Hughes' decision, rather than make a decision of his own. As he knew, he was not actually being asked to choose between 3 options, just to authorise option 3. That is what he did, the same day, by replying 25 minutes later to say:

> *Tanya*
>
> *Well laid out and clear thank you*
>
> *I agree with your conclusion*
>
> *Richard I know will need help on this one given the history and risk …*

87. Ms Nugent-Wadsworth and Mr Hughes prepared a script to read out to inform the Claimant by telephone of the decision. The notes of the conversation, prepared by the Respondent and which both sides agree are accurate were:

> [TNW or RH:] Any alternatives to redundancy?
>
> PA - Nothing not already put forward.
>
> RH - Thank you for confirming. Following the selection meeting that has been held with you for the 3 positions, we have reached a decision. Based on this exercise we will be dismissing you with notice for some other substantial reason. We will be confirming the details for reasons behind our decision - which will be sent in the post next week.
>
> PA - Can you say that again?
>
> RH - Yes. Following the selection meeting that has been held with you for the 3 positions, we I have reached a decision. Based on this exercise we will be dismissing you with notice for some other substantial reason. We will be confirming the details for reasons behind our decision - which will be sent in the post next week.
>
> PA - No can we go through that now.
>
> RH - It will be detailed in a letter we will send next week. You will be given a right to appeal against this decision which will be confirmed in the letter and the time period for appeal commences upon receipt of the letter. Thank you for your time and this concludes the meeting.

PA - No it doesn't conclude the meeting.

RH - Thank you for your time and this concludes the meeting.

88. After this last remark, Mr Hughes hung up.

89. The Claimant emailed Mr Long to ask for an explanation. He said that he could not comment and that the Claimant should wait for a letter from the Respondent. We have quoted already from the letter sent 7 days after the phone call, on 5 April 2019. The letter informed the Claimant that she could appeal, and she did so.

90. Her appeal dated 17 April disputed what was said about the 22 March interview, disputed the fairness of the dismissal, and asserted that the Respondent was dismissing her for a contrived reason, to cover up its true discriminatory reasons, in circumstances in which it knew that a redundancy dismissal was not a plausible option.

91. The Respondent appointed Mr Ian Watson, Group Procurement Director to deal with the appeal. He met the Claimant on 14 May 2019 to discuss her appeal letter. He told the Claimant that, if appropriate, he would reinstate her. The minutes of the meeting start on page 1195, and make clear that he had the letter and that he expressly noted that there were 4 bullet points on page 1. These were as set out in the previous paragraph, including the express allegation that the dismissal was for a contrived reason, to cover up its true discriminatory reasons. In the minutes, the Claimant discussed her suggestion that the only thing that had changed since her promotions up to 2014 was her disability. She also referred to the fact that she had had solicitors write to the Respondent about the need to enable her to return to work, and the chasing up she had had to do in order to be able to visit WGC. Further, in his appeal outcome letter of 24 October 2019, it was written: "Regarding your claim for disability discrimination I do not accept that this is founded." Mr Watson was fully aware at the time that the appeal included allegations of discrimination and that he was to deal with them as part of the appeal process. To the extent that he sought to suggest at the tribunal hearing that looking into discrimination had never been part of his remit (and he was "only making a decision about unfair dismissal") and that he never considered discrimination then that is plain wrong. Likewise his suggestion that he had not read the 4 bullets on page 1 of the letter cannot be correct, given that he expressly referred to them in the meeting with the Claimant.

92. Mr Watson interviewed Ms Nugent-Wadsworth, Mr Farrell and Mr Hughes by early June. Having done so, he formed the opinion that there had been no justification for the dismissal on the grounds set out in the 5 April letter. He could not understand why they had done this (although he learned, which had not been apparent from the 5 April letter, that Mr Farrell had not been involved in the decision to dismiss.) He considered reinstatement. He spoke to Alan Long and David Miles, the CEO, about doing that. These conversations were not mentioned in his statement and only were mentioned in answering questions during the hearing. He says both of them were "negative" (in his words) about the possibility of his reinstating the Claimant.

93. At some stage, he also had a discussion with Ms Fry. Whether he spoke to her for advice because Mr Long and Mr Miles were negative about reinstatement, or whether he spoke to her first, and it was as a result of giving her his preliminary views that he was told to speak to Long or Miles is unclear. Mr Watson does not have a clear recollection of the timings of the conversations or the exact details of what was said. However, the upshot of his conversation with Ms Fry is that Mr Watson was removed from considering the discrimination aspect of the appeal because Ms Fry suggested (and Mr Watson says he agreed with her) that he was becoming too emotional. This was after he had expressed anger about the way in which the Respondent had dealt with the dismissal.

94. Kevin Woodcock, Managing Director of Facilities Management, was appointed by Ms Fry to look into the Claimant's allegations that the dismissal was discriminatory. He received his instructions by email from Ms fry in July 2019. He was not given a copy of the Claimant's appeal letter. He interviewed Mr Watson, Ms Nugent-Wadsworth, Mr Farrell and Mr Hughes. He did not contact the Claimant. Mr Woodcock did not investigate whether the Claimant did, or did not, behave on 22 March 2019 as alleged by the panel members other than to note what the panel members had told him (which was vague). He produced a report which included the following extracts:

> 1 . Was the conduct on the day of the interview due to her disability?
>
> *Conclusion: It is very hard to say whether her disability influenced her conduct at the interview. During the three meetings, their overwhelming response was "no". As part of the process I did get the impression that Richard had tried to make the interview as comfortable as possible, even hiring a room off site that had accessible access and even helping Pauline to/ from the room to her car. In my opinion if Pauline felt her disability may have impacted her on the day or felt unwell due to her disability in any way she should have informed the interviewers so that any adjustments could be considered.*
>
> 3. Was the conduct so severe it warranted a dismissal and if so why do the notes not reflect this?
>
> *Conclusion: Having spoken to all three in detail, I am confident that Pauline's conduct was inappropriate on the day. Apart from Declan (who made some written notes), I cannot understand why this behaviour was not noted in some form by Tanya and Richard. Equally, if Pauline was going offtrack so badly, I would have liked to have seen an intervention that allowed Pauline to present herself properly. In my opinion I do not believe that Pauline's actions during the meeting were enough to warrant her dismissal.*
>
> 5. Discussions that took place between the 3 managers following the interview
>
> *Conclusion: No notes of this discussion were made, however it was apparent that based on the interview that Pauline was not suitable for any of the roles in the eyes of the three interviewees.*
>
> 7. Would there have been any alternative sanction suitable? - If you think this is unfair, did the conduct warrant any other form of sanction? if so what?
>
> *Conclusion: I do not think that the sanction (dismissal by SOSR) warranted the crime. In essence Pauline was dismissed due to her conduct in the Interview. I think it was an unfair decision and her conduct should have been addressed via a separate process.*

Whilst I believe the decision was a poor one, I do not believe that Pauline's disability factored into any of the decision making. I could find no evidence of this and indeed my gut feeling after the meetings was that Richard and Tanya had tried to make the environment as good as possible and had actually tried to find out what adjustments may be needed for Pauline to return to work.

Why was there a change in process half way through? Was redundancy an alternative?

Richard Hughes	*I had 3 options and 1 felt 2 were not palatable. The 3rd option of SOSR I believed got us to where we needed to be and was right for the business. Conduct can slip but loyalty for the company you work for is something else. SOSR was the most appropriate option that I had on the table*
Tanya Nugent-Wadsworth	*There were 3 roles available for Pauline, the Bid Manager role was part of a pool. Taking into consideration she had worked at a higher level in the past to not issue her with a post would have been odd. If we need 5 roles and there are 5 people then there is enough people for the roles. But the way she conducted herself, the comments about the business. I gave advice to either give her the job as Bid Manager or have a conversation with her or alternatively whilst it was out of process an SOSR dismissal. Its not a standard process, if it was just an SOSR process we would have a meeting, look at mitigating circumstances, alternative roles but ultimately it would end in dismissal. The redundancy process is kind of the same. The approach has risk to it but it is the manager's decision to make and it wasn't taken lightly and it was not an easy process from the start. Yes we could have done it differently but the outcome would have been the same. She was told potentially that she could be dismissed by the company. 3 of us thought that her behaviour would not be appropriate for the business in the role*

Conclusion: I have no clear answer as to why the process changed halfway through. In my opinion that was wrong. It seems that Richard acted on the advice given to him by Tanya and felt that the other options ie redundancy and placing Pauline in a role were not appropriate. According to Tanya the process changed because there were enough people for the roles and secondly because Richard did not feel she was appropriate for the role she advised to proceed dismissing on the grounds of SOSR.

In my opinion I believe she was unfairly dismissed by way of SOSR. However, she should have been made redundant as she did not meet the criteria for the Bids Manager role. Both the SOSR process and redundancy process would have resulted in Paulines dismissal and it is my belief that the decision made was not because of her disability in any way.

95. His overall conclusion stated that the Claimant had not been discriminated against and that she had been unfairly dismissed. It stated that the Claimant should have been made redundant and stated that she did not meet the criteria for the Bid Manager role.

96. Mr Woodcock's report was shared with Mr Watson in August 2019. An appeal outcome letter was drafted by him around 29 August 2019 which effectively

adopted Mr Woodcock's conclusions. The draft was worked on by Mr Watson, Ms Fry and others and was eventually issued in October 2019. A redundancy payment was made to the Claimant in June 2020, that is around 8 months after Mr Watson's letter. Prior to sending the letter to the Claimant, Mr Watson did not give the Claimant an opportunity to comment on any of the interviews conducted by him or by Mr Woodcock.

The Law

Time Limits under Equality Act 2010 ("EQA")

97. Section 123 of EQA 2010 states (in part)

> (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
>
> (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.

98. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed

99. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. That being said, time limits are there for a reason and the default position is to enforce them unless there is a good reason to extend. However, that does not mean that the lack of a good reason for presenting the claim in time is fatal to the extension request. On the contrary, the lack of a good reason for presenting the claim in time is just one of the factors which a tribunal can take into account, and it might possibly be outweighed by other factors.

100. The Tribunal has a broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike s 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have

regard, and it is wrong to interpret it as if it contains such a list. A tribunal can consider the list of factors specified in s 33(3) of the Limitation Act 1980, but if it does so, should only treat those as a guide, and not as something which restricts its discretion. The factors that may helpfully be considered include, but are not limited to: the length of, and the reasons for, the delay on the part of the claimant; the extent to which, because of the delay, the evidence is likely to be less cogent than if the action had been brought within the time limit specified in Section 123; the conduct of the respondent after the cause of action arose, including the extent (if any) to which it responded to requests for information or documents and whether it contributed to the time limit being missed; any specific reasons that, because of the delay, the Respondent is less able to defend itself.

101. Ultimately it is a balancing exercise, balancing the prejudice to the claimant if the extension is refused against the prejudice to the respondent if the extension is granted.

Burden of Proof under EQA

102. Section 136 of the Equality Act deals with burden of proof and is applicable to all the Equality Act claims in this action. Section 136 of EA 2010 states (in part):

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

103. Section 136 requires a two stage approach:

103.1 At the first stage, the tribunal considers whether there are proven facts from which the tribunal could conclude, in the absence of an adequate explanation from the respondent, that the contravention has occurred. At this stage it would not be sufficient for the Claimant to simply prove that what she alleges happened did, in fact, happen. There has to be some evidential basis upon which the tribunal could reasonably infer that the proven facts did amount to a contravention. That being said, the tribunal can look at all the relevant facts and circumstances and make reasonable inferences where appropriate.

103.2 If the Claimant succeeds at that first stage, then that means that the burden of proof has shifted to the respondent and that the claim must be upheld unless the respondent proves that the contravention did not occur.

104. Where we do not find, on the balance of probabilities (taking into account the evidence from both sides and drawing inferences where appropriate), that a particular alleged incident did happen then complaints based on that alleged incident fail. Section 136 does not require the Respondent to prove that alleged incidents did not happen.

Direct Discrimination

105. Direct discrimination is defined in s.13 of EQA.

(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.

106. It has two elements; firstly whether the Respondent has treated the Claimant less favourably than it has treated others ("the less favourable treatment question") and secondly whether the Respondent has done so because of the protected characteristic ("the reason why question"). So for the less favourable treatment question the comparison between the treatment of the claimant and the treatment of others can potentially require decisions to be made about the characteristics of a hypothetical comparator. That being said, the two questions are intertwined and sometimes an approach can be taken that the Tribunal deals with "the reason why question" first. If the Tribunal decides that the protected characteristic was not the reason even in part for the treatment complained of it will necessarily follow that the person whose circumstances are not materially different would have been treated the same. That might mean that in those circumstances there is no need to construct the hypothetical comparator.

107. When considering the reason for the claimant's treatment we must consider whether it was because of the protected characteristic or not. We must analyse both the conscious and sub-conscious mental processes and motivations for actions and decisions and s.136 applies. In other words, if there are proven facts from which the Tribunal could infer that there had been unlawful discrimination then the burden of proof shifts to the respondent and the claim must be upheld unless the respondent proves that the treatment was in no sense whatsoever because of a protected characteristic.

108. In approaching the evidence in a case and considering the burden of proof provisions the Tribunal can have regard to the guidance given by the Court of Appeal in, for example, Igen v Wong [2005] ICR 931 and Madarassy v Nomura [2007] ICR 867. The burden of proof does not shift simply because the claimant proves a difference in sex or race and a difference in treatment. That only indicates the possibility of discrimination, and that is not sufficient. Something more is needed. In In Deman v Commission for Equality and Human Rights 2010 EWCA Civ 1279, the Court of Appeal suggested that "something more" does not need to be a great deal more. For example - depending on the facts of the case - a non-response from a respondent, or an evasive or untruthful answer from a respondent or an important witness, could be the "something more" that is required. Against other factual circumstances, it may simply be the context of the act itself. In SRA v Mitchell, the EAT upheld a tribunal's decision that the burden of proof shifted based on a finding that the employer had given a false explanation of the less favourable treatment. That being said, it is important for us to remind ourselves that the mere fact alone that a Tribunal rejects the employer's explanation for some particular act or omission does not mean that the burden of proof necessarily shifts, see for example Raj v Capita Business Services.

109. As per Essex County Council v Jarrett EAT 0045/15, when there are multiple allegations, the Tribunal has to consider each allegation separately when determining whether the burden of proof has shifted in relation to each one. It should not take a broad-brush approach in respect of all the allegations.

110. When a comparator is used the actual or hypothetical comparator's circumstances must be the same as the claimant's other than the protected characteristic in question. In relation to comparators for allegations of direct disability discrimination, the Equality and Human Rights Commission's Code of Practice on Employment gives useful guidance

> 3.29 The comparator for direct disability discrimination is the same as for other types of direct discrimination. However, for disability, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself).
>
> 3.30 It is important to focus on those circumstances which are, in fact, relevant to the less favourable treatment. Although in some cases, certain abilities may be the result of the disability itself, these may not be relevant circumstances for comparison purposes.
>
> Example: A disabled man with arthritis who can type at 30 words per minute applies for an administrative job which includes typing, but is rejected on the grounds that his typing is too slow. The correct comparator in a claim for direct discrimination would be a person without arthritis who has the same typing speed with the same accuracy rate

Discrimination arising from disability

111. Section 15 EQA 2010 states

> (1) A person (A) discriminates against a disabled person (B) if—
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

112. The elements that must be made out in order for the claimant to succeed in a S.15 claim are:
    - 112.1 there must be unfavourable treatment;
    - 112.2 there must be something that arises in consequence of the claimant's disability;
    - 112.3 the unfavourable treatment must be because of (in other words, caused by) the something that arises in consequence of the disability, and
    - 112.4 the alleged discriminator cannot show at least one of the following:
        - 112.4.1 that the unfavourable treatment was a proportionate means of achieving a legitimate aim AND/OR
        - 112.4.2 that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability.

113. The word "unfavourably" in Section 15(1) EA 2010 is not separately defined by the legislation and must be interpreted consistently with case law and taking account of the Equality and Human Rights Commission's Code of Practice on Employment.

114. The section does not require the disabled person to show that his or her treatment was less favourable than that experienced by a comparator. The fact that a particular policy has been applied to a disabled person in circumstances in which the same policy would have been applied to a non-disabled person does not, in itself, mean that there has been no unfavourable treatment. In other words, a

decision that adversely affects the Claimant could potentially still amount to treating the Claimant unfavourably even if the decision was based on a policy that was applied to other employees as well.

115. Dismissal can amount to unfavourable treatment, as could treatment which is much less disadvantageous to an employee than dismissal. However, it does not follow that there has been unfavourable treatment merely because a Claimant can prove that they genuinely believe that they should have had better treatment.

116. For section 15, the unfavourable treatment must be shown by the claimant to be because of something arising in consequence of his or her disability, as opposed to being because of the disability itself. If the treatment is because of the disability itself then (that may potentially be a breach of section 13 of EA 2010, but) the Claimant has not demonstrated a breach of section 15.

117. There is a need to consider two separate steps when considering causation. One is that the disability had the consequence of "something" (which is an objective test); the second is that the claimant was treated unfavourably because of that "something" (which requires consideration of the decision-maker's thought process and motivation, both conscious and subconscious).

118. When considering whether the claimant was treated unfavourably because of that "something", the "something" need not be the sole reason for the treatment, but it must be a significant, or more than trivial, reason. It does not matter if the employer was unaware that the "something" was connected to the person's disability.

119. A complaint of discrimination arising from disability will not succeed if the Respondent is able to show that the unfavourable treatment was a proportionate means of achieving a legitimate aim. The aim relied upon should be legal, should not be discriminatory in itself and must represent a real, objective consideration. Business needs and economic efficiency may be legitimate aims, but simply demonstrating that one course of action was less costly than another may not be sufficient.

120. In relation to proportionality, it is not necessary for the Respondent to go as far as proving that the course of action which it chose to follow was the only possible way of achieving the legitimate aim. However, if less discriminatory measures could have been taken to achieve the same objective, then that might imply that the treatment was not proportionate. It is necessary to carry out a balancing exercise which takes into account the importance (to the Respondent) of achieving the legitimate aim, and the means adopted to pursue that aim, in comparison to the discriminatory effect of the treatment. It is unnecessary that the Respondent demonstrate that it had itself carried out the necessary balancing exercise; what matters is that the tribunal carries out that exercise, based on the evidence presented at the tribunal hearing.

121. If a Respondent employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for that Respondent to show that the treatment was a proportionate means of achieving a legitimate aim.

122. When considering what the Respondent knew (and/or what it "could not reasonably have been expected to know"), the relevant time is the time at which the (alleged) unfavourable treatment occurred. Naturally this might mean that different decisions on the Respondent's knowledge are reached in relation to different allegations of unfavourable treatment, including, for example, a decision to dismiss and a decision to reject an appeal.

Victimisation

123. Section 27 EQA reads in part:

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.

124. There is an infringement if (a) a claimant has been subjected to a detriment and (b) she was subjected to that detriment because of a protected act. The alleged victimiser's improper motivations might be unconscious or conscious.

125. A person is subjected to a detriment if they are placed at a disadvantage. There is no need to prove that their treatment was less favourable than another's.

126. In terms of what constitutes a protected act, a broad interpretation should be applied to "any other thing for the purposes of or in connection with this Act" as per 27(2)(c). It is not a requirement that the alleged protected act involves an assertion that there has been a breach of the Equality Act, since that is covered by s 27(2)(d).

127. As per section 27(2)(d), an act may be a protected act where the allegation is either express or implied. There is no requirement for the claimant to have specifically mentioned the phrase "Equality Act" or to have used specific words such as "discrimination" or "disability". However, to be a protected act in accordance with 27(2)(d) the allegation relied on must assert facts which, if true, could amount to a breach of Equality Act 2010. Where an employee makes an allegation of wrongdoing by the employer, but without asserting (either expressly or by implication) that the wrongdoing was a breach of the Act (eg that it was less favourable treatment because of a protected characteristic, or harassment related to a protected characteristic, etc) then the allegation does not fall within section 27(2)(d).

128. To succeed in a claim of victimisation the claimant must show that she was subjected to the detriment because she did a protected act (or because the employer believed she had done or might do a protected act). Where there has been a detriment and a protected act then that is not sufficient, in itself, for the complaints of victimisation to succeed. The tribunal must consider the reason for

the claimant's treatment and decide what (consciously and/or subconsciously) motivated the employer to subject the claimant to the detriment. This will require identification of the decision-maker(s) and consideration of the mental processes of the decision-makers. If the necessary link between the detriment suffered and the protected act is established, the complaint of victimisation succeeds. The Claimant does not succeed simply by establishing that "but for" the protected act, she would not have been dismissed (or subjected to another detriment).

129. The Claimant does not have to persuade us that the protected act was the only reason for the dismissal or other detriment. If the employer has more than one reason for the dismissal (or other detriment), the Claimant does not have to establish that the protected act was the principal reason. The victimisation complaint can succeed provided the protected acts have a "significant influence" on the decision making. For an influence to be "significant" it does not have to be of great importance. A significant influence is rather "an influence which is more than trivial". See Igen v Wong 2005 ICR 931 and Villalba v Merrill Lynch and Co Inc 2007 ICR 469.

130. A victimisation claim might fail where the reason for the dismissal (or other detriment) was not the protected act itself but some feature of it which could properly be treated as separable, such as the manner in which the protected act was carried out. See Martin v Devonshires Solicitors 2011 ICR 352.

131. Section 136 applies to victimisation complaints. Therefore, the initial burden is on the claimant to show that there are proven facts from which the tribunal could decide, in the absence of any other explanation, that the respondent has contravened section 27. If the Claimant does that, the burden then passes to the respondent to prove that victimisation did not occur. If the respondent is unable to do so, the tribunal is obliged to uphold the claim.

Unfair Dismissal

132. Part X of the Employment Rights Act 1996 ("ERA") contains provisions relating to an employee's right (specified in section 94) not to be unfairly dismissed.

133. Section 98 ERA states, in part:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or

> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

134. Usually, provided the respondent persuades the tribunal that it has met the requirements of subsection 98(1), then the dismissal is potentially fair, which (usually) means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996. In considering this general reasonableness, taking into account the respondent's size and administrative resources. Typically, the tribunal's analysis includes the question of whether the respondent carried out a reasonable process prior to making its decisions. In terms of the sanction of dismissal itself, the tribunal decides whether or not this particular respondent's decision to dismiss this particular claimant fell within the band of reasonable responses in all the circumstances. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure by which that decision was reached. (Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23 CA). In carrying out the analysis, it is important for the tribunal to make sure that it does not substitute its own decisions for those of the employer. In particular, it is not relevant whether the tribunal members would have applied a sanction short of dismissal, or carried out a further stage of investigation, etc, so long as the employer's decisions were not outside the band of reasonable responses.

135. In this case, the Respondent has conceded that the dismissal was unfair applying the tests set out in section 98(4). However, that concession is only on specific limited grounds, and, further, it is the Respondent's position that it would have been able to show that it met the requirements of section 98(1). Therefore, it is still necessary to make some findings and decisions about the section 98 issues as they will be relevant to the remedy outcome.

136. In terms of the basic award, section 122(2) of the Employment Rights Act states:

> Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

137. Section 123(6) says, in relation to compensatory award:

> Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

138. Section 123 provides tribunals with a broad discretion to award such amounts as is considered just and equitable in all the circumstances having regard to the loss suffered by the claimant because of the unfair dismissal.

139. As part of the assessment of compensation the tribunal must decide whether it is just and equitable to make a reduction it would otherwise make following the guidance given by the House of Lords in Polkey and A E Dayton Services. For example, a tribunal might decide that if the unfair dismissal had not occurred the employer could or would have dismissed fairly. If so, the tribunal might decide that it is just and equitable to take that into account when deciding what was the claimant's loss flowing form the unfair dismissal. In making such an assessment there are a broad range of possible approaches to the exercise. The tribunal is assessing the chances of various possible outcomes, rather than making a binary decision on the balance of probabilities.

140. In some cases, it might be just and equitable to restrict compensatory loss to a specific time period because the tribunal concludes that that was the period of time after which following a fair process a fair dismissal (or some other fair termination of employment) would have inevitably taken place. In other cases, the tribunal might decide to reduce compensation on a percentage basis to reflect the percentage chance that there would have been a fair dismissal. If the tribunal thinks it is just and equitable to do so, then it might combine these. For example, award 100% loss for a certain period of time followed by a percentage of the losses after the end of that period. There is no single "one size fits all" method of carrying out the tasks. The tribunal must act rationally and judicially but its approach must always be tailored specifically to fit the circumstances of the case in front of it.

141. When performing the exercise the tribunal must also bear in mind that when it is asking itself question *"what are the chances that the claimant would have been dismissed if the Respondent had acted fairly?"*, it is not asking itself would a hypothetical reasonable employer have dismissed. It must instead analyse what this particular respondent would have done, including asking *"what are the chances of this particular respondent deciding to dismiss had the unfair dismissal not taken place and had the respondent instead acted fairly and reasonably?"*. See Grantchester Construction v Attrill [2013] UKEAT 0327/12.

Employer's "reason" for dismissal

142. As mentioned, (what is now) section 98(1) ERA requires the Respondent to show the "reason" (or "principal reason") for the dismissal. The Court of Appeal discussed the meaning of the word "reason" in this context in Abernethy v Mott, Hay and Anderson [1974] I.C.R. 323

> *A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee. If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason. He may knowingly give a reason different from the real reason out of kindness or because he might have difficulty in proving the facts that actually led him to dismiss; or he may describe his reasons wrongly through some mistake of language or of law. In particular in these days, when the word "redundancy" has a specific statutory meaning, it is very easy for an employer to think that the facts which have*

led him to dismiss constitute a redundancy situation whereas in law they do not; and in my opinion the industrial tribunal was entitled to take the view that that was what happened here: the employers honestly thought that the facts constituted redundancy, but in law they did not.

So the reason for the dismissal was not redundancy but something else. The tribunal found that the principal reason for the dismissal related to the capability of the applicant for work of the kind which he was employed to do

143. It is the actual thought processes of the person (or group) taking the decision to dismiss that have to be analysed, and the tribunal must make findings of fact about what set of facts/beliefs caused that person (or those persons) to decide to dismiss the Claimant. This is the analysis required by section 98(1)(a), and it is separate and distinct from what is required by section 98(1)(b).

144. As per subsection (1), the dismissal will be unfair if the employer fails to show the (principal) reason for the dismissal [s98(1)(a)] and, alternatively, the dismissal will be unfair if the employer shows the (principal) reason for the dismissal, but fails to demonstrate that that reason either falls into one of the categories in subsection (2) or falls into the category "SOSR" (as discussed in more detail below) [s98(1)(b)]

145. Once the findings of fact have been made, as required by section 98(1)(a), if the "reason" is not the one which the employer claimed, then the dismissal is unfair. If it is the "reason" which the employer claimed, then section 98(1)(b) requires the tribunal to decide what "label" should be placed on the "reason". It is not necessarily fatal to the employer's defence if it makes a mistake about the correct choice of "label" for the reason. Eg, on the facts of Abernethy itself, the employer had thought (or at least stated), at the time of dismissal, that the label was "redundancy". However, on a true analysis of the employer's actual thoughts and beliefs, the legally accurate label for its dismissal reason was "capability". In that case, while the employer had stated the label was "redundancy" at the time of the dismissal, by the time it entered its response to the tribunal claim, it relied on, as alternatives, either "redundancy" or "capability". The first instance tribunal and the appellate courts were all satisfied that the Respondent had been entitled, in its pleadings, to rely on this alternative label, and that the fact that it had not been mentioned sooner did not mean that it had failed to demonstrate a fair reason for the dismissal. Importantly, the actual factual reasons for why the employer decided to terminate employment did not change, only the legal label, ie the particular category within what is now section 98(2) ERA.

146. While in Abernethy, the employer had referred to the correct label for the dismissal reason as early as its formal response to the tribunal claim, subsequent cases have confirmed that it is not necessarily fatal for the employer to leave it until much later to seek to amend it statement of case. Indeed, in some circumstances, the tribunal might decide that the dismissal is not unfair, even though it decides that the correct "label" is one which the employer did not rely on. Eg Screene v Seatwave Ltd UKEAT/0020/11 (tribunal decided the label was "conduct" rather than "capability"); Hannan v TNT-IPEC (UK) Ltd 1986 IRLR 165, EAT, (tribunal decided the label was "SOSR" rather than "redundancy"); Nwaki v Tube Lines Ltd EAT 0117/18 (tribunal decided the label was "illegality" rather than "SOSR").

147. Those cases do not, however, establish a general principle that it does not matter what the pleadings state as the label or that the tribunal must always examine each of the categories within section 98(2) as well as "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held" before declaring that the employer has failed to discharge the burden of section 98(1)(b). In those cases, the Respondent had made clear to the employee at the time of the dismissal, and to the tribunal during the hearing, what its "reason" for the dismissal was in the Abernethy sense (ie the set of facts or beliefs which caused it to dismiss).

148. Where the "reason" itself (not merely the label) changes between the dismissal decision and the tribunal proceedings, then the dismissal is likely to be unfair. Eg Hotson v Wisbech Conservative Club [1984] ICR 859; it was not permissible for the tribunal to decide that the dismissal was for a fair reason, namely conduct, rather than the originally pleaded reason of capability, because dismissing someone because they are believed to have stolen stock or cash is for a different reason than dismissing them because they are believed to have been incompetent in maintaining accurate records of stock and cash.

149. In Devonshire v Trico-folberth Ltd [1989] I.C.R. 747, it was recognised that a dismissal because of unsatisfactory attendance record (attendance in the past, up to the date of dismissal) was for a different reason than dismissal for medical capability (the belief that the employee would not be fit to do the job in the future). Notably, the original decision had been on the former ground, and it was the tribunal's opinion that that would have hypothetically been a fair dismissal. However, on appeal, the employer had disavowed the original dismissal reason and decided to confirm the dismissal decision, but substituting the latter reason. This was deemed to be an unfair dismissal, and the Court of Appeal upheld the decision to award compensation to the employee, notwithstanding the tribunal's opinion that the dismissal for the original reason would have been fair.

150. The "label" which the employer maintains is the correct one during the internal processes could, in some cases, affect the decision about reasonableness under section 98(4). For example, in some cases at least, following a specific procedure designed for disciplinary issues might not be appropriate if the ultimate dismissal reason is not for conduct.

Redundancy

151. Section 139 ERA states in part

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

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

152. Within subsection 139(1), there are 4 states of affairs described: (a)(i); (a)(ii); (b)(i) and (b)(ii). These are sometimes called "redundancy situations", though the phrase does not appear in the legislation. In an unfair dismissal case, where the employer is relying on "redundancy" as the fair reason for dismissal, it is for the employer to demonstrate that (at least) one of these states of affairs existed. (ie that there was a "redundancy situation" as it is sometimes called). That is a question of fact for the tribunal to determine on the evidence. If there was such a state of affairs, then, as made clear by the House of Lords in Murray v Foyle Meats Ltd [1999] ICR 827, the tribunal has to go on to decide if the dismissal was, in the words of section 139(1), "wholly or mainly attributable to" the existence of that state of affairs. Again, in an unfair dismissal case, because of section 98(1) ERA, it is for the employer to satisfy the tribunal that that was the case. The issue is one of causation. Was the "redundancy situation" the reason that the employer decided to terminate the contract of employment.

153. The latter step is a crucial part of the reasoning. It is not merely sufficient for the tribunal to be satisfied that a redundancy situation existed. The reason in the Abernethy sense must be determined. See, for example, Kellog Brown and Root (UK) Ltd v Fitton & Ewer UKEAT/0205/16/BA UKEAT/0206/16 at para 24. In that case, the reason was found to be not the closure of a work location (though that would have been a redundancy situation) but the employees refusal to move to a new work location. Thus, the dismissal was not "wholly or mainly attributable" to the redundancy situation, and the correct label for the dismissal reason was not "redundancy".

154. In the reason for the dismissal, it is entirely irrelevant why the redundancy situation existed, and whether the employer could have done anything to avoid it. If those points come into the unfair dismissal considerations at all, then they might be considered as part of section 98(4).

155. More generally, as regards fairness of a redundancy dismissal, Williams v. Compair Maxam Ltd [1982] IRLR 83 set out guidance which is still relevant. Tribunal must remember that it is guidance, and does not replace the wording of section 98(4). where Browne-Wilkinson J

155.1 The employer should give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment, either with the Respondent, with an associated employer, or elsewhere.

155.2 The employer should consult (usually with representatives) as to the best means by which the desired management result can be achieved fairly and

with as little hardship to the employees as possible. In particular, the employer should seek to agree the selection criteria with the representatives, and be willing to continue to engage about the processes for applying those selection criteria

155.3 The employer should seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

155.4 The employer should seek to ensure that the selection is made fairly in accordance with these criteria and consider any representations representatives as to errors or unfairness in the selection.

155.5 The employer should consider whether it is possible to offer alternative employment instead of dismissing an employee

156. In Compair Maxam, the court was mainly focussed on situations where the unions would be heavily involved in the process. However, neither then, nor now, are employers able to justify the fairness of a procedure merely by arguing that the union, or other employee representatives, had agreed it. The other side of the same coin is that it is the reasonableness of the employer's decisions (and specifically whether they were outside the band of reasonable responses) that is relevant, and the tribunal must not substitute its own views.

SOSR – "some other substantial reason".

157. The second part of section 98(1)(b) refers to "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held". We will use the shorthand SOSR, as did each counsel in their submissions.

158. The use of the word "other" is significant. A dismissal reason does not fall withing the category SOSR if, in fact, it actually falls within one of the specific definitions in section 98(2). That being said, there is nothing whatsoever wrong with a respondent relying on SOSR as an alternative label, in addition to one or more of the specific reasons set out in section 98(2).

159. The importance of the need for the tribunal to clearly and precisely identify the factual reason for the dismissal before seeking to categorise it within Section 98 is exemplified by the discussion at paragraphs 47-56 of Ezsias v North Glamorgan NHS Trust [2011] I.R.L.R. 550 in the EAT, albeit the main significance of the issue in that case was which contractual procedure ought to have been followed. In summary,

159.1 Where an employer argues that it believed that a state of affairs had existed such that there has been a breakdown in working relationships between the claimant and colleagues AND that it was that states of affairs which caused it to dismiss, then that purported reason can fall within the category SOSR, and it can do so even if the employer also believed that it was the claimant who caused the state of affairs to exist by blameworthy conduct.

159.2 However, it is important for a tribunal to carefully distinguish cases where the employer believed that a state of affairs had existed such that there has been a breakdown in working relationships between the claimant and colleagues BUT the thing which caused it to dismiss the claimant was the conduct of the claimant which brought about that state of affairs. In such cases, the dismissal reason would be "conduct" rather than SOSR.

160. The tribunal must also bear in mind the comments in paragraph 58 of Ezsias.

> 58. ... We have no reason to think that employment tribunals will not be on the lookout, in cases of this kind, to see whether an employer is using the rubric of "some other substantial reason" as a pretext to conceal the real reason for the employee's dismissal.

161. More generally, the phrase "some other substantial reason" by itself does not describe an actual reason for dismissal. Rather the employer has to identify the actual reason AND ALSO show that that the Claimant was dismissed for that specified reason AND ALSO show that the specified reason should be deemed to be SOSR. If it does those things, then the dismissal reason was a potentially fair one. That usually means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996; (albeit, in this case, the Respondent has conceded that the procedure made the dismissal unfair.

162. In this case, the Respondent's position was set out in paragraph 65 of the amended the Grounds of Resistance:

> 65. The strong opinion of all those present was that it was not possible to place the Claimant in front of a customer or a new team. The manner in which the Claimant conducted herself within the selection meeting was that there was an absolute lack of regard for the Respondent from the Claimant. The view taken was that the Claimant had answered questions in a manner in which she was dismissive of senior management and the Respondent's business as a whole, those undertaking the assessment believing that she had no respect or desire to support the business. Given that the role in the Business Development Team required support, enthusiasm and commitment to securing new work for the Respondent, the Claimant's apparent complete disregard to the business demonstrated a complete breakdown within any current and future employment relationship between the Claimant and the Respondent. As stated in the follow-up letter sent to the Claimant on 5th April 2019, the new team would involve new ways of working that would involve buy-in and strong stakeholder management, and there was no evidence during the interview on the 22nd March to indicate that the Claimant would have these qualities. The Claimant was informed that she would receive, and did receive, pay in lieu of notice of three months' pay and was given the opportunity to appeal.

163. In considering the question of reasonableness, we analyse whether the Respondent had a reasonable basis to believe that the state of affairs was indeed as described in that paragraph. We analyse whether dismissal was outside the band of reasonable responses which a reasonable employer could adopt.

164. It is not the role of this tribunal to assess the evidence and to decide whether or not we would have dismissed for the reasons set out in paragraph 65 of the amended the Grounds of Resistance. It is not our role to substitute our own decisions for the decisions made by the Respondent. That being said, the mere fact alone that the employer decided that dismissal was the appropriate outcome

does not automatically mean that we are obliged to decide that their decision was one which a reasonable employer might reach. We may take into account all the circumstances, including what caused the state of affairs that led to the dismissal. In *Governing Body of Tubbenden Primary School v Sylvester UKEAT/0527/11*

[37] …. Where the substantial reason relied upon is a consequence of conduct (and in this case it can be no other), there is such a clear analogy to a dismissal for conduct itself that it seems to us entirely appropriate that a tribunal should have regard to the immediate history leading up to the dismissal. The immediate history is that which might be relevant, for instance, in a conduct case: the suspension; the warnings, or lack of them; the opportunities to recant and the like; the question of the procedure by which the dismissal decision is reached. It cannot, in our view, always and inevitably be trumped simply by the conclusion that there has been a loss of confidence without examining all the circumstances of the case and the substantial merits of the case, as s 98 would require.

[38] We are not at all unhappy, as a matter of principle, to reach the view that that is so, because as a matter of principle if it were to be open to an employer to conclude that he had no confidence in an employee, and if an Employment Tribunal were as a matter of law precluded from examining how that position came about, it would be open to that employer, at least if he could establish that the reason was genuine, to dismiss for any reason or none in much the same way as he could have done at common law before legislation in 1971 introduced the right not to be unfairly dismissed. Lord Reid in *Ridge v Baldwin* [1964] AC 40, [1963] 2 All ER 66, 61 LGR 369 observed that the law of master and servant was not in doubt; that an employer could dismiss an employee for any reason or none. It was to prevent the injustice of that that the right not to be unfairly dismissed was introduced. The right depends entirely upon the terms of the statute, but there is every good reason, we think, depending upon the particular facts of the case, for a tribunal to be prepared to consider the whole of the story insofar as it appears relevant and not artificially, as we would see it, be precluded from considering matters that are relevant, or may be relevant, to fairness.

[40] Context being everything, subject to the wording of the statute, in our view there is no force here in the argument addressed to us by Mr O'Dair that would refuse any entitlement of the tribunal to consider the background as part of the circumstances. Indeed, it might be thought that the citations from the *McAdie* case would permit it in most cases, though not plainly in that case itself. We are not saying that in every case in which there is a dismissal for some other substantial reason, where that reason is a breakdown of trust and confidence, that a tribunal *must* have regard to how that situation came about; to do so would be to repeat the error identified in *McAdie*. But what we are asked to do is to say that the tribunal is not entitled in an appropriate case to take such matters into account, and that we simply decline to do.

Appeal

165. In some circumstances unfairness at the original dismissal stage may be corrected or cured as a result of what happens at the appellate process: that will depend on all the circumstances of the case. It will depend upon the nature of the unfairness at the first stage; the nature of the hearing of the appeal at the second stage; and the equity and substantial merits of the case. If there is unfairness at the first stage, then that can potentially impact the overall fairness of the employer's decision to dismiss, even if the second stage is carried out to a high standard of fairness. See Taylor v OCS Group [2006] IRLR 614

Analysis and conclusions

The Claimant's non-appointment as Head of Bid Management

166. The decision to appoint Mr Hughes, and to do so without following any formal process, and without offering any other person the opportunity to be considered were decisions made by Mr Long on behalf of the Respondent.

167. We were satisfied that he genuinely believed that somebody needed to be appointed to the role and we were satisfied that he genuinely thought that there were advantages in appointing one of the incoming MPS employees. We were also satisfied that his principal motivation was that he wanted to appoint the person whom he thought would benefit the Respondent most.

168. We do not think that he decided to appoint Mr Hughes as part of a pre-formed plan to dismiss the Claimant. However, to decide on the Equality Act allegations, it is necessary for us to analyse his unconscious motivations as well as his conscious motivations. We also think it relevant that the Respondent had given conscious consideration in 2018 to the Claimant's potential reaction if a post with the title Head of Bid Management was filled without her being aware of the opportunity and that Ms Fry had been part of those discussions and that we have found that she would have been aware of Mr Long's intended course of action.

169. We have taken into account that Mr Long appeared to sincerely believe that his own assessment of whether Mr Hughes was the best person to appoint was all that was needed, and that he genuinely believed that so long as he, Mr Long, was able to come to a decision about whom to appoint, there was no need for any transparent process or formal recruitment exercise. However, the fact that he genuinely believed those things in this particular case does not, in itself, demonstrate that the Claimant's disability, and things arising from her disability, played no part when the Respondent failed to give the Claimant the opportunity to apply. We are not persuaded that every single (senior) position reporting to Mr Long was filled by his making a personal decision without any formal recruitment exercise. Therefore, we need to consider what it was, on this occasion, that persuaded him that no formal recruitment exercise was necessary and that no-one else need be invited to express interest.

170. It is necessary for us to decide whether there are facts from which we could decide, in the absence of an explanation from the Respondent, that the Respondent contravened section 39(2) EQA.

> (2) An employer (A) must not discriminate against an employee of A's (B)—
>
> (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;
>
> (d) by subjecting B to any other detriment.

171. We are satisfied that the creation of the Head of Bid Management role was an opportunity for promotion for the Claimant. Had she been appointed to it, it would have been a promotion in terms of salary and status. The Respondent did not

argue otherwise (and, on the contrary, argued that it was such a significantly more senior role that the Claimant was not suitable for it).

172. In our opinion, there are no facts from which we could decide that the failure to give the Claimant the opportunity to apply was disability discrimination within the definition in section 13 EQA. Any hypothetical comparator would be someone who, like the Claimant, was unable to attend the office, unable to work full-time and who had been absent from work since April 2018. They would also have been an employee of the Respondent for several years, and have had considerable experience in bid management. We have no reason to believe that any such hypothetical comparator (who did not have the same disability as the Claimant) would have been appointed, or considered, for the post by Mr Long.

173. We do not regard Mr Hughes as an appropriate actual comparator. Differences between his situation and that of the Claimant is that he was not absent from work due to illness and he was office-based, rather than working from home. He was someone who had TUPE transferred into the Respondent from MPS, rather than having been employed by the Respondent pre-transfer.

174. Thus, from the list of issues, our decisions on 3a and 3a are that Mr Hughes was not an actual comparator and that we have not been persuaded that the Claimant was treated less favourably, because of her disability, than a hypothetical comparator.

175. The Claimant had held senior positions within the bid management function, as Mr Long knew. In particular, as he also knew, she had held a post Head of Bid Management (North). We do not think he went through a mental process of "I might have considered Pauline for this job, but she is not here and so I won't". Rather, despite the fact that she was a long-serving and talented employee within the relevant business area, he gave no thought to allowing her to be considered. We take account of (a) the fact that she was no longer in that role as of early 2019 and (b) the fact that the role was one of two which between them covered the whole country (as opposed to the new role covering the whole country) and (c) the fact that Mr Long asserts the duties and requirements of the new role were significantly different to the old Head of Bid Management (North) role. However, there are facts from which we could decide that Mr Long would have at least considered the possibility of appointing the Claimant if it were not for the facts (i) that the Claimant had been absent on sick leave from April 2018 onwards and (ii) that the Claimant, since her injury in July 2015, had ceased working in the office and had worked from home.

176. The Claimant's not being given the opportunity to apply for the role was unfavourable treatment. It is not necessary for her to prove that she was more likely than not to have been appointed had she been considered. The Claimant was placed at a disadvantage by Mr Hughes' appointment to the role of Head of Bid Management, without any opportunity for her to comment on the similarity of the role to the post which she had done up to 2017 and without any other opportunity to express interest in the role, or to ask to be considered for it.

177. The Claimant's sickness absence was caused by her disability. The fact that the Claimant was working from home was also caused by her disability.

178. The burden has shifted to the Respondent to prove that the unfavourable treatment was not because of her sickness absence and not because of her being absent from the office and working from home. We take account of the fact that, like the Claimant, the other Bid Managers (including WS) were not considered for appointment. We take account of the Respondent's argument that the Claimant did not have as much business development and sales experience as Mr Hughes. However, the Respondent has not discharged its burden of persuading us that the Claimant's sickness absence was not part of the reason for the unfavourable treatment (being the failure to give the Claimant the opportunity to apply for the post). Further, the Respondent has not discharged its burden of persuading us that the fact that the Claimant was working from home was not part of the reason for the unfavourable treatment.

179. The Respondent has not relied on section 15(1)(b) (that it can show that the treatment - the failure to give the Claimant the opportunity to apply for the post - was a proportionate means of achieving a legitimate aim). Furthermore, even to extent that the Respondent believed that appointing Mr Hughes might have been a means towards seeking to achieve a legitimate aim, it would not follow that it was proportionate to fail to allow the Claimant the opportunity to apply for the post. She may, or may not, have been able to demonstrate that appointing her would have been just as likely to help the Respondent to achieve its hypothetical legitimate aim.

180. Thus, from the list of issues, our decision on item 4a is that the Respondent contravened section 39(2)(b) EQA by discriminating against her within the definition in section 15 EQA. The issue of what percentage chance the Claimant had of being appointed as Head of Bid Development had the Respondent not contravened EQA in this way will be considered at the remedy hearing

181. In the alternative, had we not decided that this was a promotion opportunity, there would have been a contravention of section 39(2)(d) EQA.

The Claimant's Dismissal

182. Our decision is that the reason that the Respondent dismissed the Claimant is that Mr Hughes decided that he did not wish to work with her because of the comments that she made during the meetings with Mr Hughes and Ms Nugent-Wadsworth, where: (i) she queried the fact that the Respondent had appointed Mr Hughes to a role which the Claimant thought she might have been suitable for, and did so without following any transparent process, or asking her if she was interested; and (ii) she stated her opinion that the Respondent had failed to make reasonable adjustments for her since she suffered her injury, and made clear that she would require reasonable adjustments to be made for her in the future.

183. The decision was primarily Mr Hughes', but he made sure to get Mr Long's approval. Mr Farrell played no part in the actual decision to dismiss.

184. Mr Hughes decision that the Claimant should be dismissed had been made earlier than 18:43 on 27 March 2019 which was when Ms Nugent-Wadsworth sent her email to Mr Long. He had already discussed with Mr Long that he wished to dismiss the Claimant and he instructed Ms Nugent-Wadsworth to set out the

options for what justification the Respondent could use for the dismissal. That email incorrectly stated that "we do not believe as a panel of 3" that the Claimant "should be given a role within the new structure". We acknowledge what Mr Farrell said immediately after the interview, but he had never been invited to make any formal decisions about appointing the Claimant to any particular role, or about dismissing her.

185. None of the three people on the panel believed that a dismissal because of redundancy was the appropriate outcome. The three of them did not discuss, as a panel, that the Claimant should, or should not, be appointed to any of (i) Bid Manager; (ii) Senior Bid Manager; (iii) Business Development Manager.

186. We are not satisfied that, at the time, Mr Hughes genuinely considered the Claimant's comments or attitude to be so bad that dismissal for those comments was justified. As discussed in the findings of fact, he cannot recall what they were, and could not do so a short time afterwards to Watson or Woodcock. The comments were not so bad that he thought it necessary to make notes of them despite the strong criticism he has made of them.

187. The hypothetical options of a conduct or performance capability dismissal were options that Mr Hughes and Ms Nugent-Wadsworth were aware of. Had the alleged remarks been, in their opinion, sufficient to justify going down such a route, then they would have made notes of the remarks and, at the least, given that option more prominence in the discussions with Mr Long.

188. The hypothetical option of dismissing by reason of redundancy on the basis that the Claimant could not perform the duties of the Bid Manager role was not overlooked or misunderstood by Mr Hughes. Likewise, he had the input of Ms Nugent-Wadsworth and Ms Fry (a solicitor) as well as Mr Long. The express decision made at the time, having considered this possibility, was that there were no good (enough) grounds to dismiss by reason of redundancy.

189. We are not satisfied that the real reason for the 29 March dismissal notification was that the Respondent genuinely believed in the reasons set out in the 5 April letter. On the contrary, we are satisfied that the reasons for the dismissal were that Mr Hughes did not wish to have the Claimant on his team, in light of the comments made during the consultation about his appointment, and the comments she made about the need for adjustments, and the difficulties she told him about that she had encountered when seeking to access WGC and access the Respondent's IT systems and to use the voice-activated software the Respondent had provided.

190. Furthermore, and in any event, that even if the reasons set out in that letter had been genuine, the Respondent does concede that there was no fair process (as Woodcock and Watson decided in 2019). It is our assessment that a dismissal for the reasons set out in the 5 April 2019 was outside the band of reasonable responses. The letter alleges that the Claimant had no "respect or desire to support the business". In 2016, it had been the Respondent who had argued that she was not fit to return, while the Claimant had fought hard for that. In 2017, it had been the Claimant who pressed the Respondent to do the necessary work so that she could attend WGC, and the Respondent who had been slow to do that.

To the extent (if at all) that the Claimant's enthusiasm might have waned by March 2019, the Respondent failed to take account of the Claimant's ill-health absence and her bereavement. Furthermore, rather than acknowledge that the lack of software access and building access was a legitimate cause of frustration, the Respondent treated this as moaning, and not being a team player. To the extent that it was argued that Mr Hughes was not happy to put the Claimant in front of a client, there was no attempt to assess her good track record with clients over the years or Mr Critchley's praise of her in 2017, and no attempt to discuss what adjustments needed to be made to allow her to meet clients. No reasonable employer would have dismissed a long-serving employee, with an outstanding track record, on the basis that 2 people, Ms Nugent-Wadsworth and Mr Hughes, who had had no prior dealings with her had formed the view, from what she allegedly said in redundancy consultation meetings, while the employee was on long term sickness absence, that the employee was too negative to remain in employment.

191. On the basis of the binding authority of Devonshire v Trico-folberth Ltd, we accept that, in principle, a decision on appeal can result in the employer's dismissal reason (for the purposes of considering an unfair dismissal claim) can change on appeal, both in terms of the factual basis (the reason in the Abernethy sense) and the categorisation of the reason under section 98.

192. In this case, we are not satisfied that Mr Watson genuinely believed that dismissal by reason of redundancy was appropriate. We say this because:

192.1 He had been minded to reinstate, until steered off that course by Long / Miles / Fry

192.2 He was taken off the appeal by Fry for Woodcock to deal with the discrimination aspects

192.3 When questioned, he could not give a clear explanation of what the facts were that led him to state the reason was redundancy beyond saying (which we accept is accurate) that the mere fact alone that there were vacancies did not mean that a dismissal could not be by reason of redundancy

192.4 He could not give us a clear explanation of what aspects of Ms Nugent-Wadsworth's opinion (as stated to him in his interview with her) of why the Respondent had not dismissed the Claimant be reason of redundancy he thought were in error. He said he had known her a long time and he thought – based on past experience - it was possible that she was mistaken. However, he could not give a reason to say that she was mistaken on this occasion.

192.5 He did not seek any details of the scores of the appointed candidates. (Neither we, nor he, have seen evidence that she scored lowest.) He did not seek details of what vacancies existed after the 29 March notification to the Claimant, or at the time of the appeal outcome.

192.6 The Respondent did not make the redundancy payment after sending the appeal outcome letter.

193. Mr Watson's genuine reasons for sending the 24 October 2019 letter were that he had been dissuaded from reinstatement, and, following Ms Fry's intervention, sent a letter which was based on Mr Woodcock's report, notwithstanding the fact that it had been Mr Watson's responsibility to make the decision.

194. Further, even if it had been Mr Watson's genuine opinion that a hypothetical redundancy dismissal could be justified, he did not reach that after discussing the possible option with the Claimant and seeking her views, despite having said – 6 months before issuing the appeal outcome letter – that he would revert back to her after gathering more information.

Unfair dismissal questions in the list of issues

195. For 2a, we have made our findings above as to why the Claimant was sent the 5 April 2019 letter and why she was sent the 24 October 2019 letter.

196. For 2b, the answer is "no".

197. For 2c, the dismissal reason was not redundancy. A genuine belief by an employer that there is a state of affairs such that the Claimant has a bad relationship with colleagues or customers, or is unenthusiastic about her job or her employer are all the type of thing that could, in an appropriate case, fall within the category SOSR. However, that is not the case here, because that was not the genuine dismissal reason.

198. For 2d, a reason "being available" to an employer does not mean that it was the reason for dismissal. Hypothetically, when conducting a redundancy selection process, an employer might interview / test etc the existing employees and, if they fail to meet a benchmark score, dismiss, even if that leaves vacancies which are to be filled by external recruitment. However, the Respondent has not shown that it did anything similar here. It has not shown that there was any such benchmark pre-planned in advance (and admits that there was not) and has not shown that the Claimant was the lowest scoring applicant for Bid Manager. It is true that if the employer had carried out the redundancy exercise differently – with different criteria - then it might have come up with some process which hypothetically resulted in a fair dismissal of employees including, hypothetically, the Claimant. However, in the actual process which it did follow, redundancy was not "available" to the employer because the panel were satisfied that she met the standards to be Bid Manager.

199. For 2e, had the Claimant not been unfairly dismissed on 29 March, there is a 100% chance that she would have been in the post of Bid Manager from April 2019 onwards. She could not have been fairly dismissed by reason of redundancy as part of the exercise which commenced in February 2019, because that exercise was over. To dismiss by reason of redundancy after April 2019, a fresh exercise would have had to commence. Issues about what might have happened to the Claimant's employment longer term (including hours that she could work, home or office, duration of long term sickness and the consequences of that, etc, are matters for the remedy hearing).

200. For 2f, as set out above, the Respondent's reasons set out in the 5 April letter were intended to disguise its actual reasons for dismissing the Claimant.

Direct disability discrimination questions from the list of issues

201. For ease of reference, and as set out above, our decisions on 3a and 3a are that Mr Hughes was not an actual comparator and that we have not been persuaded that the Claimant was treated less favourably, because of her disability, than a hypothetical comparator.

202. For 3c, it is our decision that the dismissal reasons were that Mr Hughes decided that he did not wish to work with the Claimant because of the comments that she made during the meetings with Mr Hughes and Ms Nugent-Wadsworth, where: (i) she queried the fact that the Respondent had appointed Mr Hughes to a role which the Claimant thought she might have been suitable for, and did so without following any transparent process, or asking her if she was interested; and (ii) she stated her opinion that the Respondent had failed to make reasonable adjustments for her since she suffered her injury, and made clear that she would require reasonable adjustments to be made for her in the future.

203. The direct discrimination argument fails, because it was not the Claimant's particular disability that was the cause of the dismissal. If there had been a hypothetical comparator whose circumstances were as set out in the preceding paragraph, but who had a different disability, then we have no reason to believe that they would have been treated any more favourably than the Claimant.

Discrimination Arising from Disability questions from the list of issues

204. For ease of reference, and as set out above, our decision on item 4a is that the Respondent contravened section 39(2)(b) EQA by discriminating against her within the definition in section 15 EQA

205. For 4b, the dismissal reasons were that Mr Hughes decided that he did not wish to work with the Claimant because of the comments that she made during the meetings with Mr Hughes and Ms Nugent-Wadsworth, where: (i) she queried the fact that the Respondent had appointed Mr Hughes to a role which the Claimant thought she might have been suitable for, and did so without following any transparent process, or asking her if she was interested; and (ii) she stated her opinion that the Respondent had failed to make reasonable adjustments for her since she suffered her injury, and made clear that she would require reasonable adjustments to be made for her in the future.

206. Dismissal is unfavourable treatment.

207. The Claimant's reduced hours, periods of time off work on sick leave, difficulty accessing the Respondent's offices; and the perceived difficulty of making reasonable adjustments for the Claimant in the future were all matters arising in consequence of her disability. Given our findings as to the reason that the Claimant was dismissed, there are facts from which we could conclude that the unfavourable treatment was caused by something arising in consequence of her disability.

208. The burden shifts as per section 136 EQA. The Respondent has not discharged its burden. We reject the argument that the dismissal was for the reasons given by the Respondent.

Victimisation questions

209. For the alleged protected acts:

a – For 12 March 2019, we are satisfied that the Claimant made it clear to Mr Hughes and Ms Nugent-Wadsworth that she considered her treatment in not being considered for the new post was linked to her absence and the other matters she referred to (in particular difficulties in access to software and WGC). We are not satisfied she repeated the same comments on 22 March.

b – The Claimant did make clear on 12 March 2019 that she believed the Respondent had failed to make reasonable adjustments to enable her to work from home and had failed to make reasonable adjustments for her to access WGC

c - On 12 March, we are satisfied that the Claimant made clear to Ms Nugent-Wadsworth and Mr Hughes that she was implying that her demotion in 2017 was linked to her disability. She has not satisfied us that the same points were made again on 22 March.

D - The Claimant did not say in express terms that her selection for the at risk pool was because of disability. The closest she came to that, in our view, was the implication that, as a matter of logic, if she had been appointed as Head of Bid Management (rather than Mr Hughes) then she would not have been at risk. But she did not make a freestanding allegation that the reorganisation itself, or that fact that it placed her at risk was an act of discrimination.

210. The fact that the Claimant made the protected acts on 12 March 2019 was a significant contributory factor to the decision to dismiss her.

210.1 In particular, protected act (a) caused Mr Hughes to take against the Claimant, including informing Mr Farrell that interviewing her would not be pleasant, and persuading Ms Nugent-Wadsworth and Mr Long that there should be a dismissal.

210.2 Protected act (b) caused him to anticipate that having the Claimant on his team (a reduced team of 5) would cause him difficulties as she would be demanding that he implement reasonable adjustments that – based on what she herself was saying – previous line management had not successfully implemented. Our decision is that a large part of what Mr Hughes has alleged as negative attitudes towards the company comes from the fact that she was not more happy or grateful with the things that had been done by the Respondent since 2015, and the fact that he anticipated she also would not be content with measures which he put in place.

210.3 We do not think that Mr Hughes was particularly concerned or upset by allegations the Claimant made about the demotion in 2017, although her suggestion that what Mr Critchley had said to her then (about the strict

qualification criteria for the Lead of Tier 2) had not been followed when Mr Hughes was appointed, was part of his reasons for being dissatisfied by protected act (a).

211. We have considered whether the actual protected acts themselves can, or should be, regarded as separate from the manner in which the Claimant made the comments. In this case, we are entirely satisfied that it was the protected acts themselves (the implication that the Respondent had breached the Equality Act in the past, and the implication that it would need to take actions to avoid breaching it again in the future) which motivated Mr Hughes to form a dislike of the Claimant and a desire that she should leave the business. It was not her manner of delivery that was the issue.

212. For 5a, we have found that the burden of proof has shifted to the Respondent and the Respondent has not discharged the burden. The protected acts played a significant part in the decision to dismiss the Claimant on 29 March 2019.

Time Limits

213. The dismissal date was not 29 March because the Claimant was told on that date that the dismissal would be with notice. The effective date of termination was when she read the 5 April letter. That was prior to 12 April 2019, but the exact date does not matter as early conciliation commenced less than 3 months from (29 March or) 5 April and the claim form was submitted within a month of the end of conciliation.

214. The 22 March consultation meeting and the selection interview were inside the 3 month time prior to start of early conciliation. Although 12 March 2019 was not, that does not matter because none of the claims allege contraventions on that date, and, in any event, from the announcement of the redundancy process around 15 February 2019 to the disposal of the appeal is conduct we would have been likely to regard as extending over a period.

215. The date of the decision to appoint Mr Hughes was before the date it was notified to the Claimant (circa 14 February 2019). The date of the decision to appoint a new Head of Bid Management without notifying the Claimant is out of time.

216. We do regard it as so closely related to the reorganisation and redundancy that we should treat it as in time, as being part of conduct which extended over a period of time, being the decision to amalgamate MPS with the Respondent's teams, and to restructure. It was Mr Long who appointed the Claimant and it was he who signed off on Mr Hughes decision to terminate.

217. However, if we are wrong about that, then this is a case in which the balance of prejudice is in favour of granting a just and equitable extension. There is no particularly good reason for the Claimant not to have commenced early conciliation soon after the dismissal, and, had she done so, that might have brought the complaint about the Head of Bid Management in time. She could, of course, have started early conciliation before that. She had access to legal advice and had used it in the past. We do accept that she did not wish to rock the boat too much too soon because, as she told us, she was aware that it would be difficult to get a replacement job. The Respondent knew in August 2018 that if a Head of Bid

Management (for the job description drawn up by Mr Pace) was appointed, there might be legal issues. After the appointment of Mr Hughes, there was no delay in the Claimant raising her concerns (albeit not by way of a formal grievance). There is no relevant evidence (as far as we have been told) that has been destroyed. Although we accept witnesses memories do fade, Mr Long and Mr Hughes, as well as Ms Fry, were all available as witnesses. The prejudice to the Respondent of extending time, does not outweigh the prejudice to the Claimant.

Outcome and next steps

218. There will be hearing to determine remedy on 25 and 26 April 2022. Case Management Orders have been made separately.

Employment Judge Quill

Date: 20 January 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

24 January 2022

FOR EMPLOYMENT TRIBUNALS