Case Numbers: 2201536/2021

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mrs H Riley		**Premier Christian Communications Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 3-7 March 2022; 8-9 March 2022 (in chambers)**

BEFORE: Employment Judge A M Snelson **MEMBERS: Ms C Ihnatowicz Mr R Baber**

On hearing the Claimant in person and Mr M Jones, a solicitor acting in a private capacity, on behalf of the Respondents, the Tribunal unanimously determines that:

(1) The Claimant's complaints of unfair dismissal under the Employment Rights Act 1996 ('the 1996 Act'), ss94 and 98 are not well-founded.
(2) The Claimant's claim to be entitled to a redundancy payment under the 1996 Act, Part XI is not well-founded.
(3) The Claimant's complaint of wrongful dismissal is not well-founded.
(4) The Claimant's complaint of disability discrimination under the Equality Act 2010 ('the 2010 Act'), ss13, 15, and 20-21 is not well-founded.
(5) The Claimant's complaint of disability-related harassment under the 2010 Act, s26 is not well-founded.
(6) The Claimant's complaint of victimisation under the 2010 Act, s27 is not well-founded.
(7) The Claimant's claim under the Working Time Regulations 1998, regs 14 and 30 for compensation in respect of annual leave entitlement outstanding on termination is not well-founded.
(8) To the extent that they were presented outside the primary limitation period (three months plus the Early Conciliation period, if applicable), the claims were presented out of time and the Tribunal has no jurisdiction to consider them.
(9) Accordingly, the proceedings as a whole are dismissed.

REASONS

1 The Respondents are the corporate vehicle of a charity, Premier Christian Media Trust ('the Charity'). They broadcast across three radio stations and publish four magazines. They also disseminate material in the form of podcasts and through a number of websites and provide digital resources and training to many churches. More than half of their revenue comes from supporters' donations. Immediately before the redundancy exercise with which this case largely concerned they employed about 100 people.

2 The Claimant, Mrs Heather Riley, has for many years been affected by two conditions: Hashimoto's Thyroiditis ('Hashimoto') and ferratin and iron deficiency. It is common ground that, at all times relevant to this litigation, they have jointly and individually amounted in law to a disability. Having worked for the Respondents between 2000 and 2009, she returned to their employment on 8 January 2018, on this occasion as a part-time Content Administrator, and remained so employed until 31 October 2020. The contract was for a fixed term of one year and was extended at least once. Her duties consisted mostly of administrative tasks. The circumstances in which the employment ended were, as we will explain, unusual.

3 By a claim form presented on 1 April 2021, the Claimant brought complaints of unfair dismissal, wrongful dismissal, disability discrimination in various forms, harassment related to disability and victimisation, together with claims for a redundancy payment and compensation in respect of annual leave entitlement outstanding on termination, all of which were resisted on their merits and some also on the jurisdictional ground that they were brought out of time.

4 At a preliminary hearing for case management on 4 August 2021 Employment Judge Palca explored the dispute with the parties, gave directions and listed the matter for final hearing. In a comprehensive document sent out the same day, the judge defined the issues as they were presented to her. A very similar formulation was later substantially agreed as a joint list of issues ('LOI'), a copy of which, omitting content which is not relevant for present purposes, is appended hereto. We will return to that document very shortly.

5 The final hearing was held before us by CVP. The Claimant attended in person and presented her case with skill, moderation and courtesy. The Respondents were helpfully represented by Mr Jones, a solicitor by profession but acting in these proceedings in a personal capacity.

6 As noted at LOI, paras 19, 28.3 and 28.4 there were some points of disagreement as to the scope of the dispute. At the start of the hearing Mr Jones raised these with us. As to para 19, concerned with the complaint of direct disability discrimination, it was rapidly agreed that the 'additional comparators' listed by the Claimant were not put forward as formal, 'like-for-like' comparators. Rather, she relied on them only as broad, 'evidentiary' support for her claim. On this footing, Mr Jones told us that the Respondents could deal with her case and

his objection to para 19 was not pursued. Turning to paras 28.3 and 28.4, directed to the complaint of failure to make reasonable adjustments, we again reached a swift resolution on the Claimant explaining that the provisions, criteria or practices ('PCPs') here relied upon were, respectively, requirements for *employees* (not the Claimant alone) to travel to the office at specific times and to work longer hours. This having been made clear, Mr Jones's concerns were fully assuaged.

7 Having resolved the uncertainties just mentioned and dealt with minor housekeeping matters, we read into the case over the morning of day one. Evidence and submissions on liability took us from the afternoon of day one to lunchtime on day three. We heard Mr Jones's closing submissions followed by those of the Claimant on the afternoon of day three and then adjourned to allow the Claimant time (as she had requested) to prepare supplemental, written closing submissions. At that point we elected to reserve our judgment to spare the parties further inconvenience and costs and the parties were notified accordingly. The Claimant's written submissions were duly delivered at lunchtime on day four. Pursuant to permission given by us on day three, Mr Jones sent an email in reply on the afternoon of day four addressing one point in the Claimant's submissions. Our private deliberations occupied the remainder of day four and all of day five.

The Statutory Framework

Unfair dismissal

8 The first requirement of an unfair dismissal is a dismissal. An 'actual' dismissal occurs where the employer terminates the employee's contract of employment (with or without notice): Employment Rights Act 1996 ('the 1996 Act'), s95(1)(a).

9 A constructive dismissal occurs where the employee terminates the contract (with or without notice) in circumstances where he or she is entitled to terminate it without notice by reason of the employer's conduct (the 1996 Act, s95(1)(c)). This provision embodies the common law. The right of an employee to treat himself or herself as constructively dismissed arises where the employer has committed a repudiatory breach of the contract of employment. It may be lost if the employee affirms the contract as breached.

10 A claim for unfair dismissal must be brought before the end of the period of three months ending with the date of termination as extended where applicable by the Early Conciliation period, or within such further period as is reasonable where it was "not reasonably practicable" to present the claim in time (the 1996 Act, s111(2)).

Redundancy

11 The first requirement of a claim for a redundancy payment is a dismissal (the 1996 Act, s136(1), which corresponds with s95(1), summarised above). The second requirement is that the reason for the dismissal is that the employee was redundant (*ibid*, s135(1)). Redundancy arises (*inter alia*) where the requirements of the relevant business for employees to do work of a particular kind have ceased

or diminished, or are expected to do so (*ibid*, s139(1)(b)). A jurisdictional time limit of six months attaches to any claim (or 'reference') to an Employment Tribunal seeking a redundancy payment (*ibid*, s163(1)).

Wrongful dismissal

12 A dismissal effected in breach of the terms of a contract of employment (typically by failure to give due notice) is wrongful. A complaint of wrongful dismissal may be brought before the Employment Tribunal (the Employment Tribunals (England & Wales) Extension of Jurisdiction Order 1994, art 3). A jurisdictional time limit similar to that applicable to unfair dismissal claims applies (art 7).

The Equality Act 2010 claims

13 Direct discrimination based on specified characteristics, which include disability, is defined by s13 in (so far as material) these terms:

> **(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.**

By s23(1) and (2)(a) it is provided that there must be no material difference between the circumstances of the claimant's case and those of his or her comparator and that (for these purposes) the 'circumstances' include the claimant's and comparator's abilities.

14 In *Nagarajan* v *London Regional Transport* [1999] IRLR 572 Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

> **If racial grounds … had a significant influence on the outcome, discrimination is made out.**

In line with *Onu v Akwiwu* [2014] ICR 571 CA, we proceed on the footing that introduction of the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', etc in the pre-2010 legislation) effected no material change to the law.

15 Discrimination arising from disability is covered by the 2010 Act, s15, which, so far as material, provides as follows:

> **(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.**

16 In *Pnaiser v NHS England* [2016] IRLR 170 EAT, Simler J (as she then was), sitting in the EAT, summarised the meaning and effect of s15(1)(a) as follows (para 31):

> **… From these authorities, the proper approach can be summarised as follows:**

> **(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.**
>
> **(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.**
>
> **(c) Motives are irrelevant …**
>
> **(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links …**
>
> **…**
>
> **(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.**

17 Liability under s15 is excluded where 'A' shows that he/she/they did not know, and could not reasonably have been expected to know, that 'B' had the relevant disability (s15(2)).

18 The duty to make reasonable adjustments for disabled persons is covered by the 2010 Act, s20, the material parts of which state:

> **(2) The duty comprises the following three requirements.**
>
> **(1) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**

Failure to comply with a duty to make reasonable adjustments amounts to unlawful discrimination (s21(2)).

19 The duty to make reasonable adjustments does not arise where 'A' does not know, and could not reasonably be expected to know, that an interested disabled person has a disability and is likely to be placed at the relevant disadvantage referred to in s20(2) (sch 8, para 20(1)).

20 The 2010 Act defines harassment in s26, the material subsections being the following:

> **(1) A person (A) harasses another (B) if –**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of –**
> **(i) violating B's dignity, or**

> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **…**
>
> **(3) In deciding whether conduct has the effect referred to in sub-section (1)(b), each of the following must be taken into account –**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(4) The relevant protected characteristics are –**
> **…**
> **disability**

21 In *R (Equal Opportunities Commission) v Secretary of State for Trade & Industry* [2007] ICR 1234 HC, it was accepted on behalf of the Secretary of State that the 'related to' wording (in the Sex Discrimination Act 1975) did not require a 'causative' nexus between the protected characteristic and the conduct under consideration: an 'associative' connection was sufficient. Burton J did not doubt or question the concession. The EHRC Code of Practice on Employment (2011), which does not claim to be an authoritative statement of the law (see para 1.13), deals with the 'related to' link at paras 7.9 to 7.11. It states that the words bear a broad meaning and that the conduct under consideration need not be 'because of' the protected characteristic.

22 Despite the ample 'related to' formulation, sensible limits on the scope of the harassment protection are, we think, ensured by the other elements of the statutory definition. Two points in particular can be made. First, the Claimant must show that the conduct was unwanted. Secondly, the requirement for the Tribunal to take account of all the circumstances of the case and in particular whether it is reasonable for the conduct to have the stated effect (subsection (4)(b) and (c)) connotes an objective approach, albeit entailing one subjective factor, the perception of the complainant (s26(4)(a)). Here the Tribunal is equipped with the means of weighing all relevant considerations to achieve a just solution.

23 Central to the objective test is the question of gravity. Statutory protection from harassment is intended to create an important jurisdiction. Successful claims may result in very large awards and produce serious consequences for wrongdoers. Some complaints will inevitably fall short of the standard required. To quote from the judgment of Elias LJ in *Land Registry v Grant* [2011] ICR 1390 CA (para 47):

> **Furthermore, even if in fact the disclosure was unwanted, and the Claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The Claimant was no doubt upset … but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the Claimant to a 'humiliating environment' … is a distortion of language which brings discrimination law into disrepute.**

In determining whether actionable harassment has been made out, it may be necessary for the Tribunal to ascertain whether the conduct under challenge was intended to cause offence (*ibid*, para 13). More generally, the context in which the conduct occurred is likely to be crucial (*ibid*, para 43).

24 By the 2010 Act, s27, victimisation is defined thus:

> **(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 –**
>
> **…**
>
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**

When considering whether a claimant has been subjected to particular treatment 'because' he or she has done a protected act, the Tribunal must focus on "the real reason, the core reason" for the treatment; a 'but for' causal test is not appropriate: *Chief Constable of West Yorkshire v Khan* [2001] ICR 1065 HL, para 77 (*per* Lord Scott of Foscote). On the other hand, the fact of the protected act need not be the sole reason: it is enough if it contributed materially to the outcome (see *Nagarajan*, cited above).

25 Discrimination is prohibited in the employment field by s39 which, so far as relevant, states:

> **(2) An employer (A) must not discriminate against an employee of A's (B) –**
>
> **…**
> **(b) by subjecting B to any … detriment.**

A 'detriment' arises in the employment law context where, by reason of the act(s) complained of, a reasonable worker would or might take the view that he has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see *Shamoon v Chief Constable of the RUC* [2003] IRLR 285 HL.

26 Parallel protection against victimisation and harassment is enacted in ss 39(3) and 40(1) respectively.

27 The 2010 Act, by s136, provides:

> **(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.

28 On the reversal of the burden of proof we have reminded ourselves of the case-law decided under the pre-2010 legislation (from which we do not understand the new Act to depart in any material way), including *Igen Ltd-v-Wong* [2005] IRLR 258 CA, *Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437 EAT, *Laing v Manchester City Council* [2006] IRLR 748 EAT, *Madarassy v Nomura International plc* [2007] IRLR 246 CA and *Hewage v Grampian Health Board* [2012] IRLR 870 SC. In the last of these, Lord Hope warned (as other distinguished judges had done before him) that it is possible to exaggerate the importance of the burden of proof provisions, observing that, where the Tribunal is in a position to make findings, they have "nothing to offer".[1] That said, if and to the extent that they are in play, we take as our principal guide the straightforward language of s136. Where there are facts capable, absent any other explanation, of supporting an inference of unlawful discrimination, the onus shifts formally to the employer to disprove discrimination. All relevant material, other than the employer's explanation relied upon at the hearing, must be considered. In this regard we bear in mind the provisions governing codes of practice (see the Equality Act 2006, s15(4)) and questionnaires (the 2010 Act, s138) and the line of authority beginning with *King v Great Britain-China Centre* [1992] ICR 516 CA and ending with *Bahl v Law Society* [2004] IRLR 799 CA. We remind ourselves that s136 is designed to confront the inherent difficulty of proving discrimination and must be given a purposive interpretation.

29 By the 2010 Act, s123(1) it is provided that proceedings may not be brought after the end of the period of three months ending with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable. 'Conduct extending over a period' is to be treated as done at the end of the period (s123(3)(a)). Failure to do something is treated as occurring when the person in question decides not to do it (s123(3)(b)). Absent evidence to the contrary, a person is treated as deciding not to do a thing when he does an act inconsistent with it or, if he does no inconsistent act, on the expiry of the period within which he might reasonably be expected to do the thing (s123(4)). The 'just and equitable' discretion is to be used with restraint: its exercise must be the exception, not the rule (see *Robertson v Bexley Community Centre* [2003] IRLR 434 CA).

The Working Time Regulations 1998 claim

30 The Regulations provide (reg 14) for compensation to be paid to workers in respect of the proportion of annual leave entitlement accrued but untaken at the termination of their employment. Nothing turns here on the method of calculation.

Evidence

31 We heard oral evidence from the Claimant and her supporting witness, Mr Rick Easter, who was employed by the Respondents as a radio presenter from 1995 until 2020 or thereabouts. We also admitted in evidence brief statements in

[1] And see to similar effect the judgment of Lord Leggatt JSC in *Efobi v Royal Mail Group Ltd* UKSC 33, especially at para 38.

support of her case in the names of Ms Crystal Callow, who worked for the Respondents between 1993 and 2007, latterly at least as an HR Administrator, and Mr David Rose, an employee of the Respondents from 2002 to 2018, latterly as a radio presenter. These witnesses were not produced because Mr Jones did not wish to challenge any part of their evidence. On behalf of the Respondents, we heard oral evidence from Mr John Buckeridge, at all material times up to 1 March 2020 Deputy CEO and thereafter Director of Publishing, and Ms Suze Gurmeseva, who has provided HR advisory services to the Respondents as a contractor since March 2019.

32 In addition to the testimony of witnesses, we read the documents to which we were referred in the substantial agreed bundle prepared by the Respondents.

33 We also had the benefit of the Claimant's comprehensive opening written submissions and the written closing submissions of both sides.

The Facts

34 We have had regard to all the evidence but it is not our function to recite an exhaustive history or to resolve every evidential conflict. The facts essential to our decision, either agreed or proved on a balance of probabilities, we find as follows.

The Claimant's condition and its effects

35 It is convenient for presentational purposes to treat the Claimant's two relevant conditions, to which she has been subject throughout the period with which this case is concerned, as giving rise to a single disability.

36 The Claimant told us without challenge that her disability is incurable and must be managed by means of lifelong medication. It produces a number of symptoms, including pain, extreme fatigue, impaired mobility, severe discomfort on standing or sitting, gastric and gynaecological complications, interruption of sleep and significant impairment of memory, concentration and cognitive functions generally. The symptoms have a substantial impact upon her ability to enjoy social events and activities. No doubt they made commuting to and from the office troublesome at times. They also impaired her ability to carry out some of her duties during her time with the Respondents.

37 The main treatments which the Claimant has received for her disability have consisted of daily medication and occasional iron infusions.

38 During her employment by the Respondents the Claimant was absent from work from time to time on medical grounds. These absences resulted on occasions from the need to attend medical consultations related to her disability and/or to receive iron infusions. It would be surprising if there had been no other absences attributable to separate medical problems. We have no information as to her overall level of sickness absence[2] or as to the proportion attributable to the disability.

[2] Besides the second-hand evidence (see below) that the CEO judged the 2019 level unsatisfactory

39 Despite the difficulties caused by her disability, the Claimant is, we find, an independent-minded and resilient person. She is used to managing her condition. And provided she feels well enough, she is determined not to let it prevent her from taking on tasks and challenges that appeal to her. This explains her resentment of Mr Buckeridge's comment (to which we will return) that she should not take on extra (unpaid) work outside her contractual hours. Her ability to manage her condition also explains why she did not approach the Respondents at any time to seek adjustments to her duties or work routines.

The Respondents' knowledge of the Claimant's condition

40 The Respondents accept that, at all material times, they (as a corporate entity) had knowledge of the Claimant's disability. She referred to the condition (without explanation) in a staff information form completed when her employment began in January 2018. We accept that she made Ms Charmaine Noble-McClean, her then line manager, aware of it at around the same time and that she responded by lending support and agreeing flexible working arrangements on an ad hoc basis. The Claimant did not at any time enter any detail of any disability or health issue on the Respondents' digital HR system.

41 Mr Buckeridge did not know that the Claimant was affected by any significant medical condition until 17 March 2020, when he saw an email exchange in which the Claimant explained that she had Hashimoto's, an autoimmune condition, for which she medicated daily and which might place her in a vulnerable category for the purposes of the new Covid-19 measures then being introduced. Before becoming her line manager in or around December 2019, the only information he had relating to her health was conveyed in an oral comment of Mr Peter Kerridge, the CEO, in late 2019, to the effect that her sickness absence record in 2019 had been unsatisfactory.

December 2019 – April 2020

42 On 1 December 2019 the Claimant entered into a fresh contract. She retained the title of Content Administrator but her duties changed, becoming focussed on administration connected with a new magazine title which the Respondents had purchased in October 2019, *Woman Alive*. By agreement, her weekly hours increased from 14 to 21[3] and she was permitted to work from home on two of her three working days, but required to attend the central London office at least one day per week. She was free to choose which days of the week to work. She negotiated these flexible terms in order to accommodate her child care commitments and to keep commuting, which she found burdensome, to a minimum.

43 With the new contract came a change in the Claimant's reporting line. She worked through 2019 as part of the radio content team under Ms Noble-McClean. From October onwards she also did some administrative work on *Woman Alive*.

[3] The intention initially was that the increase in hours would enable the Claimant to provide administrative support for three magazines, not just *Woman Alive*, but a decision was taken early on to require her to focus on that title only.

After entering into the new agreement on 1 December, she was managed by Mr Buckeridge (already mentioned) and worked alongside the newly-appointed editor, Ms Tola-Doll Fisher. It was envisaged that Ms Fisher would become the Claimant's line manager in April 2020.

44 The Claimant's duties pursuant to the December 2019 contract included a range of administrative tasks but Mr Buckeridge impressed upon her the critical importance of two in particular: reducing the large volume of unanswered emails sent to the *Woman Alive* inbox and mastering and operating the purchase order/invoicing administration on the IT system. Once these needs had been met, he told her that the next priority would be to arrange for her to receive social media training with a view to her engaging with various social media platforms and (among other things) publishing posts on them on behalf of *Woman Alive*.

45 Mr Buckeridge told us that in his view the Claimant's productivity in her role was low. He attributed this to her tendency to favour work activities which were attractive and interesting to her over duller, more routine duties. He knew that she was interested in creative work (writing copy in particular) and had ability in that area, but was anxious to ensure that her energies were channelled into performing the core administrative role to which she had been appointed. We find that his evidence on these matters was sincere and that it was understandable that he formed the impressions he did.

46 A 'catch-up' meeting took place between the Claimant and Mr Buckeridge on 22 January 2021. It was a positive meeting, conducted in a friendly and constructive spirit. The main points were the following.

(1) Mr Buckeridge asked the Claimant to consider attending the office more than once per week. The reason was that he thought that her role was better suited to an office environment and she could be better supported and her productivity improved if she attended more frequently. He did not instruct her to attend more often than the one day per week required by her contract (the Claimant made no such suggestion). She explained her child care obligations and mentioned the awkward and time-consuming commute from and to her home in Watford, but agreed to be flexible.
(2) The Claimant raised the subject of training and Mr Buckeridge assured her that she would be provided with the training she required.
(3) The Claimant expressed interest in carrying out writing work in her own time (unpaid). Mr Buckeridge replied that he did not wish her to do that. He voiced concern about the dangers of blurring the line between work and non-work activities. He conveyed his view that she should not be distracted from her administrative tasks. He probably passed a comment about the risk of 'burn-out' which might arise if she spread herself too thin. On balance we are not persuaded that he referred directly to her health or said anything about how he would see matters if he were her husband.
(4) Mr Buckeridge told the Claimant that, once the key administrative tasks were up to date, there would be scope for her to undertake wider, more creative responsibilities.

There was some uncertainty in the Claimant's written case about whether the exchange referred to in (3) above happened on 22 January or on an unnamed date in February. We are satisfied that the former date is correct and the conversation was not repeated in February.

47 The Claimant did not say anything about her health at the meeting on 22 January 2020.

48 The Claimant honoured her undertaking to be flexible about her weekly work schedule and there were some weeks after 22 January 2020 in which she attended the office more than once.

49 The Claimant received training in the purchase order/invoicing system from Ms Rachel Swygart. In her evidence she told us that this amounted to 'informal' training and complained that she should have received 'formal' training. She did not explain the difference. She stated in evidence (witness statement, para 135) that she regularly asked Mr Buckeridge to provide formal training but we were taken to no documentary evidence on that matter.

50 By mid-February 2020 the Claimant had achieved some success in reducing the number of emails in the *Woman Alive* inbox, but progress on the purchase order/invoicing work was very limited. The planned social media training was yet to begin. It seems those plans were never put into effect because they were overtaken by the events to which we next turn.

April – October 2020: furlough, the redundancy exercise and 'the Agreement'

51 The national lockdown imposed on 23 March 2020 faced the Respondents with severe financial difficulty and uncertainty, which caused them to undertake urgent reviews across all areas of their business with a view to making savings. As a first step, some 14 staff members were placed on the Coronavirus Job Retention Scheme ('CJRS') or, more colloquially, the furlough scheme. Among these was the Claimant. Mr Buckeridge took the decision to furlough her. Ms Gurmeseva notified her of his decision on 9 April 2020.

52 We find that Mr Buckeridge's reasoning was as he explained it to us and in accordance with a note completed on 11 April 2020. In summary, he judged that the Claimant's role was capable of being covered by others without imposing unfair burdens on them. The fact that her job was part-time and his perception that her productivity was still poor were central elements of his thinking. When the decision to furlough was taken, the scheme was scheduled to run to the end of May only, although the government had left open the possibility of it being extended. As is well known, substantial further extensions followed.

53 In the period up to 7 May 2020 six further employees were furloughed.

54 Staff placed on furlough received their salary in full, the Respondents making up the 20% not funded by central government.

55 At the time of the decision to furlough the Claimant or very soon afterwards, and for largely the same reasons, Mr Buckeridge decided to place her at risk of redundancy. In short, he took the view that her job could be parcelled out between other staff members and a permanent saving thereby made. The 'at risk' notification was contained in Ms Gurneseva's email of 9 April. A fuller document to the same effect was sent by Ms Gurneseva on 14 April, inviting her to a first consultation meeting to be held on 17 April.

56 The Claimant was one of 18 employees placed at risk of redundancy.

57 The first consultation meeting, having been postponed at the Claimant's request, was held on 23 April. It was chaired by Ms Gurneseva. The Claimant attended, accompanied by Ms Noble-McClean. A fair record of the meeting is included in the bundle. Ms Gurneseva explained the rationale for the decision to place the Claimant's role at risk. She also drew attention to where information on alternative employment might be found, but pointed out that she had not been able to find any apparent match. The Claimant challenged Mr Buckeridge's decision, arguing that the redundancy was not "legitimate" and that she had been unfairly treated, in the redundancy process and at earlier points in her employment. She also said that if she was to be made redundant, she wished to be retained on furlough until the CJRS ended.

58 On 29 April 2020 the Claimant sent a long email to Ms Gurmeseva which repeated many of the points she had made at the first consultation meeting but also included, for the first time, the allegation that some "personal and discriminatory" motivation lay behind the act of placing her role at risk of redundancy. In this context she mentioned a number of matters including Mr Buckeridge's request for her not to undertake voluntary tasks outside working hours and not being permitted to undertake radio presenter training. She did not refer to her health or identify any personal characteristic as the basis for the suggested discrimination. The same day, Ms Gurmeseva wrote back to say that the "historic" complaints would not be addressed in the consultation process but could be raised by means of a separate grievance, to which the Claimant replied that she was not seeking to instigate a separate grievance.

59 Ms Gurmeseva looked into the two specific matters (voluntary tasks and presenter training) and was satisfied that there were cogent explanations for both.

60 On 4 May 2020 the Claimant sent an email to Ms Gurmeseva suggesting that she might be suitably redeployed to the Respondents' archiving project. Unfortunately, that idea had no traction because the project had been put on hold indefinitely and the two individuals working on it furloughed and placed at risk of redundancy.

61 A second redundancy consultation meeting was held on 5 May 2020, attended again by Ms Gurmeseva, the Claimant and Ms Noble-McClean. Many of the points discussed at the first meeting and in subsequent correspondence were revisited. There was much debate about the status of the Claimant's complaints about prior instances of allegedly unfair treatment and in particular whether she had presented a formal grievance about them, or should be treated as having

done so. Ms Gurmeseva took the view that they did not bear directly on the redundancy issue. No fresh alternative to redundancy was proposed.

62 By a letter prepared later on 5 May Ms Gurmeseva sent the Claimant confirmation that her employment would end on the ground of redundancy four weeks later, on 3 June, and drew attention to her right of appeal.

63 The Claimant exercised that right. Mr Kevin Bennett, Chief Operating Officer, was nominated to hear the appeal. The Claimant's objections to his appointment (on the ground that he was too close to the CEO) were overruled.

64 The Claimant presented lengthy grounds of appeal dated 20 May 2020, which she asked the appeal officer to read together with her letter of 29 April. Her grounds included the assertion that she had been subjected to "discriminatory" treatment during her employment and had been "singled out and treated differently to other people at work". She added: "I believe this to be partly due to the CEO's personal dislike of me for reasons that are unknown and unclear to me."

65 The Trustees of the Charity held a meeting on 27 May 2020 at which (among other things) they were asked to consider whether staff facing redundancy could be retained for the duration of the furlough scheme. In summary, they decided in principle that such staff, whether already dismissed or 'at risk', could be offered an alternative, on the following terms. First, their employment would end by resignation, to take effect no later than 31 October 2020. Second, they would receive pay at 80% of full salary for the duration of the furlough period. Third, there would be no additional cost to the Respondents.

66 The Claimant's appeal was initially set for 29 May 2020 and later postponed to 2 June. It duly took place on that day. The Claimant was given a full opportunity to develop her many challenges to the redundancy process and to ventilate her wider complaints about her treatment over the course of her employment.

67 On 3 June 2020 the Claimant's employment ended on expiry of the notice given on 5 May.

68 On 16 June 2020 Mr Bennett sent to the Claimant a letter headed 'Appeal Outcome'. That heading was inappropriate since, as he explained, his decision was reserved. He did, however, volunteer his "current thought processes" in some detail. These, as he explained, had led him to conclude that a genuine redundancy situation existed, the process by which the Claimant's role (among others) had been selected for redundancy had been fair and there was no evidence of her treatment having been influenced by bias. At the end of the letter he stated that his decision was reserved because he understood that an alternative solution involving fresh recourse to the furlough scheme might be possible and he had asked HR to look into that matter. The letter contained no ambiguity. On the contrary, it was very clear.

69 Following the Trustees' meeting the Respondents took legal advice and put steps in train to prepare a model agreement to give effect to the decision of 27 May with a view to it being offered to affected employees, including the Claimant.

70 On 17 June 2020 Ms Gurmeseva wrote an email to the Claimant about recent developments, which summarised in clear terms how such an agreement, if entered into, would work. Her message included the following:

> **I understand from Kevin you had the appeal meeting and he is holding back on making a decision to either uphold or overturn the decision to make your role redundant, pending this discussion. I am pleased to say that following recent discussions we are in a position to offer you the option to remain on furlough until end of August 2020. This is subject to certain conditions, which are intended to make the option financially viable. This option would mean that your employment would not end by reason of redundancy, but resignation on extended notice taking effect no later than 31 August 2020. You would be reinstated and paid for the period from when your employment had ended to 31 August 2020. As a resignation, although there would not be a redundancy payment, the intention is that the payments you would be eligible to receive would considerably exceed this. If this is something you would like to proceed with, please let me know and I will provide you with an agreement containing the terms.**

The reference to 31 August (instead of 31 October) was an error which was corrected later the same day. The Claimant did not suggest that the slip had any bearing on the events which followed.

71 There was further correspondence between the Claimant and Ms Gurmeseva the following day, 18 June 1920. The Claimant argued that she should be permitted to remain on furlough until the end of October with a view to her then (possibly) returning to her role. Ms Gurmeseva explained that that would not be possible. The Claimant said that she awaited the outcome of the appeal, which she regarded as a separate matter. Ms Gurmeseva pointed out that if the appeal was unsuccessful, the chance to enter into the agreement would be lost. She also said that the Claimant's decision was required by 19 June at the latest. She was at that stage under pressure from the Respondents' payroll department to advise them as to how to proceed.

72 The agreement was shared with the Claimant in draft on 19 June 2020. As a result of further representations by the Claimant, the deadline for her decision whether or not to accept it was further extended. It seems that no further deadline was identified, but the Claimant certainly understood that her answer was required promptly.

73 On 24 June 2020, following much further correspondence covering and recovering the same ground, the Claimant wrote to Ms Gurmeseva in these terms:

> **I have agreed to sign the document based on the terms you have set out more than once.**
>
> **I agree to resign as I cannot see any other choice regarding the furlough being made available to my family …**

74 On 7 July the Claimant signed the final version of the agreement ('the Agreement'). The material parts were as follows:

RECITAL:

The Employee has appealed her dismissal. No final decision has yet been reached on that appeal. If not upheld, the Employee's dismissal will be confirmed; if upheld, the Employee's dismissal will be overturned. If overturned, the Employee's status as a designated furloughed worker will not have been terminated and she is eligible to continue to be furloughed under the Coronavirus Job Retention Scheme (the Scheme).

OPERATIVE TERMS

The parties agree as follows:

The Employer agrees that the Employee's appeal against dismissal will be upheld, overturning her dismissal and restoring her continuous employment.

The Employee designation as a furloughed worker will continue from 4 June 2020 up to 31 October 2020. (the Furlough Period).

The Employee tenders her resignation to take effect on the last day of the Furlough Period.

The Employee's employment will therefore end, without further notice, by reason of resignation, on the last day of the Furlough Period.

For the purposes of calculating pay under the Scheme, the Employee's normal monthly pay is £1147 (gross).

The pay the Employee is eligible for under the Scheme is £918 per complete month gross (the Pay).

The Employee's contractual pay entitlement will be varied for the duration of the Furlough Period to the Pay.

The parties will comply with their auto-enrolment obligations to pay pension contributions for the benefit of the Employee.

The Employee will be paid, calculated on the basis of the Pay, for the full duration of the Furlough Period.

There is no contractual entitlement to pay in excess of the Pay for the Furlough Period.

The Employee will not be required to work during the Furlough Period.

The Employee will take the Furlough Period as paid holiday. In doing so, the Employee will exceed her paid holiday entitlement. In this way, any right to be paid for accrued untaken holiday on termination is thereby set off and extinguished by the paid holiday taken by the Employee during the Furlough Period. For the avoidance of doubt, the Employer waives any right to reclaim overpaid holiday pay in excess of the Employee's accrued entitlement.

There will be no further payment owed to the Employee or the Employer arising on the termination of employment.

75 In her evidence the Claimant told us several times that she not understand the Agreement. In our judgment, she did understand its general effect by the time she signed it, having received advice from a number of sources including a family

member who was a legal professional. We accept that she may not have grasped the Respondents' reasons for being willing to enter into it.

76 On 8 July 2020, pursuant to the Agreement, Mr Bennett wrote to the Claimant to advise her that, in view of the terms that had been agreed, her appeal had succeeded and she had been reinstated.

77 Following the signing of the Agreement, the Claimant sent correspondence to the Respondents apparently seeking to reopen the Agreement or alter its effect. They were not prepared to contemplate doing so.

78 In line with the Agreement, the Claimant received furlough pay up to the end of October 2020 and not thereafter.

Miscellaneous matters

79 Overall 20 staff members including the Claimant were placed on furlough. 18 were placed at risk of redundancy. Of those, nine were dismissed as redundant. Of the remaining nine, five were redeployed and four (of whom the Claimant was one) entered into agreements under which they were retained until the end of the furlough period.

80 We find in the redundancy exercise as a whole no evidence of any pattern of decision-making adverse to employees with disabilities or significant medical conditions. No pattern of discrimination, based on disability or any other protected characteristic, was suggested.

81 The complaint in LOI, para 24.1 is substantially true. Mr Kerridge did mistakenly tell Ms Noble-McLean on 23 May 2018 that the Claimant was not in the office and had not arrived for work on time. In a robust email Ms Noble-McClean put him right on a number of the points he had raised. No action was taken against the Claimant.

82 As to LOI, para 24.3, we are not persuaded on the evidence presented to us that the allegation is made out in fact.

83 Turning to the subject of voluntary radio presenter training (LOI, para 24.4), the Claimant gave unchallenged evidence, which we accept, that she applied successfully to be one of the trainees on courses commencing in July 2018 and Mar 2019 but was told in both instances, shortly before the course was due to start, that her name had been removed from the list of attendees. The courses were delivered by Mr Kerridge, the CEO, over 10 weeks, in his own time. Mr Buckeridge told us, and we accept, that, on both occasions, several candidates were disappointed as the Claimant was. It was not suggested that they shared with her the protected characteristic of disability, or any other personal characteristic.

84 The Claimant complained[4] (witness statement, paras 138-9) about an email from Mr Buckeridge to her dated 8 April 2020 in which he reproached her about "another" instance of a "basic admin" task which she had failed to carry out. For reasons which she explained, she felt that the remark was most unfair. It is not necessary for us to take a view as to whether it was fair or not; we find, however, that it was eloquent of Mr Buckeridge's somewhat negative perception of the quality of her performance of administrative duties.

85 The Claimant was on inquiry at to her legal rights as soon as the redundancy process began. By 7 July 2020 she had taken advice from a senior HR professional, from ACAS, from a friend who had recently been involved in an Employment Tribunal matter, from a CAB representative who had advised that friend and from her sister-in-law, a professional lawyer albeit not one who practised in the field of employment law.

Secondary Findings and Conclusions

Rationale for primary findings

86 In our view, all witnesses who gave evidence were mindful of their duty to provide truthful answers to the questions put to them. To the limited extent that our findings do not correspond with their evidence we acquit them of any intention to mislead the Tribunal.

87 In resolving such conflicts as we thought it necessary to resolve, we had regard to a number of relevant factors, including inherent plausibility, internal consistency and consistency with contemporary statements or documents.

Unfair dismissal

88 Was the Claimant dismissed? Manifestly, she was dismissed on 3 June 2020 when the notice given on 5 May expired. But that dismissal was reversed on 8 July, when Mr Bennett upheld her appeal and reinstated her. The consequence was that she was to be treated, for the purposes of the 1996 Act, as if she had never been dismissed (see *Roberts v West Coast Trains Ltd* [2005] ICR 254 (CA)). The Claimant complained that the reinstatement was itself legally invalid because it resulted from an agreement which was void in that she had entered into it under duress. We are very clear that this submission must be rejected, for two fundamental reasons. First, a contract entered into under duress is voidable, not void. This means that the contract remains in effect unless and until the innocent party avoids it. And if the innocent party affirms the contract he or she will forfeit the right to avoid it (on all points, see *Chitty on Contracts*, 34th ed, para 10-068). Here, the Claimant unquestionably affirmed the Agreement, taking the benefits which it offered over a period of some five months. Accordingly, any theoretical right to avoid it was lost. Second and in any event, there was, on the facts, nothing remotely capable of constituting duress. The test is a high one:

> **A contract which has been entered as the result of duress may be avoided by the party who was threatened. It has long been recognised that a threat to the victim's**

[4] She based no legal claim on this incident.

> **person may amount to duress; it is now established that the same is true of wrongful threats to the victim's property, including threats to seize their goods, and of wrongful or illegitimate threats to their economic interests, at least where the victim has no practical alternative but to submit.**[5]

There was no threat here. The Claimant was faced with a choice between taking her chance on the appeal and accepting the solution offered by the Agreement. Given Mr Bennett's provisional views as expressed in his letter of 16 June 2020, the appeal plainly had very poor prospects of success and it was natural that she should come to the view that the outcome offered by the Agreement represented, as she put it in her evidence, the "least bad" option. Of course, we accept that it was uncomfortable for the Claimant to be faced with the choice, all the more so given the limited time she was allowed to make her decision. We also accept that she felt constrained to enter into the Agreement in order to ensure a degree of financial security for herself and her family. But these pressures were not unfair. Rather, they were the natural consequence of the Respondents treating her *favourably* by giving her a second option.

89 Was there a dismissal on 31 October 2020? We find that there was no dismissal, 'actual' or constructive. The former analysis could only be put forward on the basis that the Respondents dismissed her by confronting her with the choice between resigning and being dismissed. That did not happen. The choice, as already stated, was between seeing the appeal process through and an agreed reinstatement for the duration of the furlough period.

90 The constructive dismissal analysis fares no better. Under the Agreement the Claimant gave notice of resignation expiring on 31 October 2020. She did so because that was required of her as part of the consideration to be given in return for the benefit of being reinstated and guaranteed five months' pay. She did not resign in response to any breach of her contract by the Respondents.

91 There having been, at the date of presentation of the claim form, no dismissal on 3 June or 31 October 2020, the complaint of unfair dismissal inevitably fails.

Redundancy

92 The claim for a redundancy payment fails for the same reason.

93 Had we not found that the dismissal of 3 June 2020 had 'vanished', we would have held that the reason or principal reason for it was that the Claimant was redundant. On the other hand, we would have held that if there was a dismissal on 31 October 2020, it was for 'some other substantial reason',[6] namely the fact that termination of her employment on that date was necessitated by the Agreement.

[5] *Chitty*, para 10-003
[6] See the 1996 Act, s98(2).

Wrongful dismissal

94 Likewise, the complaint of wrongful dismissal is unsustainable. There was no dismissal. And in any event, due notice (or more) was given to terminate the Claimant's employment on 3 June and 31 October 2020.

Discrimination arising from disability (the 2010 Act, s15)

95 Of the 2010 Act claims, it is convenient to take those under s15 claims first. The first question is whether the Respondents subjected the Claimant to 'unfavourable' treatment in any of the respects specified in LOI, paras 24.1-24.7. Of those, para 24.3 has already fallen away on our primary finding that the allegation is not made out in fact.

96 We are satisfied that the low hurdle of establishing unfavourable treatment is surmounted in the cases of paras 24.1, 24.4, 24.5 and 24.7.[7] On our primary findings, the allegation as formulated in para 24.2 is not established in fact and what Mr Buckeridge did say to the Claimant on 22 January 2020 was unobjectionable and incapable of amounting to an actionable tort. As to para 24.6, we take the view that offering the Agreement as an alternative to letting the appeal process run its course was plainly not unfavourable treatment. On the contrary, it was to the Claimant's advantage. Nor did the pressure which she experienced in being faced with the decision, to be taken in short order,[8] whether or not to enter into the Agreement amount to unfavourable treatment. It was simply the natural bi-product of the Respondents' *favourable* act of giving her a choice.

97 Was any unfavourable act done because of something arising in consequence of the Claimant's disability? The 'somethings arising' relied upon are noted in LOI, para 23. As to para 24.1, we see no evidential basis for the theory that Mr Kerridge's remark was linked in any way with the Claimant's disability or any consequence of it. We have no information as to her attendance record up to May 2018. There is no evidence to point to the Respondents being inconvenienced by the Claimant working part-time or working one day per week at home. More generally, there is no evidential basis for the Claimant's theory that Mr Kerridge was, in May 2018 or at any later time, motivated to 'do her down', much less that any such motivation was influenced by a perception on his part that her medical condition (or *a* medical condition) was adversely affecting her performance[9]. Had he been so actuated, he would surely have intervened to make his views known, certainly before she had completed two years' continuous service and accrued the right not to be unfairly dismissed. But his behaviour, notably in approving her transfer to the *Woman Alive* role in late 2019 when she

[7] There is room to quibble about para 24.7. Given that we have found that there was no dismissal, it might be said that this head of complaint falls away entirely. But we prefer to read the LOI broadly and generously. Dismissed or not, the Claimant understandably feels aggrieved that the events which occurred culminated in her losing her job, which she greatly valued.

[8] Had Ms Gurmeseva not extended the initial 24-hour deadline for the Claimant to choose whether or not to enter into the Agreement, we might have taken a different view.

[9] As we have recorded, while the Claimant's allegations of discrimination related to disability are confidently advanced now, on 20 May 2020 she complained only of being disliked by Mr Kerridge for "unknown" reasons.

was still without protection from unfair dismissal, was inconsistent with the malign disposition attributed to him.

98 As to para 24.2, if, contrary to our view, Mr Buckeridge treated the Claimant unfavourably on 22 January 2020, we are satisfied that he did not do so because of any consequence of her disability. As we have noted, he did not know of her condition and knew very little of her health in general, apart from the fact that Mr Kerridge felt that her sickness absence record in 2019 had been unsatisfactory. His concern was simply to ensure that she did not overwork and that she focussed her energies on discharging her core administrative duties.

99 As to para 24.4, we again see no evidential foundation for the alleged link between the treatment complained of and any consequence of the disability. We have no information about the Claimant's sickness absence record or any other potentially relevant consequence of her condition as at the time of the decisions complained of (July 2018 and March 2019). She was one of a number of candidates who were disappointed. There is nothing in the material before us pointing to a pattern of treatment based on disability or medical status generally or any other characteristic (protected or not). Nor is there anything to call into question the Respondents' explanation that (a) decisions about attendance on the course would have been based on judgements as to the suitability of the individuals concerned and how well fitted they were to a career in radio broadcasting and (b) by that measure, the Claimant, who occupied a part-time administrative role, would not have appeared a particularly strong candidate for inclusion.

100 Turning to paras 24.5-24.7, we are again satisfied that no link is demonstrated between the treatment complained of and any of the cited consequences of the Claimant's disability. It is true that, by the time of his decision to place her at risk of redundancy, Mr Buckeridge had acquired a new piece of information about her medical status, namely that she had an autoimmune condition which might make her particularly vulnerable to Covid-19. But that revelation did not suggest any clinical change or any likely deterioration in her performance or attendance. Mr Buckeridge's decision to place her at risk was on its face rational and we see no reason to doubt his explanation for it. Time was tight. An urgent need to make savings had arisen. The Claimant's role could be deleted and her duties covered by others. His actions were consistent with measures taken by other senior managers across the organisation. The dismissal of 3 June flowed directly from his decision to place her at risk. The Agreement was not put forward because of anything arising in consequence of the disability: it was offered to assist the Claimant at a difficult time by presenting her with an option which, if taken, would guarantee her an income from June to October 2020. The termination of her (reinstated) employment on 31 October 2020 was the result of her accepting the offer.

101 Our reasoning so far results in the failure of the s15 claim. To the extent that any unfavourable treatment is established, it was not applied to the Claimant because of (*ie* materially influenced by) anything arising from her disability.

Direct discrimination (the 2010 Act, s13)

102 For essentially the same reasons as those given in relation to 'unfavourable' treatment under s15, we are prepared to assume that detriments are shown in respect of the allegations under LOI, paras 24.1, 24.4, 24.5 and 24.7. Those under paras 24.2 and 24.6 do not disclose arguable detriments.

103 We are satisfied in any event that none of the detriments complained of was done to the Claimant because of, or materially influenced by, her disability. Our analysis in relation to s15 is repeated. The Respondents' acts are for the most part rationally explained[10] and there is nothing in those acts or the wider evidence tending to support an inference of discrimination. There is in that wider material much that argues against such an inference. Further and in any event, the allegations under LOI, paras 24.5 and 24.7 could not sustain complaints of direct discrimination because, as we have recorded, Mr Buckeridge was not at any relevant time aware that the Claimant had a disability.

Harassment (the 2010 Act, s26)

104 The complaint of harassment fails for very similar reasons. In the first place, we find that the events relied upon, in so far as they were 'unwanted' (we are unable to see how the offer of the Agreement (LOI, para 24.5) can be so classified), fall well short of amounting to treatment satisfying the demanding test set by the 2010 Act, s26(1)(b). They may have caused the Claimant a degree of upset or annoyance, but it would offend language and common sense to say that they had the effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Much less did they have any such purpose.

105 The harassment claims are untenable for the further reason that they rest on acts or events which are not, in any way, 'related to' the Claimant's disability, or to disability in the abstract. For the reasons already given in relation to the ss15 and 13 claims, we are satisfied that the treatment complained of had nothing at all to do with her condition or any consequence thereof, or to disability generally.

Victimisation (the 2010 Act, s27)

106 The Claimant relies on the allegations of 'discrimination' in her emails of 29 April and 20 May 2020 as 'protected acts'. We have reminded ourselves of the terms of s27(2)(d). Did those emails contain 'allegations' (express or not) that anyone had contravened the 2010 Act? In our judgment, they did not. They did include references to "discriminatory" treatment and to being "singled out and treated differently". On the other hand, they did not identify any relevant personal characteristic and, in the email of 20 May, the Claimant stated in terms that she did not know the reason for the CEO's perceived hostility towards her. Reading the emails together and in context, and making every allowance for the need to give them a broad and generous interpretation, we find that they fall short of what s27(2)(d) requires. They did not specify, expressly or by implication, the protected

[10] With the exception of the incident of 23 May 2018 (LOI, para 24.1)

characteristic of disability. They did not even say, expressly or by implication, that the alleged discrimination was something to do with a medical condition. In the circumstances, they cannot be read as containing a recognisable allegation of a contravention of the 2010 Act.

107 Without a protected act, the complaint of victimisation necessarily fails, but we will complete the analysis. The detriments relied upon as acts of victimisation (LOI, para 38) correspond directly with those identified in LOI, paras 24.6 and 24.7 (already discussed in the contexts of the ss15 and 13 claims). Of these, that at para 24.6 falls away: as we have already explained, no arguable detriment is there identified. Did the Claimant suffer the detriment of losing her job because she had made the complaints and allegations contained in the emails of 29 April and 20 May 2020? The only possible answer to that question is no. She lost her job initially on 3 June on the ground of redundancy. The redundancy process was in train before she wrote the first of the two emails. There is no evidential basis for supposing that the decision to give notice of dismissal, taken on or before 5 May, was influenced to any extent by the content of the first email, and, self-evidently, the second post-dated that decision by a fortnight. Following her reinstatement, the Claimant lost her job on 31 October 2020 because, pursuant to the Agreement, she gave notice of resignation to take effect on that date. Her election to do so was not connected in any way with the matters raised in the emails of 29 April and 20 May 2020.

108 For these reasons the victimisation claims must be rejected.

Failure to make reasonable adjustments (the 2010 Act, ss20, 21)

109 The complaint of failure to make reasonable adjustments begins with the question whether the PCPs relied upon (LOI, para 28) are established in fact. The first (para 28.1) is not clearly formulated. The Respondents did not require the holder of the Claimant's role, or any comparable role, to work *exclusively* from the office. Up to December 2019, she worked one day out of two in the office. Thereafter, the standard pattern became one day out of three, although, to her credit, the Claimant responded positively to Mr Buckeridge's encouragement to come in more often. There is no evidence to show a standard rule or practice about home/office working for holders of the role of Content Administrator or comparable positions.

110 The second PCP (LOI, para 28.2), "not having formal training programmes for people assigned to new roles", is not established. We find that, as one would expect, the Respondents seek to provide appropriate training according to the need in any particular case. There is no rule or practice proscribing resort to 'formal' training where it is seen to be necessary.

111 Thirdly (LOI, para 28.3), the Claimant relies on a PCP requiring employees to "travel to the office at specific times". This PCP, which we interpret generously as equating to operating standard office hours, is established in fact.

112 The fourth PCP (LOI, para 28.4), expressed as a requirement for employees to work longer hours, is not established in fact. The Claimant seems to

say (witness statement, para 117) that the alleged "requirement" after December 2019 to work in the office (we have found that there was no such requirement) entailed working longer hours. We accept, of course, that on days when she did attend the office, travelling there and back added to the number of hours which she needed to commit, directly or indirectly, to her work.

113 Did the only PCP established in fact (operating standard office hours) put the Claimant at a substantial disadvantage in comparison with persons who were not disabled? We accept her evidence that commuting to and from work was at times burdensome for her as a consequence of her disability. She had to catch as many as three trains each way and when travelling at peak times would often have to do without a seat. In the circumstances, the 'substantial disadvantage' test is made out.

114 Were there steps not taken that could reasonably have been taken to avoid the disadvantage? The adjustment here contended for is to permit the Claimant "flexibility around travel times/start times" (LOI, para 31.2). The difficulty is that, on her own case, such flexibility was extended to her while she was being managed by Ms Noble-McClean and she does not suggest that there was any tightening of the regime when she took on her new role in December 2019, reporting to Mr Buckeridge. As far as we are aware, between then and the lockdown of March 2020 (after which she did not attend the office at all) she did not struggle to get to work on time. If she was late on any occasion, there is no evidence of Mr Buckeridge becoming aware of it, let alone taking her to task for her timekeeping. Her understanding with Ms Noble-McClean was always that she would make up any working time lost at the start of the day and her willingness to do so was never in question. We have no doubt that, as an honourable and conscientious employee, she would have done exactly the same thing when under the management of Mr Buckeridge. In these circumstances, it seems to us that the potentially disadvantageous effect of the standard office hours was considerably mollified by a 'light touch' managerial approach to enforcement and, absent any request by the Claimant for any further adjustment or anything else to put them on notice that further intervention was required, there was no additional step which it would have been reasonable for the Respondents to have to take.[11]

115 It follows that the complaint of failure to make reasonable adjustments also fails.

Burden of proof (the 2010 Act, s136)

116 As is usually the case, we have been able to determine the claims under the 2010 Act without reference to the burden of proof provisions, having been presented with ample material on which to base our findings. Had we applied them, we would have concluded that the Claimant had not made out a *prima facie* case of discrimination and that, even if the burden had shifted to the Respondents,

[11] Our reasoning might have taken a different route to the same outcome, *viz*: the office hours regime *as applied by the Respondents* was so flexible that any disadvantage was trifling or minimal and not substantial and accordingly the PCP did not give rise to a duty to make adjustments at all. Since the Tribunal is not a forum for Jesuitical debate, we will spare the parties a discussion of the merits of these alternative analyses.

they had amply demonstrated that their behaviour had not constituted, or been tainted by, discrimination, harassment or victimisation in any form.

Time (the 2010 Act, s123)

117 Given our conclusions on the merits we necessarily find that there was no unlawful conduct extending over a period. In these circumstances, the parties are agreed that all claims based on acts, omissions or events occurring before 22 October 2020 are, on their face, out of time (LOI, para 41). Would it be just and equitable to apply a more generous limitation period in place of the 'default' period of three months? The only possible answer is no: it would obviously be idle and perverse to bring within time claims which have been held to be without merit.

118 Accordingly, all claims based on causes of action which accrued on or before 21 October 2020 were presented out of time and the Tribunal has no jurisdiction to consider them.

The Working Time Regulations 1998 claim

119 The claim for compensation for annual leave outstanding on termination fails because, pursuant to the Agreement, the Claimant's leave entitlement had been exhausted prior to 31 October 2020 and accordingly none was outstanding on that date.

Outcome and Postscript

120 For the reasons stated, the claims are not made out on their merits and must be dismissed. Many also fail for want of jurisdiction.

121 We have no doubt that the Claimant will receive the result with great disappointment. Although unfounded, her claims were entirely sincere. We hope that she will now be able to put the struggle behind her and focus on resuming her career. Despite the disadvantages caused by her disability, she is a person of obvious energy and talent and has a great deal to offer.

_____

EMPLOYMENT JUDGE – Snelson
25th March 2022

Reasons entered in the Register and copies sent to the parties on: 28/03/2022

OLU..... for Office

APPENDIX

AGREED LIST OF ISSUES

Unfair dismissal

1. Was the claimant dismissed?

1.1. Did the respondent terminate her employment and if so when? The respondent asserts that the claimant resigned, as evidenced by a written agreement signed by the claimant on 7 July 2020. The claimant asserts that this document was signed under duress and is therefore invalid.

1.2. If the respondent terminated the claimant's employment on 3 June 2020, was that termination reversed by the agreement signed by the claimant on 7 July 2020?

1.3. Did the respondent put pressure on the claimant to resign in such a way that it was tantamount to a dismissal?

1.4. If the agreement was entered into under duress (the claimant relies, at present, on financial duress), should it be voided.

2. The Claimant relies on the following forms of duress / pressure in relation to her signing an agreement on 3 July 2020:

2.1. Financial pressure in that having two dependent children amidst the labour market uncertainty of the covid 19 pandemic, she had no practicable alternative but to secure some form of income from her employment with the Respondent

2.2. Being told that 'there was no legal way' she could remain on furlough leave unless she resigned' when she had repeatedly requested that she remain until the scheme terminated

2.3. The Respondent refusing to notify her of the outcome of her appeal if she did not sign the agreement

2.4. It was made clear to her that there would be a pre-determined negative outcome to her appeal if she declined to sign the agreement

2.5. She was subjected to extreme time pressure to sign, which did not permit her an opportunity to take appropriate advice

3. What was the reason for the dismissal? Was it a potentially fair reason for section 98(2) Employment Rights Act 1996?

4. If the claimant was dismissed, was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

Redundancy

5. If the claimant was dismissed, was it wholly or mainly attributable to redundancy, in other words:

5.1. Had the respondent's requirements for employees to carry out work of a particular kind, or to do so in the place where the claimant was employed ceased or diminished?

6. Has a correct procedure been followed in selecting the claimant for redundancy? The claimant claims that the procedure was flawed for the following reasons:

6.1. Redeployment was not considered;

6.2. No or inadequate consideration was given to the points raised by the claimant in her letter of 29 April 2020;

6.3. Elements of the respondent's redundancy policy, for example that first steps would be to consider organisational ways of adjusting the reduction, including reducing the number of short term temporary or agency staff, redesigning jobs, reorganising work and asking for volunteers and job share, were not adhered to;

6.4. The appeal was not heard promptly;

6.5. The decision to dismiss her was pre-determined;

6.6. The appeal was heard by Mr K Bennett, who was potentially compromised as he worked closely with Mr Kerridge, rather than by a more neutral person such as a trustee;

6.7. A proposed decision to uphold the claimant's appeal against her selection for redundancy was subject to conditions to which the claimant was put under pressure to accept, namely that she would agree to go into the furlough scheme and that she would resign on 31 October 2020, and take untaken holiday during her furlough period. The claimant's case is that she accepted this under duress.

7. Was the dismissal nevertheless fair?

8. Is the claimant due a redundancy payment?

Constructive unfair dismissal

9. In the alternative, was the claimant constructively dismissed, i.e.

9.1. Were the matters set out below a fundamental breach of the contract of employment, namely of the implied term that she would not be subject to unlawful discrimination, and/or did the respondent breach the so-called 'trust and confidence term', i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant? The claimant relies on the following:

9.1.1. The events from the moment she was informed that she was at risk of redundancy to the termination of her employment;

9.1.2. Her perception that her role was not redundant but that dismissal had been pre-determined;

9.1.3. That she was subject to improper pressure to enter into a settlement agreement in the form of; time pressure; a refusal to hear her appeal or issue an outcome until she had signed the agreement; and an implication that if she failed to sign the agreement her appeal against the decision to dismiss her for redundancy would be dismissed

9.2. if so, did the claimant affirm the contract of employment before resigning?

9.3. if not, did the claimant resign in response to the respondent's conduct (to put it another way, was it a reason for the claimant's resignation – it need not be the reason for the resignation)?

10. If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and, if so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so- called 'band of reasonable responses'?

Time limits / limitation issues – dismissal

11. Were all of the claimant's complaints relating to dismissal presented within the time limits set out in [sections 111(2)(a) & (b) of the Employment Rights Act 1996 ("ERA")? In particular:

11.1. When did the conduct complained of take place?

11.2. Were the acts or failures to act part of a series of similar acts or failures?

11.3. Have the claims been brought within time

11.4. If not, was it not reasonably practicable for the claims to have been brought within time?

11.5. If so, were the claims brought within a reasonable time thereafter?

12. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 22 October 2020 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

…

Direct discrimination because of disability (s 13 Equality Act 2010)

16. Has the respondent subjected the claimant to the following treatment:

16.1. The claimant relies on the treatment set out at paragraph 24.1 - 24.7

17. Was that treatment “less favourable treatment”, i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances?

18. The claimant relies on the following comparators in relation to training David Rose, Martin Saunders and Victoria Lawrence, and Bridget Tetteh, and/or hypothetical comparators being people with the claimant’s skills and experience who performed the same or substantially similar role as the claimant but who were not disabled.

19. [Revision sought by Claimant - not agreed] The Claimant relies on the following additional comparators: Anthony Aris-Onsula, Tamala Cesar, Rachel Adeyibi, Cara Bentley, ENO Adeogun, Tola Mbakwe, David Senior, Hazel Rolston, Simon Ward, Kevin Bennett, David Peterson

20. If so, was this because of the claimant’s disability?

21. Have facts been established from which, in the absence of any explanation to the contrary, the tribunal could reasonably conclude that unlawful discrimination had taken place?

22. If so, has the respondent shown that there is an adequate non- discriminatory explanation as to why the events in question had occurred?

Discrimination arising from disability (s 15 Equality Act 2010)

23. Did the following things arise in consequence of the claimant’s disability:

23.1. The claimant needing to take sick leave from time to time to receive iron infusion treatments in hospital;

23.2. The claimant needing to attend hospital appointments;

23.3. The claimant needing to work part time and during restricted hours;

23.4. The claimant sometimes needing to work from home?

24. Did the respondent treat the claimant unfavourably because of any of those things as follows:

24.1. On 23 May 2018 the respondent’s CEO, Mr P Kerridge, unfoundedly told the claimant’s then line manager, Ms Noble McClean that the claimant was not in the office and had not arrived for work on time;

24.2. In January 2020 the respondent’s Deputy CEO, Mr J Buckeridge, told the claimant to concentrate on her health rather than undertake voluntary editorial work for magazines published by the respondent and that if he were her husband he wouldn’t want her doing extra work outside contracted hours;

24.3. In about February 2020 Mr J Buckeridge made the same allegation as at 24.1;

24.4. Denying her access to career development and volunteering opportunities, specifically: the PA to Mr Kerridge in 2018 and 2019 removed the claimant from attending voluntary presenter training courses despite being recommended by Miss Noble McClean and the Programme Controller, B Achapong and others;

24.5. The respondent placed her at risk of redundancy

24.6. The respondent offered an Agreement including a term under which she would 'resign' and placed her under improper pressure to sign that 'Agreement';

24.7. The termination of her employment in the form of what in the circumstances was either (i) an express dismissal or (ii) a constructive dismissal.

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

25.1. in the event the treatment is deemed to have happened:

25.1.1. That "on 23 May 2018 the Respondent's CEO Mr P Kerridge, unfoundedly told the Claimant's then line manager, Ms Noble McClean that the Claimant was not in the office and had not arrived for work on time."

It is unclear from the Claimant's description what aspects comprise the alleged treatment relied upon is. Subject to clarification, and based upon its current understanding, the legitimate aim is appropriate management of an employment relationship, including making an employee's line manager aware of matters that may be considered material to an employment relationship.

25.1.2. That "in January 2020 the respondent's Deputy CEO Mr J Buckeridge told the Claimant to concentrate of her health rather than undertake voluntary editorial work for magazines published by the respondent and that if her were her husband he wouldn't want her doing extra work outside contracted hours"

The legitimate aim is proper management of an employment relationship, including any health safety and welfare considerations, and supporting an employee to perform their full duties to the required standard with appropriate prioritization of such duties.

25.1.3. That "in about February 2020 Mr J Buckeridge made the same allegation as at 25.1.1"

It is unclear from the Claimant's description what aspects comprise the alleged treatment relied upon is. Subject to clarification, and based upon its current understanding, the legitimate aim is appropriate management of an employment relationship, including making an employee's line manager aware of matters that may be considered material to an employment relationship.

25.1.4. "Denying her access to career development and volunteering opportunities, specifically the PA to Mr Kerridge in 2018 and 2019 removed the Claimant from attending voluntary presenter training courses despite being recommended by Miss Noble McClean and the Programme Controller, B Achampong and others"

The legitimate aim is proper management of an employment relationship, including any health safety and welfare considerations, and supporting an employee to perform their full duties to the required standard with appropriate prioritization of such duties.

25.1.5. That “the respondent placed her at risk of redundancy”

The legitimate aim is proper management of an employment relationship, including complying with any information and consultation obligations to staff identified as being at risk of redundancy.

25.1.6. That “the respondent offered an Agreement including a term under which she would ‘resign’ and placed her under improper pressure to sign that ‘Agreement’”

The legitimate aim is proper management of an employment relationship, including exploring and providing an alternative to the risk of an unsuccessful appeal against dismissal.

25.1.7. “The termination of her employment in the form of what in the circumstances was either (i) an express dismissal or (ii) a constructive dismissal”

25.1.8. The legitimate aim in respect of (i) is proper management of an employment relationship, including effecting a redundancy and/or complying with the terms of an agreement.

In respect of (ii), the claimant is understood to be relying upon the following alleged breaches:

25.1.8.1. “The events from the moment she was informed that she was at risk of redundancy to the termination of her employment”

In which regard, the Respondent has insufficient particulars to properly respond

25.1.8.2. “Her perception that her role was not redundant but that dismissal had been pre-determined”

In which regard, the matter relied upon is not an act by the Respondent and the Respondent is unable to respond.

25.1.8.3. “That she was subject to improper pressure to enter into a settlement agreement in the form of: time pressure; a refusal to hear her appeal or issue an outcome until she had signed the agreement; and an implication that if she failed to sign the agreement her appeal against the decision to dismiss her for redundancy would be dismissed.”

25.1.8.4. In which regard, the legitimate aim is providing information to assist an employee to make an informed choice whether or not to enter into an agreement.

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

Reasonable adjustments: EQA, sections 20 & 21

27. Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?

28. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

28.1. Requiring people in the claimant's role to work from the office;

28.2. Not having formal training programmes for people assigned to new roles?

28.3. [Revision sought by Claimant - not agreed] Requiring employees / the Claimant to travel to the office at specific times

28.4. [Revision sought by Claimant - not agreed] Requiring employees / the Claimant to work longer hours

29. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time. The claimant relies on:

29.1. Working in the office aggravated her symptoms;

29.2. Travelling to the office aggravated her symptoms;

29.3. Working longer hours aggravated her symptoms;

29.4. From January 2020 until the office closed down during the pandemic she was given little flexibility around work hours, even though she had to catch 3 trains each way to work, found walking challenging, and only rarely was able to sit down on rush hour trains;

29.5. From around early February 2020 onwards Mr Buckeridge told the claimant he would prefer her to work in the office, so where possible she would attend at the office;

29.6. From January 2020 onwards not giving the claimant appropriate training for new elements of her magazine role, particularly regarding accounts and invoicing, that she had never undertaken before but doing so sporadically and in an unco-ordinated way. This meant that she was not able to perform her new role well.

30. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

31. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

31.1. Permitting the Claimant to work exclusively at home

31.2. Permitting the Claimant flexibility around travel times / start times

31.3. Limiting the number of hours worked each week by the Claimant

31.4. Providing a formal programme of structured training in the new role.

32. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Harassment related to disability (section 26 Equality Act 2010)

33. Did the respondent engage in conduct as follows:

33.1. The claimant relies on the facts set out at paragraph 24.1 - 24.7.

34. If so, was that conduct unwanted?

35. If so, did it relate to the protected characteristic of disability?

36. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Victimisation (Section 27 Equality Act 2010)

37. Did the claimant do a protected act? The claimant relies upon the following:

37.1. Stating that she had been subjected to discrimination in an email dated 29 April 2020;

37.2. Stating that she had been subjected to discrimination in an email dated 20 May 2020.

38. Did the respondent subject the claimant to any detriments as follows:

38.1. Offering the Claimant an 'Agreement' including a term under which she would 'resign'

38.2. Placing her under improper pressure to sign that 'Agreement'

38.3. Terminating her employment in the form of what in the circumstances was either (i) an express dismissal or (ii) a constructive dismissal

39. If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act?

Time limits / limitation issues – discrimination claims

40. Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")? In particular:

40.1. When did the conduct complained of take place?

40.2. Did the conduct extend over a period, or were the acts discrete acts?

40.3. Have all aspects of the claim been brought within time?

40.4. If not, is it just and equitable to extend time?

41. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 22 October 2020 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

Unpaid annual leave – Working Time Regulations 1998 (WTR)

42. When the claimant's employment came to an end, was she paid all of the compensation she was entitled to under regulation 14 of the Working Time Regulations 1998?

43. What was the claimant's leave year?

44. How much of the leave year had elapsed at the effective date of termination?

45. In consequence, how much leave had accrued for the year under regulations 13 and 13A WTR?

46. How much paid leave had the claimant taken in the year?

47. Did the claimant validly agree to take her untaken holiday entitlement while on furlough?

48. If she did, was she paid at normal rates of pay, as opposed to at furlough rates, during that period?

49. If she did not, how many days remain unpaid?

50. What is the relevant net daily rate of pay?

51. How much pay is outstanding to be paid to the claimant?

Breach of contract

52. The claimant's contractual entitlement was to two weeks' notice.

53. Did the claimant validly agree to give notice to the respondent?

54. If not, is the claimant entitled to be paid 2 weeks' pay in lieu of notice?

…