EMPLOYMENT TRIBUNALS

Claimant: Ms I Kurtulikova

Respondent: Pilkington Automotive Ltd

Heard at: Birmingham

On: 3, 4, 5, 6, 9, 10 May 2022

Before: Employment Judge Meichen, Mrs S Bannister, Mrs K Ahmad

Appearances
For the claimant: Mr S Keen, barrister
For the respondent: Ms R Kight, barrister

JUDGMENT was sent to the parties dated 11 May 2022. The claimant's claims of direct disability discrimination, failure to make reasonable adjustments and victimisation failed and were dismissed. Written reasons were subsequently requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013. The following reasons are provided. Oral reasons were given at the end of hearing and so these written reasons are based on the transcript of the reasons given orally.

REASONS

Introduction

1. This was the final hearing to determine the claimant's claims of direct disability discrimination, failure to make reasonable adjustments and victimisation.
2. We were provided with an agreed bundle of documents which ran to 511 pages.
3. The claimant gave evidence on her own behalf and was cross examined.
4. The respondent had seven witnesses all of whom were cross examined with the exception of one witness whose evidence Mr Keen elected not to challenge. Both parties provided written closing submissions and a chronology.

The issues

5. The parties collaborated on preparing an agreed list of issues which it was agreed we would follow. The agreed list of issues was as follows:

Reasonable adjustments

1. *Did either of the following amount to a PCP and were they applied to C:*
    a. *PCP1 – the requirement to work from the office at least two days per week every week*
    b. *PCP2 – the requirement that employees complete their workload during contractual hours*

2. *If so, did either PCP put C at a substantial disadvantage in comparison to non-disabled people in that C was more prone to becoming anxious and depressed (a) if required to attend the office (particularly during the pandemic) (PCP1) and (b) by her inability to complete her workload during her contracted hours (PCP2)?*

3. *If so, did R take such steps as were reasonable to avoid the disadvantage. C claims that R should have taken the following steps:*

    a. *Allowed C to work from home every day of the working week during COVID*
    b. *Provide C with enhanced support and/or supervision to ensure her workload remained manageable and she was able to complete it within contractual hours.*

4. *At the time of the alleged failure to make reasonable adjustments, did R or ought R to have reasonably been expected to know that:*
    a. *C was disabled?*
    b. *C was likely to be placed at a substantial disadvantage by either or both of the pleaded PCP's?*

5. *Did C present her claim for failure to make reasonable adjustments within 3 months of the date of the alleged failure? Day A was 09.11.20 therefore the alleged failure(s) should have occurred on or after 10.08.20. If not, would it be just and equitable to extend time to allow C's claim to proceed?*

Direct discrimination/victimisation

6. *Did R subject C to the following treatment:*
    a. *Selecting C and her role for redundancy and dismissing her*
    b. *Delaying hearing her appeal against dismissal by 3 months*
    c. *Not upholding her appeal against dismissal*

7. *If so, did R treat C less favourably than it would have treated a non-disabled person in materially the same circumstances and/or did such treatment amount to a detriment?*

8. *If so, was the treatment because of disability and/or because C had done a protected act and/or R believed that C would do a protected act?*

9. *In respect of C's claim for victimisation, the alleged protected acts relied upon are:*

    a. *What C alleges she said during a meeting on or about 20/21 October 2020*
    b. *C's grievance of August 2020*

10. In respect of 6(a) did this form part of a continuing act of discrimination the last act of which was the decision not to uphold C's appeal against dismissal (6(c))?

6. Point 10 in the list of issues is included because a different Employment Judge decided at a preliminary hearing that the allegation at 6(a) is out of time and it is not just and equitable to extend time. We therefore only have jurisdiction to consider that allegation if it was part of a continuing act. It was also determined at the preliminary hearing that the Tribunal did not have jurisdiction to hear the claimant's claim of unfair dismissal. Therefore that claim is not included in the issues for us to determine.

7. During the hearing Mr Keen supplemented the list of issues with the following further information in respect of the reasonable adjustment identified at paragraph 3(b) in the list of issues:

   The support and / or supervision that the Claimant alleges should have been provided is as follows:

   - *Regular written or oral communication (at the end of each shift) to consider and discuss the C's workload;*
   - *Set a target number of claims that it was achievable for C to deal with each day;*
   - *Review the target number of claims regularly and when required;*
   - *Provide reassurance to C that she wasn't expected to complete work beyond the agreed targets;*
   - *Require the line manager, as the senior client account manager, to manage customer complaints / set customer expectations for when work will be completed;*
   - *Not placing pressure on C to complete work to an unrealistic deadline;*
   - *Provide time off for medical appointments during working hours if needed;*
   - *Provide a mentor on site for C to talk to;*
   - *Implement a WRAP to highlight when things were not working.*

8. We should also note that the respondent conceded that the claimant was disabled and that they had knowledge of the disability. During the hearing Ms Kight clarified that the respondent's position was that they had knowledge of the disability from 15 January 2020. We think that is correct and the respondent's concession was rightly made. The question of whether the respondent had knowledge of any substantial disadvantage remains live.

The law

The burden of proof

9. Section 136(2) Equality Act 2010 ("EA") sets out the applicable provision as follows: "*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".* Section 136(3) then states as follows: *"but subsection (2) does not apply if A shows that A did not contravene the provision".*

10. These provisions enable the employment tribunal to go through a two-stage process in respect of the evidence. The first stage requires the claimant prove facts from which the tribunal could conclude that the respondent has committed an unlawful act of discrimination.

11. The second stage, which only comes into effect if the claimant has proved those facts, requires the respondent to prove that he did not commit the unlawful act. That approach has been settled since the case of Igen Ltd v Wong [2005] IRLR 258 and has been reaffirmed more recently in the case of Efobi v Royal Mail Group Limited [2019] IRLR 352

12. It is well established that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate the possibility of discrimination. They are not, without something more, sufficient material from which the tribunal could conclude that the respondent had committed an unlawful act of discrimination. These principles are most clearly expressed in the case of Madarassy v Nomura International plc 2007 [IRLR] 246.

13. Mere proof that an employer has behaved unreasonably or unfairly would not by itself trigger the transfer of the burden of proof, let alone prove discrimination (see in particular Bahl v The Law Society and others [2004] IRLR 799).

14. The statutory burden of proof provisions only have a role to play where there is doubt as to the facts necessary to establish discrimination. Where the tribunal is in a position to make positive findings on the evidence one way or another as to whether the claimant was discriminated against they have no relevance. This was confirmed by Lord Hope in Hewage v Grampian Health Board [2012] IRLR 87 and is consistent with the views expressed in Laing v Manchester City Council and anor 2006 ICR 1519, EAT.

Direct discrimination

15. Section 13 EA provides that: *"a person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others".*

Victimisation

16. Section 27 EA states as follows:

> (1) *A person (A) victimises another person (B) if A subjects B to a detriment because—*
> *(a) B does a protected act, or*
> *(b) A believes that B has done, or may do, a protected act.*
> *(2) Each of the following is a protected act—*
> *(a) bringing proceedings under this Act;*
> *(b) giving evidence or information in connection with proceedings under this Act;*
> *(c) doing any other thing for the purposes of or in connection with this Act;*

(d) making an allegation (whether or not express) that A or another person has contravened this Act

Failure to make reasonable adjustments

17. An employer is under a duty to make reasonable adjustments where its provisions, criteria or practices ("PCP"); the physical features of its premises; or the failure to provide an auxiliary aid place a disabled employee or job applicant at a substantial disadvantage compared with non-disabled persons.

18. The duty to make reasonable adjustments is in section 20 EA. The relevant duty in this case is at subsection (3):

"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."

19. The claimant's case is that the respondent discriminated against her by failing to comply with that requirement. The respondent accepts that if the requirement arose it had the duty to make reasonable adjustments.

20. The duty requires positive action to avoid substantial disadvantage caused to disabled people. To that extent it can require an employer to treat a disabled person more favourably than others are treated (Archibald v Fife Council [2004] ICR 954). It should be noted that *"the purpose of the legislation is to assist the disabled to obtain employment and to integrate them into the workforce"* (O'Hanlon v HM Revenue and Customs UKEAT/0109/06).

21. Schedule 8, Part 3, paragraph 20 Equality Act provides, so far as relevant:

> **20 Lack of knowledge of disability, etc.**
> (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
>
> (b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

22. The correct approach to reasonable adjustments complaints was set out by the EAT in Environment Agency v Rowan [2008] ICR 218:

a. What is the provision, criterion or practice ("PCP") relied upon?

b. How does that PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

c. Can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was likely to be at that disadvantage?

d. Has the respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage?

23. As to the identification of the PCP the EHRC Employment Code ("the Code") makes it clear the phrase is to be broadly interpreted. The Code says (paragraph 6.10): *"[It] should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions."*

24. In Lamb v The Business Academy Bexley EAT 0226/15 the EAT confirmed that the term "PCP" is to be construed broadly *"having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability".*

25. In Ishola v Transport for London [2020] ICR 1204 the Court of Appeal observed that: "*The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee."*

26. The approach that Tribunals should take to PCPs was considered by HHJ Eady QC in Carreras v United First Partners Research UKEAT/0266/15/RN:

"As noted by Laing J, when putting this matter through to a Full Hearing, the ET essentially dismissed the disability discrimination claim because it found that an expectation or assumption that the Claimant should work late was not the pleaded PCP.

The identification of the PCP was an important aspect of the ET's task; the starting point for its determination of a claim of disability discrimination by way of a failure to make reasonable adjustments (see Environment Agency v Rowan [2008] IRLR 20 EAT, para 27). In approaching the statutory definition in this regard, the protective nature of the legislation means a liberal rather than an overly technical or narrow approach is to be adopted (Langstaff J, para 18 of Harvey); that is consistent with the Code, which states (para 6.10) that the phrase "provision, criterion or practice" is to be widely construed.

It is important to be clear, however, as to how the PCP is to be described in any particular case (and I note the observations of Lewison LJ and Underhill LJ on this issue in Paulley). And there has to be a causative link between the PCP and the disadvantage; it is this that will inform the determination of what adjustments a Respondent was obliged to make."

27. Like in this case in Carreras the PCP concerned a "requirement". HHJ Eady QC observed*: "A "requirement" might imply something rather narrower than a PCP; after all, the adoption of the language of "provision, criteria or practice" rather than "requirement" or "condition" - for the purposes of defining indirect discrimination - is generally viewed as heralding a broader and more flexible approach.".* She found that *"an expectation or assumption placed upon an employee might well suffice"* as a requirement and noted that *"employees can*

feel obliged to work in a particular way even if disadvantageous to their health". The Employment Tribunal's approach had been *"overly technical and led it to treat the Claimant's case as having been put more narrowly than it in fact was".*

28. As to substantial disadvantage section 212 Equality Act 2010 defines "substantial" as meaning "more than minor or trivial". It must also be a disadvantage which is linked to the disability. That is the purpose of the comparison required by section 20. Simler P said in Sheikholeslami v University of Edinburgh UKEATS/0014/17/JW that:

"It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question. For this reason also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances.

…. The fact that both groups are treated equally and that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."

29. In relation to knowledge the burden is on the respondent to prove it did not have actual or constructive knowledge of (in this case) the substantial disadvantage. The EAT has held (in Secretary of State for Work and Pensions v Alam 2010 ICR 665) that a tribunal should approach this aspect of a reasonable adjustments claim by considering two questions:

    (i) Did the employer know both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially?

    (ii) If not, ought the employer to have known both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially?

    It is only if the answer to the second question is 'no' that the employer avoids the duty to make reasonable adjustments

30. The Code states at para.6.19:

    "For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a

substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment…"

31. Failure to enquire is not by itself sufficient to invest an employer with constructive knowledge. It is also necessary to establish what the employer might reasonably have been expected to know had it made such an enquiry *(A Ltd v Z 2020 ICR 199, EAT).*

32. As to adjustments, an important consideration is the extent to which the step will prevent the disadvantage. We should consider whether a particular adjustment would or could have removed the disadvantage: Romec Ltd v Rudham [2007] All ER(D) (206) (Jul), EAT.

33. In Griffiths v Secretary of State for Work and Pensions [2017] ICR 160 the Court of Appeal said: *"So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness."*

34. Accordingly it is unlikely to be reasonable to make an adjustment that involves little or no benefit to the disabled person in terms of removing the disadvantage. We have to consider whether on the evidence there would have been a chance of the disadvantage being alleviated. Our focus should be on whether the adjustment would, or might, be effective in removing or reducing the disadvantage that the claimant is experiencing at work as a result of her disability and not whether it would, or might, advantage the claimant generally.

35. It can be reasonable for a respondent to make an adjustment even if the claimant does not suggest it. In Cosgrove v Caesar and Howie 2001 IRLR 653 the EAT emphasised that the duty to make adjustments is on the employer. It did not follow that just because the claimant and her GP were unable to come up with any useful adjustments the duty could be taken, without more, to have been complied with. The EAT held that the tribunal had made an error of law in treating the claimant's views and those of her GP as decisive on the issue of adjustments when the employer had given no thought to the matter itself.

Time limits

36. Section 123 Equality Act 2010 states:

123 Time limits
(1) Subject to sections 140A and 140B, Proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

. . .
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

37. In relation to allegation 6(a) in the list of issues the claimant relied on showing there was an act of discrimination extending over a period in order to bring all of her allegations in time. Following the decision of the Court of Appeal in Hendricks v Metropolitan Police Commissioner [2003] IRLR 96 the burden was on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination/victimisation were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period. There was no suggestion in this case of a continuing act which should be approached as being a rule or a regulatory scheme which during its currency continues to have a discriminatory effect.

38. If the allegations of failure to make reasonable adjustments are out of time and are not part of a continuing act bringing them within time then we only have jurisdiction to hear them if they were brought within such other period as we think just and equitable.

39. We remind ourselves that the just and equitable test is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. We should take into account any relevant factor. We should consider the balance of prejudice. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant. It is the exception rather than the rule - see Robertson v Bexley Community Centre 2003 IRLR 434. There is no requirement that a tribunal must be satisfied that there is good reason for a delay in bringing proceedings - see Abertawe Bro Morgannwa University Local Health Board v Morgan [2018] IRLR 1050 CA.

40. Relevant factors which may be taken into account are set out in British Coal Corporation v Keeble [1997] IRLR 336 derived from section 33(3) of the Limitation Act 1980, which deals with discretionary exclusion of the time limit for actions in respect of personal injuries or death. Those factors are: the length and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by it; the extent to which the respondent had cooperated with requests for information; the promptness with which a claimant acted once aware of facts giving rise to the cause of action; and steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

41. Having said that however the important point to bear in mind is that the Tribunal has a very broad general discretion and therefore we should assess all the factors which are relevant to whether it is just and equitable to extend time without necessarily rigidly adhering to a checklist. The factors which are almost always likely to be relevant are the length of and reasons for the delay and whether the delay has prejudiced the respondent (for example by preventing or inhibiting it from investigating the claim while matters were fresh). This was emphasised by Lord Justice Underhill in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.

42. The Court of Appeal considered the question of time limits in a reasonable adjustments claim in Kingston upon Hull City Council v Matuszowicz 2009 ICR 1170, CA. In particular the Court considered the position in claims where the employer was not deliberately failing to comply with the duty, and the omission was due to lack of diligence or competence or any reason other than conscious refusal. In the absence of evidence as to when the omission was decided upon, the legislation provides two alternatives for defining that point (see S.123(4) EqA). The first of these is when the person does an act inconsistent with doing the omitted act. The second option requires consideration of the period within which he or she might reasonably have been expected do the omitted act if it was to be done. That requires an inquiry as to when, if the employer had been acting reasonably, it would have made the reasonable adjustments. This is not the same as inquiring whether the employer did in fact decide upon doing it at that time. Sedley LJ noted that *'claimants and their advisers need to be prepared, once a potentially discriminatory omission has been brought to the employer's attention, to issue proceedings sooner rather than later unless an express agreement is obtained that no point will be taken on time for as long as it takes to address the alleged omission'.*

43. In determining when the period expired within which the employer might reasonably have been expected to make an adjustment, the tribunal should have regard to the facts as they would reasonably have appeared to the claimant, including what the claimant was told by his or her employer (Mears Group plc v Vassall EAT 0101/13). This means the period within which the employer might reasonably have been expected to comply has to be determined in the light of what the claimant reasonably knew and in particular when it should have been reasonably clear to the claimant that the respondent was not intending to make the adjustment (Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA).

Findings of fact

44. The respondent is a manufacturer of glass for the automotive industry.

45. The claimant's employment with the respondent started on 21 July 2016.

46. The claimant was initially employed in the customer services department and her manager was Mark Atherton. The claimant had a good working relationship

with Mr Atherton. There were no issues in this initial phase of the claimant's employment.

47. In 2017 the claimant applied for and was successful in obtaining a position as a Quality Claims Analyst. The claimant had a different line manager in this role: Vito D'Annunzio. The claimant began to experience difficulties in this role and in particular in her working relationship with Mr D'Annunzio. The claimant said that she struggled to complete her work during her contracted hours, and this led to her coming in early.

48. The practice of the claimant coming in early was firmly discouraged by the respondent. The respondent's position was that the claimant could and should complete her work within her contracted hours and she would be supported if she needed additional training, supervision or assistance with prioritising her tasks. It should be noted that the claimant has been described including by herself as a perfectionist. It is likely that her perfectionism meant that it took her longer to complete tasks than it might take others. The claimant was also encouraged not to do other people's jobs. The claimant was conscientious and wanted to do her best for the respondent's customers but this led to her doing more work than she really needed to. The Tribunal was left with the strong impression that what the claimant needed was assistance in prioritising her work and managing her time but this proved difficult due to her poor working relationship with her line manager. This was not really a case of the claimant being overworked. We find the claimant's workload was manageable but the fundamental issue the claimant had was her difficult working relationship with Mr D'Annunzio and in particular the lack of communication between the claimant and her line manager (by 2020 the claimant had decided that she would not speak to her line manager at all).

49. The tension in the claimant's relationship with Mr D'Annunzio appears to have started in 2018 when Mr D'Annunzio wanted to extend the claimant's probation. When the claimant complained to HR about that she was told that her probation could not be extended. The claimant was left with the impression that her manager did not see her as suitable for the role.

50. The claimant was signed off with stress for two weeks in April 2018 and then went off again with stress on 5 November 2019. The claimant returned to work on 9 November 2019 and on 15 November 2019 she had a meeting with Mr D'Annunzio to understand any potential issues with her job and to find any areas of improvement to help the claimant deal with her work.

51. The claimant explained that she was feeling stressed and anxious because of her workload and that she felt under pressure. Mr D'Annunzio asked the claimant what he could do to help and there was a discussion on some practical matters that may assist the claimant.

52. A further meeting took place between the claimant and Mr D'Annunzio on 12 December 2019 in which similar discussions were held about how the claimant could be support and how the claimant could be more productive and efficient going forwards.

53. On 27 November 2019 Occupational Health produced a report concerning the claimant. That report described how the claimant had been absent with what she perceived to be work related stress. It was said that the issues were not primarily medical and that the claimant would benefit from regular management meetings. It was recorded that no further Occupational Health input was required at that stage.

54. The claimant reported to Occupational Health that she did not believe that Mr D'Annunzio was bullying her but she didn't like the tone of his voice sometimes. The claimant said that she believed she was being bullied by a different colleague, although we do not have any further information about that.

55. On 16 December 2019 the claimant was signed off by her GP because of anxiety and depression. She was initially signed off for a period of three weeks. However the claimant was to remain off sick until 1 April 2020.

56. On 15 January 2020 Occupational Health produced a further report that stated that the claimant was temporarily unfit for work. This report indicates that the claimant's condition had changed from work related stress into anxiety and depression which is likely to be a disability. The respondent has correctly conceded that it had knowledge of the disability from this point.

57. The Occupational Health report recorded that since the last referral the claimant had confirmed that meetings had taken place with management, herself and HR to try and address the issues around her workload. The claimant said that she had informed her manager that she was happy with the outcome but she now said that she felt intimidated and just said that because she wanted to leave the meetings. The claimant therefore said she believed that the matters had not been resolved. Occupational Health recommended that further management action was required to try and resolve the claimant's issues.

58. The report also refers to the claimant's request for a phased return and the opportunity to work from home. The reason why the claimant had requested those adjustments was not made clear and it was not suggested that working in the office was causing or exacerbating the claimant's anxiety. The proposal from Occupational Health was that the claimant undertake a phased return initially doing two days from home for two weeks then one day from home for three weeks before returning to work full time in the office after that. That suggestion is not consistent with an understanding that the claimant working in the office was a cause of or was significantly exacerbating her anxiety – home working was simply recommended as a short temporary measure to assist the claimant to getting back into the office full time.

59. Because the claimant had informed Occupational Health that she was not content with the outcome of the management meetings the respondent decided to deal with her concerns as a grievance.

60. There were attempts to arrange a grievance meeting in February but the claimant did not attend.

61. On 25 February 2020 Occupational Health produced a report setting out their opinion that the claimant was fit to attend a meeting.

62. On 26 February 2020 the claimant attended the rearranged grievance meeting with Mark Hay. A stress risk assessment was carried out after the meeting and later sent to the claimant. At the meeting the claimant read a detailed handwritten statement in which she outlined various difficulties she had experienced since starting in the Quality Claims Analyst role. These included her perceived issues with her workload and her working relationship with Mr D'Annunzio .The claimant was informed at the meeting that the respondent took the view that it was unable to accommodate her working from home as had been suggested. Again the claimant did not say that being required to go into the office caused or exacerbated her anxiety.

63. We should note here that although the claimant was line managed by Mr D'Annunzio he was in fact based in Italy and only came to the UK three or four times a year. Accordingly when she attended the office the claimant was not generally required to meet with or see Mr D'Annunzio and his management of her was remote whether she was at home or in the office.

64. The claimant also outlined in her written statement an unpleasant issue which had been concerning her. This issue was that another colleague had falsely accused the claimant of having sex with Mark Hay. The claimant had raised a separate grievance about that and it is clear to the tribunal that the claimant was upset about it. The reason why the claimant mentioned it in this new grievance was that she was unhappy about Mr D'Annunzio's reaction when she had told him about the rumour being spread. The claimant said that Mr D'Annunzio had laughed and told her that she shouldn't try and seduce her colleagues.

65. In February 2020 the respondent was looking into making cost savings. As part of that process Mark Atherton who is the General Manager for the UK and Ireland put together a proposal which included moving the claimant's role to Poland. This would achieve a significant saving as Poland was identified by the respondent as a "low cost country", meaning that work could be performed more cheaply there. The respondent has gone through a process of transferring various roles to low cost countries in order to make savings. This was a genuine business decision taken by the respondent.

66. Mr Atherton presented that proposal to senior management in February 2020 but it was not at that stage finalised. Shortly afterwards the covid pandemic hit the UK and the business focused on other priorities. The proposal was discussed again around 18 June 2020 and Mr Atherton was given the green light to go ahead with it by senior management. Again however the proposal was not acted upon quickly, essentially due to the state of flux which the business was in due to the ongoing pandemic

67. On 17 March 2020 the claimant attended Occupational Health at her request. It appears that at that stage the claimant had some financial concerns and she

was considering submitting a claim for personal injury. Notwithstanding that the claimant was aiming to return to work on 26 March 2020 and Occupational Health recommended a phased return. There was no suggestion by anyone at that point that the claimant should work from home.

68. On 25 March 2020 Mr Hay met with Mr D'Annunzio in order to discuss the claimant's grievance. Mr D'Annunzio told Mr Hay that the claimant had a tendency to take work related issues personally but he did not feel that the problems which were concerning her were in fact her fault. He accepted that he had made a mistake regarding claimant's probation. He emphasised that the claimant was not required to work extra hours or do excess work. He raised a concern that she had asked for a laptop in order to work over weekends which he did not believe was right and the claimant had been told that was not appropriate. Overall Mr D'Annunzio said that he was happy with the claimant's performance and he would provide her with coaching and guidance in order to manage her workload more effectively. We think Mr D'Annunzio's account was a fair reflection of the respondent's approach overall.

69. The claimant did not return to work at the end of March. Instead she was placed on furlough with effect from 2 April 2020.

70. On 28 April 2020 the claimant was again seen by Occupational Health. At that stage the claimant was described as fit for work subject to adjustments. The only adjustment identified however was a phased return. Working from home was not mentioned as a possible adjustment.

71. On 1 May 2020 Mr Hay sent the claimant a detailed grievance outcome letter. The grievance was not upheld. However Mr Hay, correctly in our view, identified that there had been a significant breakdown in the claimant's working relationship with Mr D'Annunzio and that needed to be addressed. Accordingly Mr Hay recommended that mediation take place. The claimant was asked to inform HR if she agreed to explore that option.

72. The claimant appealed the grievance outcome on 3 May 2020. The claimant said that she believed her grievance had not been investigated properly, that she had been discriminated against and that she would like an independent investigator to be appointed. The claimant was asked to clarify if she would accept a mediation meeting with Mr D'Annunzio but she did not answer that point. The claimant never took up the offer of mediation between herself and Mr D'Annunzio even though we are satisfied that the respondent made it clear that it was on the table and we think it could have been a constructive step in repairing the claimant's working relationship with her manager.

73. The claimant attended a grievance appeal hearing on 3 June 2020. This first grievance appeal was heard by Andy Richards and he upheld part of the claimant's appeal which led to the claimant receiving an extension to her sick pay.

74. The claimant appealed the grievance appeal outcome again on 25 June 2020 and her stage two appeal was heard on 6 July 2020 by Neil Syder.

75. The final appeal outcome was sent to the claimant on the 31 July 2020 and the outcome was that the appeal was not upheld.

76. Notwithstanding that conclusion however Mr Syder did consider the points which the claimant had raised surrounding her workload and he made a recommendation for when the claimant returned to the office of undertaking a "start continue review" – considering all the activities and the time spent undertaking each activity across the whole of the claimant's working day. This tribunal is of the view that this was a potentially useful tool for the claimant in order to address her concerns about her workload and hopefully work more efficiently. However the claimant never took up this option although we are again satisfied that the respondent made it clear it was on the table. The reason why the claimant did not take this offer up was because she had by this stage decided that her relationship with Mr D'Annunzio was such that she refused to speak to him. Accordingly it became more difficult to repair the relationship and for the claimant to engage with any process about managing her workload since should such a process would necessarily involve discussion with her line manager.

77. It's also notable that Mr Syder had considered the claimant's request to have a laptop so that she could work from home. The claimant made that proposal so that she could work in the evenings in order to catch up outside of her contracted hours. Once again Mr Syder made it clear on behalf of the respondent that it was not appropriate for the claimant to do that because she should be resting and not working outside of her contracted hours.

78. On 14 July 2020 the claimant was again seen by Occupational Health and she was again described as fit for work subject to adjustments. At the time of the report the final grievance appeal outcome had not been released to the claimant. The claimant had informed HR that she was upset about the prospect of returning to work whilst the investigation was still ongoing. In order to expedite a return to work Occupational Health recommended that the respondent consider a period of home working whilst the investigation remained ongoing, among other adjustments. It was not suggested by Occupational Health or by the claimant that being in the workplace when the investigation was not ongoing was a source of anxiety. It was not suggested that working from home should be an adjustment which should continue after the investigation had concluded. It was simply recommended as a short term temporary measure while the investigation was ongoing.

79. On 20 July 2020 the claimant went on to flexible furlough and she began working 20 hours per week. The claimant was at this stage exclusively working from home.

80. We should note here that the claimant had moved house in around June 2020. The claimant previously lived within walking distance of the respondent's office in Redditch, however she moved to Birmingham which had a significant impact on her commute. Rather than being able to walk to work the claimant was instead faced with a commute of around 2 hours which we were told by the

claimant involved getting two trains and a bus to work. The difficulty of doing that commute was of course exacerbated by the fact that at that stage the country was still in a state of lockdown, there were significant covid restrictions and the pandemic had an impact on the operation of public transport. There were therefore a number of practical difficulties in the claimant commuting to work.

81. On 24 August 2020 the claimant raised a grievance to David Ash. The claimant made this complaint specifically under the Health and Safety at Work Act 1974, because she felt that the working environment was not safe. In her written complaint the claimant did not relate her concerns to the Equality Act or to disability discrimination generally. It was a specific complaint about an alleged breach of the Health and Safety at Work Act.

82. After he received the claimant's written complaint Mr Ash spoke to the claimant on the telephone. In that conversation the claimant explained that she was suffering with anxiety and described some of the issues that she'd had previously with her line manager and with her workload. For that reason this went beyond the claimant's written complaint about an alleged breach of the Health and Safety at Work Act. The claimant didn't specifically say that she was complaining about disability discrimination but it appears that at that stage she was relating some of her concerns to her disability of anxiety. The claimant did not say anything about a possible reasonable adjustment of working from home. The claimant also did not say that she was concerned about returning to the office because of her anxiety.

83. On 26 August 2020 HR sent the claimant an updated risk assessment. It was explained to the claimant that Mr D'Annunzio was eager to assist her with her workload and discuss priorities. With that in mind HR proposed an initial call between the claimant, Mr D'Annunzio and HR to discuss the claimant's workload. That call took place on 2 September 2020. In the call practical points about how the claimant could manage her workload were discussed. The claimant did not say that she was concerned about returning to the office because of anxiety around covid.

84. Following the meeting Natasha Eastbury sent the claimant an email in which she confirmed a proposal that the claimant come back into the office on a rotational basis. The claimant responded to that email and did not suggest that returning to the office would cause her any anxiety.

85. On 3 September 2020 the claimant submitted a flexible working application. She requested a change to her hours and in particular that she start at 9:00 AM rather than 7:00 AM. That request was not fully accommodated but we understand that the respondent agreed that she could start at 8.00 AM as a compromise.

86. On 7 September 2020 the claimant was again seen by Occupational Health. She was described as fit for work subject to adjustments. The adjustments were identified as needing to be in place for a period of four to five weeks. The suggestion from Occupational Health was that the claimant should have a

phased return to work starting with reduced hours and home working, then building up to her full time hours and being fully based in the office within four weeks. Again it was not suggested that working in the office was a cause of the claimant's anxiety. The suggestion of home working was only made for a brief period of four weeks to make the claimant's return to the office easier to manage.

87. On 21 September 2020 Mr D'Annunzio emailed the claimant and HR. At that stage the claimant was still doing her phased return and was still largely working from home. She had been working 4 hours a day but that was due to change to 5 hours a day. Mr D'Annunzio suggested that the claimant also begin to work two days a week - Mondays and Wednesdays - in the office. The claimant responded to that email as follows: *"This is not a problem thank you for confirmation."* The claimant's response made no suggestion that she had any anxiety whatsoever about returning to the office.

88. On 17 September 2020 the claimant worked in the office for half a day. On 21 September 2020 the claimant requested to be referred to Occupational Health for support with her mental health. On 23 September 2020 the claimant was again in the office for half a day.

89. In her witness statement (paragraph 36) the claimant said that on the days that she attended the office in September she felt exceptionally anxious and stressed due to the fear of contracting Covid. She also said that when she knew she had to go into the office the next day she couldn't sleep the night before and was having panic attacks.

90. The claimant was due to be in the office on 28 September 2020. The claimant describes having had a panic attack on the morning of the 28 September. She did not attend work and instead went to her GP. The claimant's GP provided her with a sick note to say that she had mixed anxiety and depressive disorder, her mental health was suffering as a result of working in an office environment and she would benefit from being allowed to continue working from home.

91. On the morning of 28 September the claimant sent Mr D'Annunzio an email in which she explained that she had had a panic attack and had not slept much the night before. She said that she would continue to work from home. That is what happened.

92. The claimant has made it clear both at the time (following 28 September) and in her evidence before us that her anxiety was caused by the fact that she felt she was exposed to a risk of covid on her long commute and in the office where she believed that people were not properly complying with covid safety measures. The claimant therefore made it clear both at the time and in her evidence before us that she wished to work from home only as a temporary measure whilst the pandemic was ongoing.

93. The claimant did not attend work in the office after 21 September 2020.

94. On 29 September 2020 the claimant was again seen by Occupational Health. She was described as fit for work subject to adjustments. However the only recommendation that Occupational Health made at that stage was for mediation. Occupational Health did not suggest the adjustment which the claimant wanted of home working.

95. On 7 October 2020 Natasha Eastbury from HR sent the claimant an email in which she explained that the respondent had reviewed the claimant's GP's recommendation for home working but had decided that it should not be accommodated. The reasons why the respondent had reached that decision were set out in detail. It was said that the respondent did not believe the recommendation was reasonable. The respondent continued to have concerns that the claimant had previously attempted to start work early and she had requested a laptop so that she could work in the evenings and at weekends. Accordingly the respondent felt that they could not adequately monitor the claimant's working hours if she was solely working from home. The respondent had also identified areas of the claimant's role which they felt could not be completed whilst working from home and these included telephone contact with customers and archiving processed claims.

96. Natasha Eastbury's letter to the claimant correctly noted that the claimant had not previously raised that working in an office environment was an issue. Therefore she was asked if she would like to discuss any aspect of working in the office which she felt caused her anxiety. It was said that the respondent would work with the claimant to resolve those issues. The claimant was asked to continue with her phased return plan including building up to returning to the office on full time hours.

97. Following that letter a meeting was set up between the claimant, HR and the claimant's union representative to discuss why the claimant felt unable to work in the office and why the respondent felt that working full time from home was not appropriate for the claimant. In advance of that meeting the claimant wrote to the respondent to say that her understanding was that the status quo of home working would prevail whilst these discussions were ongoing.

98. The claimant's understanding was correct. The claimant did not come into the office on any of the days when she was meant to after 21 September 2020. Although the respondent had said that the claimant should continue with the return to work plan it did not question or challenge the claimant when she did not come in to work. Both parties understood and accepted that the status quo of the claimant working from home was to continue.

99. On 22 October 2020 the claimant attended the telephone meeting with HR and her trade union representative. The claimant covertly recorded this meeting. The claimant's concerns and the respondent's position were discussed. The claimant's union representative re-raised the issue about the claimant being overworked.

100. It is not entirely clear why the claimant's union representative raised that matter at this point in time because the claimant's evidence before us was

clear: she had no issues at all with her workload since returning to work in July. Ms Kight's written submissions recorded the claimant's oral evidence about that as follows:

"Q: So, you accept that after you returned to work from furlough there were not issues from your perspective with your workload?
A: No, there were no issues with workload
Q: So, from your perspective no need for additional supervision at that point?
A: No, not at that point"

101. We consider this to be an accurate note. Mr Keen did not dispute the accuracy of it.

102. As to why the claimant's union representative was raising her workload when that was not an issue for the claimant it may be relevant that the representative was attempting to negotiate a settlement agreement for the claimant. As part of that negotiation the claimant's union representative made a suggestion that the claimant could receive her redundancy pay as an exit package. In response Emma Neil, who was the respondent's HR director, said that the claimant's role was not redundant and therefore as far as the respondent was concerned that was not a realistic proposal.

103. The claimant has some concerns about that indication because she was put at risk of redundancy quite soon after this meeting. When they were questioned about that in the hearing before us the HR managers who attended the meeting explained that although they were aware on 22 October that there were cost saving measures ongoing neither of them were specifically aware that the claimant's role was shortly to be put at risk of redundancy. We accepted that evidence.

104. On 29 October 2020 a further Occupational Health report was produced. The claimant was described as temporarily unfit for work. Occupational Health considered the claimant's belief that she was at an increased risk of covid. The conclusion was that the claimant's risk rating was low. The Occupational Health advisor was also asked if there was any reason why the claimant could not work from the office. The response was that clinical evidence shows that managing anxiety is not in the longer term helped by avoidance of the source of anxiety. The recommendation was therefore for the claimant to be supported towards a possible gradual introduction to the workplace.

105. Occupational Health's view that the claimant was temporarily unfit for work was not shared by either the claimant or her GP. The claimant continued to work from home.

106. On 5 November 2020 the claimant was notified that she was at risk of redundancy. The respondent's evidence, which we accept, was that this was as a result of the need to save costs, which had become more acute as a result of Covid, and the fact that the claimant's role had already been identified as one that could be carried out in a low cost country and therefore bring about a cost saving.

107. The respondent held consultation meetings with the claimant and on 15 December 2020 her dismissal by reason of redundancy was confirmed.

108. The claimant promptly appealed the decision to dismiss her. An appeal hearing did not take place until 17 March 2021. The outcome was sent to the claimant on 19 March 2021. The outcome was that the claimant's appeal was not upheld.

109. As part of her redundancy appeal the claimant suggested that she had been selected because of her disability. This was rejected because the claimant's role was one of a large number of roles which had been transferred to a low cost country and her redundancy was part of a large number of changes that were taking place in the company in order to make cost savings.

Conclusions

Respondent's concessions

110. The respondent conceded that the claimant was a disabled person within the meaning of the Equality Act and that they had knowledge of that disability from 15 January 2020. We regard those concessions as rightly made.

111. We accept that the respondent cannot be said to have had actual or constructive knowledge of any disability prior to 15 January 2020 because prior to that point that the indications were largely that the claimant was suffering from reactive workplace stress. She had some time off for that but had been able to continue to work and attend productive meetings in November/December 2019. There had been a development in December when the claimant was signed off for the first time with anxiety and depression. It was not until the Occupational Health report in January that it was clarified that the claimant was now likely to have a disability. The respondent did not know and could not reasonably have been expected to know that the claimant was a disabled person until that point.

Protected acts

112. The first protected act was said to have taken place in a meeting on or about 20 or 21 October 2020. The respondent has pointed out that there was no meeting on either of those two days. However the allegation is "on or about" and there was a meeting on 22 October 2020. At that meeting the claimant and/or her union representative made allegations that the respondent had contravened the Equality Act. Accordingly we find there was a protected act.

113. The situation in respect of the second alleged protected act was less clear cut. The second alleged protected act is the claimant's grievance of August 2020. As we have noted the claimant's written grievance in August 2020 was limited to an allegation that the respondent had breached the Health and Safety at Work Act. There was no allegation express or implied that the respondent had breached the Equality Act and the claimant was not doing anything else for the purposes of or in connection with the Equality Act in her

written grievance. However in our view the claimant's case is not strictly limited to the written document. Shortly after she sent her written grievance she had a telephone conversation with Mr Ash in which the claimant related her concerns about her mistreatment by Mr D'Annunzio to her disability of anxiety. We are satisfied that without expressly saying so the claimant was making an allegation that the respondent had contravened the Equality Act in her discussion with Mr Ash. We think this should logically be considered an extension of the written grievance. Accordingly in our judgement the claimant did the second protected act too.

114. We have therefore concluded that the claimant did the protected acts as alleged.

Allegations of direct discrimination or victimisation

115. There were 3 allegations of direct disability discrimination or victimisation. These were:

115.1 Selecting the claimant for redundancy and then dismissing her.

115.2 Delaying hearing the claimant's appeal against dismissal by three months.

115.3 Not upholding the claimant's appeal against dismissal.

116. There is no dispute that the respondent did those three things, albeit the respondent says there was no deliberate delay in hearing the claimant's appeal. We consider each of these things was a detriment.

117. We do not consider there was any less favourable treatment of the claimant. Somebody in materially the same circumstances without the claimant's disability would have been treated in the same way as the claimant. This is essentially because:

117.1 The claimant's role was selected for redundancy and she was dismissed because the respondent identified that her job could be done in a low cost country. This would have happened to somebody who was not disabled and was performing the claimant's role because it was part of a genuine exercise conducted by the respondent to save costs across the business.

117.2 The delay in hearing the appeal was not deliberate but arose from the difficult circumstances associated with the pandemic at the time and the availability of the people involved. This would have happened if somebody who was not disabled raised an appeal at the same time as the claimant and the same people were involved.

117.3 The key finding by the appeal manager leading to him not upholding the claimant's appeal was that the claimant's role was one of a large number of roles which had been transferred to a low cost country and her redundancy was part of a large number of changes that were taking place in the company

in order to make cost savings. This finding was unimpeachable and would have been made in relation to somebody without the claimant's disability.

118. Mr Keen focused his argument on whether the burden of proof should shift and so we considered that point in depth. It was for the claimant to prove facts from which the tribunal could conclude absent any alternative explanation that the reason for the treatment was either disability or the protected acts. It is only if the claimant proves such facts that the burden shifts to the respondent.

119. We considered Mr Keen's argument carefully and at some length. We looked at the whole picture. We analysed the points made by Mr Keen in his skeleton argument at paragraph 23 to 24 as to why he argues that the burden should shift to the respondent. We must say that we think Mr Keen made every point that could possibly be made in the claimant's favour. We found that the burden does not shift.

120. We reminded ourselves that the Supreme Court has emphasised that it is for the Claimant to prove the prima facie case. In Hewage v Grampian Health Board [2012] IRLR 87 Lord Hope summarised the first stage as follows: *"The complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the complainant which is unlawful. So the prima facie case must be* ***proved*****,** *and it is for the claimant to discharge that burden".* We must look for facts from which it could be decided not simply that discrimination is a possibility but that it has in fact occurred (see South Wales Police Authority v Johnson [2014] EWCA Civ 73 at paragraph 23).

121. Before the burden can shift there must be something to suggest that the treatment was discriminatory (see B and C v A [2010] IRLR 400). Inadequately explained unreasonable conduct and/or a difference in treatment and a difference in status and/or incompetence is not sufficient to infer unlawful discrimination (Quereshi v London Borough of Newham [1991] IRLR 264; Glasgow City Council v Zafar [1998] ICR 120 HL; Igen v Wong [2005] IRLR 258; Madarassy v Nomura International Plc [2007] EWCA Civ 33).

122. In Chief Constable of Kent Constabulary v Bowler EAT 0214/16 it was held that an employment tribunal had impermissibly inferred direct race discrimination solely from evidence of procedural failings in dealing with the claimant's grievances and internal appeal against the rejection of those grievances. The EAT memorably observed: *'Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.'.*

123. Against that background we found that the points raised by Mr Keen did not shift the burden of proof. Our analysis of his argument was as follows.

124. We did not find that the respondent had a generally disparaging or disdainful attitude to the claimant's grievance and request for adjustments. Rather we found that although the respondent reached conclusions which were

not what the claimant wanted they had engaged reasonably and thoroughly with the points raised by the claimant.

125. Although the respondent ultimately rejected the claimant's request to work from home we did not find that this meant they were generally unsupportive. The respondent had, we think correctly, identified that what really needed to be resolved was the claimant's working relationship with her line manager and it proposed mediation in order to resolve that. The respondent had legitimate concerns about the claimant working excess hours which would be more difficult to control if the claimant was working exclusively from home. The respondent was plainly willing to, and did, discuss practical measures that could be taken to assist the claimant with her workload. As we mentioned in our findings of fact the start continue process which was recommended but not taken up by the claimant struck us as a further practical measure that could well have assisted. Moreover, the respondent changed the claimant's start time from 7 am to 8 am, allowed her to work from home for a significant period and carried out stress risk assessments. Overall therefore we do not think that the respondent could fairly be characterised as being unsupportive towards the claimant.

126. We do not accept that the transcript of the meeting on 22 October 2020 shows that the claimant was being treated in a "callous" way by HR. Again HR made it clear that they did not agree that the claimant should work from home but overall the input from HR shows in our view that they were attempting to consider other practical measures that could assist the claimant in getting back to work. Moreover at this meeting HR were plainly trying to understand what the claimant's position was because she had only recently said that she had an issue attending the workplace and it had only recently been suggested that covid was a significant stressor for the claimant. The HR managers were also struggling to understand why the claimant's trade union representative was referring back to the workload issues. We think it was understandable that they queried that because as the claimant confirmed in evidence before us there had in fact not been any issue with the claimant's workload since her return to work in July. This was therefore a historic issue and it was not clear why the representative was raising it.

127. Mr Keen complained that the respondent had failed to produce relevant evidence, but as far as we're aware there's been no application for specific disclosure in this case. This would have been the appropriate application to make if the claimant considered there had been a material failure to disclose and we would have expected her to make as she is professionally represented. It has not been established that the respondent failed to disclose any specific key documents. The essential complaint made on behalf of the claimant seems to be that there is a lack of evidence showing how her role was selected for redundancy. However we felt that that was relatively clear from the evidence - it was identified in February that her role could be transferred to a low cost country and that proposal was then actioned later in the year following the worst of the pandemic.

128. We were satisfied that at the meeting on 22 October the HR managers were not aware of the claimant's impending redundancy and we do not draw any adverse inference from what was said about redundancy at that meeting. It seems to us to be relevant that the question of redundancy only came up in the meeting because it was suggested by the claimant's union representative that she could receive a redundancy payment as an exit package. It was not something that the HR managers were anticipating would be raised. This was not a meeting specifically to discuss the prospect of redundancy. It is therefore not surprising that the HR managers were not briefed about the impending redundancy process prior to this meeting and that they reacted the way they did when it was raised by the claimant's representative as a negotiation tool.

129. A procedural complaint was identified that the appeal manager dismissed the claimant without speaking to Mr Atherton who had been behind the redundancy process. In our view this was at most a procedural error but nothing more. The appeal manager's conclusion as to the reasons behind the redundancy was based on a correct understanding of the process undertaken by the respondent and the reasons for it. This was not a cover up. The appeal manager reached his own view based on his own knowledge of the redundancy process and the cost saving measures the respondent was undertaking. The appeal manager frankly told us in evidence that he did not believe he had to speak to the decision maker because he was aware of the reasons behind the redundancy himself and he felt it would be better if he reached his own view independently. We can understand the argument that this was a procedural flaw but it is not in our view a matter from which we can infer discrimination or victimisation.

130. In a similar vein the claimant has raised a number of complaints about the grievance process which took place earlier in 2020. The particular point which has been emphasised by the claimant is that Mr Hay should not have been the decision maker because he was named in the grievance. Again however this is at most a procedural error in our view and nothing more. Again there is nothing in our view to suggest that this was done as part of a cover up. Instead, the context was that Mr Hay was appointed to hear the grievance and it only became clear that he was named when the claimant read out her detailed statement at the meeting. Even then Mr Hay was not really the subject of the complaint as he was not alleged to have spread the rumour or reacted inappropriately to it. The fact that Mr Hay did not withdraw from the grievance when it is arguable that he should have done is not a fact from which we could conclude that the claimant's dismissal or appeal was tainted by disability discrimination or victimisation. Especially given that those processes were undertaken by different managers some 9 months later.

131. We reached the same conclusion on each complaint which the claimant had about the grievance process; they were complaints of unreasonable conduct or procedural failings and were not matters from which we could infer disability discrimination or victimisation.

132. Finally the claimant encourages us to draw an adverse inference from the fact that the respondent's dealings with the claimant were driven heavily by

HR. We do not see anything untoward about that. This was a case which obviously required significant HR input. It was serious and not straightforward. Moreover, the claimant's relationship with her line manager (who was in any event based in Italy) had broken down and she was refusing to speak to him. In those circumstances one would expect HR to step in and have a significant role.

133. A complaint was made that HR were dismissive of the claimant's anxiety but we did not see any cogent evidence of that. As we saw it HR were instrumental in obtaining a large amount of Occupational Health advice and assistance and they repeatedly attempted to engage with the claimant about how she could be assisted to get back to work. This was an appropriate response and did not indicate a dismissive attitude.

134. We therefore concluded that the burden of proof in this case did not shift as the claimant had not proved facts from which we could conclude that discrimination or victimisation had occurred.

135. In any event we found the following in relation to the allegations concerning the appeal:

135.1 We were entirely satisfied that Richard Batchelor (who was the decision maker on the appeal) reached his outcome because he genuinely believed it to be the right one and he was aware of the process followed from his own knowledge (which was essentially correct). He was not influenced in any sense whatsoever by the claimant's disability or the protected acts. Indeed, we think he was not even aware of the protected acts.

135.2 The evidence surrounding the delay in hearing the appeal in our view plainly demonstrate that the delay was in no sense whatsoever connected with the claimant's disability or the protected acts. Immediately after the claimant appealed on 15 December she was sent an email explaining that the appeal would be heard in the new year. However in January 2021 a further lockdown was imposed. Subsequent email exchanges between HR and the claimant's trade union representative show that the delay in arranging the appeal hearing were down to availability between the trade union and HR in the challenging context of lockdown. Accordingly we were satisfied that the reasons for the delay therefore had nothing whatsoever to do with either disability or the protected acts. There was no evidence that the delay was deliberate or that the availability issues had been manufactured or were not entirely genuine.

136. We therefore had no jurisdiction to consider the claimant's allegation about her selection for redundancy and her dismissal. This was because that allegation had already been found to be out of time and it could not be part of a continuing act because we had not upheld any of the later allegations relating to the appeal.

137. We nevertheless record the following. We were entirely satisfied from the evidence that the reason behind the claimant's selection for redundancy and dismissal was the cost saving measures the respondent was undertaking and

the fact that the claimant's role had been identified in February 2020 as one which could be transferred to a low cost country and thus make a significant cost saving. The claimant's selection and dismissal was in no sense whatsoever connected to disability or the protected acts.

138. Therefore even if the burden had shifted we would have found that the respondent had proved that discrimination or victimisation did not occur. The claimant was not treated less favourably and the reason for the detrimental treatment was not because of disability or the protected acts.

Reasonable adjustments

139. As is apparent from our findings of fact this is a case where the claimant's working arrangements changed over the relevant period. The claimant's claim of a failure to make reasonable adjustments falls to be considered in that context.

140. The first reasonable adjustments claim concerned a PCP that the respondent had a requirement to work from the office at least two days per week every week. We are satisfied that the respondent had a PCP of this nature, with the following caveats:

(i) The claimant was required to work from the office full time prior to her being furloughed in April 2020 when she was fit to do so. The claimant was not fit to do so between December 2019 and March 2020.

(ii) The claimant was not required to work in the office at all when she was furloughed between April 2020 and July 2020.

(iii) Upon her return to work in July 2020 the claimant was not required to work in the office at all because she was permitted to work all her hours from home.

(iv) The claimant worked half a day in the office on 17 September 2020. There was no requirement at that stage for her to do two days a week in the office.

(v) On 21 September 2020 the claimant was told she should work two days per week in the office. This was a requirement.

(vi) After 28 September 2020 the claimant was not really "required" to attend the office on any days. However, adopting a broad and liberal approach to identifying the PCP as we think we ought to we would accept that there remained a form of expectation that the claimant would attend the office two days a week as the respondent had declined to formally agree the adjustment of the claimant working from home.

141. The claimed substantial disadvantage arising from this PCP is that the claimant was more prone to becoming anxious and depressed if required to attend the office particularly during the pandemic.

142. In his written submissions Mr Keen said that the disadvantage caused by the requirement to work in the office was simply that it caused the claimant to be anxious. He also said that the claimant was anxious not just about working in the office but about the prospect of working in the office. That latter point did not appear to us to have been clearly foreshadowed in the pleadings, the list of issues or the evidence (other than on specific dates in September 2020). We have focused on the question of if and if so when the PCP put the claimant at the claimed disadvantage according to the case presented to us and in particular the evidence we have heard. There is no evidence that the claimant was caused anxiety about the "prospect" of working in the office other than in September 2020 when the claimant knew she was required to do so (and did so on three occasions).

143. Prior to September 2020 the last time the claimant had in any sense been required or expected to work in the office was December 2019. This appears to be before the claimant's disability began and it is certainly before the respondent had actual or constructive knowledge of the disability. We therefore do not think the duty to make reasonable adjustments could arise at that stage.

144. We also do not think we have any jurisdiction to hear a reasonable adjustments claim relating to December 2019 or the decision which was communicated to the claimant in February 2020 that she would not be permitted to work from home. The parties are agreed that any reasonable adjustments claim is out of time unless it occurred on or after the 10 August 2020. For the reasons we explain below we do not think it is just and equitable to extend time to hear a claim from before that time.

145. In any event we find that the claimant was not put at the claimed substantial disadvantage compared to somebody without her disability prior to September 2020 and the respondent was not aware of any disadvantage in this period.

146. At no stage prior to September 2020 did the claimant inform the respondent that she was prone to or was becoming anxious and depressed if required to attend the office. We think if she was experiencing that the claimant would simply have said so, particularly via Occupational Health. The claimant was being regularly assessed by Occupational Health and she could have explained that disadvantage to them. We think if it existed she would have done so.

147. We took into account that the claimant had requested to work from home in January 2020. However in making that request she did not say that she was more prone to becoming anxious and depressed if required to attend the office. Further it seems clear that there were other reasons – unrelated to anxiety - why the claimant did not want to be in the office at that time including that she had been the subject of an unpleasant and untrue workplace rumour about

sleeping with a manager and that she believed she had been bullied by a colleague.

148. Finally and we think most importantly the claimant's clearly stated position both at the time and in her evidence before us has been that her anxiety from having to attend the workplace arose because of her concerns around covid. This is in fact referred to in the disadvantage as it appears in the agreed list of issues ("particularly during the pandemic"). That anxiety can therefore only have arisen when the claimant was required to attend the office in September 2020 as there is no point prior to that when the claimant was required to attend the office during the pandemic.

149. That fundamental point is reflected in the way in which the claimant's case has been put (we note with the benefit of professional advice). In particular the claimant's case is that she should have been afforded a reasonable adjustment of allowing her to work from home only during the pandemic. The claimant's evidence before us was also clear that she was only requesting a temporary adjustment during the pandemic. Therefore the claimant's case reflects the essential fact that the claimant was not caused anxiety by going into the office generally - it was just caused by going into the office during the pandemic.

150. We are satisfied that the claimant was put at the claimed substantial disadvantage compared to somebody without her disability when she was required to go into the office on 17, 23 and 28 September 2020. We accept the claimant's evidence that on those occasions she experienced significant anxiety concerning her commute and working in the office when the pandemic was ongoing. If the claimant did not have her disability she would not have experienced anxiety to the same extent and we think this was a substantial disadvantage. It was a disadvantage linked to her disability.

151. However we find that the respondent did not know and could not reasonably have been expected to know that the claimant was likely to be placed at that disadvantage.

152. The reason for that is that prior to 28 September 2020 the claimant had never explained that she was anxious about returning to work in the office. The respondent had dutifully commissioned a large number of Occupational Health reports none of which had mentioned that either. As we have observed working from home was recommended by Occupational Health only as a short term measure to assist the claimant to get back to full time office working within a matter of weeks. That is in fact what happened. There was nothing in the Occupational Health reports to suggest that the claimant was likely to be anxious about returning to the workplace generally or for the entirety of the pandemic. The claimant had raised a grievance about health and safety at work but she did not say in that that she was experiencing or was prone to experience anxiety about returning to the office. Most pertinently when it was directly suggested to the claimant by her line manager that she start coming into the office two days a week the claimant's response to that was to say that it would be no problem. This demonstrates that prior to 28 September 2020 the

claimant had not indicated that coming into the office might cause her anxiety and there was no reason for the respondent to believe that.

153. In those circumstances we find that the respondent did not have actual or constructive knowledge of the disadvantage prior to 28 September 2020. Accordingly the duty to make reasonable adjustments did not arise in that period.

154. We next considered the period after 28 September 2020. The respondent's evidence before us was that the claimant was allowed to continue working from home after 28 September because although the respondent had communicated to the claimant that she should be attending the office they had equally decided not to challenge the claimant when she made it clear that she wished to continue working from home. That evidence was not disputed by the claimant and we accepted it.

155. This is therefore a slightly unusual situation where the respondent had communicated that it did not agree with the proposed adjustment, it had not formally made an adjustment, but the adjustment was nevertheless informally allowed. As the claimant's contemporaneous emails showed she understood that the status quo of her working from home would remain. The claimant was never questioned or challenged about staying at home on the days when she was meant to be in the office. She did not experience any adverse consequences (such as disciplinary action) as a result of not attending the office.

156. Notwithstanding the above we concluded that there was in the broad and liberal sense a PCP of an expectation that the claimant would attend the office two days a week. This was because the respondent had declined to formally agree to the adjustment of the claimant working from home full time for the duration of the pandemic. Instead the respondent had apparently decided to informally allow the adjustment and everyone seems to have accepted that that situation would continue. There remained in our view a form of expectation that the claimant would attend the office. We concluded however that this broader form of PCP did not put the claimant at a substantial disadvantage because it did not cause her any anxiety.

157. We did not close our minds to the possibility that a failure to formally agree an adjustment may not alleviate the disadvantage and that in particular such a failure may be an ongoing cause of anxiety. However that is not the way in which we understand the claimant's case to have been pleaded, particularised or presented to us in the list of issues. We also do not think it is consistent with the claimant's evidence to the tribunal. As we understand it the claimant's case is that she was caused anxiety on the days when she was required to attend the office on 21, 23 and 28 September. She did not suggest that she was caused anxiety subsequently by a failure to formally agree an adjustment.

158. We refer in particular to paragraphs 36 to 38 of the claimant's witness statement. The claimant clearly explained that on the days that she attended

the office in September she felt anxious and stressed due to the fear of contracting covid. She explains the panic attack which she experienced on the morning of 28 September which was as a result of knowing that she had to attend work that day. The claimant describes attending her GP and how the GP's recommendation that she worked from home was formally refused by the respondent on 7 October. The claimant does not suggest that she was caused any anxiety after 28 September 2020.

159. We found as a fact but the claimant was not caused any further anxiety about coming to the office after 28 September 2020. This was because she understood that the status quo would prevail, she would not be challenged on her decision not to attend the office and in practice she would be allowed to work from home. This is what happened. The fact that the claimant was more prone to becoming anxious and depressed if required to attend the office was irrelevant after 28 September 2020 because she knew she was not in reality required to attend the office and she did not do so.

160. Had the situation continued things may have come to a head and the respondent may have insisted that the claimant come to the office. The prospect of returning to the office may then have caused the claimant further anxiety. However that did not happen because the focus changed quite quickly from discussing the claimant's working arrangements to discussing the claimant's impending redundancy. Once the focus changed the working from home issue was not revisited. In particular it was not suggested that the claimant should stop working from home. The claimant was not caused any further anxiety about working in the office before she was dismissed.

161. In those circumstances we find that the claimant was not put at the substantial disadvantage compared to a non-disabled person after 28 September 2020 and therefore the duty to make adjustments does not arise in that period either.

162. In any event we would have found it was not reasonable to expect the respondent to make the adjustment of the claimant working from home every day during the pandemic because:

(i) The medical advice was that the claimant was not in fact at an increased risk of covid.

(ii) The occupational health advice was that managing the claimant's anxiety would not in the longer term be helped by avoidance of the source of anxiety. They therefore did not support the claimant working exclusively from home.

(iii) The respondent had legitimate concerns about it being more difficult to manage the claimant's tendency to work excess hours if she was exclusively working from home. The claimant's welfare and her anxiety levels were at risk if she worked excess hours and this was a situation the respondent had, in our view reasonably, sought to avoid from the start of the claimant's difficulties.

(iv) The respondent had legitimate concerns that not all of the claimant's work could be performed effectively from home.

163. It seemed to us that points (ii) and (iii) above were particularly relevant because they demonstrated that the proposed adjustment would not alleviate the claimed disadvantage.

164. The claimant's second reasonable adjustment claim concerned a PCP of a requirement that employees complete their workload during contractual hours. The respondent accepted, correctly in our view, that they had this PCP.

165. The claimed substantial disadvantage in relation to this PCP was that the claimant was more prone to becoming anxious and depressed by her inability to complete her workload during her contracted hours.

166. The claimant was not put at any disadvantage due to her workload between 16 December 2019 and 20 July 2020. This is because the claimant was not required to do any work in that period. There is no evidence of the claimant being caused anxiety about the prospect of her workload in that period.

167. The claimant was not put at any disadvantage due to her workload at any stage following her return to work from furlough on 20 July 2020. The reason for that is that we accepted the claimant's own evidence to us that she had no issues with her workload following her return to work in July (we refer to the note of the claimant's oral evidence reproduced in our findings of fact). The claimant was not unable to complete her workload in that period and her workload did not make her, or make her prone to become, anxious and depressed in that period.

168. The claimant had complained about her workload prior to going off sick on 16 December 2019. This was prior to the respondent having actual or constructive knowledge of the claimant's disability and so the duty to make adjustments did not arise.

169. Further we do not think we have any jurisdiction to hear a reasonable adjustments claim relating to that time. The parties are agreed that any reasonable adjustments claim is out of time unless it occurred on or after the 10 August 2020. The claimant's evidence means that any claim in relation to the second PCP is out of time.

170. Following the approach in Matusciwz if the claimant had been put at a substantial disadvantage the respondent would have been under a duty to make adjustments prior to her going off sick in December 2019. Even if the period was very generously extended to April or May 2020 at the very latest this claim is significantly out of time.

171. The claimant did not present any evidence as to why it might be just and equitable to extend time. We find that it would not be just an equitable, for the following reasons.

(i) The onus is on the claimant to show why it would be just and equitable to extend time and she is not done so.
(ii) The claimant has not presented any evidence as to why she did not bring a claim earlier.
(iii) There is no evidence that the claimant would have been unable to bring a claim earlier,
(iv) The claimant was aware of her rights under the Equality Act, but she had not acted promptly to bring the claim earlier.
(v) There is no suggestion that the respondent failed to respond to requests for information. Rather the evidence indicates that the respondent was willing to engage with the claimant's complaints internally.
(vi) The claimant is intelligent and articulate and she has written a number of detailed documents in particular concerning her grievance and appeal. She has engaged in detailed meetings during the relevant period. She has been well assisted by her trade union throughout. We therefore consider that the claimant could and should have brought her claim within time.
(vii) The delay is substantial.
(viii) There cannot be said to be any prejudice to the claimant in these circumstances in applying the well-known rules on time limits. Conversely we consider that there is a prejudice to the respondent in hearing a claim out of time when there is no good reason to do so and they have been deprived of investigating and responding to it while matters were still fresh.

172. We therefore find that we do not have jurisdiction to hear the claimant's claim in relation to the second PCP. Nevertheless and for completeness we shall set out our findings on that claim in any event.

173. We find that the claimant was not put at the claimed substantial disadvantage by the second PCP at any point.

174. The claimant was not in our view unable to complete her workload during her contracted hours at any stage. We found that this was not a case of the claimant being overworked. Importantly, the claimant was repeatedly assured that she was not expected to work outside her contracted hours and she was never pressurised to do so for example by setting unrealistic targets. The claimant needed support and guidance as to how to manage her workload because she was something of a perfectionist and was so dedicated to her job that she took on work that she did not really need to do. This was offered and provided by the respondent. We found that the reason why the claimant continued to experience anxiety was because of the total breakdown in her working relationship with her line manager. The claimant had issues with her manager which were not related to workload – such as his attempt to extend her probation and his reaction to the workplace rumour. It was repeatedly recognised throughout this unfortunate process that the breakdown in the

relationship with the claimant's line manager was the underlying problem which needed to be addressed. We find that that was the root cause of the claimant's difficulties at work.

175. It was not the PCP of completing her workload during contractual hours that was causing the claimant's anxiety or making her prone to anxiety and depression, it was the breakdown in the relationship with her manager.

176. Moreover even if the claimant was put to the claimed substantial disadvantage by the PCP we would find that the respondent took such steps as were reasonable to avoid the disadvantage. The broad suggestion made by the claimant was that the respondent should have provided enhanced support and/or supervision to ensure that her workload remained manageable and she was able to complete it within contractual hours. We find that the respondent did that.

177. It was repeatedly made clear to the claimant that she should not be working outside her contracted hours and she was strongly discouraged from doing so. The claimant was instead advised that she should be prioritising her workload and constructive meetings about that took place. We refer in particular to the meetings which the claimant had with her line manager on 15 November and 12 December 2019 and the later meetings with HR. The respondent also initiated a stress risk assessment and it proposed mediation and a start continue review of the claimant's workload. These efforts were frustrated because the claimant did not feel able to fully engage with repairing her working relationship with her manager. Instead she decided that she would no longer communicate directly with him other than by email and consequently their relationship remained unworkable.

178. In those circumstances we considered the further detailed adjustments proposed by Mr Keen during this hearing but we found that it would not have been reasonable to expect the respondent to take those steps. This was essentially because we did not feel that there was a prospect that they would have alleviated any disadvantage in circumstances where the respondent had already made extensive efforts to support the claimant and she was unwilling to communicate with her line manager.

179. We should also note that it was implicit in Mr Keen's further suggestions that the respondent was not communicating with the claimant on her workload, was not setting achievable targets, was not reassuring the claimant that she was not expected to work beyond her targets and was placing pressure on the claimant to work to unrealistic deadlines. These allegations do not not accord with our findings of fact which are to the effect that the respondent was attempting to support the claimant (including through third parties such as HR) and support her, especially by repeatedly reassuring her that she was not expected to work outside her contracted hours and providing practical advice on how to manage her workload.

Result

180. It follows from the above that the claimant's claims must fail and be dismissed.

181. We wish to express our sympathy for the difficult time which the claimant has been through however we think that the claims which have been presented to us must necessarily fail for the reasons we have explained.

Employment Judge Meichen
12 August 2022