EMPLOYMENT TRIBUNALS

Claimant: **Mr A Courtney**

Respondent: **AGTC Ltd**

Heard at: **Reading (by CVP)** **On: 26–30 September 2022**

Before: **Employment Judge Reindorf**
Ms R Watts Davies
Mr D Palmer

Representation

Claimant: In person

Respondent: Ms L Simpson (counsel)

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal succeeds and is upheld.

2. The Claimant's claims for direct disability discrimination, harassment related to disability and victimisation fail and are dismissed.

REASONS

Introduction

1. In a claim form presented on 30 June 2021 the Claimant brought a claim for unfair dismissal, disability discrimination and "other payments". His complaint related principally to his dismissal for redundancy which took effect from 20 April 2021. The Respondent denied the claims.

The issues

2. The issues were clarified at a Preliminary Hearing on 23 March 2022, at which it was agreed that the Claimant's claim was for unfair dismissal, harassment related to disability, direct disability discrimination and victimisation. The following list of issues was agreed:

Unfair dismissal

1. *What was the reason for the dismissal? The respondent asserts that it was by reason of redundancy. The claimant alleges that redundancy was a pretext for his dismissal or that he was not fairly selected for redundancy.*
2. *In the event that there was a genuine redundancy situation did the respondent follow a fair procedure? The claimant challenges the process for the following reasons:*
    - 2.1. *He was not offered the role of Operations Manager in Sheffield;*
    - 2.2. *He was not provided sufficient information about the alternative roles he was offered (including rates of pay in relation to those roles);*
    - 2.3. *The pool for selection was unfair because it was too narrow and should have included the incumbent in the Merchandise Manager role, namely Hannah Cole;*
    - 2.4. *The appeal manager was not sufficiently independent from the original decision.*
3. *Was the claimant's selection for dismissal by reason of redundancy within the reasonable range of responses for a reasonable employer?*
4. *Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?*

Disability

5. *Did the claimant have physical and mental impairments, namely a back condition and depression?*

6. *If so, did/do the impairments have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?*

7. *If so, are the effects of those impairments long term? In particular, when did they start and:*

    7.1. *have the impairments lasted for at least 12 months?*

    7.2. *is or was each impairment likely to last at least 12 months?*

8. *Are any measures being taken to treat or correct the impairments? But for those measures would either impairment be likely to have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?*

9. *The relevant time for assessing whether the claimant had/has a disability (namely, when the discrimination is alleged to have occurred) is 12 June 2020 until the termination of his employment on 20 April 2021.*

Section 26: Harassment related to disability

10. *Did the respondent engage in unwanted conduct as follows:*

    10.1. *On 12 June 2020 Catherine Taylor sent text messages about the claimant describing him as childish;*

    10.2. *In November 2020 Thomas Cutler criticised the claimant about lost stock issues, said the claimant had "switched off" and thereafter until the end of the claimant's employment the frequency of communication between Mr Cutler (the claimant's line manager) and the claimant deteriorated;*

    10.3. *On 18 November 2020 during a telephone call between Mr Cutler and the claimant Mr Cutler told the claimant that he never liked the way the claimant worked and asked the claimant if he wanted to leave;*

    10.4. *Angelika said to the claimant during a 4 January 2021 telephone call "what do you mean you can't be better after five weeks off" or words to that effect;*

    10.5. *Tom Cutler failed to conduct the claimant's end of year review before the end of January 2021 or at all before the termination of the claimant's employment.*

11. *Was the conduct related to the claimant's protected characteristic (either of his alleged disabilities)?*

12. *Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?*

13. *If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?*

14. *In considering whether the conduct had that effect, the tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.*

Section 13: Direct discrimination because of disability

15. *Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely:*

    15.1. *Being subjected to a purported redundancy process;*

    15.2. *Being selected for purported redundancy;*

    15.3. *Being dismissed for the purported reason of redundancy.*

    15.4. *Any of the treatment not found to have been harassment.*

16. *Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on hypothetical comparators.*

17. *If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?*

18. *If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?*

Section 27: Victimisation

19. *Has the claimant carried out a protected act? The claimant relies upon the grievance he submitted on or around 26 January 2021 and representations made during the grievance hearing on 26 February 2021.*

20. *If there was a protected act, did the respondent subject the claimant to a redundancy process and terminate the claimant's employment by reason or redundancy or purported redundancy because the claimant had done a protected act?*

Time/limitation issues

21. *The claim form was presented on 30 June 2021. Accordingly and bearing in mind the effects of ACAS early conciliation (which commenced on 17 May 2021 and a certificate being issued on 1 June 2021) any act or omission which took place before 18 February*

2021 is potentially out of time, so that the tribunal may not have jurisdiction.

22. *Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?*

23. *Was any complaint presented within such other period as the employment tribunal considers just and equitable?*

Remedies

24. *If the claimant succeeds, in whole or part, the tribunal will be concerned with issues of remedy.*

25. *There may fall to be considered a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, and/or the award of interest.*

3. During cross-examination the Claimant clarified that the only complaint of harassment related to disability or direct disability discrimination that related to his back condition (as distinct from his depression) was that listed at paragraph 10.1 in the list above.

The Evidence and Hearing

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

5. The hearing took place over five days. Judgment was reserved.

6. There was an agreed trial bundle consisting of 745 pages and a supplementary bundle of 10 pages.

7. The Tribunal heard evidence from Angelika Waszak (formerly Human Resources Business Partner) and Thomas Cutler (Managing Director and co-founder) for the Respondent. The Claimant gave evidence on his own behalf. All witnesses produced written witness statements and were subjected to cross-examination. The Tribunal gave the Claimant permission to rely on an undated supplementary witness statement.

8. The Claimant also produced an unsigned one-page statement from Patrick Corr (the Respondent's former Finance and HR Manager) and applied for a witness order to compel Mr Corr to attend the hearing to give evidence. The statement had been sent to the Respondent on the Thursday before the hearing.

9. Mr Corr's statement contained evidence about the decision making between the Respondent's senior management about how to dismiss the Claimant. Mr Corr was the dismissing officer and he conducted the redundancy process. Neither of the Respondent's witnesses had been

substantively involved in the redundancy process. As such, if Mr Corr was called he would be the only witness able to give direct evidence on the matter.

10. Ms Simpson for the Respondent accepted that the evidence in Mr Corr's statement was relevant in principle, but stated that the Respondent had had insufficient time to consider it and take instructions on it. She also stated that the statement was prejudicial because Mr Corr had left the Respondent's employment under a settlement agreement, and that his statement amounted to a circumvention of the non-disclosure agreement contained in the settlement agreement.

11. The Tribunal issued a witness order requiring Mr Corr to attend to give evidence. We were satisfied that Mr Corr could give evidence that was relevant to the issues in dispute and that it was necessary to issue an order to require his attendance, since he would not attend without one. We were also satisfied that there was sufficient time for Ms Simpson to take instructions on the statement. We did not consider the terms of the Respondent's settlement agreement with Mr Corr to be relevant to our determination.

12. In the event Mr Corr did not appear. Ultimately the Tribunal did not attach weight to his statement because we were able to determine the issues to which it related by reference to the documentary and witness evidence before us.

Findings of Fact

13. The Respondent is a retail sales company which operates by way of mail order and internet sales. The Claimant was employed on 8 January 2018 as an Operations Manager. He was made redundant with effect from 20 April 2021.

14. The Claimant's place of work was in the Respondent's Head Office in Pangbourne. The Respondent also operated a warehouse in Sheffield.

15. The Warehouse Manager, who was based in Sheffield, reported to the Claimant from 2019. Also reporting to the Claimant were the Transport Manager and the Operations Reporting Analyst, Daniel Barford. Mr Barford was based in Pangbourne.

16. The Claimant suffered an injury to his back on 1 February 2019. This required an operation, which took place on 17 August 2019. He was off sick for six weeks. On his return to work he requested a desk riser so that he could work standing up, as this would be more suitable for his back. There were delays in obtaining the desk riser, which was provided in December 2019. The Claimant did not request any other adjustments for his back condition.

17. After his return to work the Claimant's relationship with his colleague Catherine Forbes Taylor (Buyer) deteriorated. He spoke to Mr Cutler about this by telephone frequently from January or February 2020. At this time Mr Cutler was Chief Operating Officer (he later moved into the Managing Director role) . These conversations were often lengthy; the Claimant said that one of them was five hours long.

18. On Friday 12 June 2020 Ms Forbes Taylor mistakenly sent two message to a Whatsapp group chat instead of sending them privately to an individual colleague, Hannah Cole (Merchandiser). The Claimant was a member of the Whatsapp group and saw the messages, which said:

"*Also his spares email made hardly any sense"*

"*I don't understand why his situation is apparently so exception* [sic]. *All 3 of them have kids. Why is it so much harder for him?*

19. Both messages referred to the Claimant. The second message related to a previous discussion in which the Claimant had said that he had difficulties with the time for a virtual meeting because of childcare commitments.

20. The Claimant raised a formal grievance to Mr Cutler by email on Sunday 14 June 2020 in which he complained that Ms Forbes Taylor had bullied him in various ways over a period of months.

21. Mr Cutler held an informal meeting with the Claimant and Ms Forbes Taylor on Monday 15 July 2020. Ms Forbes Taylor apologised to the Claimant in relation to the WhatsApp messages of 12 June. Mr Cutler thought that the meeting was successful in clearing the air between the two. He received no further complaints from the Claimant about Ms Forbes Taylor for several months.

22. Mr Cutler accepted in evidence that he did not follow up the Claimant's formal grievance of 14 June 2020 in accordance with the Respondent's grievance procedure.

23. In August 2020 the Respondent went through a management programme called Entrepreneurial Operating System ("EOS"). This was conducted by an external consultant. It was intended to provide a more efficient structure for the company, which had had a period of rapid and haphazard growth during lockdown.

24. In Mr Cutler's view the Operations Department was facing particular difficulties at this time. His evidence was that it was an unsafe working environment, there were internal theft issues, a backlog of orders and poor communication with the warehouse. It was decided during the EOS process that there would be a new role of Head of Operations. At this

time it was anticipated that the Claimant's role of Operations Manager would report into the Head of Operations.

25. At an EOS meeting on 18 August 2020 Mr Cutler said that he did not think that the Claimant had the skill set to be appointed to the new Head of Operations role. The Claimant was shocked by this, in part because it was said in front of his peers and the external consultant. The Claimant had never been subjected to capability procedures, and no evidence was given by the Respondent that capability procedures were considered at this time.

26. In a private conversation with the Claimant on the same day Mr Cutler told him that one of the reasons that he would not be suitable for the new role was that there were concerns about his people management skills. As an example, he mentioned the issues which had arisen with Ms Forbes Taylor earlier in the year. In relation to that matter, he said that the Claimant had "a version of events in his head" which differed from his own.

27. It was also decided during the course of the EOS process that Mr Cutler was not well suited to the day to day management required of the COO role, and that a new COO should be recruited.

28. After the EOS programme some elements of the Claimant's job were removed from him, such as warehousing and customer service. He remained on the same salary as before. This was done on the basis that the role had become too large and required warehouse management experience. Mr Cutler gave evidence that he thought the Claimant would be pleased by this reduction in duties. In fact, the Claimant felt as though he was being pushed out of the business.

29. Thereafter senior management had ongoing discussions about restructuring the Operations Department. This was described to the Tribunal as a restructure of the business, but it appeared from the documentary and oral evidence to be limited to the Operations Department.

30. On 19 August 2020 the Claimant had a telephone consultation with his GP. He reported "stress at work" and referred to the issues with Ms Forbes Taylor. He explained that he had had an episode of depression in 2006/2007 for which he had been treated with medication. He said that he would like to restart antidepressants. His GP refused medication. She suggested he take a week off and use the time to take exercise and get some rest. A further consultation was arranged for 7 September, but this does not appear to have taken place.

31. The Claimant's next consultation with his GP was on 2 October 2020. His medical records for this appointment show a diagnosis of depressive

disorder. He was prescribed medication for depression and strongly encouraged to speak to his managers and take time off work.

32. In a video call immediately after the Claimant's GP appointment on 2 October 2020, Mr Cutler reiterated to the Claimant that he would not be suitable for the Head of Operations role, and told him that he would not be required to attend senior leadership team meetings in future. In evidence, Mr Cutler said that he thought the Claimant would welcome this development because it would reduce his stress. The Claimant told Mr Cutler that he was suffering from depression and that because of his medication he was spaced out and it was taking him longer to do things. Mr Cutler said that the Respondent would support him and suggested that he take time off, which he refused.

33. Mr Cutler accepted in his evidence that he did not consult or comply with the contractual procedures contained in the Respondent's company handbook. These required line managers to work with any employee who had a diagnosed mental health problem to compile a "personal wellness action plan".

34. At this time Mr Cutler was based in New Zealand. From 3 October 2020 his availability was very limited for a period of around six weeks because he was on paternity leave and his new-born baby had health problems.

35. The Claimant consulted his GP on 7 October about ongoing issues with low mood and anxiety. Following this appointment he started talk therapy sessions.

36. On 12 October 2020 Mr Cutler emailed the Claimant asking him what the Respondent could do to support him with his depression. The Claimant did not respond, but he and Mr Cutler attended a virtual meeting the following day, after which Mr Cutler mentioned to the Claimant that the number for the employee support line could be found in the company newsletter. Mr Cutler did not make any further attempts to discuss the Claimant's depression with him at this time, although they saw each other at virtual team meetings.

37. At some point during October 2020 Mr Cutler interviewed Matthew Talbot for the COO position. The precise chronology of events relating to Mr Talbot's appointment was not clear to the Tribunal, since we were given vague and inconsistent evidence about it. It appears that in or about November 2020 Mr Talbot was appointed on the basis that he would formally take up post in or around May 2021. In his role as COO he would report to Mr Cutler, whose new job title was to be Manging Director. In the meantime, Mr Talbot had some input into strategic advice and discussions about the Operations Department restructure. We were told that in October he told Mr Cutler that in the new structure the Operations Team should be based close to the warehouse, and that thereafter there

were discussions about whether to lease a warehouse close to Head Officer in the south of England.

38. The Claimant had an interim review with his GP on 21 October 2020. He reported that he was feeling "a bit numb".

39. On 17 November 2020 the Claimant and Mr Cutler attended a virtual team meeting. There was a discussion about an incident in which stock had been lost. In front of other team members, Mr Cutler said to the Claimant that he had "switched off" in relation to this issue.

40. The following day a telephone call took place between the Claimant and Mr Cutler. Mr Cutler produced an 8 page note of this discussion, which he said was written from memory after the call.

41. At the outset of the call the Claimant said that he was disappointed that Mr Cutler had not been in touch with him about his depression. Mr Cutler's note shows that, in the main, the remainder of the conversation was taken up with lengthy and very detailed criticisms of the Claimant's performance going back to 2019. He told the Claimant that he thought he was "disengaged" and "switched off" from the business and that he had poor people skills. He said that he thought the Respondent had let the Claimant down by giving him too large a role which was beyond his skill set and was putting the business at risk.

42. Mr Cutler also said that the performance issues were the reason why the Claimant had been removed from the senior leadership team and had been told that he was not capable of the Head of Operations role. He asked again whether the Claimant was committed to staying in the business. The Claimant said that he wanted to remain in his job but that he felt that he was not supported by his colleagues. This referred, at least in part, to the issues he had had with Ms Forbes Taylor. Mr Cutler said that he had not previously been aware of the extent of Mr Cutler's illness, and that the Respondent would support him.

43. During the call the Claimant and Mr Cutler agreed to have weekly 30 minute calls. Mr Cutler also said he would put in place an appraisal and action plan for the Claimant based on the performance issues he had raised. However, no appraisal ever took place. Mr Cutler said in evidence that this was because "the past issues which we couldn't get past kept coming up". By this, he meant the Claimant's complaints about alleged bullying by Ms Forbes Taylor and others.

44. On 19 November 2020, the Claimant telephoned Ms Waszak. He told her that he was suffering from depression. He said his depression was due to several factors, including the alleged bullying by Ms Forbes Taylor. Ms Waszak offered the Claimant time off work and counselling sessions. The Claimant said that he did not want to take time off work.

45. On 21 November 2020 Ms Waszak sent the Claimant an email summarising the conversation they had had on 19 November. She thanked him for opening up and sharing with her about his depression, and said that she and Mr Cutler were there to support him. She said that the Respondent was happy for the Claimant to take the rest of the year off if he wished, comprising two weeks on contractual sick pay followed by pre-booked paternity leave and then his remaining holiday. She also offered the Claimant counselling.

46. The Claimant reported to his GP on 23 November that he was finding himself "going into a daze" with "lots of negative circular thoughts".

47. The Claimant did not take up Ms Waszak's offer of time off before his paternity leave. He took two weeks' paternity leave at the beginning of Equally it is possible for an employer to fairly dismiss an employee because he is underperforming. 2020. He then returned to work for one day on 14 December and went off sick the following day for six days. He had two weeks pre-booked annual leave at the end of December.

48. During the autumn and winter of 2020 Mr Cutler, Ms Waszak, Adam Gilbourne (Managing Director) and Mr Corr had discussions about the Claimant. In her witness statement Ms Waszak said that these discussions were about "recurring issues" with the Claimant which were causing a "negative atmosphere". She said that the Respondent was considering an exit settlement with the Claimant. She gave no specific details of the content of these discussions in her witness statement and she was evasive about it in cross-examination, as was Mr Cutler.

49. The Tribunal finds that these discussions were, in significant part, about the Claimant persistently raising complaints about alleged bullying by Ms Forbes Taylor and others and the way in which Mr Cutler had dealt with his grievance of June 2020. The It was clear from the evidence that the Claimant had started to raise these issues again over the previous few weeks, although it the Tribunal was not told precisely when or to whom. The Respondent – in particular Mr Cutler – believed that the matters which the Claimant was complaining about were historical and had already been dealt with. Mr Cutler was frustrated by the fact that the Claimant was repeatedly raising these issues.

50. We find also that in their discussions Mr Cutler, Mr Gilbourne Ms Waszak and Mr Corr decided that they did not want the Claimant to remain in the Respondent's employment. The reason for this decision was, in part, that they believed that the Claimant was underperforming. Another part of the reason was Mr Cutler's frustration with the Claimant repeatedly complaining about his colleagues. Because of this the Respondent perceived that the Claimant was causing friction in the workplace. These were also the reasons why Ms Waszak made the offer to the Claimant on 19 November 2020 that he could take time off immediately until the

end of the year (referred to above). By that time, the Respondent had decided that it did not want the Claimant to be at work.

51. We further find that the reason that the Respondent did not take immediate steps to terminate the Claimant's employment in November or December 2020 was because it was trying to find a way to do so which would appear to be lawful. We draw that conclusion from the following correspondence:

    51.1. In an email on 10 December 2020 Ms Waszak told Mr Gilbourne and Mr Cutler that she had spoken with the Respondent's advisors (Avensure) to "double check our options regarding Anthony's employment". She went on:

    For the best for this case and the company we need to be careful with our steps and the way we are approaching Anthony. We can not rush this process and definitely not take impulsive decisions.

    51.2. In the email Ms Waszak then suggested that the Respondent's approach should be for Mr Cutler to have a discussion with the Claimant on his return to work to check how he was and to "close all 'open' cases from the past". Once these issues had been dealt with the Respondent would "draw a line in the sand". The Tribunal finds that Ms Waszak was referring here to the complaints that the Claimant had raised about his colleagues in his June grievance and which he had persisted in reiterating more recently.

    51.3. At the same time, Ms Waszak said, the Respondent would "set clear expectations" for the Claimant on his return, and "give him a few weeks to independently improve areas of concern". These were "performance/behaviour/attitude". Thereafter, should the Claimant not show improvement, the Respondent would ask him for a "protected conversation". If he did not agree to an exit package, he would be placed under six months' formal performance management, following which he would be dismissed if he did not improve.

    51.4. In response to Ms Waszak's email of 10 December 2020, Mr Gilbourne wrote on 11 December:

    If we just tell him to 'go' whats the most we could be sued for?

    Of course I don't expect this is a financial [sic] *viable option and he would be able to sue us for to* [sic] *much.*

    Do we also have an option to say, Anthony, your job has been re-located from the office, to the Sheffield warehouse. So we don't sack him but basically push him to resign?

While all of this is going on, can we drop his salary down to what we paid him when he started? At least we are not paying top dollar for a non performer!!!!!!!

51.5. Mr Corr responded later the same day, saying that the Respondent needed to "ensure we do absolutely everything by the book, due to him being employed for over two years and stating that he has depression (protected characteristic)". He said that he felt that the Claimant was "waiting for us to make a crucial mistake". Mr Corr advised against doing anything beyond what Ms Waszak had advised in her email of the previous day. He continued:

I have raised the notion of essentially making his role redundant and this is something we are still reviewing to better understand the ramifications of doing this. I am in total agreement that we do need to realign his salary based on his 'new role'. Unfortunately there is red tape and we must follow any process to the absolute letter of the law.

I know not the perfect response to what you are seeking, but just to reassure, we are looking at all possible options and looking to resolve in the best time frame we can.

51.6. Mr Gilbourne responded thanking Mr Corr for "protecting the company", and asking whether it would be reasonable to lower the Claimant's salary and change his role before starting "the process".

52. The Claimant returned to work on 4 January 2021. He called Ms Waszak on that day. In response to her asking if he was happy to return to work, he said "no, not entirely". Ms Waszak asked how he could not be better after having five weeks off. The Claimant was upset by this comment.

53. On 7 January the Claimant had a meeting with Mr Cutler. Mr Cutler later sent an email to Ms Waszak containing "minutes" of this meeting. These notes were made from recollection and were not shared with the Claimant. They included commentary from Mr Cutler marked as "sidenotes". The notes record that the meeting began with Mr Cutler asking the Claimant how he was now feeling about the issues he had had with Ms Forbes Taylor the previous year. The Claimant said that before Christmas Mr Cutler had made it clear he wasn't going to do anything about those issues and that "you don't want me here". Mr Cutler denied this and said that he wanted the Claimant to remain in his job but "we have to overcome these issues" in order to "move forward and rebuild". He encouraged the Claimant to raise a formal grievance, despite the Claimant saying there was nothing that could be done because nothing had been done in June and Mr Cutler had told him on 18 August that it was "all in his head". Mr Cutler was insistent that the

Claimant raise a further grievance, saying "I need you to raise a formal grievance if this is still an issue". In a "sidenote", he explained to Ms Waszak why he considered the Claimant's version of what happened in June to be wrong.

54. On the same day the Claimant was sent a list of objectives.

55. On or around 14 January 2021 Ms Waszak referred the Claimant to an Occupational Health provider at his own request. On 25 January the Claimant made an application for flexible working, which was approved by Mr Cutler.

56. On 26 January 2021 the Claimant emailed Mr Cutler a written grievance setting out in some detail his dissatisfaction with how his complaint about Ms Forbes Taylor had been dealt with the previous June. He complained that his June 2020 grievance had been ignored.

57. At some point in early 2021 Ms Waszak was asked to write a business case for the restructure. In his witness statement, Mr Cutler indicated that this was in late January or early February, and that by this time Mr Talbot had already negotiated the terms of a lease on a warehouse in Sheffield. Ms Waszak said in her witness statement that she was asked to write the business case in February or March and that Mr Talbot negotiated the lease after that. The Tribunal finds that whatever the precise date on which Mr Talbot negotiated the lease, it was before Ms Waszak was asked to put together the business case for the restructure. The Respondent's witnesses did not explain why Mr Talbot was involved in negotiating a lease on behalf of the company several months before his official start date.

58. During this period the Claimant consulted his GP on several occasions. On 22 January 2021 the GP advised that his medication could be changed.

59. The Occupational Health provider, Dr Irons, reported on 29 January 2021 that the Claimant was suffering from a recurrent significant mood disorder caused by both work-related issues and personal issues. The Claimant was starting new medication the following week, and Dr Irons did not think that he would be mentally robust enough to attend a grievance meeting on 1 February, although he might be able to instruct somebody to make representations on his behalf. Dr Irons recommended that the Respondent consider delaying the meeting for about four weeks, by which time the Claimant's new medication would have started to take effect.

60. Dr Irons said that he was concerned that it may not be beneficial for the Claimant to remain at work in the current circumstances, and that the Claimant should discuss this with his GP and the Respondent. Dr Irons' opinion was that a short period of absence "may be useful" while the

Claimant's new medication took effect and to allow any meetings regarding the Claimant's concerns to take place. Unless the work-related issues could be addressed satisfactorily, the longer-term prospects of the Claimant returning to work were, in Dr Irons' view, "guarded".

61. Dr Irons also recommended that an ergonomic assessment be undertaken for the Claimant because of his back problems.

62. On the same day (although before he had had sight of Dr Irons' report) Mr Cutler emailed Ms Waszak asking whether it would change "the business re-structure case" if the Occupational Health report recommended that the Claimant take time off work. Ms Waszak replied as follows:

It is difficult to say anything at the moment as I do not know what will be Anthony's next step, we are ahead of him but he is trying to wiggle his way. I do not think we will wait 28 weeks but if something like that would be possible we would look at him as not being fit for work and we would look for terminating his contract because of health reasons

63. On 2 February 2021 Ms Waszak emailed the Claimant saying that she had received Dr Irons' report and asking whether he wished to take time off work. Not having received a response, she emailed the Claimant again on 4 February inviting him to a mandatory meeting the following day. The Claimant replied the same day saying that although he was experiencing side effects from his new medication he was not sure that this warranted time off, and that he could not in any event afford to take time off because of his workload and because he only had one week of contractual sick pay entitlement remaining.

64. At the meeting with Ms Waszak on 5 February 2021 the Claimant declined to take time off as annual leave.

65. Later on 5 February 2021 Ms Waszak sent the Claimant an invitation to a grievance hearing on 12 February. This was later postponed to 26 February at the Claimant's request.

66. The Claimant's grievance hearing took place on 26 February. It was held remotely and the Claimant was not accompanied. Ms Waszak heard the grievance and Mr Corr was the notetaker. The Claimant read out from a 28 page document, which he later sent Ms Waszak. The matters raised by the Claimant included: his unhappiness with the outcome of the meeting of 15 July 2020 between him, Mr Cutler and Ms Forbes Taylor; Mr Cutler's comment at the EOS meeting in August 2020 that the Claimant did not have the skill set to be Head of Operations in the new structure; and his perception of a change in attitude towards him thereafter.

67. Ms Waszak conducted an investigation. On 15 March 2021 she sent the Claimant a 42 page letter dismissing the grievance. In the letter the Claimant was offered the opportunity to appeal to Patrick Graham, who was a Managing Director of another company, EllisKnight International.

68. In the meantime, the Claimant had a GP appointment on 1 March 2021 in which he reported that he was ruminating and struggling to let go of negative thoughts. His medication dose was increased.

69. By email on 16 March 2021 the Claimant told Ms Waszak that he was disappointed with the grievance outcome but that he did not intend to appeal because of his mental ill health. Furthermore he did not think that Mr Graham would be impartial because he had an ongoing business relationship with the Respondent.

70. In that email the Claimant complained that he had had limited contact from Mr Cutler. He accepted an offer made by Ms Waszak in the grievance outcome letter for him and Mr Cutler to engage in mediation, but said that he would prefer to use an external mediator. On 27 March 2021 Ms Waszak informed the Claimant that she had not been able to find a local external mediator who had availability before May.

71. On 22 March 2021 the Claimant attended a meeting with Ms Waszak in which she offered him a "protected conversation" and a settlement on the basis that his employment would be terminated. The Claimant was given until 26 March to respond to the offer of settlement, which he did not do.

72. The last GP appointment for which the Claimant produced a record was on 29 March 2021. In this appointment he reported that he was having CBT therapy and finding it useful.

73. The Claimant and Mr Barford attended a remote consultation meeting with Mr Corr on 6 April 2021 at which Mr Corr told them that they were at risk of redundancy. On 7 April Mr Corr sent them letters to the same effect. They were invited to another consultation meeting on 12 April.

74. At the meeting on 12 April 2021, which the Claimant and Mr Barford attended together, Mr Corr told them that discussions about the restructure had been ongoing for around six months, and that he had no "final proposals" but wanted to make them aware of "some immediate changes" and inform them of new vacancies which included Controls and Reporting Analyst and Head of Operations (Sheffield based). The Claimant asked Mr Corr when he would be told about the new structure, to which Mr Corr replied "shortly, but we do not have a time frame at the moment". The Claimant then asked a large number of questions, including: how long the consultation period would be; when individual consultation would start; why his role was redundant; why was he not being pooled for redundancy with others; what was the selection

process; what opportunities there would be for him to challenge the new structure; why the new roles were being advertised; what support would be offered; and what had been done to avoid redundancies. Mr Corr said that he was not going to answer the questions in the meeting because he did not know all the answers. He said that he would try to get the answers to the Claimant by the end of the week.

75. On 15 April 2021 an undated document was sent to the Claimant containing answers to the questions he had posed at the 12 April meeting. Amongst other things, the document said that: the consultation period might be ending the following week; the reason for the redundancies was that the Operations department might be more efficient if it was located in Sheffield near the warehouse; there was no need for pooling; there were no selection criteria; the only support being offered was reasonable time off for interviews; no individual consultation was planned (but could be requested); there would be no opportunity to challenge the new structure but there would be an opportunity to appeal; as for ways to avoid redundancy, the Respondent was still reviewing the structure and was offering the Claimant the opportunity to apply for other roles.

76. The business case was not shown to the Claimant at any time, even though according to Ms Waszak and Mr Cutler it was completed at the end of March 2021.

77. Also on 15 April 2021 Mr Corr sent the Claimant and Mr Barford a list of vacancies, asking them to respond the following day. The Claimant requested additional time and details of the salary brackets for the new posts. He also complained that the company handbook said that at-risk employees would have a discussion with their line managers about redeployment, but Mr Cutler had not spoken to him about this at all.

78. In response Mr Corr extended the deadline for expressing an interest in the new roles until the following Monday and gave the salary information the Claimant had requested. His answers to the Claimant's questions about individual consultation and redeployment were that the only individual meeting that was required was the final one, and that opportunities for alternative employment were being provided.

79. By email on 19 April 2021 the Claimant informed Mr Corr that none of the alternative roles were suitable for him and expressed his dissatisfaction with the answers Mr Corr had given him on 15 April.

80. Also on 19 April 2021 Mr Corr sent the Claimant a letter inviting him to a further formal consultation meeting the following day. The purpose of the meeting was said to be "to give you another opportunity to discuss any ways in which the company could avoid the need to make you redundant. In this meeting we will review with you the consultation process".

81. The Claimant attended the meeting with Mr Corr on 20 April 2021 unaccompanied. Tanya Wardle took notes. Mr Corr informed the Claimant that his employment was terminated by reason of redundancy with immediate effect, with a week's pay in lieu of notice, payment for accrued holiday and a statutory redundancy payment.

82. The Claimant repeatedly asked to see the new structure. Mr Corr answered that the new Head of Operations would be in Sheffield, but did not explain the new structure any further.

83. The Claimant asked why it had been decided that some tasks which had previously been done by the Operations team would still be done from Pangbourne, such as booking in containers. Mr Corr said that he could not comment on that because he did not fully understand the needs of that specific task.

84. On the same day the Claimant was sent a dismissal letter and a schedule setting out his financial entitlements. The letter explained that he had the right to appeal to Mr Graham.

85. Mr Barford was also made redundant.

86. The Claimant appealed against his dismissal by letter dated 26 April 2021. Amongst other things, he complained that: the consultation process was neither genuine nor meaningful; Mr Corr had not been properly prepared; there was no individual consultation; he had not had an opportunity to challenge the restructure; insufficient efforts were made to find alternative employment for him; there was no genuine reason for the redundancy; and his dismissal was retaliation for him having raised a grievance and having refused to accept the without prejudice offer made in the protected conversation.

87. The appeal was heard by Mr Graham on 6 May 2021, with Ms Waszak taking notes. The Claimant was unaccompanied.

88. At the outset of the appeal hearing the Claimant asked Mr Graham about his relationship with the Respondent. Mr Graham explained that he owned a building that the Respondent rented from him.

89. During the appeal hearing the Claimant elaborated on his written grounds of appeal and made several additional points. These included: that he felt that his dismissal amounted to discrimination on grounds of sex and disability and victimisation; that he did not believe there was a reason for his role to be moved to Sheffield; that his dismissal was predetermined; that he should have been offered a role in Customer Services; and that he had had no mental health support.

90. In a 6 page letter dated 7 June 2021 Mr Graham rejected the Claimant's appeal against redundancy. In the letter Mr Graham referred to

"investigations" he had done, but did not specify who he had spoken to or attach any investigation notes. No notes were included in the Tribunal's bundle and Mr Graham was not called to give evidence.

91. Following the Claimant's redundancy Paul Abbott was employed as Warehouse Manager in Sheffield on a six month temporary contract. In due course he was made permanent and then in December 2021 was promoted to the Operations Manager role.

The law

Unfair dismissal

92. By section 94 of the Employment Rights Act 1996 ("ERA") an employee has the right not to be unfairly dismissed.

93. In a claim for unfair dismissal, the employer must show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a potentially fair reason (s.98(1) ERA). Potentially fair reasons include redundancy (s.98(2(c) ERA).

94. If the employer has shown that the dismissal was for a potentially fair reason, the Tribunal must determine whether the employer acted reasonably or unreasonably in treating that reason as sufficient reason to dismiss the employee. In determining this question the Tribunal must have regard to the circumstances of the case, including the size and administrative resources of the employer's undertaking and equity and the substantial merits of the case (s.98(4) ERA).

95. In conducting its enquiry under s.98(4) ERA the Tribunal should keep in mind that:

    95.1. the "band of reasonable responses" test applies to all aspects of the dismissal (*British Home Stores Ltd v Burchell* [1980] ICR 303; *Graham v Secretary of State for Work and Pensions (Jobcentre Plus)* [2012] IRLR 759 CA); and

    95.2. the question is not whether there was something else which the employer ought to have done, but whether what it did was reasonable (*Sainsbury's Supermarkets v Hitt* [2003] IRLR 23 CA).

96. Redundancy is defined in s.139(1) ERA, which provides (in relevant part) that an employee will be taken to have been dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of the business:

    96.1. for employees to carry out the work for which the employee was employed; or

96.2. to carry out that work in the place where the employee was so employed

have ceased or diminished or are expected to cease or diminish.

97. Guidance as to the proper approach to redundancy dismissals was provided by the Employment Appeal Tribunal in *Williams v Compair Maxam* [1982] ICR 156 at 161 by Browne-Wilkinson J. The principles in this case are stated to apply to redundancy situations in which a union is involved, but can inform the assessment of other redundancy situations. The employer should:

1. …seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

2. …consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

4. …seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5. …seek to see whether instead of dismissing an employee he could offer him alternative employment.

The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim".

98. The approach set out in *Williams* presupposes that a pool of employees will be identified from which some will be selected. The traditional approach is that where a pool is used, it should include all those employees carrying out work of a particular kind but may be widened to include other employees whose jobs are similar to or interchangeable with those employees. This is not, however, an absolute requirement.

99. The principle that a Tribunal should not substitute its own view for that of the employer, and should consider instead whether a decision lay within the range of reasonable responses also applies to selection pools (*Green v A & I Fraser (Wholesale Fish Merchants) Ltd [*1985] IRLR 55).

100. An employer is not necessarily required to identify a pool at all, and may place the affected employee in a "pool of one". It is not necessarily unreasonable for an employer to limit the pool to people doing work of the kind that has diminished (*Green*). Furthermore the fact that employees perform similar tasks (or even have the same title) does not automatically mean that their roles are interchangeable (see, for example, *Lomond Motors v Clark* UKEATS/0019/09/BI where two accountants were not considered to be interchangeable because one did not have the requisite experience to cover the other's site).

101. In *Capita Hartshead Ltd v Byard* [2012] IRLR 814 the EAT gave guidance as follows:

> *the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that:*
>
> *(a) It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in* Williams v Compair Maxam Limited *[1982] IRLR 83);*
>
> *(b) ...the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn (per Judge Reid QC in* Hendy Banks City Print Limited v Fairbrother and Others *(UKEAT/0691/04/TM);*
>
> *(c) There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem (per Mummery J in* Taymech v Ryan *EAT/663/94);*
>
> *(d) the Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine*

if he has "genuinely applied" his mind to the issue of who should be in the pool for consideration for redundancy; and that

(e) even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it.

102. In *Samels v University of the Creative Arts* [2012] EWCA Civ 1152 the Court of Appeal upheld the Employment Tribunal's decision that it was permissible for the employer to place the employee into a pool of one. See also *Wrexham Golf Co v Ingham* UKEAT/0190/12 (10 July 2012, unreported).

103. A fair consultation involves giving the body or individual consulted a fair and proper opportunity to understand fully the matters about which they are being consulted and to express their views on those subjects with the consultor thereafter considering those views properly and genuinely (per Glidewell LJ in *R v British Coal Corpn Ex p Price* [1994] IRLR 72 at 75).

Protected conversations

104. By s.111A(1) of the Employment Rights Act 1996, evidence of pre-termination negotiations is inadmissible in a claim for ordinary unfair dismissal. The section renders both the fact and the content of the negotiations inadmissible (*Faithorn Farrell Timms LLP v Bailey* [2016] ICR 1054 EAT).

105. A "pre-termination negotiation", also known as a "protected conversation", is defined in s.111A(2) as any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.

106. Section 111A(4) provides that subsection (1) only applies to the extent that the Tribunal considers just "in relation to anything said or done which in the Tribunal's opinion was improper, or was connected with improper behaviour".

107. This principle does not apply to complaint of discrimination made under the Equality Act 2010.

Disability

108. By s.6 of the Equality Act 2010:

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

109. Sch 1, Part 1 EqA contains the "long-term condition":

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

110. The burden of proof is on the Claimant to show on the balance of probabilities that he was, at the material times, disabled within the meaning of s.6 EqA (*Morgan v Staffordshire University* [2002] IRLR 190, EAT).

111. The Claimant must provide evidence of the "normal day-to-day activities" which he claims to be less able to carry out (*Mutombo-Mpania v Angard Staffing Solutions Ltd* UKEATS/0002/18 (17 July 2018, unreported)). "Normal day-to-day activities" include ordinary tasks or activities of daily life, such as walking, cooking, shopping or socialising. It may encompass activities which are relevant to participation in working life (*Chief Constable of Norfolk v Coffey* [2019] EWCA Civ 1061 CA).

112. A "substantial" adverse effect is one which is "more than minor or trivial" (s.212(2) Equality Act 2010).

113. By Sch 1 para 5, the effect of any treatment or correction of an impairment should be disregarded in determining whether the impairment amounts to a disability. The Tribunal should consider whether the impairment would be likely to have a substantial adverse effect but for the treatment or correction (*SCA Packaging Ltd v Boyle* [2009] ICR 1056 HL).

114. The question of whether the effects of an impairment were, at the material time, likely to last 12 months (the long-term condition) is to be assessment by reference to the facts and circumstances existing at the date of the alleged discrimination (*Richmond Adult Community College V McDougall* [2008] IRLR 227 CA; *All Answers Ltd v W* [2021] IRLR 621 CA). The Tribunal should ask whether at the time it "could well happen" (see paragraph C3 of the statutory "Guidance on Matters to be Taken into Account in Determining Questions relating to the Definition of Disability" (2011)'; *Boyle v SCA Packaging Ltd* [2009] IRLR 746).

Victimisation

115. By s.27 Equality Act 2010 an employee is victimised if he is subjected to a detriment by his employer because he has done or is expected to do

a protected act.

116. Protected acts include making allegations that any person has contravened the Equality Act or doing any other thing for the purposes of or in connection with the Act. It is not necessary for the employee to specifically name the Equality Act; it is enough if he alleges that things have been done which would be a breach of the Act (*Waters v Metropolitan Police Comr* [1997] ICR 1073 CA). There must be "something sufficient about the complaint to show that it is a complaint to which at least potentially the Act applies" (*Durrani v London Borough of Ealing* UKEAT/0454/2012 (10 April 2013, unreported).

117. A detriment is something which a reasonable employee would consider to be to his detriment (*MOD v Jeremiah* [1980] ICR 13 CA). An unjustified sense of grievance cannot amount to a detriment (*St Helens Metropolitan Borough Council v Derbyshire* [2007] ICR 841 HL).

118. There is no need for a comparator in a complaint of victimisation.

Time limits for the presentation of complaints of discrimination

119. A complaint of discrimination contrary to the Equality Act 2010 must be presented within three months of the act complained of, allowing for ACAS Early Conciliation (s.123 Equality Act 2010).

120. The Tribunal may extend time for the presentation of the claim if it would be just and equitable to do so (s.123(3) Equality Act 2010). This is a broad discretion and a matter of fact and judgment (*Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 CA).

121. The factors to take into account may include:

    121.1. the length of and reason for the delay;

    121.2. the extent to which the cogency of the evidence is likely to be affected by the delay;

    121.3. whether the Claimant was aware of his right to claim, and/or of the time limit;

    121.4. whether the Respondent cooperated with any requests for information;

    121.5. the promptness with which the Claimant acted once he knew of the facts giving rise to the cause of action;

    121.6. the steps taken by the Claimant to obtain professional advice once he knew of the possibility of taking action;

121.7. the prejudice that would be suffered by the employer if the claim was permitted to proceed (necessarily balanced against the prejudice to the claimant if he is refused the extension of time).

(See *British Coal Corpn v Keeble* [1997] IRLR 336)

122. A failure to provide a good excuse for the delay in bringing a relevant claim will not inevitably result in an extension being refused (*Rathakrishnan v Pizza Express (Restaurants) Ltd* [2016] IRLR 278).

123. Where ill health is relied on in an application for an extension of time, it is not necessary that the Claimant's ill health actually prevented him from presenting the claim (*Watkins v HSB Bank Plc* [2018] IRLR 1015).

Conclusions

Unfair dismissal

124. The Tribunal finds that there were two reasons for the Claimant's dismissal: firstly, that the Respondent believed that he was having an adverse impact on workplace relationships; and secondly that the Respondent believed he was underperforming.

125. The Tribunal accepts that the Respondent decided for organisational reasons that the Operations Department should be based near the warehouse. However, this was the opportunity for the Claimant's dismissal rather than the reason for it. The Tribunal was entirely satisfied on the evidence that the Respondent decided over the period between August and November 2020 that it wished to dismiss the Claimant from its employment because of his perceived effect on the workplace and his perceived performance problems. It then set about finding a mechanism to do so, as is amply demonstrated by the emails between Mr Cutler, Ms Waszak, Mr Corr and Mr Gilbourne on 10 December 2020.

126. The Respondent having failed to show that the reason given to the Claimant for his dismissal was a potentially fair reason, the dismissal was unfair.

127. Even if the reason was a fair one, the Respondent did not act reasonably in the circumstances in dismissing the Claimant.

128. It is possible for an employer to fairly dismiss an employee because he is having a detrimental effect on workplace relationships. A dismissal for this reason could fall into the "some other substantial reason" category. Equally, it is possible for an employer to fairly dismiss an employee because he is underperforming. In either case, however, the employer should act reasonably in the circumstances by undertaking reasonable investigations into the problem and making reasonable efforts to remedy the issue before concluding that dismissal is an appropriate response.

129. In this case, the Respondent undertook no adequate investigations into the problems it was experiencing with the Claimant. It investigated his grievance in early 2021, but that is not the same exercise as investigating whether he was having a detrimental effect on workplace relationships. In any event, the Tribunal finds that the grievance investigation was not fairly conducted by Ms Waszak. She was not sufficiently impartial, since she had already been heavily involved in discussions in December 2020 about how best to dismiss the Claimant. The Tribunal was also troubled by the evidence that Mr Cutler had positively insisted that the Claimant should lodge a formal grievance in January 2021. We concluded that he did so in order that the Respondent could demonstrate that it had dealt with the Claimant's complaints before dismissing him, rather than as a genuine attempt to resolve his concerns. This approach was Ms Waszak's suggestion, made in her email of 10 December 2020. Again, this suggests that she was not an impartial decision maker. Furthermore, on 7 January 2021 Mr Cutler had sent Ms Waszak his version of events in advance of the Claimant lodging his formal grievance. The Tribunal finds that this pre-emptive action was designed to influence Ms Waszak's decision in the grievance investigation.

130. As for the Claimant's performance, the Respondent did not get further than Mr Cutler's suggestion to the Claimant on 17 November 2020 that he would be placed under an action plan and given an appraisal. Neither of these steps was ever taken, and no further investigation into the Claimant's performance was undertaken. Nor was he given any proper opportunity to improve his performance. Furthermore, the possible impact of his illness on his performance and behaviour was not investigated or taken properly into account. Instead, on 21 November Ms Waszak simply sought to persuade the Claimant to take time off until January 2021. We find that she did not do because the Respondent wanted to support the Claimant, but because by that time it had decided that it no longer wished to have him in the workplace.

131. The Tribunal therefore finds that the Respondent's decision to dismiss the Claimant was outside the range of responses open to a reasonable employer.

132. Even if we are wrong about the reason for the dismissal and it was genuinely by reason of redundancy, we find that the Respondent did not act reasonably in deciding to dismiss the Claimant for that reason in all the circumstances of the case. The Claimant was not properly consulted, since he was given insufficient details of the business case for the restructure or, indeed, the proposed new structure itself on which to comment. No consideration was given to pooling him with any other employees of similar rank. The Tribunal was not given enough evidence to conclude that the Claimant should have been pooled with others, but we were satisfied that the Respondent should have applied its mind to the question and did not. Moreover the Claimant was not given any realistic opportunity to apply for the Operations Manager post, having

been definitively told by Mr Cutler in August 2020 that he would not be suitable for the job. The appeal did not remedy these flaws, and the Tribunal was not convinced that the appeal manager was impartial given his relationship with the Respondent.

133. In determining the complaint of unfair dismissal the Tribunal did not take into account the evidence given about the protected conversation which took place on 21 March 2021. There was no basis upon which we could disapply s.111A of the Employment Rights Act 1996; in particular, there was no suggestion of improper behaviour such as to invoke s.111A(4). In any event, the Claimant was unable to specify the relevance of the protected conversation to the unfair dismissal claim, and it appeared that he relied upon it principally in relation to the discrimination complaints.

Disability

134. The Tribunal finds that the Claimant has not produced sufficient evidence to show that he was a disabled person at the relevant times by reason of depression.

135. The evidence did not show that the Claimant's depressive disorder had a substantial adverse effect on his ability to carry out normal day-to-day activities at the relevant time. What evidence there was of the effect of the impairment was not sufficiently specific; such as the Claimant's evidence in his witness statement that in November 2020 he was feeling "spaced out" and that things were taking him a lot longer. There was no medical evidence to indicate that this arose from his depression and there was no evidence to show that this effect was more than minor or trivial.

136. Furthermore the Claimant produced no evidence of the effect that his impairment would have had on his ability to undertake normal day-to-day activities if he had not been taking medication.

137. There was also insufficient evidence to show that the long-term condition was met. There was evidence in the bundle that the Claimant was still taking medication for depression in November 2021, fifteen months after he first consulted his GP for work stress. However, that is of limited assistance, since the relevant test is whether <u>it was likely at the relevant time</u> that the effect of the impairment would last for more than twelve months. The only relevant evidence on this point was the Occupational Health doctor's prediction that a long-term return to work was "guarded" unless the Claimant's work issues were addressed. The Tribunal was unable to find on this evidence that it could be said to have been likely at that time that the impairment would last for twelve months.

138. The Tribunal does not reach a conclusion as to whether the Claimant's back condition amounted to a disability, because we have found that the

single complaint of disability discrimination to which this impairment was relevant was presented out of time (see below).

Harassment related to disability and direct disability discrimination

139. The Tribunal having found that the Claimant was not a disabled person by reason of depression, we make no further findings on the Claimant's Equality Act complaints which relate to his depression.

140. As for the Claimant's single complaint of harassment related to his back condition, we find that that this was presented outside the statutory time limit for the presentation of complaints under the Equality Act 2010. The incident of which he complained occurred on 12 June 2020. The ET1 was lodged on 30 June 2021, more than a year later. ACAS Early Conciliation had taken place from 17 May 2021 to 1 June 2021.

141. The Claimant offered no reason why he had not lodged the complaint earlier and did not suggest any reason why the Tribunal should exercise its discretion to extend time on the basis that it would be just and equitable to do so. Therefore the Tribunal declines to extend time for the presentation of the complaint.

Victimisation

142. The Tribunal finds that the Claimant's written grievance of 26 January 2021 was not a protected act for the purposes of s.27 of the Equality Act 2010, because it did not contain any complaints which amount to allegations of a breach of the Equality Act 2010.

143. At the grievance hearing on 26 February 2021 and in other representations made by the Claimant in the course of the grievance process he made some complaints which were protected acts. These included a complaint that reasonable adjustments had not been made in respect of his back condition and a complaint that the way in which he was treated in respect of the June 2020 grievance "goes against the Equality Act".

144. However, the Tribunal finds that the Respondent did not subject the Claimant to a redundancy procedure and then dismiss him because of the contents of his grievance (whether the written grievance of 26 January 2021 or any representations made by him thereafter). The Respondent had decided to dismiss the Claimant before he lodged his grievance. It then encouraged him to lodge the grievance so that it could show that it had dealt with his complaints before dismissing him. Therefore, although we do find that the Claimant was subjected to detrimental treatment by the Respondent, including his dismissal, we do not find that this amounted to unlawful victimisation.

145. A remedy hearing has already been listed. The Tribunal will consider at that hearing how much compensation the Claimant is entitled to for his unfair dismissal, including the question of whether he would have been dismissed fairly in any event (paragraph 4 in the list of issues above).

Employment Judge Reindorf

Date 13 January 2023

JUDGMENT SENT TO THE PARTIES ON

13 January 2023

FOR THE TRIBUNAL OFFICE