EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms N Twebaze	**v**	**Muji Europe Holdings Ltd**

Heard at: London Central (by video)

On: 20 - 23 June 2022

Before: Employment Judge P Klimov
Tribunal Member L Moreton
Tribunal Member P de Chaumont-Rambert

Representation:

For the Claimant: in person

For Respondent: Mr L Welsh (HR Consultant)

JUDGMENT having been sent to the parties on 23 June 2022 and written reasons having been requested by the claimant on 29 June 2022, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Issues

1. By a claim form presented on 27 November 2020 the claimant brought complaints of unfair dismissal, pregnancy and maternity, race, disability and sex discrimination.

2. At the case management hearing on 21 July 2021 the claimant withdrew her complaint of pregnancy and maternity discrimination. The remaining complaints were clarified as being direct race discrimination (s.13 of the Equality Act 2010 ("**EqA**")), direct sex discrimination (s.13 EqA), failure to make reasonable adjustments (s.20, 21 EqA). For the purposes of her direct race discrimination complaint the claimant

relies on her race as “Black African” and for the purposes of her failure to make reasonable adjustment complaint - on her alleged disability of “severe depression and anxiety”.

3. The respondent denies all the claims. It does not accept that at the relevant time the claimant had a disability within the meaning of s.6 EqA. It further contends that the claimant’s race and disability discrimination claims are out of time and the Tribunal does not have jurisdiction to consider them.

4. At the preliminary hearing on 21 July 2021, EJ Henderson gave various case management orders and listed the case for the final hearing over 5 days, starting on 14 February 2022. The final hearing was postponed on the respondent’s late application due to its representative being unavailable to attend the hearing on medical grounds.

5. The claimant submitted her disability impact statement pursuant to the case management orders. However, except for two letters dated 24 April 2020 and 16 August 2021 from her Psychological Therapist, she did not provide any other medical evidence in support of her disability claim.

6. The parties failed to comply with all other case management orders. In particular, the respondent did not prepare a bundle and did not provide a copy of it to the claimant by 1 October 2021. The parties did not agree on the final list of issues by 30 July 2021. The claimant sent her witness statement to the respondent (which largely repeated her disability impact statement) three days before the start of the hearing. The respondent sent its witness statements to the claimant on Sunday evening before the first day of the hearing on Monday. The respondent failed to disclose to the claimant and include in the bundle some key documents central to the claimant’s case.

7. The respondent sent the trial bundle, the claimant’s and four respondent witnesses’ witness statements, agreed list of issues and cast list to the Tribunal on Sunday, 19 June 2022, at 20:17 before the start of the hearing on Monday, 20 June 2022, at 10am. The case management orders required the respondent to send those documents to the Tribunal at least five working days before the hearing.

8. The hearing started at 10am on Monday, 20 June 2022. The claimant appeared in person and the respondent was represented by Mr Welsh. I asked Mr Welsh why the documents had not been sent earlier. He said that the parties were late agreeing the bundle and because of that witness statements had only been exchanged on Sunday. The claimant said that she had sent her witness statement to Mr Welsh three days earlier, however, she was happy to accept the respondent’s late witness statements and proceed with the hearing.

9. I asked the claimant whether she agreed with the list of issues. She said that she wanted to change her case on unfair dismissal and contest the reason of redundancy, which she had accepted at the case management hearing on 21 July 2021 as the reason for her dismissal, as the genuine reason for her dismissal. She said the change in the position was because she had discovered new evidence casting doubt on the genuineness of the redundancy. I explained to the claimant that if she wished to make that change, she would need to make an application to amend,

which the Tribunal would then hear before the evidence. I also explained that since the respondent's case was prepared based on redundancy being accepted as the reason for her dismissal, if her application were allowed, the respondent might seek to adduce further evidence or postpone the hearing to prepare to deal with this new issue.

10. After a short adjournment the claimant confirmed that she would not be making an application to amend and was happy to proceed with the case on the basis that redundancy was the reason for her dismissal. The claimant also confirmed that she was in agreement with the list of issues (reproduced as Appendix to this judgment for ease of reference). The claimant also said that she wanted to add some further documents (Uber rides receipts) and her Schedule of Loss, which was not included in the bundle. It was agreed that she should send those documents to the respondent and the respondent would then update the bundle. Additional documents were accepted by the Tribunal as documentary evidence in the case. The hearing was adjourned until 2pm for the Tribunal to read the papers.

11. The hearing re-started at 2pm with the claimant giving her evidence and being cross-examined by Mr Welch. In the course of the claimant's evidence, it became apparent that many key documents related to the claimant's case (meeting notes of her performance improvement plan and redundancy consultation meetings) were not in the bundle. It was also reasonably apparent that such documents were in existence and within the respondent's possession or control. The claimant confirmed that the notes had not been disclosed to her by the respondent.

12. The hearing finished for the day at 16:45 with the claimant still giving the evidence. On the second day of the hearing, 10 minutes before the start of the hearing, Mr Welsh sent to the Tribunal and the claimant copies of the notes of her appeal meeting against the first written warning and the notes of her appeal against redundancy. No other meeting notes were disclosed.

13. At the start of the hearing, I asked Mr Welsh why those notes had not been disclosed earlier and why no other meeting notes had been included with this disclosure. Mr Welsh said that it was all that he had received from the respondent and that he had only received the notes that morning. The Tribunal adjourned the hearing to consider the matter.

14. It appeared to the Tribunal that there were grounds to consider whether the respondent's response should be struck out under Rule 37(b) and/or (c) of the Employment Tribunals Rules of Procedure 2013 ("**the ET Rules**"). Accordingly, after the adjournment the Tribunal invited the parties to make representations on that issue.

Strike Out Decision

The Law

15. Rule 37 of the Employment Tribunals Rules of Procedure 2013 (**the "ET Rules"**) provides:

37.— Striking out
(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
……..;
(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
(c) for non-compliance with any of these Rules or with an order of the Tribunal;
……...

16. In ***Bolch v Chipman*** [2004] IRLR 140, the EAT set out the test that the Tribunal should apply when considering whether a claim or response should be struck out under the Rule 37(1)(b). The test was affirmed by the Court of Appeal in ***Abergaze v Shrewsbury College of Arts & Technology*** [2009] EWCA Civ 96 and summarised by Elias LJ at [15]: "*In the case of a strike out application brought under [r 37(1)(b)] it is well established that before a claim can be struck out, it is necessary to establish that the conduct complained of was scandalous, unreasonable or vexatious conduct in the proceedings; that the result of that conduct was that there could not be a fair trial; and that the imposition of the strike out sanction was proportionate. If some lesser sanction is appropriate and consistent with a fair trial, then the strike out should not be employed*."

17. The rule requires the Tribunal to find that the conduct of the proceedings was scandalous, vexatious or unreasonable. The purpose of the rule was set out in ***Bennett v Southwark LBC*** [2002] EWCA Civ 223 by Sedley LJ at [26]: "*What the rule is directed to… is the conduct of proceedings in a way which amounts to an abuse of the tribunal's process: abuse is the genus of which the three epithets scandalous, frivolous and vexatious are species*."

18. The meaning of "*vexatious*" was considered in ***Attorney General v Barker*** [2000] EWHC 453 where Bingham LJ held at [19]:
"*The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process*."

19. "*Unreasonable*" has its ordinary English meaning and is not to be interpreted as if it means something similar to '*vexatious*' (***Dyer v Secretary of State for Employment*** EAT 183/83 (unreported).

20. In deciding whether to strike out a party's case for non-compliance with an order under rule 37(1)(c), a tribunal will have regard to the overriding objective set out in rule 2 of seeking to deal with cases fairly and justly. This requires a tribunal to consider all relevant factors, including:

    a. the magnitude of the non-compliance
    b. whether the default was the responsibility of the party or his or her representative
    c. what disruption, unfairness or prejudice has been caused
    d. whether a fair hearing would still be possible, and
    e. whether striking out or some lesser remedy would be an appropriate response to the disobedience — see ***Weir Valves and Controls (UK) Ltd v Armitage*** *2004 ICR 371, EAT*.

21. In ***Emuemukoro v Croma Vigilant (Scotland) Ltd*** [2022] ICR 335, Choudhury P reminded tribunals, when considering a strike-out application, to consider all the factors relevant to a fair trial, including "*the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective*" at [19].

Submissions, Analysis and Conclusions

22. Mr Welsh accepted that the manner, in which the proceedings had been conducted by or on behalf of the respondent had been unreasonable and that the respondent was in breach of the Tribunal orders, and therefore Rules 37(1)(b) and (c) were engaged. He, however, argued that the claimant was equally in breach of the Tribunal's orders and her conduct of the proceedings had been unreasonable too.

23. Mr Welsh also said that the respondent had submitted its ET3 in time and that the claimant had many documents sent to her pursuant to her data subject access request ("the **DSAR**"). He also argued that the claimant was in possession of the documents in the bundle for some time and kept adding new documents over the course of the preceding week.

24. Finally, Mr Welsh argued that the striking out the respondent's response would be a disproportionate step in the circumstances because the claimant would still have a fair opportunity to present her case. He suggested that it would be more proportionate to postpone the hearing with a costs order against the respondent.

25. The claimant said that all additional documents, which she had sent to the respondent to be added to the bundle, were the respondent's originated documents, she had tried to exchange documents on the date ordered by the Tribunal, but Mr Welsh was unavailable. She tried to contact the respondent's

HR and was told to deal with Mr Welsh. She also said that she had tried to exchange the witness statements earlier but again had problems contacting Mr Welsh. She went on to give examples of the difficulties she had had contacting Mr Welsh in January – May 2022.

26. Finally, the claimant said that she believed in her claim and wanted to get through the trial to be able to get on with her life, even though she felt disadvantaged by not having the meeting notes disclosed to her earlier as she had no time to study them.

27. In reply, Mr Welsh said the reason for the claimant not being able to contact him was him being in the hospital. He also said that the claimant herself had been taken ill with Covid and was not available.

28. The Tribunal adjourned to consider the matter. The Tribunal decided unanimously that the respondent's response must be struck out under Rule 37(1)(b) and, in the alternative, under Rule 37(1)(c) of the ET Rules. The Tribunal gave the parties the following reasons for its decision:

    a. *We reject the respondent's assertion that its unreasonable conduct of the proceedings and the non-compliance with the Tribunal's orders have been caused by the claimant. The claimant is a litigant in person and based on the representations we have heard from her we are satisfied that she has made every reasonable effort to comply with the Tribunal's orders and to progress the matter to the trial in an orderly manner.*

    b. *In any event, the respondent did not explain how the alleged non-compliance by the claimant had prevented the respondent to comply with the Tribunal's orders, for example, by disclosing to the claimant its documents when it should have done that back in September 2021, or how it had caused the respondent to conduct the proceedings in an unreasonable manner, which it admits to has done.*

    c. *We consider that the magnitude of the respondent's non-compliance is significant. The respondent's late and incomplete disclosure of the relevant documents, and the extremely late disclosure of its witness statements, has put the claimant at a serious disadvantage in these proceedings.*

    d. *These documents (notes of various performance improvement plan ("**PiP**") meetings, consultation and appeal meetings), which the respondent has still not disclosed fully, go to the core of the claimant's claim that she had been treated in a discriminatory manner during the PiP meetings and that her redundancy selection was unfair and tainted by sex discrimination.*

e. *The respondent has failed to disclose the notes on the original date it was ordered to do so by the Tribunal, 17 September 2021. It has failed to disclose them before the original trial date in February 2022. It has failed to disclose them before the start of this hearing. The respondent has only disclosed two sets of notes 10 minutes before the start of the second day of the hearing, after the claimant had already given most of her evidence. It has disclosed those notes only because the Tribunal specifically asked Mr Welsh on the first day of the hearing why none of the relevant meeting notes were in the bundle.*

f. *The respondent has been professionally represented from the start of the proceedings. It would have been obvious to the respondent and its representative that those notes were highly relevant and must be disclosed. The explanations provided by Mr Welsh for failure to disclose the documents are entirely unsatisfactory. The fact that he had received them only this morning is neither here nor there. The duty of disclosure is on the respondent, and Mr Welsh as its representative should have dealt with that matter much earlier.*

g. *The fact that the respondent has presented its ET3 in accordance with the Rules does not give the respondent a valid excuse to ignore the Tribunal's case management orders.*

h. *Equally, it is no answer to the failure to comply with the disclosure order to say that the claimant was sent a large number of documents as part of her DSAR. The documents should have been disclosed as part of these proceedings, irrespective of the DSAR. In any event, we are not satisfied that the relevant notes had been disclosed as part of the DSAR. The respondent did not present any evidence to show that they had been, and indeed did not even suggest that.*

i. *We reject Mr Welsh submission that the reason for the late and partial disclosure is the presentation by the claimant of new documents. We accept the claimant's submission that most of the documents she had disclosed (and in a timely manner) were the respondent's documents. Adding 20-25 pages of Uber receipts is not something that could have hampered the respondent's ability to disclose all relevant documents and witness statements in time.*

j. *We do not know whether the fault lies with the respondent or Mr Welsh and it is not for us to determine that. We do not accept Mr Welsh submission that his illness prevented him to work on the case. The Tribunal's records indicate that he was in the hospital in Feb 2021 and that was the reason why the original hearing had to be postponed.*

k. We accept the claimant's submission that she had problems engaging with Mr Welsh before the original hearing and waited until April 26 (the end of Mr Welsh sickness absence) before unsuccessfully trying to re-engage with him.

l. In any event, if Mr Welsh considered that his ill health prevented him from representing the respondent in these proceedings and meeting the deadlines set by the Tribunal's orders, he should have considered coming off the record. He continued to represent the respondent. We observe that the respondent is a large business with means to afford professional legal representation.

m. We also find that Mr Welsh's reference to the claimant being unwell with Covid as the reason for the respondent's non-compliance with the orders is an ill-thought through attempt to shift the blame on the claimant. We accept the claimant's submission that she was unwell with Covid in January 2022 for a period of 2 weeks only. Therefore, there is no good reason why the claimant's short illness in January could have prevented the respondent to comply with the Tribunal orders.

n. We find that the respondent's non-compliance with orders and unreasonable conduct has caused significant disruption, unfairness, and prejudice to the claimant. As stated above, we find that the meeting notes are critical to the claimant's case, and their late and only partial disclosure has put the claimant into an impossible position when she needs to deal with the disclosed documents on the hoof and while being in the middle of giving her evidence.

o. Further, given that the respondent has still failed to disclose the PiP meetings' notes, the claimant remains highly prejudiced by not being able to put to the respondent's witnesses, by referencing the contents of those notes, that what was actually said in those meetings was very different to what the respondent wrote to the claimant in its subsequent emails and what the respondent witnesses will telling the Tribunal.

p. We accept that at the start of the first day of the hearing the claimant said that despite the late submission of the respondent's witness statements she wanted to go ahead. However, that was before it became apparent that the respondent had in its possession critical documents, which it had failed to disclose.

q. Further, the claimant is a litigant in person and would not have necessarily known of her right to seek a strike out order on that ground. We also accept that she wanted to get on with the trial as she was waiting to get this matter heard for a long time. This, however, does

not mean that the respondent's unreasonable conduct and non-compliance with the orders did not cause her any prejudice or hardship.

r. *The next and critical question for us is whether a fair trial is still possible. We accept that striking out the response is a draconian measure. It is not meant to be a punishment for unreasonable conduct or for non-compliance with the orders. If we find that despite the respondent's non- compliance and unreasonable conduct a fair trial is still possible, we should allow the respondent to present its case.*

s. *However, the question is not whether a fair trial is still possible in theory, but whether it is possible within the trial window allocated, i.e. now.*

t. *In Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 335, Choudhury P reminded tribunals at [19], when considering a strike-out application, to consider all the factors relevant to a fair trial, including "the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective".*

u. *Therefore, we reject the respondent's submission that the case can be adjourned to a later date. In any event, we have already heard evidence from the claimant, and so have the respondent. Therefore, even if the hearing were to be adjourned it would most likely require a new panel and even with a new panel the claimant would be materially disadvantaged by having given her evidence first, allowing the respondent significant time to prepare its witnesses. Making all such arrangements to accommodate the respondent's unreasonable conduct and non-compliance with the orders, in our judgment, would be disproportionate and not in accordance with the overriding objective.*

v. *It is not a case where an unless order requiring the respondent to disclose relevant documents would address the issue. In short, we find that no lesser sanction would be appropriate in the circumstances.*

w. *However, since striking out the respondent's response does not prevent the respondent from participating in the hearing to an extent allowed by the Tribunal under Rule 21 of the ET Rules, we find that in would be in accordance with the overriding objective to allow the respondent to participate in the hearing to a limited extent, to which issues we will turn next.*

x. *For these reasons, it is decision of this Tribunal to strike out the respondent's response*.

Continuation of Hearing

29. Having announced this decision the Tribunal went on to explain to the parties that under Rule 37(3) of the ET Rules, the effect of the strike out decisions shall be as if no response had been presented by the respondent, as set out in Rule 21.

30. Rule 21 states that the respondent "*shall only be entitled to participate in any hearing to the extent permitted by the Judge*". The Tribunal decided that it would be appropriate and in accordance with the overriding objective to allow the respondent to participate in the hearing in the following way:

    a. To make submissions to the Tribunal on the time limit issues with respect to the claimant's race and disability discrimination claims,

    b. To make submissions to the Tribunal on the issue whether the claimant has met the initial burden of proof under s.136(2) EqA with respect to her sex and race discrimination claims,

    c. To make submissions to the Tribunal on the issue whether the claimant had met the burden of proof to show that at the relevant time she had a disability within the meaning of s.6 EqA,

    d. To make submissions to the Tribunal on the issues of compensation, including on any *Polkey* adjustments.

31. The respondent was not allowed to continue cross-examining the claimant or lead its evidence. Save as indicated above, the respondent was not allowed to argue its case on any liability issues.

32. The hearing proceeded with the Tribunal taking the claimant's evidence by asking its questions. After a short adjournment the parties made their final submissions.

Findings of Fact

33. The claimant was employed by the respondent as a Management Accountant from 1 January 2017 until her dismissal for reason of redundancy on 6 August 2020.

34. In September 2018 the claimant went on maternity leave and returned on 23 September 2019. On 21 August 2019, prior to her return to work, the claimant had a meeting with Mr Chath Weerasinghe ("**CW**") – the respondent's Head of Finance and Ms. Leila Blackman ("**LB**") – the respondent's European HR Manager, to discuss her return to work. At the meeting the claimant was told about the changes in the Finance department resulting in the change in the claimant's responsibilities. The claimant was also told that she had accumulated 23 days of annual leave and asked if she wished to take those before returning to work.

35. On 28 August 2019, the claimant sent an email to CW and LB asking to return on a flexible schedule and use her accumulated holiday entitlement to cover parts of weeks/days when she would not be working. LB replied suggesting that the claimant

took all her accumulated leave and returned to work after that, to which the claimant agreed.

36. The claimant returned to work on 23 September 2019 and was given handover by Yajiao Zhang ("**YG**"), who had been recruited to cover for the claimant.

37. In the first few weeks and months after returning to work the claimant was struggling with completing work tasks correctly and on time. That was largely due to the new processes and systems, introduced by the respondent when she was absent on maternity leave, staff changes and sick absences in the Finance team.

38. In early December CJ contacted LB to tell her that he had concerns about the claimant's performance. A meeting was organised with the claimant on 11 December 2019 to discuss the CJ's concerns. The claimant was not told in advance of the purpose of the meeting. At the meeting the claimant was told by CJ and LB that her standard of work was unsatisfactory because of mistakes she had been making when closing November books. She was told that if she made the same mistakes in December, she would be put on a performance improvement plan ("**PiP**"). The claimant requested to have flexible hours of work. LB said that the respondent would consider the request. The claimant did not receive any response to her request.

39. On 3 January 2020, the claimant was invited to an "informal" PIP meeting on 14 January 2020. Although the meeting was described as "informal" it was conducted in a heavy-handed and overbearing manner. The meeting was attended by CJ, LB and Chung Sze Chan ("**CZC**"), Subsidiary Finance Manager. The claimant asked for support and requested her management to be "*more friendly*". LB said that the claimant did not understand how serious the matter was and that the process could lead to the claimant's dismissal. LB also said the words to the effect: "*Let me get it clear, Nicolette, you have failed*".

40. The "informal" PiP and the lack of the management support caused the claimant to suffer anxiety and depression. In January 2020 the claimant contacted Ultimate Counselling therapists for help. She attended psychological therapy initial assessments. Her psychometric scores indicated severe depression and anxiety, and impaired functionality. Ongoing psychometric assessments conducted during the therapeutic process indicate symptoms of depressive disorder and generalised anxiety disorder. Although the claimant engaged in the therapy process well, outcomes were limited by the claimant's persistent feeling of unfairness and mistrust at work.

41. On 17 January 2020, the claimant requested to work from home in accordance with the respondent's working from home policy. The respondent declined the request for the reason of the claimant's being on the PiP. Another respondent's employee, Ms Rowen Kelly, who is white, and who had returned from maternity around the same time as the claimant was allowed to work from home. Ms Kelly was not on a PiP.

42. On 3 February 2020, the claimant had a meeting with LB, at which the claimant told LB that she was unhappy about being on the PiP and that she felt that she was not being supported by the management. LB explained the reason, the purpose and next steps in the PiP.

43. On 14 February 2020, there was another PiP meeting attended by the claimant, CJ, LB and CZC. The claimant was told that the "informal" PiP was unsuccessful, and the matter would now progress to the formal PiP. Following the meeting, the claimant sent an email challenging various aspects of the process and indicating her disagreement with how the process had been run and highlighting the lack of support from her managers. In that email the claimant specifically requested that she was given daily feedback on any errors and issues. She asked to have more support by way of 1-2-1 meetings with her managers. She also asked that the PiP process structure was revised, as in the present form it was causing her a lot of anxiety and affecting her health.

44. On 17 February 2020, LB responded to the claimant's email promising certain measures to address the claimant's concerns but reiterating that the PiP cannot be suspended. LB also said that having reached the end of the informal process, the next step would be to hold a meeting under the formal PiP process. LB said that at the meeting different options would be discussed, including a different option to the formal PiP.

45. On 25 February 2020, there was the first formal PiP meeting, at which the claimant requested to be given permission to work from home occasionally. CJ agreed that the claimant could work from home a maximum 2 days a month during the PiP period.

46. PiP meetings continued on a weekly basis through March, April and May 2020, with the last PiP meeting held on 27 May 2020.

47. On 25 March 2020, the claimant was invited to a formal capability meeting on 1 April, which was on the claimant's request postponed until 14 April. The meeting was chaired by Apiramei Danial ("**AD**") – the respondent's Finance Manager, who became the claimant's line manager in or around March 2020.

48. On 20 April 2020, following the capability meeting, AD issued the claimant with the first written warning under the PiP. On 26 April, the claimant appealed the first written warning. The appeal was heard on 6 May 2020 by Masato Arai ("**MA**") – the respondent's Finance Director. MA upheld the first written warning, which he confirmed by a letter to the claimant of 19 May 2020.

49. On 10 June 2020, the claimant with her agreement was placed on furlough.

50. In July 2020 the respondent initiated a redundancy programme, which included the Finance function. On 17 July 2020, the claimant and another Management Accountant, Mr Carlo Irregalore ("**CI**") were placed at risk of redundancy.

51. Both the claimant and CI were offered the option of voluntary redundancy, which they did not take. The respondent then progressed to selecting one person from the pool of two (the claimant and CI) using the selection criteria, which comprised of a set of criteria (performance, skills, experience, qualifications/certificates, absences, disciplinary/capability records) and a set of competency-based questions. The claimant scored significantly lower than CI and was selected for redundancy.

52. On 6 August 2020, the claimant was notified by a letter that her employment would be terminated with immediate effect by reason of redundancy.

53. On 12 August 2020, the claimant appealed her redundancy. The appeal was heard by MA on 20 August 2020. MA dismissed the claimant's appeal.

54. On 28 October 2020, LB wrote to the claimant advising her of Accounts Payable Controller vacancy with the respondent. On 11 November 2020, the claimant replied stating that she was not interested in the role.

Direct Race Discrimination complaint – Issues 17 -21

55. The claimant complains that she was discriminated against because of her race by the respondent on 17 January 2020 refusing her request to work from home, when in similar circumstances Ms Rowan Kelly (who is white) was allowed to work from home.

The Law

Time Limit

56. Under s123 Equality Act 2010 ("EqA") *a claim 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.

57. If a claim under the EqA is prima facie out of time, the Tribunal has a wide discretion to extend time where it would be "just and equitable" to do so.

58. In ***Robertson v Bexley Community Centre t/a Leisure Link*** 2003 IRLR 434, CA, the Court of Appeal held that when employment tribunals consider exercising the discretion under S.123(1)(b) EqA, '*there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule*.'

59. The onus is therefore on the claimant to convince the tribunal that it is just and equitable to extend the time limit. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law simply requires that an extension of time should be just and equitable — ***Pathan v South London Islamic Centre*** EAT 0312/13.

60. The relevant principles and authorities were summarised in ***Thompson v Ark Schools*** [2019] I.C.R. 292, EAT, at [13-21], and in particular:
    a. Time limits are exercised strictly;
    b. The onus is on the claimant to persuade the tribunal to extend time;
    c. The decision to extend time is case- and fact-sensitive;
    d. The tribunal's discretion is wide;
    e. Prejudice to the respondent is always relevant;

f. The factors under s33(3) Limitation Act 1980 (such as the length of and reasons for the delay and the extent to which the claimant acted promptly once he realised, he may have a claim) may be helpful but are not a straitjacket for the tribunal.

Submissions and Conclusions

61. The claimant accepts that her race discrimination claim is significantly out of time. However, she argues that the Tribunal should exercise its discretion and extend the time limit and consider her claim on the merits because the same managers were involved in later alleged discriminatory conduct, albeit it was on different grounds than race.

62. Th respondent argues that it will not be just and equitable to extend the time limit because it was a one-off alleged discriminatory conduct. It was many months ago. The claimant was granted homeworking a maximum two days a month, which she accepted and never raised any complaint about that at the time.

63. Having considered the parties' arguments, we are not satisfied that the claimant has demonstrated sufficient reasons to persuade the Tribunal that it will just and equitable to extend time. The claimant alleges that the same managers were involved in later alleged discriminatory conduct. However, she does not claim that such later discriminatory conduct was in any way linked to the respondent's refusal to allow her to work from home, which she claims was because of her race.

64. More importantly, even accepting that the same managers were involved in later acts of alleged disability and/or sex discrimination, this does not explain why the claimant could not have brought her race discrimination complaint earlier.

65. If the claimant thought at that time (as she argues now) that the refusal to allow her to work from home was an act of direct race discrimination, there is no satisfactory explanation as to why she did not take any steps to enforce her rights. She never complained about that matter to the respondent. The claimant accepted two days working from home arrangement proposed by the respondent in February 2020, and the matter was never raised by the claimant again until she issued these proceedings.

66. Considering the balance of prejudice test, we find that it lies in favour of the respondent. It is a historic matter, which happened many months ago. Until issuing her claim at no stage did the claimant put the respondent on notice that she considered the conduct in question as being discriminatory because of her race. By allowing the claimant to work from home two days a month, which was accepted by the claimant, the respondent would have reasonably considered that the matter had been resolved to the claimant's satisfaction. CW who refused the claimant's initial request to work from home full time is no longer with the respondent and was not called as a witness. Therefore, we find that the respondent would be significantly prejudiced if it had to defend this historic claim.

67. For these reasons we find that it will not be just and equitable to extend the time limit. It follows that the claimant's direct race discrimination claim is dismissed for lack of jurisdiction.

Direct Sex Discrimination complaint – Issues 5 – 7

68. The claimant complains that she was treated less favourably by the respondent because of her sex by the respondent:

    a. dismissing the Claimant as a result of being consistently compared to Carlo Irregolare; and
    b. putting her at a disadvantage because of the Claimant's absence whilst on maternity leave.

69. The claimant compares the treatment afforded to her with how the respondent treated CI (actual comparator).

70. The claimant confirmed at the case management preliminary hearing in July 2021 and again, at this final hearing that her claim is for direct sex discrimination only. At the start of the hearing, I explained to the claimant the difference between direct and indirect discrimination claims.

The Law

71. Section 13 of EqA states:

    "*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*."

72. Sex is protected characteristic (s.11 EqA).

73. A complaint of direct discrimination will only succeed where the tribunal finds that the protected characteristic was the reason for the claimant's less favourable treatment.

74. There is a substantial case law on the issue of how the question of causation should be approached by employment tribunals. In the majority of cases, the best approach in deciding whether allegedly discriminatory treatment was '*because of*' a protected characteristic is to focus on the reason why, in factual terms, the employer acted as it did.

75. Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out. (***Nagarajan v London Regional Transport*** [1999] IRLR 572, HL).

76. The relevant legal authorities recognise that direct discrimination can arise in one of two ways: where a decision is taken on a ground that is inherently discriminatory — that is, where the ground or reason for the treatment complained of is inherent in the act itself, such as the employer's application of a criterion that differentiates by race, sex, etc. In cases of this kind, what was going on inside the head of the discriminator

— whether described as intention, motive, reason or purpose — will be irrelevant (see ***Amnesty International v Ahmed*** 2009 ICR 1450, EAT), or

77. The other category of cases is where a decision is taken for a reason that is subjectively discriminatory — that is, where the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation; i.e. by the 'mental processes' (whether conscious or unconscious) which led the putative discriminator to do the act. In that latter category, the individual employee who carried out the act complained of must have been motivated by the protected characteristic. If he or she is innocent of any discriminatory motivation but has been influenced by information supplied or views expressed by another employee whose motivation is discriminatory, the correct approach is to treat the supply of information or view expressed by the other employee as the discriminatory action (see ***CLFIS (UK) Ltd v Reynolds*** [2015] EWCA Civ 439; [2015] IRLR 562, CA.)

EqA Burden of Proof

78. Section 136 EqA states:

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

79. The guidance set out in ***Igen v Wong*** [2005] ICR 9311 (approved by the Supreme Court in ***Hewage v Grampian Health Board*** [2012] ICR 1054) sets out the correct approach to interpreting the burden of proof provisions. In particular:
    a. it is for the claimant to prove on the balance of probabilities facts from which the tribunal could conclude that the employer has committed an act of discrimination, in the absence of an adequate explanation (para 79(1), see also ***Ayodele v Citylink Ltd and anor*** [2018] ICR 748 at paras 87 - 106);
    b. it is unusual to find direct evidence of discrimination and '*[i]n some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in*"' (para 79(3));
    c. therefore, the outcome of stage 1 of the burden of proof exercise will usually depend on '*what inferences it is proper to draw from the primary facts found by the tribunal*' (para 79(4));
    d. '*in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts*' (para 79(6));
    e. where the claimant has satisfied stage 1 it is for the employer to then prove that the treatment was "in no sense whatsoever" on the grounds of the protected characteristic and for the tribunal to '*assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that [the protected characteristic] was not a ground for the treatment in question*' (para 79(11)-(12));

f. '*[s]ince the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof*' (para 79(13)).

80. In ***Igen v Wong*** the Court of Appeal cautioned tribunals '*against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground*' (para 51).

81. In ***Madarassy v Nomura International PLC*** [2007] ICR 867 Mummery LJ stated that: '*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*' (para 58).

Submissions and Conclusions

82. In support of her direct sex discrimination claim, the claimant submits that it was unfair to compare her with CI as part of the selection process, because CI had greater knowledge of the company's new processes and systems, which she had missed out on due to being on maternity. She says because only women take maternity leave, it follows that she was discriminated against as a woman.

83. She also claims that CI was favoured in the process by the respondent by deliberately structuring interview questions in such a way that CI would be able to give better answers than her because of his knowledge of the company's new processes and systems

84. Mr Welsh said that the respondent did not accept that the claimant had made out *a prima facia* case of sex discrimination, but instead of giving reasons for that, proceeded to argue the respondent's case that it was a genuine redundancy situation and the claimant's sex played no part in her being selected for redundancy. I stopped Mr Welsh and explained again that because the respondent's response had been struck out, the Tribunal could not consider the respondent's defence. The Tribunal allowed the respondent to participate in the hearing only to a limited extent, including by making submissions on whether the claimant has discharged the initial burden of proof. Mr Welsh did not make any further submissions.

85. The first step for the Tribunal was to decide whether based on the facts in front of us the claimant has satisfied the so-called stage 1 of the burden of proof, i.e. whether on the balance of probabilities she has established facts from which the Tribunal could conclude that the respondent has committed an act of sex discrimination by dismissing her and/or by favouring CI in the selection process. If the Tribunal finds that she did, as the respondent's response has been struck out, her sex discrimination claim will succeed.

86. The claimant's case on causation is not that the respondent favoured CI because he is a man, but because he was given opportunities to acquire knowledge of the company's new processes and systems, which opportunities she missed out on

because she was on maternity leave. She compares how things were before she went on maternity leave and what happened when she came back (changes in the company's structure, staff resignations, sick leaves, new processes, etc.) which in her own words she struggled with.

87. She says all that would not have happened if she had not gone on maternity and as only women could take maternity leave, and CI is a man and accordingly did not and could not have taken maternity leave, the reason for the less favourable treatment must be her sex.

88. We find that the claimant argument is misconceived. The focus must be on the reason why the claimant was treated less favourable than CI, that is why she was selected for redundancy and dismissed, and he was not. The answer is because CI scored higher on the selection criteria. The reason he scored higher was because he had stronger knowledge on the matters the respondent chose to test the candidates, and not because he is a man. The claimant accepts that.

89. The claimant claims that the selection criteria were unfair because she was marked down on capability and that was unfair because the PIP was unfair. However, she does not claim that the criteria were inherently discriminatory against women.

90. She claims that the interview questions favoured CI. However, she does not claim that it was CI's sex that made the respondent to structure its questions in a way which was favourable to CI. Her complaint is that the questions were structured in a way to favour CI because he was present at the company and was able to acquire the relevant skills and knowledge when she was on her maternity leave. Her evidence was: "*If I hadn't gone on maternity I would have been trained on those systems. I would have had exposure to the systems*". Therefore, it is not the CI's sex, but his skills and knowledge acquired by him while the claimant was on maternity, was the reason for the difference in treatment she complains about.

91. In deciding whether the claimant has established a prima facia case of sex discrimination, we take the claimant's case at its highest and disregard the respondent's pleadings and witness evidence, not only because the respondent's response has been struck out, but also because that is the correct approach at this stage of the enquiry (see paragraph 79.d above).

92. The claimant does not claim that the changes at the company, her being placed on the PiP and other matters she says caused her to underperform, which ultimately led to her being selected for redundancy, were discriminatory because of her sex. The complaint of sex discrimination is only about her being selected for redundancy.

93. Therefore, the claimant's maternity leave absence is no more than the relevant background and not the reason or something that had a significant influence on how the respondent chose to run the selection process or the respondent's decision to dismiss her.

94. The reason for the respondent's conduct is that it considered that CI had better skills and knowledge relevant to the business and favoured him. Whether in arriving to that conclusion the respondent acted fairly towards the claimant is a different matter and we shall return to it later when dealing with the unfair dismissal complaint. However, on the claimant's case taken at its highest, the unfairness was not because of the difference in sex between her and CI.

95. If the claimant sought to argue (and she did not run her case on that basis) that she should have been afforded more favourable treatment than CI to "compensate" her for the disadvantage caused by her maternity absence, the respondent was not obliged to treat the claimant more favourably than CI. Indeed, such treatment could have amounted to direct sex discrimination of CI. The case on the point is *Eversheds Legal Services Ltd v De Belin* 2011 ICR 1137, EAT, where the EAT held s. 13(6) EqA, which reads:

> (6) *If the protected characteristic is sex—*
>
> *(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;*
>
> *(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth*.

cannot be used to favour such women beyond what is reasonably necessary to compensate them for the disadvantages occasioned by their condition.

96. We reiterate that the claimant does not bring a claim for indirect sex discrimination. She does not claim that the respondent has applied a provision, criterion or practice equally to her and CI, but which puts or would put women at a particular disadvantage when compared with men, and which put the claimant at that disadvantage. Therefore, we must decide her complaint as direct sex discrimination complaint only.

97. For these reasons, we find that the claimant has failed to establish facts, from which the Tribunal could conclude that the treatment she complains about was because of her sex.

98. It follows, that the claimant has failed to meet the requirements of s.136(2) EqA and her complaint of sex discrimination therefore fails and is dismissed.

Failure to make reasonable adjustments – Issues 12- 16 and 20, 21

99. The claimant claims that she was placed at a substantial disadvantage as a disabled person by the respondent holding the capability meetings, which were part of the Performance Improvement Plan, during the busy month end period.

The Law

Time Limit

100. S. 123 EqA states (*emphasis added*)

> *(1) Subject to section 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.

101. The Court of Appeal in ***Kingston upon Hull City Council v Matuszowicz*** 2009 ICR 1170, CA noted that, for the purposes of 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, it is to be treated as having decided upon the omission at what is in one sense an artificial date. 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, which is when the person does an act inconsistent with doing the omitted act. The second option presupposes that the person in question has carried on for a time without doing anything inconsistent with doing the omitted act, and it then 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. In terms of the duty to make reasonable adjustments, that requires an inquiry as to when, if the employer had been acting reasonably, it would have made the reasonable adjustments.

102. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** 2018 ICR 1194, CA, the Court of Appeal held that the duty to comply with the reasonable adjustments requirement under s.20 EqA begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage. In that case, the claim concerned a failure to deploy the claimant to another role. The Court rejected the respondent's contention that the date when the duty begins is also the date when time starts to run for the purpose of calculating the time limit for bringing proceedings under s.123(4)(b) (i.e. on the expiry of the period in which the employer might reasonably have been expected to make the adjustment).

103. However, there have been cases where the obligation to make an adjustment was found to be a "continuing state of affairs" meaning that the duty was breached every day – see for example ***Secretary of State for Work and Pensions (Jobcentre Plus) v Jamil*** UKEAT/0097/13.

Submissions and Conclusions on Time Issue

104. The claimant's initial request for reasonable adjustments, which was refused, was on 14 January 2020, when she attended the first "informal" PiP, and therefore it could be argued that the time limit under s.123(3)(b) should start running from that date. However, there were many subsequent PiP meetings at which the claimant repeated her requests for reasonable adjustments, which were refused. The last PIP meeting was on 27 May 2020, shortly before the claimant going on furlough on 10 June 2020.

105. Therefore, we find that the latest act of the alleged failure to make reasonable adjustments was on 27 May 2020. Therefore, the claimant should have started ACAS EC by 26 August 2020, and she did do so only on 28 September 2020 and presented her ET1 on 27/11/2020. Her complaint for failure to make reasonable adjustments is therefore out of time.

106. We, therefore, must consider whether it is just an equitable to extend time.

107. Mr Welsh for the respondent accepted that it would be just and equitable to do so. However, as it is a jurisdictional matter, the Tribunal must satisfy itself that it will be just and equitable to extend time.

108. We applied the same legal principles as stated earlier in relation to the claimant's race discrimination complaint. However, in this case, we have arrived at a different conclusion.

109. The delay is much shorter, only just over a month, the claimant thought that the capability process was still ongoing while she was on furlough and was expecting further PiP meetings upon her return. She says her redundancy was linked to the PIP (though she does not claim that there was a failure to make reasonable adjustments in relation to the redundancy process). She claims her mental state was such that her judgment was clouded. She says she tried to stay at work and look after her young children. She says she tried to stay mentally healthy and avoid further troubles.

110. We accept that considering these factors and the fact that the respondent is not opposing the application and not arguing that extending time will cause it undue hardship and prejudice, it will be just and equitable to extend the time limit.

111. Therefore, we find that the Tribunal does have jurisdiction to consider the claimant's claim for failure to make reasonable adjustments.

112. The next question we need to deal with is the issue of disability.

Disability – Issues 8 -11

The Law

113. Section 6 of the EqA 2010 defines disability as follows:

"***6 Disability***

(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."

114. The relevant point in time to be looked at by the Tribunal when evaluating whether the claimant is disabled under s. 6 is not the date of the hearing, but the time of the alleged discriminatory act: ***Cruickshank v Vaw Motorcast Ltd*** [2002] I.C.R. 729. In the present case, the earliest of which is 17 January 2020 (first PIP) and the latest – 27 May 2020 – the last PIP.

115. By virtue of s.6(6) EqA 2010 the meaning of disability is supplemented by the provisions of Schedule 1 of the Act. However, there is no specific definition of "impairment" in the EqA 2010.

116. In ***Rugamer v Sony Music Entertainment UK Ltd*** [2001] IRLR 664, the EAT defined "impairment" in the following way (at [34]): "*Impairment" for this purpose and in this context, has in our judgment to mean some damage, defect, disorder or disease compared with a person having a full set of physical and mental equipment in normal. We find that in this case condition. The phrase 'physical or mental impairment' refers to a person having (in everyday language) something wrong with them physically, or something wrong with them mentally*."

117. In ***McNicol v Balfour Beatty Rail Maintenance Ltd*** [2002] ICR 1498, CA, the Court of Appeal held that 'impairment' in this context bears '*its ordinary and natural meaning… It is left to the good sense of the tribunal to make a decision in each case on whether the evidence available establishes that the applicant has a physical or mental impairment with the stated effects*.'

118. In ***Goodwin v Patent Office*** [1999] I.C.R. 302, Morison J (President, as he then was), provided guidance on the proper approach for the Tribunal to adopt when applying the provisions of the Disability Discrimination Act 1995 (the predecessor legislation to EqA). Morison J held that the following four questions should be answered, in order:

a) Did the claimant have a mental or physical impairment? (the 'impairment condition');
b) Did the impairment affect the claimant's ability to carry out normal day- to-day activities? (the 'adverse effect condition');
c) Was the adverse condition substantial? (the 'substantial condition');
d) And was the adverse condition long term? (the 'long-term condition').

119. Underhill J (President, as he then was) in ***J v DLA Piper UK LLP*** [2010] ICR 2010 suggested (para [40]) that although it was still good practice for the Tribunal to state a conclusion separately on the question of impairment, as recommended in *Goodwin*, there will generally be no need to actually consider the 'impairment condition' in detail: "*In many or most cases it will be easier (and is entirely legitimate) for the tribunal to ask first whether the claimant's ability to carry out normal day-to-day activities has been adversely affected on a long- term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from an impairment which has produced that adverse effect. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve the difficult medical issues*."

120. The Guidance on matters to be taken into account in determining questions relating to the definition of disability ("the **Guidance**") states, at A5:

"*A disability can arise from a wide range of impairments which can be:*

[…]

• mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders; bipolar affective disorders; obsessive compulsive disorders; personality disorders; post-traumatic stress disorder, and some self-harming behaviour;
• mental illnesses, such as depression and schizophrenia; produced by injury to the body, including to the brain".

121. In the Guidance, at A34: "*The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects*".

122. The EHRC Code of Practice on Employment, at paragraph 7 of Appendix, puts it succinctly "*What it is important to consider is the effect of the impairment, not the cause.*"

123. However, in ***Walker v Sita Information Networking Computing Ltd*** [2013] UKEAT/0097/12, Langstaff P said: "*That is not to say that the absence of an apparent cause for an impairment is without significance. The significance is, however, not legal but evidential. Where there is no recognised cause of [the alleged disability], it is open to a Tribunal to conclude that he does not genuinely suffer from it…that is a judgment made on the whole of the evidence*."

124. S. 212(1) of the EqA defines "*substantial*" as meaning "*more than minor or trivial*."

125. In ***Rayner v Turning Point*** [2010] 11 WLUK 156, HHJ McMullen QC held, at [22], that although the question of whether there is a "substantial" adverse effect is a matter of fact for the Tribunal to determine.

126. The cumulative effects of an impairment should be taken into account when working out whether it is substantial. An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, taken together, could result in an overall substantial adverse effect.

127. Appendix 1 to the EHRC Employment Code of Practice also provides guidance on the meaning of "substantial" 6: "*Account should… be taken of where a person avoids doing things which, for example, causes pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation*."

128. Whether an impairment has a substantial effect is for the Tribunal to decide, taking account of the relevant Guidance. The Guidance sets out a number of factors to consider including: the time taken by the person to carry out an activity [paragraph B2]; the way a person carries out an activity [B3]; the cumulative effects of an impairment [B4]; the cumulative effects of a number of impairments [B5/6]; the effect of behaviour [B7]; the effect of environment [B11] and the effect of treatment [B12]

129. "*Day to day activities*" encompass activities which are relevant to participation in professional life as well as participation in personal life, and that the Tribunal should focus on what the claimant cannot do, not what they can do.

130. In ***Elliot v Dorset County Council*** UKEAT/0197/20/LAHHJ Tayler points out that, once again, it is difficult to look at this question in isolation – for example, how is it possible to decide whether there is a "substantial adverse effect" on normal day to

day activities without first identifying which "normal day to day activities" are affected?

131. The Guidance provides the following examples of what is meant by "normal day to day activities". "*In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities"*.

132. In the Appendix to the Guidance, an illustrative non-exhaustive list of factors is set out which, if experienced by a person, would be reasonable to regard as having a substantial adverse effect on normal day to day activities. There is a separate list of what it would not be reasonable to regard as having a substantial adverse effect on normal day to day activities.

133. An illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities, includes:

- *Persistent general low motivation or loss of interest in everyday activities;*
- *Frequent confused behaviour, intrusive thoughts, feelings of being controlled, or delusions*
- *Persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships, for example because of a mental health condition or disorder;*
- *Persistent distractibility or difficulty concentrating*

134. An illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would not be reasonable to regard as having a substantial adverse effect on normal day-to-day activities, includes:

- *Inability to concentrate on a task requiring application over several hours*;

135. Finally, Schedule 1, part 1, para. 2 of the EA 2010 defines "long-term" as follows:

"The effect of an impairment is long-term if –
it has lasted for at least 12 months,
it is likely to last for at least 12 months, or
it is likely to last for the rest of the life of the person affected".

136. Tribunal must analyse all three scenarios envisaged in paragraph 2 of schedule (see ***McKechnie Plastic Components v Grant*** UKEAT/0284/08).

137. '*Likely*' has been held to mean it is a "*real possibility*" and '*could well happen*' rather than something that is probable or more likely than not (***SCA Packaging Ltd v Boyle*** [2009] ICR 1056).

138. In that case the Supreme Court upheld Girvan LJ in the Court of Appeal (at [19]):

"*The prediction of medical outcomes is something which is frequently difficult. There are many quiescent conditions which are subject to medical treatment or drug regimes and which can give rise to serious consequences if the*

treatment or the drugs are stopped. These serious consequences may not inevitably happen and in any given case it may be impossible to say whether it is more probable than not that this will occur. This being so, it seems highly likely that in the context of paragraph 6(1) in the disability legislation the word "likely" is used in the sense of "could well happen".

139. The Guidance states that conditions with effects which recur only sporadically or for short periods can still qualify as long term impairments for the purposes of the Act. If the effects on normal day to day activities are substantial and are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term. The guidance sets out examples of impairments with effects which can recur beyond 12 months, or where the effects can be sporadic [C5 and 6]

140. The guidance sets out that it is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the 'long-term' element of the definition is met [C7]

141. The Guidance sets out what should be considered in relation to the likelihood of recurrence. Essentially this means that all circumstances should be taken into account including the way in which a person can control or cope with the effects of an impairment, which may not always be successful [C10]

142. In a recent case of ***Tesco Stores Ltd v Tennant***, UKEAT/0167/19, the EAT held that, where the claimant's condition was found to have the necessary substantial adverse effect, but the claimant provided no evidence that the condition was "likely" to last for at least 12 months, the Tribunal erred in finding the respondent liable for acts of discrimination before the effects had in fact lasted for 12 months.

143. It is for the claimant to prove that she is disabled, that is to show, on the balance of probabilities, that she satisfies all four elements, that is that:

a) She has a mental or physical impairment? (the 'impairment condition');
b) The impairment affects her ability to carry out normal day-to-day activities (the 'adverse effect condition');
c) The adverse condition is substantial (the 'substantial condition'); and
d) And that the adverse condition is long term? (the 'long-term condition').

144. It has often been emphasised in the cases that the burden of proving disability rests with the applicant, who must bring medical evidence to establish this. Witnesses from any branch of medicine (including the professions related to medicine such as speech therapy) will be far more comfortable with assessing the reality of the risk rather than putting precise percentages upon it.

Submissions and Conclusions

145. The paucity of medical evidence in this case is very unfortunate. The claimant was specifically ordered by the Tribunal at the case management hearing in July 2021 "*to send to the respondent copies of any medical notes, reports, and other evidence in her possession and/or control relevant to the issue of whether the claimant was at all relevant times a disabled person under section 6 of the EQA*".

146. She was ordered to prepare a witness statement identifying what "*physical or mental impairment"(s), in accordance with EQA section 6, is relied on in relation to*

the disability issue; stating, in relation to each impairment relied on, between which dates it is alleged the claimant was a disabled person because of that impairment; dealing, by specific reference to schedule 1 to the EQA and any relevant provision of any statutory guidance or Code of Practice, with the effect of the alleged disability (or disabilities) on the ability of the claimant to carry out normal day to day activities".

147. She was referred by the EJ Henderson to the part of the Presidential Guidance issued on General Case Management, that relates to disability. She was also encouraged to seek legal advice, given the complexity of discrimination claims generally, and sent a list of Sources of Free legal advice.

148. The claimant produced her impact statement, which in large part deals with the history of her employment with the respondent and only to a limited extent deals with the disability issue. She also produced two letters from a Specialist Psychological Therapist, from whom she sought support. There are no other medical records of any kind in front of the Tribunal. Nevertheless, we must decide the case based on the evidence as they are presented by the parties.

Did the claimant have a mental impairment?

149. Based on the evidence in front of us we are satisfied that the Claimant did have a mental impairment, namely severe anxiety and depression.

150. We base our conclusion on the claimant's witness evidence and two letters from the Counselling services' psychological therapist, which confirm that.

151. The respondent does not accept that the claimant had a disability at the material time. Mr Welsh did not develop the argument, other than referring the Tribunal to the case of ***J v DLA Piper UK LLP*** 2010 ICR 1052, EAT, in which the EAT said that, when considering the question of impairment in cases of alleged depression, tribunals should be aware of the distinction between clinical depression and a reaction to adverse circumstances.

152. However, we find that the argument is misconceived. Firstly, the expression "*clinical depression*" comes from the old Disability Discrimination Act and is not replicated in the EqA, under which this case is to be decided. Secondly, the EAT, when overturning the ET's decision on that point, stated: "*We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice*". Finally, the *ratio* of the ***DLA Piper*** case is precisely the opposite to what Mr Welsh appears to suggest. As noted above, the EAT held that "*in many or most cases it will be easier (and is entirely legitimate) for the tribunal to ask first whether the claimant's ability to carry out normal day-to-day activities has been adversely affected on a long- term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from an impairment which has produced that adverse effect. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve the difficult medical issues"*.

Did claimant's mental impairment affect her ability to carry out normal day-to-day activities?

153. We are satisfied that it did. The claimant gave the evidence, which we accept, on how she struggled to concentrate at work and how much longer it took her to complete routine tasks, how she felt scared using public transport, how she could not give proper care to her children or attend to home chores and required help from her friends and family.

Was the impact substantial – in the sense more than minor or trivial?

154. We find that it was. As mentioned above Appendix 1 to the EHRC Employment Code of Practice provides guidance on the meaning of "substantial", which includes the following: "*Account should… be taken of where a person avoids doing things which, for example, causes pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation*."

155. It is clear from the claimant's evidence that her mental impairment serious affected her way of life both at work and at home. She told us how she was avoiding her colleagues, not giving enough time to her children, breaking down in front of them, being tearful, lacking energy and motivation to attend to normal day-to-day tasks.

Was the impact – long term?

156. This is the final and the most difficult question. This question must be answered by reference to the date of the alleged discriminatory conduct, the latest of which was, as we found, at the last PiP meeting on 27 May 2020.

157. The Guidance stresses that anything that occurs after the date of the discriminatory act will not be relevant (see para C4). It also states that account should be taken of both the typical length of such an effect on an individual and any relevant factors specific to this individual, such as general state of health and age.

158. The claimant did not present any evidence on this specific point, i.e. a medical prognosis made at the relevant time on the likely duration of her condition. We note that it is accepted in the medical literature that the duration of a depressive episode varies and is influenced by its severity, as well as treatment and individual factors. However, the average length of a depressive episode is thought to be between six and eight months. The claimant did not present any evidence on relevant health factors specific to her, which would cause us to conclude that in her case anxiety and depression was likely to last a longer than the suggested range.

159. Secondly, and very importantly in this particular case, the assessment is not whether the impartment has lasted or is likely to last 12 months (or for life), but whether the substantial adverse effect of the impairment has lasted or is likely to last 12 months (or for life).

160. We must analyse all three scenarios: Under para 2(1) of Schedule 1 to the EqA (see paragraph 135 above).

161. At the last alleged discriminatory treatment (failure to make reasonable adjustment at the PiP meeting on 27 May 2020), the effect of the claimant's mental impairment has not lasted for at least 12 months. The claimant gave evidence that until December 2019 she had no prior history of depression or anxiety.

162. The next question is whether the claimant established that as at the relevant time (that is between 14 January and 27 May 2020), the substantial adverse effect was likely to last at least 12 months.

163. The claimant relies on two letters from her psychological therapist. However, the first was written on 24 April 2020, and it does not give any prognosis as to the likely duration of the claimant's anxiety and depression. The second letter is written on 16 August 2021, almost 15 months after the alleged discriminatory conduct.

164. In considering whether the effect was likely to last 12 months the Tribunal must look at things as they were at the date of the alleged discriminatory treatment, and not with the benefit of hindsight of what actually happened after that. Therefore, the fact that the second letter states that the claimant was still receiving psychological therapy in August 2021 cannot be taken as proving that at the dates of the alleged discriminatory conduct, that is between 14 January and 27 May 2020, the adverse effect was likely to last at least 12 months.

165. We note that the first 24 April 2020 letter states that the claimant was experiencing "*work related stress*" and that she "*may benefit from being offered adequate support to address the stress she is experiencing at work*". The claimant's evidence is that the course of her anxiety and depression was the PiP: "*Following the meeting on 11 December 2019, I developed anxiety and depression which became severe with time. I contacted Sarah Kasule a specialist psychological therapist of Ultimate counselling, training, and support services for help because I was falling apart.*" (para 18 of the claimant's witness statement).

166. The last of PiP meetings was 27 May 2020 and shortly after that on 10 June 2020 the claimant went on furlough leave. Therefore, with the claimant starting furlough leave, the source of her anxiety and depression has been removed.

167. The claimant was notified of the impeding redundancy on 17 July and dismissed on 6 August. Therefore, even if with her being on furlough the threat of the "suspended" PiP was still hanging over the claimant, thus causing the work related stress to continue, her dismissal for redundancy has definitely brought that source of anxiety and depression to an end.

168. Looking at all the evidence in front of us, we are not satisfied that the claimant has shown on the balance of probabilities that at the time of the alleged discriminatory conduct (between 17 January 2020 and 27 May 2020) the effect of her mental impairment was likely (in the sense of being a "real possibility", or "could well happen") to last 12 months or more. For the same reasons we cannot conclude that the effect was likely to last for the rest of her life.

169. Therefore, we find that at the relevant times the claimant did not have a disability within the meaning of s.6 EqA. It follows that her claim for failure to make reasonable adjustments fails.

Unfair Dismissal – Issues 1 - 4

170. As noted above (see paragraphs 29-30 above), the effect of the respondent's claim being struck out is that it shall be treated as if no response had been presented by the respondent, as set out in Rule 21 of the ET Rules.

171. Rule 21(2) states:

(2) An Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment accordingly. Otherwise, a hearing shall be fixed before a Judge alone.[Where a Judge has directed that a preliminary issue requires to be determined at a hearing, a judgment may be issued by a Judge under this rule after that issue has been determined without a further hearing.]

172. We have decided that based on the claimant's pleaded case and the evidence she gave to the Tribunal and the documents we have been referred to we can properly determine the issue of fairness of her dismissal.

The Law

173. The law relating to unfair dismissal is set out in s.98 of the Employment Rights Act 1996 (ERA).

"*(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
(a) The reason (or, if more than one, the principal reason) for the dismissal; and
(b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it –
[..]
(c) is that the employee was redundant, or
[..]
…..

174. If the employer shows (or when it is accepted by the claimant) that the reason for the dismissal is a potentially fair reason under s. 98(1) or 98(2) ERA, the tribunal must then consider the question of fairness, by reference to the matters set out in section 98(4) ERA which states:
"*Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*

depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case."

175. Procedural fairness is an integral part of the reasonableness test is section 98(4) of ERA. In redundancy dismissal "*the employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation*" (***Polkey v AE Dayton Services Ltd*** 1988 ICR 142, HL).

176. In deciding whether the adopted procedure was fair or unfair the tribunal must not fall into the error of substitution. The question is not whether the tribunal or another employer would have adopted a different and, what the tribunal might consider a fairer procedure, but whether the procedure adopted by the respondent "*lay within the range of conduct which a reasonable employer could have adopted*" (***Williams v Compair Maxam Ltd*** [1982] ICR 156).

177. The selection criteria must be objective and not merely reflecting personal opinions of scorers. It must be verifiable by reference to objective data. The fact that certain selection criteria may require a degree of judgement on the employer's part does not necessarily mean that they cannot be assessed objectively or dispassionately (***Mitchells of Lancaster (Brewers) Ltd v. Tattersal*** (UKEAT/0605/11/SM).

178. Provided the employer's criteria are objective and their application were reasonable (to be assessed by the test of the range of reasonable responses), the tribunal must not engage in a re-scoring exercise. However, where there is clear evidence of unfair and inconsistent scoring the resulting dismissal is likely to be unfair. (***British Aerospace plc v Green and ors*** 1995 ICR 1006, CA)

179. If the tribunal decides that the dismissal is procedurally unfair, as part of considering the issue of remedy it ought to consider the question whether the employee would have been fairly dismissed in any event, and/or to what extent and/or when. This inevitably involves an element of speculation. However, the tribunal may reasonably take the view that based on the evidence available it might be too speculative and uncertain to try and predict what might have happened if a fair procedure had been followed (***Software 2000 Ltd v Andrews and ors*** 2007 ICR 825, EAT).

180. In ***Britool Ltd v Roberts and ors*** 1993 IRLR 481, EAT, the EAT stated that the burden of proving that an employee would have been dismissed in any event was on the employer. If the employee presents an arguable case that he or she would not have been dismissed were it not for the unfair procedure, the evidential burden shifts to the employer to show that the dismissal might have occurred even if a correct procedure had been followed.

Submissions and Conclusions

181. The claimant accepts that she was dismissed for redundancy. She claims that the dismissal was unfair because she was put at a disadvantage by the unfair PIP process, which resulted in her being given lower scores, in particular by receiving a low score on Performance and a negative score on Disciplinary/Capability criteria.

182. Having heard the claimant's evidence and having considered the documentary evidence in the hearing bundle, we find that the PiP process was grossly unfair. The claimant was put under a tremendous pressure with no or limited support offered. She was threatened with dismissal at the very first "informal" meeting in December. Her requests for reasonable adjustments to the process and more supportive stance by the management were left unheeded. The respondent did not follow its own capability procedure in conducting the PiP.

183. We also find that the unfairness of the PIP process materially affected the claimant's position in the redundancy selection and made the selection process unfair. In those circumstances we find that the respondent's decision to dismiss the claimant for the reason of redundancy fell outside the range of reasonable responses and therefore was unfair.

184. It follows that the claimant claim for unfair dismissal succeeds.

Remedy issues

185. Before the final day of the hearing the claimant presented her updated schedule of loss claiming a financial loss in the total amount of £14,568.19. The claimant incorrectly deducted her Universal Credit payments and did not include the notice pay in her calculations. With those adjustments the total compensation claim was calculated as £14,147. Both parties accepted that figure as being correct.

186. The claimant presented documents showing the steps she had taken to mitigate her loss. The respondent accepted that the claimant had taken reasonable steps to mitigate her loss, however, Mr Welsh argued that it was not reasonable for the claimant to refuse the invitation from the respondent to consider applying for the vacancy of Accounts Payable Controller in November 2020.

187. Considering the treatment that the claimant had received from the respondent after her return from maternity leave, the Tribunal found that it was not unreasonable for the claimant not wishing to pursue that opportunity with the respondent. We also decided that the claimant had taken reasonable steps to mitigate her loss. Therefore, there shall be no reduction for failure to mitigate.

188. Finally, the Tribunal invited Mr Welsh to address it on the issue of ***Polkey***. First, Mr Welsh said that there should be 100% reduction because the dismissal was fair. When I pointed out to him that the ***Polkey*** issue only arises when it is found that the dismissal was unfair, he said that he was confident that the claimant would have scored lower than CI, but could not provide any sensible reasons for that assertion. Finally, he said that there should be a 50% ***Polkey*** reduction because there were two employees (the claimant and CI) in the selection pool.

189. The Tribunal was satisfied that the claimant presented an arguable case that she would not have been dismissed if the selection process had not been "tainted" by the unfairness of the PiP process. Therefore, the burden to show that she would have still been dismissed in any event or the likelihood of that happening shifted to the respondent. Given limited submissions not supported by any cogent arguments or evidence by Mr Welsh, the Tribunal was not satisfied that the respondent had discharged the evidential burden to show that the claimant would have been dismissed in any event or the likelihood of that happening.

190. In the circumstances for the Tribunal to apply a *Polkey* reduction would have required the Tribunal to engage in a re-scoring exercise of the claimant and CI, which would be an error of law (see paragraph 178 above). For these reasons the Tribunal declined to make any Polkey reduction to the compensatory award.

191. Accordingly, the Tribunal declared that the claimant had been unfairly dismissed by the respondent and ordered the respondent to pay to the claimant compensation for unfair dismissal in the total amount of £14,147.

192. For the purposes of regulation 4 of the Employment Protection (Recoupment of Benefits) Regulations 1996 the Tribunal calculated the Prescribed Element as £13,647.

Employment Judge Klimov

11 August 2022

Sent to the parties on:

.11/08/2022

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For the Tribunals Office

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Appendix 1

Agreed List of Issues

Unfair Dismissal

During the Preliminary Hearing held on 21st July 2021 before EJ Henderson, the Claimant accepted that there was a genuine redundancy situation.

The issues are therefore:

1. Did the Respondent follow a fair procedure in relation to the dismissal?

2. Were the selection criteria and interview questions adopted as part of the redundancy process biased towards Carlo Irregolare and therefore unfair?

3. Did the process adopted discriminate because of sex (see below)?

4. Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant and was dismissal within the range of reasonable responses?

Direct sex discrimination (section 13 of the Equality Act 2010 ("EQA"))

5. Has the Respondent subjected the Claimant to the following treatment:

a. dismissed the Claimant as a result of being consistently compared to Carlo Irregolare; and

b. disadvantaged because of the Claimant's absence whilst on maternity leave?

6. Was that treatment less favourable treatment i.e. did the Respondent treat the Claimant as alleged less favourably than they treated or would have treated others ("comparators") in not materially different circumstances? The Claimant relies on an actual comparator, Carlo Irregolare.

7. If so, was this because of the Claimant's sex i.e. being female?

Discrimination (sic) [Disability]

8. Did the Claimant have a physical or mental impairment, namely extreme anxiety and depression?

9. Did that impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

10. Was that adverse effect long-term?

11. Did the Respondent have knowledge, or could the Respondent have been reasonably expected to have knowledge, of the Claimant's alleged disability?

Failure to make reasonable adjustments (section 21 Equality Act 2010)

12. Did the Respondent not know and could not reasonably be expected to know that the Claimant had a disability?

13. Was the Claimant placed at a substantial disadvantage by a provision, criterion or practice, namely holding the capability meetings, which were part of the Performance Improvement Plan, during the busy month end period?

14. If so, did the Respondent know or ought reasonably to know that the Claimant was likely to be placed at a substantial disadvantage because of her disability?

15. If so, did the Respondent fail to take such steps as are reasonable to avoid the

disadvantage?

16. Should the Respondent have implemented an adjustment of changing the timing of the meetings to a less busy time in the month?

Direct race discrimination (section 13 of the Equality Act 2010 ("EQA"))

17. Has the Respondent subjected the Claimant to the following treatment:

a. refused to work from home?

18. Was that treatment less favourable treatment i.e. did the Respondent treat the Claimant as alleged less favourably than they treated or would have treated others ("comparators") in not materially different circumstances? The Claimant relies on actual comparators, Rowen Kelly and Apiramei Danial.

19. If so, was this because of the Claimant's race i.e. Black African?

Time limits / Limitation issues

20. Were any of the Claimant's complaints presented within the time limits set out in

sections 123(1)(a) & (b) of the EqA?

21. If presented out of time, would it be just and equitable to extend time?