EMPLOYMENT TRIBUNALS

Claimant: Miss J Mallinowski

Respondent: STB Limited (trading as Surrey Translation Bureau) (1)
Mr G Cooke (2)

Heard at: Bury St Edmunds Employment Tribunal (by CVP)

On: 28, 29, 30 November and 1, 2 December 2022 (5 days)

Before: Employment Judge Hutchings
Mrs K Knapton (Tribunal member)
Ms K Omer (Tribunal member)

Representation
Claimant: Dr S Coulton (lay representative)
Respondent: Mr L Wilson (counsel)

The Judgment is corrected under Rule 69 to amend a errors at paragraph 15 and 81 (underlined).

RESERVED JUDGMENT

1. The claim of unfair dismissal is not well founded and is dismissed.

2. The respondents have not contravened section 13 of the Equality Act 2010. The claimant's dismissal was not direct disability discrimination. The claim of direct disability discrimination in respect of dismissal is not upheld.

3. The respondents have not contravened section 15 of the Equality Act 2010. The claim of discrimination arising from disability is not upheld.

4. The respondents have contravened sections 20 and 21 of the Equality Act 2010. The respondents failed to make reasonable adjustments to the redundancy process. This claim is upheld.

5. The respondents have not contravened section 26 of the Equality Act 2010. The respondents did not harass the claimant. The claims of harassment are not upheld.

6. The claim for holiday pay is not well founded and is dismissed.

REASONS

Introduction

1. The claimant, Miss Mallinowski, was employed by the first respondent, STB Limited (trading as Surrey Translation Bureau) as an English to German translator from 1 April 2011 until her dismissal on 19 March 2021. Early conciliation started on 22 March 2021 and ended on 23 March 2021. The claim form was presented on 24 March 2021. She makes the following complaints:

   1.1. Unfair dismissal (redundancy);
   1.2. Direct disability discrimination in respect of dismissal;
   1.3. Discrimination arising from disability in respect of dismissal;
   1.4. Failure to make reasonable adjustments to the redundancy process;
   1.5. Harassment; and
   1.6. Pay for accrued but untaken holiday.

2. The first respondent, STB Limited ('STB'), is a provider of agency translation services and is based in Farnham, Surrey. The second respondent, Mr George Cooke, is a director and shareholder in STB. Both respondents defend the claims, presenting a response on 23 April 2021. STB says the reason for Miss Mallinowski's dismissal was redundancy *'in response to economic pressures caused in the previous financial year ending 31 March 2020 and a sharp decline in the volume of English-German translation services which necessitated the removal of the position dedicated to that service'.*

Procedure, documents, and evidence

3. The claimant was represented by Dr Coulton (lay representative), who called evidence from the claimant and himself.

4. The respondents were represented by Mr Wilson of counsel, who called sworn evidence on behalf of the respondents from:

   4.1. Mr George Cooke, owner and director of STB Limited;
   4.2. Mrs Hannah Stacey, Head of Translation Operations, STB Limited; and
   4.3. Ms Allison Spangler, Miss Mallinowski's line manager.

5. The hearing was listed for 5 days before a full Tribunal. We considered documents from a 705-page joint hearing bundle and a 27-page supplementary bundle introduced by the claimant in evidence. Sections of the hearing bundle were not agreed. This was addressed by the Tribunal as a preliminary matter. The Tribunal also considered an agreed cast list and chronology.

6. At the end of the 5 days, we had heard all the evidence. The Tribunal made a case management order dated 2 December 2022 ('CMO') for submission of agreed meeting transcripts and written statements. The orders and deadlines were explained to the parties at the hearing, and the issues detailed in the CMO. While a written version of the CMO was not sent to the parties until 17 December 2022 (after the deadline for written submissions of 16 December

2022), parties were aware of the contents and issues at the end of the hearing. The following documents were not received by this Tribunal Panel until 5 January 2023; accordingly, the issues they raise are addressed in the 'preliminary matters' section of this Judgment:

6.1. Agreed transcripts of redundancy consultation meetings which took place on 19 October 2020, 16 December 2020 and 15 January 2021;
6.2. The Claimant's written requests for amendments to the CMO dated 23 December and application to reject the respondents' written submissions dated 31 December 2022;
6.3. Reference in an email dated 31 December 2022 to the respondent's application for an extension of time for written submissions (not seen by this Tribunal) and the claimant's objection to this;
6.4. The claimant's written submissions dated 16 December 2022, revised 22 December 2022'; and
6.5. The respondent's written submissions dated 31 December 2022 and explanatory email.

Preliminary matters

7. At the start of the hearing on 28 November 2022, we considered a list of pre-hearing issues submitted by Dr Coulton. First, we confirmed the claims before the Tribunal. By case management order dated 28 March 2022 Employment Judge Hawksworth allowed Miss Mallinowski to amend her claim to include a claim for discrimination arising from disability in respect of dismissal. By case management order dated 4 May 2022 Employment Judge Eeley allowed Miss Mallinowski to amend her claim to add nine allegations of section 26 harassment (numbered 1 to 9 in the claimant's further information on harassment dated 15 December 2021). Accordingly, Dr Coulton's list of claims was incorrect to the extent that the claimant's denial of reasonable adjustments claim (section 20) does not include claims 1,2,3 and 8 in the claimant's further information on harassment dated 15 December 2021. In preliminary discussion with the Tribunal Dr Coulton challenged this stating that his understanding of the oral reasons given by Judge Eeley was that the section 20 claim for denial of reasonable adjustments did include claims 1,2,3 and 8. Employment Judge Eeley identified the claims proceeding to the final hearing at paragraphs 2 and 3 of the case management order of 4 May 2022 as:

'Applications
2 The claimant's application to amend the claim to add nine further allegations of section 26 harassment (in the terms set out in paragraphs 1-9 of the table at p59 of the Tribunal Hearing Bundle) is granted for the reasons which I gave orally during the hearing.

Claims and Issues
3 The claims and issues for determination at the final hearing are as set out in the case management summary of Employment Judge Hawksworth dated 28 March 2022 together with the additional harassment allegations numbered 1-9 referred to above at paragraph 2.'

8. The only claims added by Employment Judge Eeley at this hearing were allegations 1-9 as claims for harassment arising from the redundancy. No additional claims for reasonable adjustments were allowed. The order states: *'Anyone affected by any of these orders may apply for it to be varied,*

suspended or set aside.' The claimant did not do so. Therefore, this Tribunal must proceed on the basis of the issues identified in the case management orders. We set out the list of issues below. Given the time listed the Tribunal will consider evidence as to liability only.

9. Second, we considered Dr Coulton's request that the claimant gives her evidence first. Mindful that the claimant suffers with anxiety, we agreed the request that the claimant give her evidence and is cross examined first. In consultation with the parties, we agreed the following outline timetable, which we noted may change during the course of the hearing. Miss Mallinowski had not made a specific request for reasonable adjustments at the hearing. Mindful of her disability the Tribunal took regular breaks throughout the hearing, making it clear at the beginning of the hearing that Miss Mallinowski must request additional breaks at any time if needed and the Tribunal would accommodate this; we did so several times during the hearing.

   9.1. Day 1: preliminary matters and Tribunal reading day. Mindful of the claimant's anxiety and our agreement to hear her evidence first, we did not consider it appropriate to start taking evidence from her on day 1 as this would result in her being under oath overnight.
   9.2. Day 2: claimant evidence.
   9.3. Days 3 and 4: respondent evidence.
   9.4. Day 5: closing submissions, including an order for written submissions agreed by the Tribunal at the request of Dr Coulton.

10. Third, we considered issues between the parties as to the admissibility of evidence, noting that the claimant included documents in the bundle she considers relevant to challenge additional evidence submitted by the respondents after the May hearing. The respondents do not consider this evidence relevant to the issues in dispute. The obligation of disclosure is on-going; where parties cannot agree on relevance, it is a matter for the Tribunal. We informed parties we would consider the relevance of any documents in dispute when directed to the same in oral evidence and submissions. Mr Wilson raised the issue of recordings by Dr Coulton of meetings without the consent of STB's witnesses, telling us Dr Coulton had produced transcripts not agreed by the respondents. The Tribunal explained that covert recordings are not admissible but if parties agree a neutral transcript the Tribunal would accept this in evidence; we received agreed transcripts on 5 January 2023.

11. Finally, Dr Coulton raised a couple of amendments the claimant would like to make, one to her witness statement and one to the wording of harassment allegation 1. We explained these would be addressed when she introduced her evidence. The amendments were allowed.

12. During the hearing on 30 November 2022 when questioning Mr Cooke, Dr Coulton identified what he considered a typo in the list of claims agreed at the March 2022 case management hearing. The order refers to a table of allegations prepared by the claimant following the Tribunal's order that she submit further particulars of her claim. Dr Coulton told the Tribunal that Allegation 3 *'On days that JM had to attend physiotherapist-led exercise class for her MS condition, very tiring days, JM asked if she could park on site, rather than having to walk to and from the public car park. HS denied the request'* occurred in 2019 and not in 2018 as stated in the claimant's table. Dr Coulton could not identify evidence in the hearing bundle which corroborates this. The

claimant accepted the date of 2018 at both case management hearings. She did not raise the error with the Tribunal after the orders were issued and at any time up to the third day of the final hearing. The respondent's reply is to an allegation in 2018. Mindful of the overriding objective of the Employment Tribunals Rules of Procedure 2013 (rule 2) we do not consider it fair or just to make such a late alteration at the request of the claimant to a document she and her representative produced some months ago.

13. By email dated 23 December 2022 the Dr Coulton references an earlier application to amend the 2 December CMO (not seen by this Tribunal) and asks the Tribunal to extend the deadline for written submissions to 23 December 2022. Dr Coulton sent revised written submission to the Tribunal on the same day. By email dated 31 December 2022 counsel for the respondents sent written submissions to the Tribunal, referencing a prior request for extension (not seen by this Tribunal) and explaining that submission was delayed due to counsel's illness, hence the application to extend. By the same email these submissions were sent to Dr Coulton, who objected to this late submission by email to the Tribunal dated 1 January 2023.

14. We state the following for the avoidance of doubt and as context for our decision regarding written submissions. This Tribunal has seen the claimant's request to amend the December CMO and revised written submission dated 23 December 2022; it has not seen the previous version we understand was submitted by the Claimant to the Tribunal on 16 December 2022. This Tribunal has not seen the respondents' request for an extension of time for written submissions. In stating this, we do not doubt these applications were made to the Tribunal; there are inevitably delays forwarding documents to a Tribunal Panel over the holiday period. This Tribunal did not receive the other post hearing documents to which we refer in this Judgment until 5 January 2023.

15. In these circumstances, we see no need to examine the various applications; to do so would not be in keeping with the overriding objective of the Employment Tribunals Rules of Procedure 2013 ('the Rules'). The wording of the December CMO accurately records the issues for each claim, based on the March and May 2022 CMOs and the preliminary discussion on 28 November. To re-examine a request which is settled would be contrary to Rule 2(b) and the Tribunal's objective to deal with cases in ways which are proportionate to the complexity and importance of the issues. As both parties submitted written submissions late, each explaining why, we consider the parties are on an equal footing. We accept the claimant's revised written submissions dated 23 December 2022 and the respondents' written submissions dated 31 December 2023, received simultaneously by this Tribunal Panel on 5 January 2023.

Findings of fact

16. The relevant facts are as follows. First, the Tribunal makes a general finding on evidence. In assessing credibility, we have borne in mind the time which has passed (approximately 2 years) since many of the events occurred. We found Miss Mallinowski to be a willing and open witness. On occasion her oral evidence and recollections contradicted contemporaneous documentary evidence, some of which written by Miss Mallinowski, others agreed records of meetings. When referred to the evidence she was either willing to concede that the written record was different to her recollection or to explain her interpretation of the document. In assessing Miss Mallinowski's credibility we

have borne in mind that factually incorrect evidence may be given due to her interpretation and genuine belief that an event happened and not to mislead.

17. For example, when it was put to Miss Mallinowski in cross examination that she did not appeal the final redundancy notice, her initial response was that she did. When it was pointed out to her that the appeal email to which she was referring predated the redundancy and a second document she had prepared was not sent to the respondents, she conceded that while appeal was in her mind, she did not follow through with an appeal process. We note that in oral evidence Miss M Mallinowski focused on how she felt at a particular time rather than the facts at that time. There was little documentary evidence to corroborate her feelings as described. We are also mindful that the contemporaneous evidence records that prior to her redundancy Miss Mallinowski had a good working relationship and considered the respondents her family, something she acknowledged in her oral evidence.

18. Dr Coulton is the claimant's lay representative. He submitted a witness statement in support of her claims. Save for 3 consultation meetings (about which we make findings of fact subsequently) Dr Coulton was not directly involved (either personally or by correspondence) or party to many events about which Miss Mallinowski complains. In oral evidence he confirmed that he was not privy to the email evidence before the Tribunal prior to his involvement in the redundancy process.

19. Much of his evidence is hearsay; he reports events based on his opinion of what happened or how Miss Mallinowski was feeling, rather than his own direct knowledge. For example, regarding a 2017 request by Miss Mallinowski for home working, Dr Coulton comments that: *'This was met with a considerable amount of reluctance and procrastination from her Manager, Mrs Stacey. Mrs Stacey reluctantly agreed to allow Jenny to work from home one day per week…..Jenny found Mrs Stacey's procrastination very stressful and unhelpful.'* It is not within Dr Coulton's direct knowledge to know what happened; he was no there. A witness statement is a statement of facts, relevant to the issues in dispute, based on direct knowledge of events by the statement maker. Accordingly, we cannot give weight to the hearsay comments and opinion set out in Dr Coulton's statement.

20. Dr Coulton's witness statement addresses the 3 redundancy consultation meetings he attended with Miss Mallinowski. He recorded these meetings without the knowledge of the respondents and their witnesses. The Tribunal did not admit the secret / covert recordings, ordering parties to agree a transcript of these recordings for them to be admitted in evidence. Mr Lachlan addresses these recordings in the respondents' written submissions. We agree with his observations. Secret recordings do not present fair evidence; one side is aware of the recording the other not and this can influence behaviour of the recording both parties. For example, at the 19 October 2020 meeting Dr Coulton asks questions, '*didn't catch what the suitable alternatives were, have you proposed one?'*, knowing he was recording the meeting while others present were unaware. Some of the documents prepared with Dr Coulton's assistance and submitted by the claimant as created contemporaneously to the events they record were not in fact so (see post).

21. Based on the approach taken to evidence by Dr Coulton, his evidence and that of the respondents' witnesses' conflict, we prefer the evidence of the respondents' witnesses. We find Mr Cooke, Ms Spangler and Ms Stacey

knowledgeable and credible. Their responses were straight forward, corresponding with their written evidence and contemporaneous documents.

22. We turn now to our findings of fact relating to the period of Miss Mallinowski employment and the redundancy process.

23. Following a period from October 2010 as a University intern, on 1 April 2011 Miss Mallinowski started full time employment with STB as an English to German translator. As part of this role, she performed several additional tasks; these are recorded in her annual review forms. She accepted in evidence that if she had STB had had sufficient English to German translation work to occupy her full time, she would not have done the extra tasks. We find that throughout her employment the claimant undertook tasks in addition to her core translation duties to fill her hours.

24. That this was a possibility was envisaged from the outset of Miss Mallinowski's employment; her contracts of employment dated 1 April 2011 and 9 September 2020 state respectively:

    'You are employed as an English to German translator…..
    ….when it is considered necessary or appropriate by management you may be required to carry out any other duties considered within your skill and competence to assist the smooth running of the business.'

    'You are employed as an English to German translator. We reserve the right to reasonably amend your duties in line with business needs.'

25. In April 2015 Miss Mallinowski was diagnosed with clinically isolated syndrome, a precursor to Multiple Sclerosis ('MS'). In September 2017 she was diagnosed with relapsing remitting MS. In November 2017 Miss Mallinowski disclosed her diagnosis to her line manager, Ms Spangler. The respondents accept that Miss Mallinowski's MS is a disability within the definition of the Equality Act 2010 pursuant to section 6 and paragraph 6 of schedule 1.

26. In 2017 Miss Mallinowski alleges that she *'requested a seat being made available for a team building meeting a week in advance due to disability related fatigue'* but the request was actioned for another, pregnant employee. Her evidence is not an accurate account. On 30 May 2017 Ms Stacey emailed the venue asking for a chair; the email refers to *'Jenny'*. Given the discrepancies between her claim (initially that no request was made, then it was made for another employee) and the fact the email refers to the claimant, we prefer Ms Stacey's recollection that a chair was available on the day, Miss Mallinowski did not sit it and it was then taken by the pregnant employee, but other chairs were available.

27. Miss Mallinowski alleges that in 2017 she asked Ms Stacey if she could work from home ('wfh') on days her medication, which required refrigeration, was delivered and this was denied. Her witness statement refers to 2018. There is no evidence of a written request in 2017 or 2018. Ms Stacey recalls a conversation on her keeping in touch day while on maternity leave, in which Miss Mallinowski asked to wfh and a subsequent discussion about delivery at work and the use of a lunchbox to keep the medication refrigerated. In oral evidence Miss Mallinowski accepted the conversation took place and that she was never denied being at home.

28. Miss Mallinowski alleges that in 2018 she asked to park on site when she had to attend a physiotherapist-led exercise class for her MS condition. The only evidence before the Tribunal is a request in an email dated 2 January 2020; it refers to the exercise class, but the response does not refuse a parking space. Miss Mallinowski acknowledged that she may have got the date wrong in her claim. We find there was no such request in 2018 and it may have been 2020.

29. The only reference in the evidence to parking spaces is the email of 2 January 2020 states *'Hannah [Ms Stacey] made it clear that the parking space would not be available on any other days'.* We have considered the email exchange between Mallinowski and Ms Stacey on 2 - 3 January 2020. Miss Mallinowski misrepresents the email exchange. It does not, as she suggests, evidence that a request to use an on-site parking space was denied. Indeed, the email is not a request for a parking space; parking is only discussed in the context of Ms Stacey agreeing to the wfh request and in doing so flagging that the parking space will not be available on swapped wfh day.

30. There is no evidence to substantiate Miss Mallinowski's suggestion spaces were made available to other employees, including those with children, instead of her. On the balance of evidence, we find that STB did not deny Miss Mallinowski access to on-site parking outright; they accommodated it to the extent able balancing other commitments such as contractual parking spaces. An email dated 24 February 2020 records that Miss Mallinowski was allocated Mr Cooke's space on Mondays and Wednesdays.

31. Miss Mallinowski alleges that in 2018, having shared with Ms Stacey her struggle with fatigue, Ms Stacey *'responded that she knew the feeling well, as someone who was pregnant before and has a baby now'.* Ms Stacey recalls the conversation, explaining she was trying to offer some empathy of debilitating tiredness based on her experience of post-natal depression. In oral evidence Miss Mallinowski accepted that Ms Stacey was trying to empathise. Ms Stacey's words were not intended to offend.

32. In 2018 Miss Mallinowski alleges she telephoned Ms Spangler to say she was too fatigued to work. Ms Spangler relayed the information to Ms Stacey, who (Miss Mallinowski was informed by another colleague in a text considered by this Tribunal) *'replied in a sarcastic manner, in front of other colleagues, words to the effect….She never looks like she is doing well.'* Ms Stacey acknowledges she made the comment, saying it was out of concern for the claimant and that the person who overheard it did not hear the entirety of the conversation and took the comment out of context. The text records, *'It was just an observation, as in she is not surprised that you had to call in today'*; it does not suggest the comment was sarcastic, but flippant. The person reporting the comment has not given evidence to the Tribunal. Therefore, we prefer Ms Stacey's recollection. She made the comment, which she went on to explain at the time.

33. In 2019/2020 Miss Mallinowski alleges that she *'asked, yet again, to be considered for promotion to senior translator after promotion criteria were circulated', saying 'I enquired about promotion on a number of occasions….I fulfilled the criteria and was never given a reason as to why promotion was not an option'*

34. Her recollection is inaccurate. The claimant wanted to be promoted; she had

considered the list of tasks which needed to be completed to apply, discussing in her annual reviews and meetings with Ms Stacey and Ms Spangler the process. Recognising she did not fulfill the criteria for promotion, she asked about training and trade events (outstanding items). STB actioned training in early 2020, but there was a delay due to the cancellation of trade conferences during the Covid-19 pandemic. Going through a list of actions is not the same as repeatedly asking for promotion (her claim).

35. During 2019 Ms Spangler attended a training course at the request of Mr Cooke titled *'progressive illnesses and the workplace'*, telling the Tribunal this was *'to better understand how I could help Jenny'* and the company *'supported this kind of training and implemented my learnings where needed.'* This was not challenged by Dr Coulton in cross examination.

36. Miss Mallinowski claims her request to wfh one day a week was met with reluctance initially, before being allowed to do so one, then two day(s) a week provided it did not clash with meetings. Ms Spangler told the Tribunal prior to the Covid-19 pandemic the claimant was allowed permanent wfh days and was able to wfh on an ad hoc basis, whenever she was feeling unwell. There is no evidence before the Tribunal of push back. Indeed, in oral evidence Miss Mallinowski accepted that Ms Spangler and Ms Stacey never denied her an ad hoc wfh day when she was unable to come in. A Reasonable Adjustments Agreement dated 14 January 2019, signed by Miss Mallinowski and Ms Spangler records that that Miss Mallinowski can:

    'work from home 2 days a week, Tuesdays and Thursdays or another suitable day. Can change depending on the STB meeting, or other reason that Jenny must be in the office, day change must be approved by line manager (Allison) or other manager.' '[Miss Mallinowski] will let [STB] know if there are changes to my condition which have an effect on my work and/or if the agreed adjustments are not working….will then meet privately to discuss any further reasonable adjustments or changes that should be made'.

37. An email exchange between Miss Mallinowski and Ms Stacey on 2 and 3 January 2020 confirms this; it is the only evidence we have seen of a wfh request. Miss Mallinowski asks to shuffle her wfh days over coming weeks due to doctors' appointments. Ms Stacey replies almost immediately to confirm this is fine. Ms Stacey asks whether any meetings will be affected. The tone is friendly and supportive and there is no push back.

38. We find Miss Mallinowski misguided in her recollection that her employer was reluctant or stubborn in response to requests to wfh. In the early years of her diagnosis (2017-2019) there is no record of requests; similarly, there is no evidence of push back; the situation is formalised in the 2019 agreement. The claimant's recollection of STB's stubbornness in response to her requests does not accord with her own evidence that she had a good working relationship with her employer and colleagues, which is reflected in email exchanges at that time.

39. Miss Mallinowski claims she *'had multiple doctor's appointments in one particular week'* and that she asked Ms Stacey *'if I could have extra time working from home'. But the request was denied'* and she was '*instructed to work in the office on the day I usually worked from home so that didn't have extra day working from home.*' In evidence the claimant referenced the request

in an email on 2 January 2020, to which Ms Stacey replied: '*All sounds fine with me.'* The claim was not denied nor is there evidence any other requests made.

40. Miss Mallinowski alleges Mr Cooke *'insisted that I buy a new computer if I wanted to keep working from home.'* She does not provide details of when or how Mr Cooke communicated this insistence. Mr Cooke told us STB did not provide computers for staff working at home as it did not have the resources to do so and that staff working from home were responsible for using own computer. He recalled a conversation about the claimant getting a compatible device as she was having issuing working from home with her chromebook.

41. Provision of a device was not company policy at that time; a float laptop was available for use at meetings, conferences, and exhibitions. It was not recorded as a reasonable adjustment in the agreement, nor did the claimant request it. On the balance of evidence before us we find that Miss Mallinowski did not request a computer nor Mr Cooke insist that she buy one. Indeed, in oral evidence the claimant confirmed that a month or 2 into the pandemic she took an office computer home.

42. Miss Mallinowski alleges that in 2019/2020 Mr Cooke *'constantly changed computer settings, made working from home complicated'* such that Miss Mallinowski *'could no longer use her own laptop due to these changes'* There is no evidence before the Tribunal that Mr Cooke constantly changed the settings. We prefer Mr Cooke's evidence that he changed the settings on one occasion so he could access the system.

43. Miss Mallinowski alleges that in 2020 she *'asked to skip a non-mandatory team building exercise on Zoom due to feeling unwell'* and that Ms Spangler pushed back multiple times *'saying that everyone should be there'*, such that she *'had to beg and explain in detail that she was unwell.'* Ms Spangler has a different recollection, telling us that: '*Initially Jenny did not explain that she felt unwell and worried the event would cause her fatigue. Without this explanation, I didn't know that it would be difficult for her to participate. As soon as Jenny explained this reasoning, I understood and said she was not required to attend the team building event'*. Balancing these recollections, we find that there was an initial push back, not multiple times as alleged; once a full conversation had taken place there was no pressure placed on Miss Mallinowski to attend this event.

44. On 13 March 2020 Ms Stacey received a Health4Work report from Hampshire Hospitals following Occupational Health Referral by STB; the report concluded that *'the adjustments put in place at present are suitable'* and advises some *'further minimum adjustments'* In oral evidence Miss Mallinowski's acknowledged that STB put these in place. It was subsequently updated and signed by Miss Mallinowski and Ms Spangler on 11 June 2020. On 9 September 2020 Miss Mallinowski signed a new contract of employment with STB, as did all staff.

45. In a telephone call on 9 October 2020 Mr Cooke informed Miss Mallinowski her job was at risk of redundancy, which he confirmed in a letter sent by email the same day, stating: '*I regret to inform you that as a result of the downturn in business brought about by the pandemic your role of full-time English-German translator is now at risk of redundancy. We shall be consulting with you next week as agreed.'* In his witness statement Dr Coulton states this communication shows the redundancy was predetermined, the basis on which

the claimant claims unfair dismissal.

46. We have considered this email; it informs Miss Mallinowski that she will continue working as normal to her current schedule *'until any decision is made'.* Dr Coulton also refers to an email of 9 October between Ms Spangler and Ms Stacey; this discusses the need to issue Miss Mallinowski with a statement setting out the reasons for redundancy and ensure the process is fair, Ms Stacey asking if a statistical document will be sent to Miss Mallinowski, and Ms Stacey replying *'it could be sent to Jenny eventually'.* The other document referred to by Dr Coulton in reference to his comment the redundancy was already predetermined on 9 October is a transcript of a subsequent consultation meeting which took place on 19 October 2020. There are 2 issues with this document. First, it is a transcript of a secret recording, not agreed by the respondents and for the reasons stated in this Judgment not accepted as evidence by the Tribunal. Second, it does not relate to the 9 October letter notifying Miss Mallinowski she was at risk of redundancy.

47. Mr Cooke explained STB's reasons for the redundancy, that STB 'had decided in advance the English to German translation position was redundant based on statistics going back years and the impact of the Covid-19 pandemic. Mr Cooke's evidence is that it was not known at the time the letter was sent whether the company would find an alternative position for the claimant.

48. In cross examination of Mr Cooke Dr Coulton explored options to identifying Miss Mallinowski for redundancy. Mr Cooke told the Tribunal that STB did not ask for volunteers as 'it was not a case of reducing the number of staff, it was a question of making sure the company had the right staff to keep the company going in the long term. Mr Cooke dismissed Dr Coulton's proposition that STB should have adopted a *'last in first out'* approach, telling the Tribunal that *'length of service in and of itself does not mean that person is relevant to the company at the relevant moment.'* Dr Coulton suggested to Mr Cooke that STB should have considered bumping to retain Miss Mallinowski, to which Mr Cooke replied: *'no, it was correct commercial decision at that time all other staff were required. We did not change reason, we expanded reason, immediate trigger was pandemic and putting people on furlough but as we looked at the statistics backwards and into the future we came to the decision even if the position recovered to what they were before Covid's the amount of work coming into for Jenny was not sufficient and that for E to G the right thing to do was at the company does not get sufficient work.'*

49. We record this as on the face of her claim the claimant suggests that STB should have taken another approach. As a matter of law, this is not a factor for an employee. It is for the employer to determine whether there is a redundancy situation and for the Tribunal to determine whether the employer's belief in redundancy is genuine. Mindful the claimant is not legally represented we record that we have considered this evidence and our findings of the reasons stated by STB for entering a redundancy process with the claimant.

50. We find that STB stated from the outset of the redundancy process the reason they had identified Miss Mallinowski's position for redundancy. There is no evidence to support Dr Coulton's assertion that the redundancy was predetermined on 9 October 2020. None of the documents to which Dr Coulton refers indicate that it was a foregone conclusion the claimant would be dismissed as an outcome of the redundancy process. We prefer Mr Cooke's

evidence that for STB at this time the ultimate outcome was still be determined.

51. Miss Mallinowski was the only person to be notified that she was at risk of redundancy. She was the only employee in the role of English to German translator; this is her job title in both of her employment contracts. She is a native German speaker; English is her habitual language. STB also employed German to English' translators, all of whom were native English speakers and none of whom were notified they were at risk of redundancy as STB considered them different roles and labelled them as such in its contracts of employment.

52. Mr Cooke, Ms Spangler and Ms Stacey explained the difference between translation roles. Based on their explanations we find the following facts distinguish the roles where a non-native speaker is translating to a habitual language as the claimant did when she undertook some German to English translation:

    52.1. client requests / contractual agreement translations are always done by a native translator;
    52.2. prevailing philosophy it is safer to have a native speaker, so they do not make an obvious error, use an inappropriate word or unnatural language;
    52.3. the work of any translator translating into habitual not native language required an additional checking stage called revision; and
    52.4. the commercial impact of adding a revision stage of increased deadlines and cost.

53. Based on the explanation provided by STB we find that the roles different. The distinction is translators were employed by reference to their native language for these reasons, as the Miss Mallinowski was in her role as an English to German translator. In this role translating into her native language her work was not revision checked; it was when she translated to English. For German to English translations her work would need to be revised, at additional time and cost to a client.

54. On 12 October 2020 an initial consultation meeting took place between Mr Cooke and Miss Mallinowski. We have seen STB's notes of this meeting, the contents of which Dr Coulton did not challenge in cross examination of the respondents' witnesses. Mr Cooke explained to Miss Mallinowski that her role had been identified at risk due to a 50% downturn in English to German translation work, explaining by reference to job numbers and income the reduction and telling her that the company had made a financial loss to 31 March 2020. In oral evidence Ms Stacey explained why there was a difference in the fall in workflow of 50 % English to German translations, compared to a drop of 25% in German to English translations, telling us the statistic represents the amount of work received, the drop was for many reasons like the client had stopped working for the pandemic, translated the website the previous year so did not have to do it again.

55. At this meeting Mr Cooke proposes a part time marketing role as an alternative to redundancy. Miss Mallinowski replies that she did not want to give up her translation role completely and suggests 2 days marketing and 3 days translation for 6 months, with Ms Spangler agreeing that this might work using Friday as ad hoc day. Mr Cooke is enthusiastic about finding an alternative role agreeing STB would look at the viability of this option' and provide Miss

Mallinowski with the information she requests evidencing the statistics about the downturn.

56. On 12 October 2020 STB sent an email to all staff informing them that the English to German translation role was at risk of redundancy. As Miss Mallinowski was the only employee with this role, it was possible for colleagues to identify that she had been informed she was at risk of redundancy.

57. On 13 October 2020 Ms Spangler emails Miss Mallinowski with figures relating to the downturn, confirming projects overall had reduced 25%, English to German translations 50%. The email is supportive, acknowledging the upset and confusion regarding Miss Mallinowski start date and offering an in-person meeting and use of parking space at the second consultation meeting on 19 October.

58. On 14 October 2020 Miss Mallinowski replies asking if she can *'bring someone with me as a support',* as *'a reasonable adjustment to be made in accordance with the Equality Act',* after researching the same. Miss Mallinowski also tells Ms Stacey she has spoken to the MS Society, saying they encourage her to bring someone *'to take notes and be a set of ears'* and that this person *'would not actively participate in the meeting'.* Ms Stacey agrees, explaining the person cannot attend in person due to Covid restrictions.

59. On 15 October 2020 STB produces and emails further statistical information (presented in pie charts) in response to Miss Mallinowski. On 16 October Mr Cooke emails Miss Mallinowski confirming that STB wants to hear Miss Mallinowski's proposals for alternative working arrangements at the meeting on 19 October, which she confirms the following day she will bring to the meeting.

60. On 19 October 2020 a second consultation meeting takes place by zoom. Dr Coulton attends. He records the meeting without the knowledge of the attendees. We have seen an agreed transcript of this meeting. Mr Cooke gives Miss Mallinowski an explanation of the 15 October report; Miss Mallinowski does not challenge these statistics during the meeting.

61. Miss Mallinowski is asked for her suggestions; she proposes the job support scheme ('JSS') as an alternative to redundancy, handing those present (and emailing) a paper proposal. She was told at this meeting the reasons STB did not consider her proposal of the furlough scheme appropriate. Mr Cooke reads through the proposal, then explains why he does not consider JSS a viable option for STB: *'Well an employer erm erm, having a full time employee working with reduced hours on a the job support scheme, er the company will be paying about 60 % of the normal full time costs for somebody to be doing 40% of the hours….on two days a week it is not attractive unless we had another reason to keeping someone on, which might be you would fairly confident it would be for a short time and their hours would go back up again.*'

62. Mr Cooke suggests registering Miss Mallinowski with STB freelance; she rejects this option. He then proposes a marketing role; Miss Mallinowski asks for more information and a 4-week trial is suggested. Mr Cooke agrees to 'put something detailed in writing.

63. When asked by Dr Coulton in re-examination why Miss Mallinowski *'wanted to on furlough'* she replied that it was to 'help the businesses to retain

workers….*from our calculation it would have made sense to keep using it'.* It is a matter for the business and its managers, not the employee, to determine whether a furlough scheme is a commercially viable option as it is the employer, not the employee, who has the complete picture of the financial position of the business. We record this as it is something the claimant seeks to rely on in her claim regarding suitable alternative employment.

64. One of the claims brought by Miss Mallinowski is 41 allegations of harassment during the redundancy process. In our findings of fact, the Tribunal must establish whether the things alleged said or done did happen. Several statements (allegations 15-21) are comments Miss Mallinowski says were made at the 19 October meeting. We have considered the agreed minutes of that meeting. The statements were made; however, the quotations in the allegations are not accurate. Parts of sentences / paragraphs have been quoted in the claim, with interim words omitted. Allegation 15 is an example. Miss Mallinowski alleges the following was said:

    'Part of the process asks us to look at any vacancies, we are not hiring.'

65. In fact, Ms Stacey said the following [the part quoted items are underlined]:

66. '*Erm the other thing I have to clarify is that <u>part of the process</u> is that we have to <u>look at any other open vacancies</u> like jobs we are hiring for right now, so I just have to clarify to you that <u>we are not hiring</u>, which you know, erm but just so we are all on the same page there. Erm so that leaves us with suitable alternatives or redundancies to kind of discuss now. George do you have anything to add to that?'*

67. As to allegations 16 and 17, Mr Cooke does make an analogous reference to a fish counter; however, the following, alleged statement [*'So, that's where the suitable alternative applies, someone can be just pushed into it, That's just the sort of position we are in'*] is not an accurate reflection. Mr Cooke actually said:

    'and.. and in that case, it could be that if someone was offered, was told sorry you've lost the job on the fish counter but we can put you on the cheese counter instead and you said well that is not what I wanted to to do then, the employer could say well erm we have offered her every alternative you haven't accepted it ermm therefore err we don't have to make you redundant we're just saying you've got to take, you've got a new job but if you don't want to do it then you can just leave that's it .. so err so that is were the suitable alternative can erm someone could be pushed into it.. errm in some situations'

68. We have considered all the statements allegedly made at this meeting (allegations 16 to 21). We find that the same approach has been taken with each. While presented in the claim as verbatim quotes, they are not. Parts of sentence / paragraphs have been quoted from a secret recording (the agreed transcript was produced by order of the Tribunal) and as such the words have been taken out of their full context. Mindful of this finding of fact, the Tribunal will consider the <u>full context</u> of each statement in the agreed transcript of that meeting when considering the legal test whether these statements were made by STB as having the purpose or effect of violating Miss Mallinowski's dignity.

69. After the 19 October meeting, STB debates alternative work arrangements. Mr Cooke tells Ms Spangler in an email dated 22 October 2020 Mr Cooke says: *'I*

would still like to officially make the job split with marketing and for her to have responsibility for all marketing to German-speaking customers and to do a minimum number of hours per week.' On 23 October he sends Ms Stacey a draft proposal for a *'2 days a week in a new role of German Marketing officer'.* Ms Stacey and Ms Spangler exchange emails between 26 and 29 October titled '*draft proposal for Jenny'*, in which they discuss a number of options and debate what they could offer as a *'German speaking marketing officer and linguist' role'* They produce a job description of marketing officer role to German speaking countries, 4 days a week on the same pro-rata salary as Miss Mallinowski's English to German translation role. The job description separates the task and responsibilities for the marketing officer and German speaking linguist parts of the role.

70. On 30 October 2020 Mr Cooke sends details of this role to Miss Mallinowski. Her response on 1 November 2020 focuses on her proposal to stay on her current contract and make use of the furlough scheme while it was still available. Miss Mallinowski makes an harassment allegation about some of the wording which is in this email; we find it is quoted out of context.

71. On 5 November Ms Stacey emails all employees notifying that no other redundancies are being considered.

72. By letter dated 10 November 2020 Mr Cooke confirms that Miss Mallinowski's role is redundant, formalises the offer of the German speaking marketing officer role, setting out in the letter the terms and conditions of this job. He also confirms the 4-week trial period as 16 November to 11 December 2020; this is subsequently extended to 16 December 2020.

73. On 10 December 2020 Ms Stacey arranges a meeting on 16 December to discuss the 4-week trial. By email dated 14 December 2020 Miss Mallinowski provides feedback on the trial that the role is not for her and asks to discuss alternative arrangements. She repeats her proposal to avoid redundancy, asking STB to consider putting her on furlough, which by then is the Job Retention Scheme ('JRS'), to avoid making her redundant. Throughout the redundancy process the only proposals she makes involve retaining her English to German translation role supported by furlough.

74. By email dated 11 December 2020 Miss Mallinowski replies to a request from STB to set up a further consultation meeting, asking to attend remotely via Zoom' and to be accompanied by Dr Coulton. Ms Stacey replies confirming Dr Coulton's attendance as *'a second pair of eyes and ears'*. There is no suggestion by the claimant that she wants Dr Coulton to speak on her behalf.

75. On 16 December 2020 Miss Mallinowski, Dr Coulton, Mr Cooke, Ms Stacey, Ms Jabeen and Ms Spangler attend the third consultation meeting by Zoom. We have seen the agreed notes of this meeting. Mr Cooke explores why Miss Mallinowski found the marketing role unsuitable and raises the possibility of an alternate role in the linguistic administration team.

76. Miss Mallinowski alleges that at this meeting STB failed to *'provide the answers to the questions asked by the claimant in an email sent before the meeting and again by Dr Coulton at the meeting on 16 December 2020.'* Miss Mallinowski confirmed in oral evidence that the email referred was an email she sent to Mr Cooke and Ms Stacey on 14 December. We have considered this email. It does

not contain any questions; it asks to discuss retaining her position as a full time German linguistic.

77. The question put to STB in this meeting was why Miss Mallinowski was not being enrolled on the JRS scheme. Mr Cooke refers to a written response, received by the claimant explaining this. At this meeting Dr Coulton attempts to speak. Ms Stacey tells him he is not eligible to ask questions and offers to send Miss Mallinowski a written answer to any of her questions.

78. Miss Mallinowski alleges that statements made at this meeting amount to harassment (allegations 26-34). We have considered the agreed transcript. The quoted words are not an accurate reflection of the conversation. Phrases / sentences are part quoted from sentences / paragraphs.

79. After the meeting Miss Mallinowski emails Mr Cooke requesting further explanation as to why STB is not prepared to enroll her on furlough with her current job title. Mr Cooke provides a detailed explanation by letter dated 17 December 2020 as to why STB do not consider it viable to put Miss Mallinowski on the JRS. He asks Miss Mallinowski to consider the role in the linguistic administration team. Allegations 35 and 36 are part quotes from this letter, taken out of context.

80. Miss Mallinowski replies on 3 January 2021, rejecting, with reasons, the offer of an English to German linguist role. The emails repeat her request that STB's enroll her on the JRS, saying they have not provided an adequate reason for not doing so. Based on our findings by this time Mr Cooke has explained several times the reason STB's do not consider furlough an alternative, both verbally and in writing.

81. On 12 January 2021 Mr Cooke emails Miss Mallinowski to arrange the final consultation meeting remotely on 15 January 2021, confirming she can be accompanied by <u>a companion with the option to address the meeting or attend as witness.</u> She replies, referring to the Equality Act 2020 and asking for Dr Coulton to attend, which he does.

82. At the 15 January meeting Mr Cooke informs Miss Mallinowski she is being made redundancy, which he confirms by letter dated 19 January 2021. Miss Mallinowski raises the JRS, saying: '*I just don't understand why we are not considering this at all'.* By this point Mr Cooke has repeatedly explained why STB do not consider a furlough option viable; he does so again at the meeting.

83. Miss Mallinowski alleges that statements made at this meeting amount to harassment (allegations 37-46). We have considered the agreed transcript. The quoted words are inaccurate. We find that the same approach has been taken to the wording quoted from 19 October and 15 December meetings: phrases / sentences are part quoted from sentences / paragraphs.

84. On 16 January 2021 Mr Cooke emails Miss Mallinowski setting out details of the redundancy process, including right of appeal, and payment. He asks the claimant to reconsider STB's alternative job proposals. The email continues that if she decides to accept a STB's proposed role (marketing / administration, not translation) STB would support any unpaid element with the furlough scheme. At the end of the email Mr Cooke says he needs to speak to her about her network drives.

85. On the morning of 18 January 2021 Mr Cooke telephones Miss Mallinowski; they have different recollections of this call. In his witness evidence he says he *'contacted Jenny to reconsider whether she wanted to continue working for the company with a different job description'* and the basis of him doing so was what he considered, and Miss Mallinowski admitted in oral evidence, their good working relationship.

86. Notes of the conversation were made by Miss Mallinowski and Dr Coulton. In oral evidence Dr Coulton told the Tribunal that the notes of this telephone call were made on 27 January 2021 as Miss Mallinowski was too upset until them. This explanation is simply not credible and invariably affects the weight the Tribunal gives to this record. After this call Miss Mallinowski wrote a comprehensive email to Mr Cooke, much of which flows from the conversation. It is implausible that she was too upset to recount the call until 9 days later, as Dr Coulton suggests, yet was able to write this coherent email at the time.

87. The claimant's note of this call was labelled *'Fourth 'consultation meeting''* Even accounting for the use of quotation marks, this is wholly inaccurate. The call was on a Monday morning and no prior arrangements had been made for this call. The passage of time between the call and note, the labelling, the fact she was assisted by Dr Coulton, whose evidence we have found not credible in places, the contemporaneous email led us to conclude this note does not accurately reflect the conversation. We prefer Mr Cooke's version of the call, which was not challenged by Dr Coulton in cross examination. It aligns with the correspondence he sent on that day and on 16 January. .

88. Following this call Mr Cooke email Miss Mallinowski, asking her again to reconsider, saying *'As a final alternative to redundancy, please consider again an alternative working arrangement at your current salary'.* She replies that evening telling him that she doesn't feel she can carry on working for him anymore. She says, *'it has become clear to me that you don't want me to work for you anymore.'* The Tribunal finds that this is simply not true. Mr Cooke has made several offers to enable Miss Mallinowski to continue working for STB. She would not consider them in any meaningful way as they were not on her terms; to continue as a translator with some additional tasks, in other words to retain the job she had been told was redundant and to be supported by furlough payments where the work had fallen off. For this reason, she was unable at the time to open her mind to the suitable alternative roles being put to her.

89. A letter confirming redundancy letter was sent to Miss Mallinowski by Mr Cooke on 18 January 2021. Miss Mallinowski's evidence about whether she appealed is conflicting and confused. Initially in cross examination she said she did appeal the redundancy. When asked by Mr Lachlan to direct the Tribunal to this appeal, she referred to her 3 January 2021 email; this was not an internal appeal as part of the redundancy process as it was sent before Miss Mallinowski received the final redundancy decision on 18 January. Indeed, her oral evidence conflicts with her written statement which records her preparing grounds of appeal that *'was never sent'.* When asked in re-examination by Dr Coulton why she did not submit the grounds of appeal she told the Tribunal that after the phone call with Mr Cooke she *'did not feel [she] wanted to appeal and trust had gone.'* She accepted that a second document she referred to (of which we have seen a screenshot) was prepared with Employment Tribunal proceedings in mind and not for an internal appeal to STB. In oral evidence

Miss Mallinowski accepted that she did not appeal as she *'did not want to work for STB anymore.'* We find that Miss Mallinowski did not appeal the redundancy.

90. On 19 January Miss Mallinowski was told she could take the rest of the week off; she was also given 3 extra days holiday. On 20 January 2021 Mr Cooke emails Miss Mallinowski asking her to take her remaining 7 days holiday during her notice period, identifying the holiday dates as 15 to 24 February and to take garden leave from 21 January on full pay; in oral evidence Miss Mallinowski accepted that she received this email and understood the request. STB agreed to move the last day of holiday to 19 March, Miss Mallinowski's last day. She is asked to return from garden leave on 27 January to do some market research. Miss Mallinowski notice period ends on 19 March 2021.

91. In January 2021 Mr Cooke agreed an advert for a Project Manager. Dr Coulton suggested the advert was created on 21 January 2021 on the basis the document was titled *'Translation Project Management vacancy job advert Jan 21.docx'* The advert was sent out by STB on 25 January. Ms Stacey told us that the reference to 21 is to the year not day. This is a plausible explanation which accords with how documents appear as an attached, the year stated after the month.

92. STB did not offer this role to Miss Mallinowski. In oral evidence Miss Mallinowski told us had it done so at the time she would have taken project management role, even though it was a lesser salary

93. When this was put to her, she had already confirmed that she would not take a job which a lesser salary she suggested it could have been offered to her and a discussion could have been had. Ms Stacey told us STB did not offer the claimant the role; she explained the decision not by reference to '*the message from her repeated through the redundancy process was that she wanted to be a translator.'*

94. The Tribunal finds that Miss Mallinowski's oral evidence that she would have accepted the Project Manager role is not plausible. In correspondence and at consultation meetings she is clear in part that her reason for rejecting the roles put forward by STB is that she would be unable to use her translation skills in the way she wishes. In the 3 January letter she says *'I reiterate that I am a linguist and that the new position was totally beyond my skills set. I am not an experienced marketeer and I have no qualifications or experience to 'take the lead'.* The Project Manager job description does not have a linguistic element; it requires a similar skillset in terms of taking a lead on projects. For these reasons for Miss Mallinowski to say now that she would have accepted the Project Management role in January 2021 not credible. We acknowledge that when asked the question at a hearing 2 years after the redundancy process, she may consider, with hindsight, that she would have accepted the role. However, the question is how she would have responded at the time. We find she would not have accepted this role. From our review of the verbal and written exchanges between STB and Miss Mallinowski we find that the only role Miss Mallinowski was willing to accept as was an English to German translation role supported by furlough.

95. There is no evidence Miss Mallinowski did not raise her concerns that her selection for redundancy and subsequent dismissal were motivated by STB's

knowledge of her disability during the redundancy process as she was worried about losing her job. The first reference to her disability is in an email dated 18 January 2021. In her oral evidence Miss Mallinowski confirmed that she had never claimed a failing on the part of STB to make a reasonable adjustment for her until commencing the proceedings for unfair dismissal, as during that time she was *'not aware where the condition will progress and not aware in future that she might need a reasonable adjustment.'*

Issues to be determined by the Tribunal

96. We set out below the issues for the Tribunal to determine, as set out in the case management orders of 28 March and 4 May 2022.

1. Time limits

1.1 Were the discrimination and harassment complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.1.2 If not, was there conduct extending over a period?

1.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.1.4.1 Why were the complaints not made to the Tribunal in time?

1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Unfair dismissal

2.1 What was the reason or principal reason for dismissal? The respondent says the reason was redundancy.

2.2 If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:

2.2.1 The respondent adequately warned and consulted the claimant;

2.2.2 The respondent adopted a reasonable selection decision, including its approach to a selection pool;

2.2.3 The respondent took reasonable steps to find the claimant suitable alternative employment;

2.2.4 Dismissal was within the range of reasonable responses.

3. Disability

3.1 The claimant has multiple sclerosis which is a disability for the purposes of the Equality Act 2010 pursuant to section 6 and paragraph 6 of schedule 1.

4. Direct disability discrimination (Equality Act 2010 section 13)

4.1 Was the dismissal of the claimant less favourable treatment?
The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.
If there was nobody in the same circumstances as the claimant, the

Tribunal will decide whether she was treated worse than someone else would have been treated.
4.2 If so, was it because of disability?

Discrimination arising from disability (Equality Act 2010 section 15)
5.1 Did the respondent treat the claimant unfavourably by dismissing her?
5.2 Did the following things arise in consequence of the claimant's disability:
5.2.1 The claimant's need for reasonable adjustments; and
5.2.2 The respondent's fear that the claimant may require hospitalisation and substantial time off work in the future should her disability worsen?
5.3 Did the respondent dismiss the claimant because of one or both of those things?
5.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent's aims are to be clarified in the amended response.
5.5 The Tribunal will decide in particular:
5.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;
5.5.2 could something less discriminatory have been done instead;
5.5.3 how should the needs of the claimant and the respondent be balanced?
5.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

6. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)
6.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?
6.2 A "PCP" is a provision, criterion or practice. Was the respondent's redundancy process a PCP?
6.3 Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that symptoms of multiple sclerosis include anxiety and inability to concentrate and the claimant therefore required more support with the process?
6.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?
6.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:
6.5.1 Allowing Dr Coulton to speak on behalf of the claimant at the consultation meetings on 19 October 2020 and 16 December 2020;
6.5.2 Providing at the meeting with Mrs Stacey on 16 December 2020 the answers to the questions asked by the claimant in an email sent before the meeting and again by Dr Coulton at the meeting on 16 December 2020;
6.5.3 Holding the meeting on 18 January 2021 with Mr Cooke by Zoom not telephone to allow her to be accompanied.
6.6 Was it reasonable for the respondent to have to take those steps?
6.7 Did the respondent fail to take those steps?

Harassment related to disability (Equality Act 2010 section 26)
7.1 The claimant says that during the redundancy process she was subject to harassment related to disability. The alleged incidents of harassment are at numbers 1 to 9 (added by Order of Judge Eeley on 17 May 2022) and 10 to 51 of the Claimant's has provided a table of allegations.

7.2 Did the respondent do the things alleged by the claimant?
7.3 If so, was that unwanted conduct?
7.4 Did it relate to disability?
7.5 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
7.6 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Holiday Pay (Working Time Regulations 1998)
8.1 The claimant says she was required by the respondent to take her accrued but untaken annual leave (seven days) during her notice period.
8.2 Did the respondent comply with regulation 15 of the Working Time Regulations 1998 when requiring the claimant to take annual leave during her notice period?
8.3 If not, for how many days accrued but untaken annual leave is the claimant entitled to be paid?

Law

Time Limits

97. Section 123 s123 of the Equality Act sets the time limits. The ACAS early conciliation procedure covers discrimination claims. The primary time-limit is within 3 months of the discriminatory action. If the claim is late, the tribunal has a 'just and equitable' discretion under s123(1)(b) to extend time. *In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96*, the Court of Appeal held that 'an act extending over a period' can comprise a 'continuing state of affairs' as opposed to a succession of isolated or unconnected acts. There needs to be some kind of link or connection between the actions.

Unfair dismissal (redundancy)

98. Section 94 of the Employment Rights Act 1996 (the '1996 Act') confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. An unfair dismissal claim can be brought by an employee (section 94) with 2 years continuous employment (section 108) who has been dismissed (section 95). This is also satisfied by the respondent admitting that it dismissed the claimant (within section 95(1)(a) of the 1996 Act).

99. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

100. Here the respondent replies on the reason of redundancy (section 98(2)(c), which is a potentially fair reason set out on the legislation. Section 139 (1) of that Act defines redundancy; this is the definition the Tribunal must apply in a claim of unfair dismissal. The definition states:

For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a)the fact that his employer has ceased or intends to cease—

(i)to carry on the business for the purposes of which the employee was employed by him, or

(ii)to carry on that business in the place where the employee was so employed, or

(b)the fact that the requirements of that business—

(i)for employees to carry out work of a particular kind, or

(ii)for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

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

101. In redundancy dismissals in determining if the reason is fair or unfair the respondent must show that:

101.1. There has been a reduction in the number of employees needed to carry out the work or a reduction in the amount of work therefore less employees are needed. This is a commercial decision, and the employer must show that this is the case.

101.2. That the process was fair and reasonable.

101.3. That the manner in which the claimant was selected was fair and reasonable.

101.4. Whether the employer took any reasonable steps to redeploy the employee whose role was at risk.

101.5. Whether there were any alternatives to dismissal.

102. Section 98(4) of the 1996 Act deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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.

103. The compensatory award if a claim of unfair dismissal is successful must be 'just and equitable'. As a result of the decision in *Polkey v AE Dayton Services Ltd [1987] IRLR* 503 a Tribunal may reduce the compensatory award to reflect the chance that the claimant would have been dismissed in any event had the dismissal followed a fair process. The Tribunal assesses this possibility by reference to the actual employer in the claim. To substitute the Tribunal's own mindset is an error of law.

Direct disability discrimination in respect of dismissal (Equality Act 2010 section 13)

104. Under section 13, Equality Act 2010, "EqA", direct discrimination is defined: "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others." 101. The protected characteristics are set out in section 4 EqA and includes race, sex and disability. Direct discrimination occurs where the employer treats the employee less favourably because of a protected

characteristic. There is no defence of justification for direct discrimination in respect of disability.

105. Section 23 of EqA provides for a comparison by reference to circumstances in a direct discrimination complaint. The Tribunal must consider whether the employee was treated less favourably than they would have been treated if they did not have the protected characteristic. One way of testing whether or not the employer would have treated them better if they did not have the protected characteristic is to imagine a "hypothetical comparator". There is no actual comparator in this case; therefore, the test of hypothetical comparator is applied. The circumstances of a comparator must be the same as those of the claimant, or not materially different: see section 23 of EqA. The circumstances need not be precisely the same, provided they are close enough to enable an effective comparison: *Hewage v Grampian Health Board [2012] UKSC 37.*

106. The important thing to note about comparators (whether actual or hypothetical) is that they are a means to an end. The crucial question in every direct discrimination case is: What is the reason why the claimant was treated as he/she was? Was it because of the protected characteristic? Or was it wholly for other reasons? It is often simpler to go straight to that question without getting bogged down in debates over who the correct hypothetical comparator should be: *Shamoon v. Royal Ulster Constabulary [2003] UKHL 11.*

107. The Tribunal must consider the "mental processes" of the alleged discriminator: *Nagarajan v London Regional Transport* [1999] IRLR 572. The protected characteristic need not be the *only* reason for the less favourable treatment. It may not even be the main reason. Provided that the decision in question was **significantly** (that is, more than trivially) influenced by the protected characteristic, the treatment will be because of that characteristic.

108. The burden of proof provisions are contained in section 136 of EqA:

(2) If there are facts from which the [tribunal] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the [tribunal] must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene that provision.

109. We have considered the guidelines on the application of the burden of proof provisions were set out by the Court of Appeal in *Igen Ltd v Wong* [2005] EWCA Civ 142. Section 136 prescribes two stages to the burden of proof: Stage 1 (primary facts) and Stage 2 (employer's explanation). At Stage 1, the burden of proof is on the claimant *Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913* *Royal Mail Group Ltd v Efobi [2021] UKSC 22* Stage 2 considers the employer's explanation. Has the employer proved on the balance of probabilities that the treatment was not for the proscribed reason. In a direct discrimination case, the employer only has to prove that the reason for the treatment was not the forbidden reason. There is no need for the employer to show that they acted fairly or reasonably.

Discrimination arising from disability (Equality Act 2010 section 15)

110. Section 15 of EqA provides:

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

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

111. Section 20 EqA sets out the duty on an employer to make adjustments; the duty comprises the following three requirements.
…..
(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4)The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5)The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

112. Section 21 provides:
(1)A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

113. In the case of *Mr J Hilaire v Luton Borough Council* [2022] The Court of Appeal held that, however widely and purposively the concept of a PCP was to be interpreted, it did not apply to every act of unfair treatment of a particular employee. All three words ("provision", "criterion" and "practice") carried the connotation of a state of affairs indicating how a similar case would be treated if it occurred again; although a one-off decision or act could be a practice, it was not necessarily one.

Harassment related to disability (Equality Act 2010 section 26)

114. Section 26 EqA sets out the legal definition of harassment; sections (1) and (4) relate to claims of harassment related to disability
(1) A person (A) harasses another (B) if-
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) The conduct has the purpose or effect of-
(i) Violating B’s dignity, or

(ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

whether it is reasonable for the conduct to have that effect.

115. In considering the words "intimidating, hostile, degrading, humiliating or offensive" a Tribunal must be sensitive to the hurt comments may cause but balance so as not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase: *Richmond Pharmacology Ltd v. Dhaliwal* [2009] IRLR 336. Where a claim for harassment is brought on the basis that the unwanted conduct had the *effect* of creating the relevant adverse environment, section 26 has been interpreted as creating a two-step test for determining whether conduct had such an effect; *Pemberton v Inwood* [2018] EWCA Civ 564. The steps are:

115.1. Did the claimant genuinely perceive the conduct as having that effect?

115.2. In all the circumstances, was that perception reasonable?

Holiday Pay (Working Time Regulations 1998)

116. Regulation 15 of the Holiday Pay (Working Time Regulations 1998) sets out notice provision for dates on which leave is taken. Regulation 15 (2) states that: A worker's employer may require the worker— (a)to take leave…on particular days, by giving notice to the worker in accordance with paragraph (3), the relevant part of which Regulation 15(3): (b) states shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and (c)shall be given to the employer or, as the case may be, the worker before the relevant date. Regulation 15(4) defines the relevant date, for the purposes of paragraph (3) twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates.

Conclusions of the Tribunal

117. The Tribunal sets out its conclusions by reference to the issues for each of the claims brought by Miss Mallinowski.

Time limits

118. First, we address whether the discrimination and harassment complaints were made within the time limit in section 123 of the Equality Act 2010? The issues we must address were listed in the March case management order. The Tribunal directed parties to these issues when ordering written submissions at the end of the hearing and repeated the issues in the case management order of 2 December 2022.

119. Miss Mallinowski filed her ET1 on 24 March 2021, following a period of early conciliation from 22 to 23 March 2021. The first issue is whether the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates? We must draw a distinction between allegations 1-9 and allegations 10-51 of the harassment claims (listed in a table

at page 59 of the hearing bundle). The March and May case management orders note that allegations 10 to 51 have been accepted by the Tribunal as being claims of harassment relating to dismissal (the redundancy process). Therefore 3-month period starts with the date of redundancy (19 March 2022). The respondents accept these allegations were made in time. We agree; allegation 10 - 51 were made to the Tribunal within three months (plus early conciliation extension) of 19 March 2022 and are therefore within the legal time limits

120. Allegations 1 – 9 have been accepted by the Tribunal as allegations of harassment under section 26 of the Equality Act 2010 only, subject to each claim being in time. This is recorded in the May case management order of Judge Eeley, which states, *'The claimant's application to amend the claim to add nine further allegations of section 26 harassment'.* These were not accepted or recorded by the Tribunal as claims made in respect of dismissal, not least as these events do not relate to the redundancy process in time or substance.

121. Therefore, the first question is, was each allegation made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates? We have considered the claimant's submissions about the time limits. The claimant does not distinguish allegations 1-9 but submits all claims are in time by reference to the effective date of termination (19th March 2021) and the date the claim form was submitted (24th March 2021). This is incorrect. The starting point for calculating the time limit for allegations 1-9 is not the date of the redundancy, as the claims were not accepted as relating to redundancy. Therefore, the date the Tribunal must consider is the date of the alleged act. By reference to the date given by the claimant in the table of allegations each of the allegations 1 – 9 took place outside the 3-month period (after allowing for the period of ACAS conciliation). As they are out of time, we must apply our discretion under s123(1)(b) of the Equality Act 2010 and consider whether it is just and equitable to extend time, applying the guidance of the Court of Appeal in *Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96*. The decision guides that there needs to be some kind of link or connection between the actions. The claimant's submissions do not address why the claimant considers the events a continuing state of affairs.

122. By reference to our findings on these events we conclude the events in incidents 1-9 are separate, stand-alone allegations of harassment not connected to each other. Some of the allegations date to 2017 and 2018, others 2020. We conclude these events are not connected to each other or to the respondent starting a redundancy process. We conclude that allegations 1-9 do not constitute an act extending over a period and by reference to the date of each allegation are out of time.

123. Our next consideration is whether it is just and equitable in all the circumstances to extend time. The onus is on the claimant to advance a case why a just and equitable extension of time by a Tribunal is appropriate. The claimant does not address this issue in written submissions. In evidence Miss Mallinowski told us that she did not wish to complain about these alleged incidences at the time they occurred. She has not suggested she was prevented from doing so. Indeed, by her own evidence she was happy in her role at the time of allegations 1-9 and considered the respondents family at the times of these alleged events.

124. We must be balanced the prejudice to the respondents of extending time. In the Tribunal's judgment the greater prejudice in extending time is to the respondents. Several years have passed between some of the events and date of the claim. This delay prevents a timely investigation of the allegations by the respondents, while matters were still fresh in everyone's minds. Bringing allegations after this length of delay would require Ms Stacey, Mr Cook and Ms Spangler (who no longer works for the respondents) to revisit historic, discrete events. We do not consider it fair for them to do so after the passage of the years, mindful that the events took place when Miss Mallinowski says she was happy, and there is no evidence from her that she was prevented from complaining at the time. On balance, in the Tribunal's judgment, it is not just and equitable to extend time. Allegations 1-9 are out of time.

Unfair dismissal

125. The respondent has satisfied the requirements of section 95 of the 1996 Act, admitting that it dismissed Miss Mallinowski (within section 95(1)(a) of the Employment Rights Act 1996) on 19 March 2021. The first issue is to determine the reason for Ms Mallinowski's dismissal. In a letter dated 10 November 2020 Mr Cooke confirms that Miss Mallinowski's role is redundant. Following a period of consultation this is confirmed in Mr Cooke's letter of 18 January 2021. Miss Mallinowski claims she was dismissed due to her disability. STB asserts the reason was redundancy; it has the burden to prove this. We conclude that, on the balance of probability, it has. In applying the definition of redundancy in section 139(1) of the 1996 Act we consider the decision of STB falls within section 139(b); that the type of work Ms J Mallinowski was doing (English to German translation) had diminished and that STB expected this to continue. Therefore, there was a genuine business need to reduce the workforce doing a particular type of work.

126. Redundancy is a commercial decision; it is for the employer to show to the Tribunal that there has been a reduction in the number of employees needed to carry out the work or a reduction in the amount of work therefore less employees are needed. If an employer can discharge this burden, the Tribunal cannot look behind its business decision. In *Polyflor Limited v Old [2003] UK EAT 0482-02-1305* the EAT confirmed that: *'It is not necessary for an employer to show an economic justification for its decision to make redundancies, properly so called*' if the employer has shown that the dismissal arises from a reduced number of employees carrying out a particular type of work.

127. We consider that STB has satisfied this legal test; it has evidenced to the Tribunal that it's decision to reduce the number of employees carrying out English to German to translations due to a 50% reduction in incoming workflow of English to German translations and as such STB decided to reduce the number of employees carrying out this particular type of translation work (English to German). Miss Mallinowski's employment contract records her role as *'an English to German translator'.* Therefore, her dismissal from this role arises from the 50% reduction in English to German translation work, which meant that less translators were needed.

128. The Tribunal has no jurisdiction to consider any statistical analysis or economic justification for an employer's decision to make an employee redundant. To do so and look behind a business decision would be an error of

law. It is sufficient for the Tribunal to find that there was a reduction in the amount of work, which we have by reference to the 50% reduction. There is no evidence before the Tribunal that the redundancy was a sham or related to Miss Mallinowski's disability. That Miss Mallinowski did not agree with the statistical analysis has no bearing on the determination by an Employment Tribunal as to whether the redundancy was genuine. Nor does STB's decision not to place Miss Mallinowski on a furlough scheme. Following the guidance of the Employment Appeal Tribunal in *Polyflor Limited* STB does not need to show to the Tribunal any economic justification for its decision. It is sufficient for STB to demonstrate a reduction in the amount of English to German translation work, which we have found it has.

129. As we have concluded that the reason for Miss Mallinowski's dismissal was redundancy, due to a reduction in the workflow of English to German translations, our next consideration is whether the process of redundancy was fair and reasonable in all the circumstances. In considering the reasonableness of the STB's conduct (applying the applying section 98(4) of the Act} *'the Tribunal should not substitute its decision as to what was the right course to adopt. The function of the Tribunal is to determine whether, in the circumstances of the case, the Respondent's decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have* adopted', noting that *'If a Respondent so demonstrates this, the dismissal is fair (Iceland Frozen Foods v Jones [1982] IRLR 439, paragraph 24)'.* The test applied is the band of reasonable responses test; the consideration for the Tribunal is did STB act as no reasonable employer would have done, mindful of the size and resources of STB. In reaching its conclusions a Tribunal must not impose by own view but apply the views of STB at the time of the dismissal (*London Ambulance v Small [2009] IRLR 563*).

130. In considering fairness, we must decide whether the consultation process was fair; whether STB adequately warned and consulted Miss Mallinowski. We conclude that it did. We have found that Miss Mallinowski was first notified her role of English to German was at risk of redundancy on 9 October 2020. Mr Cooke and Ms Spangler then met with Miss Mallinowski on 12 October 2020 for a first consultation meeting. We have found that at this meeting Mr Cooke explained to Miss Mallinowski that her role had been identified at risk due to a 50% downturn in English to German translation work, explaining by reference to job numbers and income the reduction and telling her that the company had made a financial loss to 31 March 2020. In response to Miss Mallinowski request at this meeting, the following day Ms Spangler emails Miss Mallinowski with figures relating to the downturn, confirming projects overall had reduced 25%, English to German translations 50% and on 15 October 2020 STB produces and emails statistical information (presented in pie charts) in response to Miss Mallinowski. At the meeting alternative options are considered in outline. A second consultation meeting takes place on 19 October 2020 to discuss at which alternative roles are considered. The next meeting takes place on 16 December 2020.

131. Between these meetings in a letter dated 10 November 2020 Mr Cooke confirms that Miss Mallinowski's role is redundant, formalises the offer of the German speaking marketing officer role and confirms the trial period. At the third consultation meeting on 16 December 2020 the role of English to German linguist was explored, Mr Cooke following up on this option in his email of 17 December 2020. A final consultation meeting takes place on 15 January 2021

at which Mr Cooke informs Miss Mallinowski she is being made redundancy; he emails her on 16 January 2021 with details of the redundancy process, including her right of appeal, and payment and inviting her reconsider STB's alternative job proposals.

132. On 19 January 2021 Mr Cooke writes to Miss Mallowinski to confirm the redundancy. The period of consultation lasts over 3 months from 9 October 2020 to 19 January 2021 during which STB engage in 3 consultation meeting, at which we have found, from reading the agreed transcripts, STB actively engaged in consultation with Miss Mallinowski and between which STB engaged in email and telephone conversations addressing Miss Mallinowski's queries and requests. During this period of consultation, we have found STB proposed alternative roles for Miss Mallinowski, which parties discussed at these meeting, considered Miss Mallinowski's proposals for furlough. That STB did not accept Miss Mallinowski alternative suggestions of furlough does disregard the consultation process. Based on the timeline, agreed meeting transcripts, conversation, and correspondence which we have found took place between the meetings we consider that STB engaged in a comprehensive and meaningful consultation process. We conclude that the consultation process was fair.

133. We turn now to whether the way Ms Mallinowski was selected was fair and reasonable. As part of the consultation process an employer must adopt a reasonable selection decision. We must consider whether the selection pool was appropriate in the circumstances. There are no fixed rules about how the pool should be defined (*Thomas & Betts Manufacturing Ltd v Harding [1980] IRLR 255 (CA)*). It is unreasonable for an employer not to have considered a pool.

134. The first step for an employer is to consider whether there is appropriate pool of employees to be selected as part of a pool. Once the employer has shown it applied its mind to a pool, the composition of that pool is a matter for the employer. An employee has no say in selection. Who should have been in that pool is not a matter for this Tribunal as we must not substitute our own views as to what the pool should have been (*Hendy Banks City Print Limited v Fairbrother and others UKEAT/0691/04/TM*). The Tribunal can only unpick a pool in exceptional circumstances.

135. Therefore, we must consider whether STB genuinely applied its mind to selection of a pool. In selecting a pool, or dismissing the need for a pool, the employer must consider the test: the roles carried out by the employees in the pool do not have to be identical, employees carrying out similar roles should be included and only excluded if there is good reason to do so. A reasonable employer would have applied its mind to whether there were more than one person doing this role or whether there were any similar roles to this one before notifying any individuals of a redundancy risk and include in the pool all roles that are the same or similar.

136. We conclude that STB did discharge the burden to apply its mind to selection of any pool. We have found that STB considered the difference between German to English translators and English to German translators in that where a translator was not translating into their native language it was likely that the translation would require an extra stage, a revision check, as a matter of course to ensure accuracy and to meet the terms of agreements with client.

This additional process had a commercial impact in that it added additional time and cost to the process.

137. We have found for these reasons that the role of English to German translator is not the same role as German to English translator. Nor was it sufficiently similar given our findings about the commercial impact of the revision stage and client requirements that translation would be undertaken by a native speaker. We conclude that STB applied its mind to the selection of a pool; Mr Cooke told us and we have accepted his evidence that it was not a case of reducing the number of staff but rather a question of making sure the company had the right staff to keep the company going in the long term. He identified the English to German translation role as redundant following a downturn of 50% in English to German translation workflow. STB identified a pool of English to German translators. While the fact both roles require translation may mean they appear similar and the direction of translation only a small difference, the reality based on our findings as to how the business operated in response to client demands and the practice of a revision stage made a big difference. For these reasons the roles are not interchangeable. Therefore, we conclude that STB applied its mind to the consideration of a pool.

138. We are mindful that who should have been in that pool is not a matter for this Tribunal, or for the employee. This was confirmed by the Employment Appeal Tribunal in the case of *Halpin v Sandpiper Books Ltd* (EAT/0171/11). As we have concluded that STB applied its mind to the composition of the pool, we must consider the pool as a question of fact and not substitute how the Tribunal, or any other person may have chosen a pool. The pool was English to German translators. As a finding of fact Miss Mallowinski was the only employee at STB with the English to German translation role. Therefore, having applied its mind to the distinction between English to German translators and German to English translators it was reasonable and fair for Miss Mallowinski to be selected as a pool of one, the rational explanation for which is the commercial reality of the revision stage when a translator is not translating into their native language. We consider that a reasonable employer in STB's circumstances could have adopted this pool of one and therefore the pool selection is in the range of reasonable responses.

139. Our next consideration is whether the STB took reasonable steps to redeploy Ms Mallinowski into suitable alternative employment. This duty does not extend to making every possible effort to look for alternative employment (*Quinton Hazell Ltd v WC Earl [1976] IRLR 296*); the test is reasonable efforts. We conclude that on the evidence before the Tribunal STB did make reasonable efforts to find alternative employment for Miss Mallinowski. We have found that STB explored several alternative options with Miss Mallinowski, including initially trialing a marketing/translator role, all of which were rejected by Miss Mallinowski.

140. At the December 2020 meeting STB explored a second alternative role combining some translation work with administrative tasks. We have found that in January 2021, up until 18th, STB was still trying to engage Miss Mallinowski in a discussion of alternative roles in a telephone call and email exchanges. one of which was pro-rata (4 days a week) on the same daily salary as the role from which Miss Mallinowski was made redundant. STB's proposals are rejected by the Miss Mallinowski.

141. Throughout the conversations about alternative roles Miss Mallinowski repeatedly puts forward an option that combines continuing her English to German translation role supported by the government furlough scheme. Miss Mallinowski alleges that her proposal was ‘disregarded without proper consultation. We disagree. We have found that the business did not consider this a suitable alternative proposal and have accepted in our findings Mr Cooke’s explanation that STB did not see why continuing the current situation under the umbrella of the furlough scheme would be a long-term solution. It is not for an employee to tell a business which proposal is more suitable; this is a matter for the business. STB explained more than once why it did not consider furlough a suitable alternative.

142. By these proposals STB discharged its burden to offer Miss Mallinowski alternative roles; indeed, the numerous proposals repeated by STB went above and beyond that of a reasonable employer. That Miss Mallinowski did not like the proposals put forward, or that she wanted a proposal to include an element of the furlough, does not render the proposals unsuitable.

143. Miss Mallinowski has raised the fact that STB did not offer her a project manager role, which was advertised in January 2021, as an alternative role. We have not accepted her evidence to the Tribunal that she would have done so; it does not accord with the contemporaneous communications for the reasons we have stated. We have accepted STB’s evidence that the message Miss Mallinowski repeated through the redundancy process that she wanted to be a translator. Based on our findings we conclude that it was reasonable for STB not to have offered the project management role to Miss Mallinowski.

144. The final consideration for the Tribunal is whether dismissal was within the range of reasonable responses. When considering fairness of process, we must not substitute our own view for the employer’s view; the Tribunal must decide if dismissal fell within the range of reasonable responses of the employer (mindful of the size and administrative resources of the respondent’s business). Overall, we conclude that the consultation process adopted by STB, the selection of the pool of 1 and consideration of several alternative roles was an approach a reasonable employer would adopt.

Direct disability discrimination in respect of dismissal (Section 13)

145. Our next consideration is whether Miss Mallinowski was discriminated due to her disability in the decision to dismiss her. STB and Mr Cooke accept that Ms Mallinowski has multiple sclerosis which is a disability for the purposes of the Equality Act 2010 pursuant to section 6 and paragraph 6 of schedule 1. Ms Mallinowski claims her dismissal was not a genuine redundancy and that she was dismissed because of her of disability. We must decide whether she was treated worse than someone else in similar circumstances to Ms Mallinowski. She was the only English to German translator employed by STB. The respondent employed 2 German to English translators. For the reasons above we have found that the role of English to German translator and German to English translator are not comparators. Due to the commercial reality of the need for a revision step the roles are sufficiently different. Accordingly, we consider there is a material difference between these roles for the purpose of a claim for discrimination.

146. We have also found that Miss Mallinowski was selected for dismissal as part of a genuine redundancy process and not because of her disability. She was selected as work for her role (English to German translator) had fallen in volume by 50% and she was the only translator employed by STB in this role.

Discrimination arising from disability in respect of dismissal (Equality Act 2010 section 15)

147. Miss Mallinowski brings a claim of discrimination arising from disability in respect of her dismissal. The respondents accept that dismissal is unfavourable treatment and as such they treated Miss Mallinowski unfavourably by dismissing her. The respondents also accept that Miss Mallinowski's need for reasonable adjustments arose in consequence of her disability.

148. We have found that STB allowed Miss Mallinowski to wfh, swap her working days and put in place the adjustments recommended in the OH report. We conclude that the respondents complied with their duty to provide reasonable adjustments. The complaint made under section 15 relates to the redundancy process as Miss Mallinowski alleges, she was discriminated against in respect of dismissal. During the period of the redundancy process (October 2020 to January 2021) there is no evidence before the Tribunal that the respondents feared that Miss Mallinowski may require hospitalisation and substantial time off work in the future should her disability worsen. The reasonable adjustment requested by Miss Mallinowski as part of the redundancy process (that Dr Coulton attend consultation meetings as Miss Mallinowski eyes and ears was accommodated.

149. Based on our findings of fact that reasonable adjustments requested were accommodated and that there is no evidence that the respondents were concerned that Miss Mallinowski disability mean she would require hospitalisation or increased time off work, in our judgment the respondents could not have and did not dismiss for these reasons.

150. Accordingly, we do not need to consider the defence available to the respondents of proportionate means of achieving a legitimate aim, as the claim of discrimination arising from disability in respect of dismissal is not well founded. The respondents dismissed Miss Mallinowski following a genuine redundancy process.

Failure to make reasonable adjustments to the redundancy process (Equality Act 2010 sections 20 & 21)

151. The respondents accept that from at the time of the redundancy process they knew Miss Mallinowski was disabled. In November 2017 Miss Mallinowski disclosed her diagnosis to her line manager, Ms Spangler. A redundancy process is a practice which puts an employee at a disadvantage.

152. We have found that Miss Mallinowski's MS caused her to be anxious and to become tired. This affected Miss Mallinowski's ability to concentrate. Based on our findings of the extent of the respondents' knowledge about Miss Mallinowski's disability, which we have found the respondents supported with reasonable adjustments throughout her employment and the fact that Ms Spangler attended a course to increase the respondents awareness of and

knowledge about Miss Mallinowski's disability, we conclude that the respondents knew that Miss Mallinowski was likely to be placed at the disadvantage in engaging in the redundancy consultation process. Indeed, they acknowledged this by agreeing to her request that Dr Coulton attend consultation meetings as her eyes and ears.

153. Miss Mallinowski suggests that the respondents should have allowed Dr Coulton to speak on her behalf of the claimant at the consultation meetings on 19 October 2020 and 16 December 2020. We agree. We have found no such request was made; Dr Coulton attended as Miss Mallinowski's eyes and ears. However, the consideration for the Tribunal is did the respondents take such steps as is reasonable to avoid the disadvantage arising from Miss Mallinowski's disability, not did it take the steps requested.

154. We conclude that it was reasonable given the impact of Miss Mallinowski's disability on her, known to the respondents since November 2017, for them to have allowed Dr Coulton to speak on her behalf when he attempted to do so at these consultation meetings. We have read the agreed transcripts of the meetings and found that when Dr Coulton attempted to speak, he is referred to the request granted; that he is attending in capacity of eyes and ears only and has no remit as Miss Mallinowski's advocate. This is an unreasonable response in the circumstances known to and accepted by the respondents at the time. By not allowing Dr Coulton to speak on Miss Mallinowski's behalf at these consultation meetings the respondents failed to make a reasonable adjustment to the redundancy process.

155. Miss Mallinowski also alleges that the respondents failed in their duty to make reasonable adjustments by not providing at the meeting with Mrs Stacey on 16 December 2020 the answers to the questions asked by the claimant in an email sent before the meeting. This claim mispresents the facts. We have established that the email referred to the claimant sent to Mr Cooke and Ms Stacey on 14 December. We have considered this email; it does not contain any questions. We have considered the agreed transcript of the December consultation meeting. Questions are raised generally by Dr Coulton. We have found that the subject matter of these questions is addressed by the respondents in subsequent email correspondence. Further, there is no evidence before the Tribunal that Miss Mallinowski's disability reasonably requires correspondence to be in writing. There is no failure to provide reasonable adjustment about questions raised.

156. Miss Mallinowski alleges that the respondents failed to make reasonable adjustments to the redundancy process by not holding the meeting on 18 January 2021 with Mr Cooke by Zoom, rather than telephone, to allow her to be accompanied. We consider the allegation to be founded on a retrospective misrepresentation of the facts. We have found that a meeting did not take place on 18 January, nor was it ever scheduled nor proposed as a meeting. Mr Cooke telephoned Miss Mallinowski directly to discuss alternative roles as part of an ongoing dialogue of email exchanges following up on the January consultation meeting. There is no evidence before us that Miss Mallinowski required a reasonable adjustment that she could not communicate by telephone during the redundancy process or that she required every conversation with her employer to take place in a forum where she was accompanied, nor did she request this at the time. We do not consider such an adjustment reasonable to

alleviate the impact of Miss Mallinowski's disability. There is no failure by the second respondent in his handling of the telephone call on 18 January.

157. In our judgment, mindful of the impact of Miss Mallinowski's disability, which was known to the respondents, it was a reasonable adjustment to allow Dr Coulton to speak on her behalf at the consultation meetings. In refusing to allow him to do so, the respondents failed to make reasonable adjustments to the redundancy process. The other claims for failure make reasonable adjustments are not well founded.

Harassment related to disability during the redundancy process **(Equality Act 2010 section 26)**

158. Miss Mallinowski says that during the redundancy process she was subject to harassment related to her disability. The alleged incidents of harassment are at numbers 1 to 51 in the table at page 59 of the hearing bundle. By the date cited by Miss Mallinowski for allegations 1-9, they are outside the 3-month time limit (allowing for the extension for early conciliation). We have found that they do not form part of a continuing series of events and that, for the reasons stated, it is not just and equitable for the Tribunal to extend time. While we have made findings as to whether these events happened at all, or happened in the way described by Miss Mallinowski, as each is out of time it is not within the jurisdiction of the Tribunal to consider whether these events amount to harassment. Allegations 1-9 fail for being out of time.

159. Except for allegation 50 (which we have found happened after Miss Mallinowski was made redundant) allegations 10 – 51 are linked to the redundancy process and as such are in time. Our first consideration is, did the respondent do these things as alleged by Miss Mallinowski?

160. Turning to allegations 10 – 51, we have found that the statements quoted at 15 to 21 and 24-34 and 35-36 and 27-46 and 47-48 are part quotations from sentences or paragraphs said or written. They are not quoted in the claim in the full context of the verbal or written dialogue. We consider the presentation to the Tribunal of extracts of phrases from sentences / paragraphs / conversations / documents disingenuous. To cherry pick part dialogue is to misrepresent the dialogue and correspondence. At no time, in the meetings or exchanges of correspondence did Miss Mallinowski indicate the phrases used were unwanted conduct, related to her disability, not least as the phrases quoted cannot reasonably be considered without the fill context of the sentences spoken or written document.

161. Crucial to determining whether there is harassment is an assessment of whether the conduct had the purpose of violating a claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that claimant or whether it had that effect taking account of all the circumstances of the case and whether it is reasonable for the conduct to have that effect. Key to our assessment of whether conduct is, or can reasonably be perceived, as intimidating, hostile, degrading, humiliating, or offensive is the guidance in the case of *Richmond Pharmacology Ltd v. Dhaliwal* [2009] IRLR 336. We must balance hurt that comments cause bit does not encourage a culture of hypersensitivity.

162. To take account of all circumstances of the case we must consider

allegations 15 to 21 and 24-34 and 35-36 and 27-46 and 47-48 in the full context of the meetings and written documents, and not as the selective phrases quoted by Miss Mallinowski. In the context of the full text of the agreed transcripts from which the phrases are quoted and the full context of the written documents we conclude that the phrases did not relate to Miss Mallinowski's disability but to a redundancy process for which we have found she was selected because of her role. In their full and proper context these phrases do not reasonably have the purpose or effect of violating dignity. Difficult conversations invariably take place as part of any redundancy process. The phrases when considered in their proper context are not intimidating, hostile, degrading, humiliating or offensive; any perception they were is not reasonable.

163. Allegations 10 – 13 and 22-23 form part of the redundancy process, aspects which may have been difficult for Miss Mallinowski. However, in our judgment they are part of a difficult, but necessary process and cannot reasonably have the purpose of effect of violating Miss Mallinowski's dignity. In saying this we are mindful that the Tribunal in reaching its decisions must not create an environment of hypersensitivity.

164. We consider this guidance also relevant to allegation 14. The precaution was reasonable given the circumstances at the time (Covid); this situation does not have the purpose or effect of violating dignity. We have found that Miss Mallinowski's request was that Dr Coulton attend as eyes and ears. There was no request that he speak on her behalf; to suggest that the refusal at the time to allow him to do so created an intimidating, hostile, degrading, humiliating, or offensive is not a reasonable perception given the request she had made.

165. Allegation 49 concerns the telephone call that took place on 18 January 2021. We have found Miss Mallinowski's record of this call inaccurate and have accepted Mr Cooke's recollections of this call for the reasons stated. This conversation did not take place as alleged by Miss Mallinowski. Based on our findings of fact about this call, we conclude that the call could not have violated Miss Mallinowski's dignity in the way alleged, nor could it reasonably have done so considering the conversation we have found took place.

166. We have found that allegation 50 did not take place as alleged by Miss Mallinowski. Miss Mallinowski's agreed without objecting to do the work offered, we conclude that these events could not have violated Miss Mallinowski's dignity in the way alleged, nor could they reasonably have done so as they did not take place in the way suggested to the Tribunal.

167. We have found that had Miss Mallinowski been offered the project manager role in January 2021 she would not have accepted it. Her evidence she would have is not credible as is any suggestion she was humiliated. The evidence throughout the redundancy process was that she did not want this type of role. There was no violation of her dignity in not drawing her attention to this role in the circumstances as we have found them in January 2021.

168. Accordingly, the respondents did not harass Miss Mallinowski in the ways she alleges at allegations 10 to 51 and the claim for harassment during the redundancy process is not well founded.

Pay for accrued but untaken holiday.

169. By email dated 20 January 2021 Mr Cooke asks Miss Mallinowski to take her remaining 7 days holiday during her notice period, identifying the holiday dates as 15 to 24 February. Regulation 15 of the Working Time Regulations 1998 allows an employer to require a worker to take leave to which the worker is entitled on particular days by giving notice to the worker. The notice must specify the days on which notice is to be taken. The employer must give the notice before twice as many days in advance of the earliest day specified in the notice as the number of days to which the notice relates.

170. The first day of the holiday Miss Mallinowski was asked to take was 15 February 2021. The length of the holiday period was 7 days. Mr Cooke made the request on 20 January 2021. This request is more that 14 days before 15 February 2021. Therefore, STB complied with regulation 15 of the Working Time Regulations 1998 by giving Miss Mallinowski sufficient notice. Accordingly, the claim for holiday pay is not well founded.

171. The Tribunal will notify the claimant and respondents of the date for a remedy hearing to consider compensation for the claim of failure to make reasonable adjustments to the redundancy process, which succeeds.

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Employment Judge Hutchings

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 2 February 2023

Amended as at 17 March 2023

Sent to the parties on 27 March 2023

FOR EMPLOYMENT TRIBUNALS