EMPLOYMENT TRIBUNALS

Claimant: **Mrs AM Bainbridge (née Senior)**

Respondent: **The Employers Network for Equality and Inclusion**

Heard at: **London South (Croydon) via CVP** **On: 17/4/2023 to 20/4/2023 and 24/4/2023 to 26/4/2023**

Before: **Employment Judge Wright**
Ms Y Batchelor
Mr S Sheath

Representation:

Claimant: **Mr C Umezurike - counsel**

Respondent: **Mr J Boyd - counsel**

LIABILITY JUDGMENT

It is the unanimous Judgment of the Tribunal that the claimant's claims under the Equality Act 2010 (EQA) and the Employment Rights Act 1996 (ERA) fail and are dismissed.

REASONS

1. Oral reasons were given on 26/4/2023 and in accordance with Rule 62(3)[1] and further to a request (only received on the 22/5/2023) written reasons are accordingly provided.

2. The claimant presented a claim form on 17/2/2020 following a period of early conciliation which started on 18/12/2019 and ended on 10/1/2020. The claimant was employed by the respondent as an Executive Development Consultant from 7/3/2016 and her employment ended by reason of redundancy on 31/12/2019.

3. A case management hearing took place on 25/8/2020 and that resulted in an agreed list of issues.

4. Under the Employment Rights Act 1996 (ERA) the claimant claims unfair dismissal. Under the Equality Act 2010 (EQA), the claimant claims the protected characteristics of: disability (s.6) (the respondent conceded the claimant was disabled by reason of Primary Progressive Multiple Sclerosis (MS)); race (s.9) (West Indian) and sex (s.11) (female). The prohibited conduct upon which she relies is: direct discrimination (s.13); a failure of the duty to make reasonable adjustments (s.20 and s.21); harassment (s.26); and victimisation (s.27). The complaint is detriment and dismissal (s.39 and s.40).

5. The Tribunal heard evidence from the claimant and from her former colleagues: Mr Danny Robertson; Miss Magali Merindol; and Miss Flora Alphonse.

6. The respondent called four witnesses. They were: Mr Harry Gaskell; Mr Marcus Adams; Mr Alaba Okuyiga; and Mr Jonathan Crookall.

7. There was an issue in respect of the bundle. An accessible electronic copy was not provided in advance of the hearing. The respondent's solution on the first day of the hearing, was to send a further copy of the bundle in 12 parts. This was not acceptable. Had this case been heard in July 2020, there would have been some sympathy (video hearings were just being to be heard during the pandemic). The respondent was

[1] The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1.

represented and the Presidential Guidance on remote and in-person hearings dated 14/9/2020 was clearly available to the respondent in respect of producing a suitable bundle.

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8. The bundle was vast, running to 2196 pages and with a 23-page index. It contained irrelevant material which pre-date and post-dated the issues which the Tribunal was to determine (approximately pages 92-484 and 1740-2196).

9. Both counsel provided written submissions and supplemented them orally. Those submissions are not repeated in full or in summary in this Judgment, nonetheless they have been fully considered and taken into account.

10. At the outset of the hearing, reasonable adjustments were raised and in particular the claimant was asked to say if anything was required and to say if she required additional breaks.

11. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.

12. Only relevant findings of fact pertaining to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

Findings of fact

13. The respondent is an employer's network promoting equality and inclusion in the workplace. It is a not for profit organisation. Primarily, it provides advice and training to its members on equality issues, including disability. At the time the respondent presented its ET3 in April 2020 it employed 24 staff. By the time of the amended ET3 on 30/10/2020 the number of employees was 18. The claimant's own witness gave evidence that there were approximately 15-20 staff at the time she was employed.

14. Notwithstanding what is said above regarding evidence and documents which pre-dated and post-dated the allegations which form the issues which this Tribunal has had to determine; the earliest allegation in time relates to the harassment claim.

15. The claimant relies upon a conversation between Mr Okuyiga and Manojkanth Somsaundaram on 12/7/2018. She became aware of this when Mr Somsaundaram informed her of it in late July 2018.

16. Against this background, is Mr Somsaundaram's own claim to the Employment Tribunal. He was employed from 18/6/2018 to 5/11/2018. He presented his claim of disability discrimination on 29/3/2019. He relied upon the disabilities of polio and dyslexia. A preliminary hearing took place on 16/9/2019 and in his case management agenda for that hearing, he identified the claimant as a potential witness[2]. The respondent accepts that from the time it received the case management agenda, it was on notice of the intention of Mr Somsaundaram to call the claimant as a witness. The final hearing took place via CVP in January 2021 and the Judgment is dated 20/3/2021. In his claim form, Mr Somsaundaram referred to the conversation between him and Mr Okuyiga. At paragraph 1.3 of his particulars of claim[3], he said:

> 'On 12th July 2018, after I observed his Unconscious Bias training, [Mr Okuyiga] gave me a lift to the station in Leicester. During the journey he mentioned that [the claimant], a fellow colleague at [the respondent], is suffering from Multiple Sclerosis and that he is not happy with her work. He said that she had failed him with one of his good contracts; that she cannot manage her work with her disability; that she should be fired, and he couldn't believe that she is still working for [the respondent]. I was shocked by his remarks.'

17. As set out, Mr Okuyiga was delivering training and Mr Somsaundaram was observing him. Mr Okuyiga gave Mr Somsaundaram a lift to the train station.

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[2] It is accepted this was a protected act for this claimant for the purposes of s.27(2)(b) EQA.

[3] Res Judicata and issue estoppel applied in respect of Mr Somsaundaram's Judgment of 20/3/2021 at paragraphs 45-47 where the Tribunal found that it was 'not plausible Mr Okuyiga would mention or discuss [this claimant's] work be reference to her disability'. This matter had already been judicially considered and this was not drawn to this Tribunal's attention. This Tribunal however reached its conclusion independently of that, albeit it reached the same conclusion, for slightly different reasons.

18. The allegation is that Mr Okuyiga breached the claimant's confidentiality by referring to her MS/disability, commenting he was not happy with her work and said that the claimant should not be working for the respondent.

19. The claimant first mentioned this to the respondent in her grievance which she raised on 7/11/2018 (page 609). In that document, she said that Mr Okuyiga said:

> "because of her MS [the claimant] is all over the place and forgets things all the time - all she had to do was go to the interview and she completely hashed it up."

(page 610)

20. In the investigation meeting on 23/11/2018 (page 777), the claimant said:

> "because of [the claimant's] MS (multiple sclerosis) she's all over the place, she forgets things all the time".

21. In the claim form dated 17/2/2020, the claimant said Mr Okuyiga said (page 43) she had:

> "failed him with one of his good contracts, that [she] cannot manage [her] work with [her] disability and that [she] should be fired."

22. The Tribunal notes the change over time from the claimant directly referring to Mr Okuyiga referencing her MS, to the more generalised description of her 'disability'.

23. The Tribunal finds that this change of position by the claimant relates to Mr Okuyiga's response to this allegation when he was interviewed as part of the grievance. The exchange on 26/11/2018 is recorded as:

> *Q* *[The claimant] says that you made discriminatory comments to [Mr Somasundaram] regarding her performance, in a meeting you were in with a client. She said that when [Mr Somasundaram was in the meeting with you, observing you or accompanying you, you said something to him along the lines of "because of [the claimant's] MS, multiple sclerosis, she is all over the place, she forgets things all the time" and [the claimant] said that after a meeting with the you said to him "[the claimant] is all over the place because of her MS,*

she forgets things, and she went to this meeting by herself, all she had to do was do a good meeting and she completely hashed it up and we lost the work. So can you comment on that allegation please?

Mr Okuyiga I deny that categorically. And for that ...until now I was not aware that [the claimant] had MS, multiple sclerosis. I assumed all along that she had Parkinson's Disease.

Q So she has never told you her diagnosis?

Mr Okuyiga She has never told me her diagnosis. I was the one who assumed it was Parkinson's.

(page 971 (19-22))

24. The claimant therefore *needed* to address the fact that Mr Okuyiga said he did not even know she had MS and so the narrative was changed from Mr Okuyiga referring to MS, to referring to 'disability'.

25. The Tribunal did not hear from Mr Somasundaram, despite the fact the claimant had given evidence for him at his hearing in January 2021.

26. Mr Okuyiga said that he had expressed his unhappiness with the claimant's work during the car journey. He accepted that he knew the claimant had a disability, but he did not know she had MS until the investigation meeting.

27. He categorically denied that he referred to the claimant's disability in any format.

28. The Tribunal finds that on balance, Mr Okuyiga did not refer to the claimant having a disability. Mr Okuyiga was a thoughtful witness; for example, when he was asked if he was surprised if the claimant had a perception that he had an aggressive tone of voice, he responded:

> 'I really do not think so, that is something I do not accept. I have been in this role several decades and I am acutely aware of the way I come across, that particular stereotypes come into play, I am a large black male, a black male with a different accent, perhaps if that's how people view that, it's coming from their mindset. I am direct absolutely, but aggressive, no I do not accept that.'

29. The Tribunal finds that shows an insight and into how Mr Okuyiga believes he is perceived. As a trainer in equality and inclusion, the Tribunal finds that Mr Okuyiga's categoric denial of this allegation is credible and it is prepared to accept that denial. As such it finds the comments attributed to Mr Okuyiga did not take place. It is implausible that Mr Okuyiga would make negative comments about the claimant's MS/disability when giving a lift to a colleague who had an obvious disability (polio) after delivering a session on unconscious bias. Furthermore, Mr Okuyiga is himself disabled.

30. In the alterative, the claimant was made aware of the allegation in 'late July 2018'. The allegation is self-contained and a single alleged act of harassment. As such, it cannot possibly be a continuing act.

31. The claimant made no attempt to persuade the Tribunal that it was just and equitable to extend the time limit in her evidence-in-chief. Save that it was submitted upon her behalf it was just and equitable to extend the time limit, it was not said why it was so (paragraph 30). As noted by the respondent, the allegation was first raised by the claimant in her grievance on 7/11/2018, over three months later (page 610). The claimant did not provide an explanation for the delay, such as to seek an extension of time to the 17/2/2020 when her claim was presented.

32. The next allegation is that the claimant sought reasonable adjustments from 10/1/2019 (according to the chronology). The respondent disputes this.
33. The claimant said that she made the request to Mr Okuyiga on 10/1/2019 and that the request had been outstanding from her 2018 grievance (witness statement paragraph 52). The claimant did not give any evidence as to what those adjustments were.

34. It appears the claimant returned to work on the 10/1/2019 following a twoweek period of sickness absence due to 'work related stress' (page 1067). Mr Okuyiga denied the claimant had requested adjustments from him. He was aware of the fact the claimant was disabled and that Mr Robertson had previously put in place adjustments. Besides those adjustments, Mr Okuyiga said he had undertaken training that involved onerous travel, so that the claimant did not need to do so.

35. The claimant does not mention this alleged failure by the respondent at all in her grievance or in any appeal. Furthermore, it is the claimant's case that Mr Okuyiga was not talking to her at this point in time. This (on the

claimant's case) outstanding matter was not raised in any interview note or email between 10/1/2019 to October 2019.

36. In any event, the PCP[4] relied upon for the reasonable adjustments claim is the introduction of 'hotdesking'. The hotdesking policy was introduced on 19/3/2019 following a relocation to new premises. Any earlier request for adjustments cannot therefore be relevant to the PCP contended for. For the sake of completeness, the claimant has not satisfied the burden of proof to demonstrate that she did in fact make such a request of Mr Okuyiga on 10/1/2019 and the Tribunal finds she did not do so.

37. It is correct to say that once the hotdesking policy was introduced the claimant did not have a specific workstation. That would be true of all employees. There was no substantial disadvantage when compared with persons who are not disabled. All employees suffered the same disadvantage, none of them had a specific workstation.

38. The Tribunal finds that the claimant did not raise any need for an adjustment (a dedicated workstation) until the return to work meeting on 3/9/2019 following a two week absence due to back pain (page 1470). At that meeting, Mr Miah recorded in answer to the question 'is there any aspect of your job which you feel is contributing to your health problems (or which potentially could do?) Do you have suggestions of anything we could do to help you to overcome this? And list agreed points and timescales' (page 1468) as:

> 'Sometimes it can be travel to and from any location. Travel is main issue. [The claimant] – requires a workplace assessment with a designated desk which includes any reasonable adjustments. [The claimant] can be flexible around periods of travel.
>
> Suggestions to overcome this
>
> 1 Reasonable adjustments for office equipment and desk.
>
> 2 [The claimant] – requires a health assessment by someone who is independent and medically qualified who submits a report to HR regarding any issues with the duties that [the claimant] will need to undertake in her role at [the respondent].'

[4] PCP = 'provision criterion or practice as per s. 20(3) EQA.

39. Clearly, although travel was raised, the action points were in relation to an assessment and the provision of equipment.

40. Mr Miah then contacted Ergo at Work Ltd and in particular a Charted Physiotherapist and Ergonomic Consultant. He received a response and a quotation for an assessment (£290 + vat) on 5/9/2019 (page 1481). Mr Miah also informed the claimant of the assistance of Access to Work and asked the claimant to contact them herself on 10/9/2019 (page 1472). On the 12/9/2019 he emailed the claimant and asked the claimant to complete the forms to send to Access to Work in order to make a claim (page 1473). On 17/9/2019 Mr Miah emailed Ergo at Work and asked for the assessment to be carried out as soon as possible and it was carried out on 19/9/2019 (page 1480). Ergo at Work's report is dated 22/9/2019 and Mr Miah forwarded it onto the respondent's CEO and HR on 30/9/2019 (page 1488). Mr Miah stated that he is keen to discuss the report with the claimant 'asap'.

41. The claimant claimed that on 24/9/2019 Mr Miah said that the chair recommended by Ergo at Work was too expensive and made other derogatory comments. The total cost of the equipment suggested by Ergo at Work was £1190.03 (page 1494), excluding vat and delivery charges.

42. The Tribunal finds that Mr Miah was extremely proactive in arranging the workplace assessment and he expressed his desire to put in place the adjustments as soon as possible. Furthermore, the respondent had previously put in place adjustments for the claimant without demur. On 10/3/2017 when the claimant first informed the respondent of her MS, she requested a lighter laptop and dictation software (page 179). Her then Line Manager responded that he was keen to ensure reasonable adjustments and support were put in place (page 178). There is no dispute that these adjustments were put in place shortly thereafter and a new lighter laptop is likely to have cost as much as, if not more than the chair Ergo and Work proposed.

43. There is no record of a meeting between the claimant and Mr Miah on 24/9/2019, although it is possible Mr Miah had by the 24/9/2019 received the report. When however he sent it to the CEO and HR on 30/9/2019, he said that he wanted to discuss the report with them and was 'keen to discuss this with [the claimant].'

44. That does not indicate that Mr Miah had already discussed the report with the claimant. Although the chair was the most expensive item to purchase and to set up (£721.80), there is no evidence that the respondent was concerned about the costs which would be incurred. The claimant

referred to a cheaper chair being available as long as it was the same specification as the chair recommended by Ergo to Work. It is not clear why, if there was a cheaper chair available, Ergo at Work did not recommend it. However, the cost to the respondent was not prohibitively expensive and there is nothing to indicate the respondent would balk at incurring the cost. The Tribunal finds Mr Miah did not make those comments.

45. On 16/10/2019 the claimant was asked which two days per week she planned to be in the office (page 1508). She responded that she was waiting for the assessment from Access to Work who were assessing reasonable adjustments for her and until that has taken place and adjustments agreed, that she will be working from home (page 1507). This was despite the Ergo at Work report stating that the claimant's workstation at home was less adjustable than the existing one in the office (without adjustments) (page 1531). The concern expressed by the respondent does not indicate that it was concerned about the cost of the adjustments.

46. On 21/10/2019 Mr Miah emailed the claimant regarding the Ergo at Work report. He said the respondent was 'keen' to respond to the recommendations, however as Access to Work was going to conduct an assessment of the claimant's working arrangements on 24/10/2019, he proposed to wait for the second report and to combine the two. It is not clear what the claimant said in response.

47. In the background to these assessments, the respondent had taken the decision at a Board of Trustees' meeting on 10/10/2019 to restructure the Training and Consultancy Team, with the result that the claimant's role was potentially redundant (page 2107).

48. Mr Miah then invited the claimant to a meeting to discuss the Board of Trustees' decision 24/10/2019 and he sent her an email following that meeting (page 1555).

49. Access to Work contacted the claimant and Mr Miah on 30/10/2019 to say that the report had been received and would be sent out once it was completed (page 1571). The claimant responded on the same date to say that her work situation was potentially changing, but she nonetheless looked forward to receiving it as the information will be invaluable to her.

50. The claimant claims the substantial disadvantage she was put to was that the lack of adjustments had a profound effect on her ability to manage her workload in the office on a daily basis. The fact is that whilst the

respondent was taking steps to put in place the reasonable adjustments, the claimant chose not to attend the office; despite the respondent having concerns over this. There was not therefore an impact of the claimant's ability to manage her workload in the office. She did not attend the office.

51. The claimant also alleges that a failure by the respondent to implement the adjustments exacerbated her MS. The respondent took proactive steps to implement the adjustments. They were not something which could be put in place instantaneously. They took time and the respondent did not delay. If there was any exacerbation of the claimant's MS symptoms, that liability did not fall to the respondent. The claimant had chosen to work from home, when Ergo at Work said that her home workstation was less satisfactory than the unadjusted workplace workstation. There was no failure by the respondent.

52. The claimant's unfair dismissal claim flows from the respondent's decision to make her role redundant. She also claims selection process and dismissal are acts of direct race, sex and disability discrimination. She also claims the selection for redundancy and dismissal was an act of victimisation.

53. Mr Miah was appointed as Director of Business Development and Training in June 2019 and he became the claimant's line manager. He made a presentation to the Board of Trustees on 10/10/2019 to restructure the team. The proposal would result in the deletion of the claimant's role and one other. In short, the claimant was an in-house trainer and the proposal was that independent external contractors would be used to deliver the training going forwards.

54. After the Board of Trustees approved the reorganisation proposal on the 10/10/2019, there were some discussions about the process between Mr Miah and HR.

55. Mr Miah put one-to-one meetings in the dairy of his three team members on 22/10/2019 (page 1546). The claimant responded asking Mr Miah what the meetings were about and whether she needed to prepare. HR confirmed to Mr Miah that his suggestion to say it was an update from the Board of Trustees' meeting was appropriate.

56. Mr Miah met with the claimant on the 24/10/2019 (page 1555). He followed up that meeting with an email and he attached the rational for the restructure (pages 1556-1557).

57. In the background, HR was doing some preparation for letters for the potentially redundant staff (page 1559). The claimant takes issue with this and asserts that it shows the eventual dismissal was pre-determined.

58. In his response to HR, Mr Miah said 'we will of course have to wait for the consultation feedback' (page 1558).

59. The Tribunal finds that the outcome of the restructure was not predetermined. By its very nature, if a restructure is considering deleting roles from the organisation (for whatever reason), consideration needs to be given to which roles are to be deleted. The particular needs of those individuals also needed to be considered. For example, how long as a particular individual worked in the organisation (do they have two years' continuous service?), or are they on maternity leave? The consultation does not operate in a vacuum. Furthermore, the respondent needs to consider the cost savings it will make. Some potentially redundant employees will cost more in terms of redundancy payments and notice payments than others.

60. As an aside, the claimant criticises the respondent for not putting any costings into the presentation to the Board of Trustees on 10/10/2019. The claimant has calculated the cost of a self-employed contractor (referred to by the respondent as an 'Associate') as being in the region of £600-£800 per day, whereas her weekly salary cost the respondent £875 per week. The claimant uses these figures to assert her case that the redundancy was a sham and that were was no cost saving to the respondent. The Tribunal does not accept this and does not accept the claimant's figures. Had the claimant wanted to take this point, it was open to her to do so during the consultation.

61. Later on 24/10/2019 the claimant wrote to Mr Miah to ask for more time to consider the restructure proposal. Mr Miah had wanted feedback by 5pm on the 29/10/2019 (page 1560). The claimant also requested details of the redundancy terms the respondent was offering. Mr Miah replied and agreed to extend the consultation period to 5pm on the 31/10/2019 (page 1562).

62. On 30/10/2019 Mr Miah confirmed the details of the redundancy payment to the claimant (page 1569). This was the same date Access to Work contacted the claimant to say that the report will be sent out (page 1571). The claimant sent Mr Miah her response on the consultation on 31/10/2019 (page 1592).

63. On 1/11/2019 the claimant requested that the meeting scheduled for 4/11/2019 be postponed in order for her to arrange for her Trade Union representative to attend (page 1591). Mr Miah agreed and rescheduled the meeting for 6/11/2019.

64. Following further representations from the claimant, Mr Miah extended the date of the meeting to 11/11/2019 (page 1597).

65. The claimant had not been in the office since at least 17/10/2019, when she said she would be working from home until the Access to Work assessment was carried out (page 1507). She was then certified as unfit for work due to 'work related stress and anxiety' on 7/11/2019 until 21/11/2019, although Mr Miah was not aware of this until the claimant sent an email on 11/11/2019 (page 1604 and 1629). In fact the claimant did not return to work.

66. On the same date (7/11/2019) the claimant requested a further two weeks to consider the restructure proposal (page 1611). On 8/11/2019 Mr Miah wrote to the claimant and said that he was unable to grant an extension of two weeks, as the timetable impacted upon other staff. He then offered to the claimant (page 1616):

> '1. A consultation meeting at a neutral venue to be mutually agreed on Friday 15th November with you and your accredited representative if this would be easier for you than holding it in the office or
>
> 2. A telephone consultation as an alternative on the same day or
>
> 3. If you feel that you are unable to accept either of these options, then I am willing to accept written representations from you to be received by 10am on Tuesday 19th November i.e. within 7 working days of the date of this letter setting out your representations and any alternative proposals that would remove your post from being at risk of redundancy or other alternative options that you wish us to consider.'

67. Later on the 11/11/2019 and after the claimant had informed him of her unfitness for work, Mr Miah asked the claimant to respond to his letter of 8/11/2019 (page 1622).

68. In response on the 12/11/2019 the claimant requested a copy of the respondent's diversity and inclusion policy (page 1630).

69. Mr Miah sent the claimant a copy of the Diversity and Inclusion policy on 13/11/2019 and asked the claimant which of the three options he had offered her on the 8/11/2019 she preferred to follow. He also asked if there was anything further he could do to support the claimant (page 1634).

70. Also on the 13/11/2019 Mr Miah wrote to the claimant to say that he had had a letter from Access to Work, to say that her application had been successful and that there was a declaration for her to sign by the 4/12/2019 (page 1631). It is not clear to the Tribunal what had been successful.

71. On the 14/11/2019 the claimant responded to Mr Miah's letter of the 8/11/2019 (page 1639). She referred to a lack of empathy, the process exacerbating her disability, the Acas Code of Practice[5] on redundancy and asked for 11 different documents (page 1542).

72. Mr Miah responded on the 15/11/2019 (page 1646). He disagreed with the claimant, but the salient point is that he extended the consultation period for the final time to 4pm on 22/11/2019, after which a decision would be made.

73. On the 21/11/2019 at 8:16pm the claimant wrote to Mr Miah (page 1649). She said that she was going to 'refrain from engaging in this stressful process' until her health improved. She said that she would not be accessing emails or any other correspondence until both her GP and MS consultant advised her that she is fit enough to do so. She also said that she wanted to:

> 'explore other options and "not" redundancy!'

74. When asked in cross-examination what she meant by this, the claimant stated that she wanted the same option Mr Okuyiga had when he resigned and left the respondent's employ. After his resignation as the claimant's line manager, Mr Okuyiga had become an Associate (in effect a selfemployed consultant) for the respondent (he is still one today).

75. The Tribunal finds this to be disingenuous. If that was what the claimant was seeking, she could have simply asked the respondent about other options, not necessarily redeployment, that could be offered.

[5] The Tribunal does not accept there is such a Code.

76. The claimant raised a second grievance date 16/11/2019, which she emailed to three Board members at 5:34pm on 22/11/2019 (page 1712). The grievance was a complaint about the conduct of the CEO and Mr Miah.

77. Mr Miah wrote to the claimant on 25/11/2019 to say that notwithstanding some interaction which had taken place, there had been no representations from the claimant to avoid or minimise the redundancy situation (noting that the claimant did not then suggest the Associate role) (page 1718). Mr Miah regretfully confirmed the claimant's role would be redundant and that her last day of service would be the 31/12/2019.

78. The claimant was offered outplacement support to the value of £1,500 and details of how to access this was available on request. The claimant criticised this and said that the respondent said it had spent £1,300 to help her find alternative employment. She said that was incorrect and she had no idea what the respondent was referring to (witness statement paragraph 80 and 82). Even if through ill health the claimant was confused at the time she received Mr Miah's letter, it is difficult to reconcile the content of his letter, to the comments the claimant made in her witness statement dated 16/3/2023 when she had the benefit of professional legal advice. The respondent offered outplacement support and it was up to the claimant to take up the offer.

79. The claimant's colleague Ms Carey was also made redundant as part of the same process, albeit that Ms Carey's employment terminated on 31/3/2020 as there was a requirement for her to complete an assignment. The claimant acknowledged this and said the respondent would be in a 'mess' if Ms Carey had left at the same time she did (page 2168). The Tribunal finds that the process the respondent followed was reasonable and there was adequate consultation with the claimant.

80. Despite saying that she was refraining from engaging in the process, the claimant appealed against the decision to terminate her role by reason of redundancy on 4/12/2019 (page 1725).

81. The claimant asked for a further delay to the process and asked that her friend (Ms Power née Marriott) represent her. This was granted although Ms Power was neither a fellow worker nor Trade Union representative. Further correspondence regarding the grievance and the appeal against redundancy followed during December 2019 and January 2020.

82. There is one substantive issue which arises out of this which requires determination. The claimant alleges that it was an act of direct race discrimination to appoint the CEO to hear the grievance. Her comparator is Ms Carey who is white.

83. Ms Carey is not a comparator as she is not in materially the same circumstances as the claimant. She did not raise a grievance.

84. In any event, this allegation fails factually. Although the grievance was raised against Mr Miah and the CEO, the CEO was never appointed to hear the grievance. This was a misunderstanding on the claimant's part and again, giving her a generous interpretation, even if she were confused at the time, once she was well, had considered the evidence and had taken legal advice, it was clear the CEO was never appointed to hear the grievance.

85. The CEO wrote to the claimant on the 15/1/2020 at 12:39pm to ask if she was well enough to take forward the grievance (page 1755). The previous day (14/1/2020) Ms Marriott had written to Mr Gaskell regarding the progress of the grievance and appeal (1838). Mr Gaskell was in the US and he replied on the 15/1/2020 at 1:54pm (GMT) and copied the CEO in. Mr Gaskell said the CEO is 'looking into this and I'm sure she's the best person to respond to the points you raise [in] your email.' Mr Gaskell was not only in the US, but he was not an employee of the respondent. Although the grievance was against the CEO (and Mr Miah) all the CEO was doing was dealing with the administrative process.

86. Ms Marriott in reply said that the CEO cannot hear the grievance as it is against her. Ms Marriott went onto say that the CEO could hear the appeal. Mr Gaskell replied the same day and agreed that the CEO could not hear the grievance. Indeed he went onto say that it was not appropriate for her to hear the appeal. He then clarified that the CEO will 'manage' the respondent's response to both. This is understandable as the personnel hearing the grievance were not employees of the respondent and the process would need to be coordinated internally.

87. In suggesting it was an act of race discrimination and the fact the CEO was never appointed to hear the grievance; it was put to the claimant that having laboriously gone through the correspondence the claimant was still not prepared to entertain the sensible interpretation of the emails that the CEO's involvement, such as it was was no more than administrative. The claimant was not prepared to accept that.

88. The claimant also advanced and maintained another allegation; that there was a conspiracy to 'get rid of her'.

89. The seriousness of the claimant's allegations was put to her and that she said she was dismissed due to her race, sex, disability and as an act of victimisation. She maintained those allegations. The claimant also said there was a conspiracy. She was asked who had conspired and she named the CEO, HR and Mr Okuyiga. She added to that group Mr Miah as he had instigated the restructure. Then at the time of the meeting of the Board of Trustees, she was forced to add Mr Gaskell to the conspiracy for her allegation to be maintained.

90. The Tribunal finds there was no conspiracy and it adopted Mr Boyd's categorisation of this as outlandish. There was a redundancy situation. If the Tribunal is satisfied it is not a sham, it is not open to the Tribunal to go behind an employer's commercial decision to reorganise its workforce. Clearly, if the reason for the reorganisation is cost-saving, it is always open to say that costs can be saved in other ways than shedding staff. For example, the costs of the premises could be saved if an employer decided that all staff should work from home. That does not mean that it is not reasonable and open to a respondent to retain its premises and to save staffing costs and to make redundancies and for those dismissals to be fair. Otherwise, the argument that costs could be saved by other means, would defeat the fairness of any redundancy dismissal.

91. This reorganisation was not necessarily cost-based. It was in part about efficiency, delivery of services and effectiveness going forward. The respondent summarised this as: restructure of the current team; grow external Associates; and administration to be reorganised (page 1556).

92. This was against a background of the last two years' financial targets not being met, after five years of actual income exceeding target. The claimant was the only remaining Executive Development Consultant. Or to put it another way, she was the only in-house trainer remaining.

93. Additionally the respondent was considering deleting Ms Carey's post, she was in a different role to the claimant. She was a Relationship Manager. The claimant contended that Mr Miah should have been in the pool of employees considered for redundancy. Mr Miah was Director of Business Development and Training. His role was at a higher level than the claimant. She also suggested Mr Zaman should be in the redundancy pool. Mr Zaman's role was that of a bid writer. The Tribunal finds that to be a separate and distinct role to that of the claimant. A such they were not comparators.

94. As such, the Tribunal accepts the respondent's decision to decide that the claimant and Ms Carey were in a 'pool of one', in that their roles were unique and self-selecting. As long as the respondent's decision was one which a reasonable employer could reach, and the Tribunal finds that it was, it is not for the Tribunal to go behind that decision and to re-make it.

95. The claimant alleges that the respondent did not complete a redundancy matrix. It is not clear what was meant by this and it was not revealed in cross-examination. The claimant agreed that she had received the proposal which was put to the Board of Trustees on 10/10/2019 in crossexamination (page 2112). The Tribunal has already found the claimant was in a 'pool of one' and therefore there was no need for selection criteria (sometimes called a matrix) and the claimant had sufficient and relevant information.

96. As already found, the claimant had the opportunity to make proposals during the consultation. As an allegation of direct discrimination based upon the protected characteristics of race, gender, disability and as an act of victimisation, none of the claimant's comparators were in materially the same circumstances as she was. Although not set out as an allegation of direct discrimination, the claimant refers to the fact two male employees were retained and those two male employees were her comparators. They were not comparators as they were in different roles.

97. The claimant also referred to Ms Carey being retained (her race is white and she is not disabled), in fact that was not the case. Ms Carey's role was dismissed as redundant in the same redundancy exercise, although her termination date was not the same as the claimant's. Ms Carey was not retained by the respondent.

98. There is no need to consider a hypothetical comparator as the Tribunal is satisfied the selection for redundancy and the decision to dismiss was not because of race, gender or disability.

99. There were no alternative vacancies available to the claimant. There was an Office Administrator vacancy at a salary of £22,000, which was £20,000 less than the claimant earned and was a lower status role. The claimant contended for other roles (Relationship Manager) which she said she had not done, but which she could be trained to do (page 2165). Selfevidently, a role which the claimant would need to be trained to so was not suitable alternative employment. In addition, Ms Carey's role was that of Relationship Manager and that role was no longer going to be part of the structure going forward and that role was also redundant.

100. The respondent accepted that the claimant had done some protected acts. It accepts that: the 2018 grievance; the complaint to the CEO in September 2017; informing Mr Robertson of her diagnosis of MS in March 2017; and the 2019 grievance are protected acts. As at least two protected acts pre-date the earliest allegation of a detriment (Mr Okuyiga's comments on 12/7/2018), there is no need to make a finding in respect of the remaining protected acts upon which the claimant relies.

101. The claimant also accepted that also she contended there were six detriments, in fact detriments (iv), (v) and (vi) were consequences of the alleged detriments, not detriments in themselves for the victimisation claim. Those matters would be relevant in respect of the remedy the claimant sought if successful.

The Law

102. In respect of unfair dismissal s. 94(1) ERA provides that an employee has the right not be unfairly dismissed. Section 98 ERA provides:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

2. A reason falls within this subsection if it –

…

(c) is that the employee was redundant…

…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer

acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

103. S.98(2) ERA requires the Tribunal to consider whether the reason for the dismissal was 'potentially fair'.

104. The burden of proof is on the respondent to demonstrate that its reason for dismissing the claimant was a fair one.

105. S.98(4) must also be applied. This provides that the Tribunal must consider whether the dismissal is fair or unfair in accordance with equity and the substantial merits of the case, bearing in mind the size of the employer.

106. The Tribunal must not decide the case according to what it would have chosen to do. Rather it must apply the standard of what a reasonable employer would have done: depending on the circumstances there may be a range of responses that a reasonable employer could have adopted.

107. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL, the House of Lords adopted Brightman LJ's definition of 'detriment' when he stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'.

108. S.13 EQA provides:

(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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

109. S.23 EQA provides:

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

(2) The circumstances relating to a case include a person's abilities if-

(a) on a comparison for the purposes of section 13, the protected characteristic is disability.

…

110. S.136 EQA provides:

(1) This section applies to any proceedings relating to a contravention of this Act.

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

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

…

(6) A reference to the court includes a reference to-

(a) an employment tribunal;…

111. S. 123 EQA provides:

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

112. In Madarassy v Nomura International plc [2007] ICR 867, CA, Mummery LJ stated that: 'The bare facts of a difference in status and a difference in treatment only indicates a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent has committed an unlawful act of discrimination'.

113. If a claimant establishes a *prima facie* case of discrimination, then the second stage of the burden of proof test is reached, with the consequence that the burden of proof shifts onto the respondent. According to the Court of Appeal in Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases [2005] ICR 931, CA, the respondent must at this stage prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever based on the protected ground.

114. S.20 EQA provides:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) 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…

115. S.21 EQA provides that:

…

(2) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

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

116. Tribunals should take a structured, step-by-step approach to the consideration of whether there was a duty to make reasonable adjustments. The duty does not arise in every case of disability.

117. Firstly, identify the provision, criterion or practice ('PCP') being applied?

118. Secondly, does that PCP put the claimant to a substantial disadvantage compared with a person who is not disabled?

119. Thirdly, has the employer taken reasonable steps to avoid that disadvantage? This is an objective question, the focus being on the practical result. There must be a prospect (some cases say a 'real prospect') of the step being effective.

120. Paragraph 7.29 of the Code[6] sets out factors that may be relevant in deciding what is reasonable. The size and resources of the employer; what proposed adjustments might cost; the availability of finance or other help in making the adjustments; the logistics of making the adjustment; the nature of the role; the effect of the adjustment on the workload of other staff; the other impacts of the adjustment; the extent it is practical to make. Another factor is the likely effectiveness of the step: the chance that it is likely to be successful.

121. In Wade v Sheffield Hallam University UKEAT/0194/12 the EAT upheld a decision that it was not a reasonable adjustment for an employer to waive its competitive interview process and appoint the disabled claimant to a new role for which she did not meet the requirements.

122. The duty to make adjustments arises in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person.

123. The first factor listed in paragraph 6.28 of the EHRC Employment Code that an employer may wish to consider when deciding what is a reasonable step to have to take is the extent to which taking a particular step would be effective in preventing the substantial disadvantage caused to the disabled person. In practice, it is most unlikely to be reasonable for an employer to have to make an adjustment that involves little benefit to the disabled person.

124. S.26 EQA provides:

[6] Equality Act 2010 2010 Code of Practice - Employment

(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.

(2) …

(3) …

(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;

(c) whether it is reasonable for the conduct to have that effect…

125. In respect of violating a person's dignity: '[n]ot every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended' (Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT).

126. EAT also observed that 'the word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence' (Betsi Cadwaladr University Health Board v Hughes and ors EAT 0179/13).

127. S.27 EQA provides:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because-

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act-

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

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

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.'

128. The complaint is of dismissal and detriment s. 39(2)(c) and (d) and s. 40 EQA.

129. In respect of the vagueness of the allegations, it is important that to establish that the treatment was because of a protected characteristic it must be shown that a named individual (or a number of individuals) who subjected the claimant to a detriment was consciously or subconsciously influenced by the protected characteristic. Unless the claimant identifies the alleged discriminator(s), that exercise cannot be conducted and the claim will fail Reynolds v CLFIS (UK) Ltd [2015] IRLR 562.

Conclusions

130. The Tribunal has found that Mr Okuyiga did not make the remark attributed to him on 12/7/2019 which was reported to the claimant in late July 2019. There was therefore no act of harassment. The harassment claim fails.

131. There was no failure to make reasonable adjustments. As soon as the claimant raised further adjustments she required, Mr Miah acted proactively and appropriately to put them in place. Matters were then overtaken by the Board of Trustees' decision to reorganise the

team in which the claimant worked. The claimant still wished to pursue the Access to Work report, describing the information as being 'invaluable' and she was able to do so (page 1571). The Tribunal has no doubt that but for the intervening act of the reorganisation in October 2019, the respondent would have put in place the reasonable adjustments which had been recommended, as it had done in 2017.

132. As there was no failure to make reasonable adjustments, that cannot form a detriment.

133. As there was no harassment by Mr Okuyiga in July 2018, that cannot form a detriment.

134. The respondent relies upon a fair reason for dismissal, by reason of redundancy. There was a genuine redundancy as a result of a reorganisation. The claimant was informed of the potential redundancy and there was a fair consultation process. The claimant had the opportunity to engage in that process and to make the points she now makes in criticism of the respondent. She had the opportunity to enquire about an Associate role (although that would not have obviated the fact her role was redundant; it would have given her an alternative role and source of income).

135. The procedure which the respondent adopted was within the range of reasonable responses open to this respondent, taking into account its size (small) and administrative resources (HR support). The dismissal also in accordance with equity and the substantial merits of the case. Ms Carey was also made redundant. There was no suitable alternative vacancy available to the claimant.

136. As for the allegations of direct discrimination, the claimant was not dismissed because of her race, her gender, her disability, nor was it an act of victimisation. She was dismissed as her role was redundant. The CEO was never appointed to hear the grievance, that allegation is factually incorrect.

137. The claimant has failed to demonstrate how the selection process was unfair, other than she disagrees with the outcome of that process. The process was not tainted by either her race, her gender, her disability, nor was it an act of victimisation. It is difficult to comprehend how the claimant can argue that the motivation for her selection for and her dismissal was because of her race, in the alternative her gender, in the further alternative her disability and in

the final alternative as an act of victimisation. S. 14 EQA is not in force and therefore, the claimant cannot rely upon multiple protected characteristics.

138. There was therefore no direct discrimination in respect of the selection process or the selection procedure. The Tribunal found the claimant was the only employee performing her role and once the respondent reasonably decided to delete that role, it obviously selfselected. That is not to say that is the end of the matter. The respondent was still obliged to consult with the claimant and to take reasonable steps to avoid the need for the claimant to leave the organisation; notwithstanding her substantive role was redundant. The respondent did that and there were no suitable alternative vacancies.

139. The Tribunal has also concluded that the burden of proof did not shift to the respondent and the allegations were insufficient to conclude there were any acts of unlawful discrimination. If that is wrong, the Tribunal is satisfied that the respondent had a non-discriminatory explanation for it conduct, in the main, that there was a redundancy situation and the dismissal was fair. The claimant did nothing more than to reference her protected characteristics and complain about actions taken by the respondent with which she disagreed (Madarassy).

140. Based upon those findings, the claimant was not selected for redundancy and dismissed as an act of victimisation.

141. For those reasons, the claimant's claims fail in their entirety and are dismissed.

22 May 2023

Employment Judge Wright