EMPLOYMENT TRIBUNALS

Claimant: Mrs P Pantegi

Respondent: BT Plc

Heard at: Manchester **On:** 11-15 September 2023

Before: Employment Judge Phil Allen
Mr I Frame
Ms E Cadbury

REPRESENTATION:

Claimant: In person (also assisted by Mr S Wilk, a McKenzie friend)
Respondent: Miss J Ferguson, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The respondent failed to pay the claimant the amount to which she was entitled in lieu of accrued but untaken annual leave. The respondent is ordered to pay the claimant the sum of **£306.40**.

2. The respondent did not treat the claimant less favourably because of age. The claim for direct age discrimination under section 13 of the Equality Act 2010 does not succeed and is dismissed.

3. The claimant was not treated unfavourably because of something arising in consequence of her disability. The claim for discrimination arising from disability under section 15 of the Equality Act 2010 does not succeed and is dismissed.

4. The respondent did not fail to comply with a duty to make reasonable adjustments. The claim for breach of that duty under sections 20 and 21 of the Equality Act 2010 does not succeed and is dismissed.

5. The respondent did not fundamentally breach the claimant's contract of employment. The claimant was not dismissed as she did not terminate the contract under which she was employed in circumstances in which she was entitled to terminate it without notice by reason of the respondent's conduct. The claim for unfair dismissal does not succeed and is dismissed.

6. The respondent did not breach the claimant's contract of employment with regard to notice. The claim for breach of contract does not succeed and is dismissed.

7. The reason for the termination of the claimant's employment was not redundancy. The claim for a redundancy payment does not succeed and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent from 14 November 1983 until 27 September 2020. She was latterly employed as a Team Member, who worked within the Hosted Communications team. The claimant resigned with immediate effect on 27 September 2020.

2. The claimant alleged that she was less favourably treated because of age (direct discrimination). The claimant has a hearing impairment which the respondent accepted was a disability at the relevant time. She alleged that the respondent discriminated against her for something arising from her disability in breach of section 15 of the Equality Act 2010 and that it failed to comply with its duty to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010. The claimant also alleged that she had been constructively unfairly dismissed, she claimed a redundancy payment, she alleged that she was dismissed without notice in breach of contract, and she also claimed that she was due pay in lieu of accrued but outstanding annual leave. The respondent denied the claimant's claims.

Claims and Issues

3. There were a number of preliminary hearings in this case. Following a preliminary hearing (case management) conducted by Employment Judge Ross on 11 June 2021, a list of issues was appended to the case management order. A further preliminary hearing was conducted on 14 November 2022. A final hearing of the claim had previously commenced on 23-24 January 2023. That hearing had needed to be abandoned because the Tribunal which conducted that hearing considered that a fair hearing could not take place in light of issues with the claimant's auditory equipment. Following that hearing, Employment Judge Batten sent a letter to the parties which addressed case management issues, to which was appended an updated list of issues (it was materially the same, but issue 33 had been added to the previous issues).

4. At the start of this hearing the Tribunal confirmed with the parties that the list of issues which had been appended to Employment Judge Batten's letter remained the list of issues which needed to be determined. The parties both confirmed that it did. A copy of the final list had not been included in the bundle, but both parties had a copy, and further copies were obtained by the Tribunal from its file.

5. The issues identified are attached to this Judgment as an appendix. The list includes as issue 16 a question about whether the claimant had a disability at the relevant time. That issue did not need to be determined as it had been agreed by the respondent that she had. The names of the actual comparators in issue 12 were also identified as requiring amendment during the hearing, and those names have been corrected in the attached list.

Procedure

6. The claimant in part represented herself at the hearing, but in practice Mr Wilk largely acted as her representative. Mr Wilk, who accompanied the claimant at the hearing, was described as a McKenzie friend. He supported the claimant and, for much of the hearing, spoke on her behalf. He cross-examined the respondent's witnesses on the claimant's behalf, it having been agreed at the start of the hearing that either the claimant or Mr Wilk was able to cross-examine each witness (but not both). Mr Wilk also gave the brief oral submissions put forward on the claimant's behalf, following the provision of the lengthy written submission document. Miss Ferguson, counsel, represented the respondent at the hearing.

7. The hearing was conducted entirely in-person with both parties and all witnesses in attendance in the Employment Tribunal in Manchester.

8. An agreed bundle of documents was prepared in advance of the hearing. The bundle initially ran to 551 pages. Where a number is referred to in brackets in this Judgment, it is a reference to the page number in the bundle. On the first morning of the hearing the claimant made an application to add her disability impact statement to the bundle. It was a one-page statement. The respondent did not believe that the document was relevant, disability having been conceded. The Tribunal granted the application and added the statement to the end of the bundle. Towards the end of her evidence, the claimant also referred to some messages which had been omitted from the bundle. The documents were provided by the claimant during lunch time on the second day and were added to the bundle. At lunch time on the third day, the respondent was ordered to provide a copy of one document upon which it relied (411) with the names of the identified comparators unredacted (the document being a skills matrix in which only the claimant's name had remained unredacted in the version in the bundle). That document, with the names unredacted, was provided during the morning of the fourth day.

9. The Tribunal was provided with written witness statements for all of the witnesses. Following initial discussion on the morning of the first day of the hearing, the Tribunal read the witness statements and the documents in the bundle referred to in those witness statements. The verbal evidence commenced shortly after 2.30 pm on the first day of the hearing.

10. The claimant used a hearing loop during the hearing. She did not use her own device, as she had done at the previous hearing which had needed to be abandoned. On the afternoon of the first day, the claimant confirmed that she was not using any device other than the hearing loop. The Tribunal adjusted the way in which the tables in the Tribunal room were configured, so that the claimant could see the respondent's representative as she spoke without needing to look sideways at her. After the claimant's evidence was heard, the parties changed sides in the

hearing room, so that the claimant was able to better see the witnesses as they gave evidence (as a result of the position of the witness table in the Tribunal room used). The position of the witness table was moved closer to the microphones in the room, when the respondent's witnesses spoke quietly. It was understood that for the majority of the hearing, the hearing loop worked effectively. On occasion, when it stopped working, a break was taken to enable the issue to be rectified. Unfortunately, on the afternoon of the fourth day when oral submissions were to be heard, the hearing loop stopped working. The position of the tables in the room was adjusted and the claimant confirmed that she could hear the Employment Judge and the respondent's representative using her own hearing aid, for the time during which oral submissions were made.

11. The claimant provided two witness statements: one signed on 12 November 2022; and a supplemental statement signed on 4 December 2022. After the claimant was sworn in, she confirmed the truth of both statements. Prior to this hearing, a third statement had been prepared on the claimant's behalf, but in a letter of 4 August 2023 Employment Judge Leach had refused the claimant's application to rely upon that additional statement. The Tribunal did not see or consider that third statement. The claimant was cross-examined on the afternoon of the first day and the morning of the second day, before being asked questions by the Tribunal.

12. The respondent provided witness statements for the following witnesses: Ms Sandra Southall, currently Team Leader of the Hosted IP Voice and Numbering Operations team at the respondent (and the person who had been the claimant's line manager at the relevant time); Mr Sanjay Patel, hosted IP and Numbering Operations Manager at the respondent (and the person who had been the line manager of both Mrs Southall and Mrs Aulakh at the relevant time); Mrs Rekha Patel, a Subject Matter Expert in the respondent's hosted provision team; and Mrs Jasbeer Aulakh, the Service Operational Lead at the respondent (the duty of care manager for the claimant during a period from early August 2020 until the end of the claimant's employment). The Tribunal read the witness statements on the first morning of the hearing. Each of the respondent's witnesses gave evidence during the afternoon of the second day, or the third day of the hearing, were cross examined by Mr Wilk, and were asked questions by the Tribunal.

13. After the evidence was heard, each of the parties was given the opportunity to make submissions. Both parties wished to provide a written document for submissions. Time was allowed on the fourth day for those submissions to be prepared and provided. Each party provided a document. Those written documents were read by the Tribunal. In the afternoon of the fourth day, the parties were given the opportunity to also make oral submissions. The respondent's representative made oral submissions. Mr Wilk had indicated that the claimant preferred to record her submissions in a written document (which she did), and he made only very brief verbal submissions on the claimant's behalf.

14. Judgment was reserved. The Tribunal spent the remainder of the time available on the fourth day and the time required on the fifth day to reach its decision in chambers. The Tribunal provides the Judgment and reasons outlined below.

Facts

15. The claimant worked for the respondent from 14 November 1983. The Tribunal was provided with the offer letter sent to her at the time (64) and the enclosed statement of terms and conditions of employment (67). At the time of her recruitment, the claimant was a telephonist. There was no dispute that by the time of the relevant events the claimant was employed as a Team Member and worked in the Hosted Communications Team. A job description was provided for the claimant's role dated January 2020 (182) in which her job title was stated to be Hosted Communications Provision Handling. The claimant was recorded as grade C3. She reported to Mrs Southall.

16. The Tribunal was referred to only one document which recorded any of the respondent's policies. That was the grievance procedure dated 20 January 2023 (526). That document was clearly not the actual procedure which had been in place at the time when the claimant had been employed and had raised a grievance. The claimant was, entirely understandably, critical of the respondent for not providing and including in the bundle the policy which would have been in place at the time. The procedure included a section headed "*How can I resolve a grievance informally?*" which highlighted that the best way to resolve a concern was to speak to someone informally. The procedure document also included a formal grievance procedure. Neither party highlighted any specific parts of the procedure.

17. It was clear that the claimant had enjoyed a long and successful employment with the respondent. By the time her employment terminated, the claimant had worked for the respondent for over thirty-six years.

18. The claimant suffers from a hearing impairment, which the respondent accepted was a disability at the relevant time. It was the claimant's evidence that her disability had become apparent in January 2018. In her disability impact statement (552) she described how she was diagnosed as hard of hearing with a bilateral moderate hearing loss affecting both ears in March 2018. She uses hearing aids. Her statement said that she mishears some speech sounds, and it takes her more time to make sense of what she hears and, when there is background noise, she is unable to follow conversations.

19. In 2018 the claimant was assessed by Access to Work. A referral document was provided (88). Equipment was obtained as detailed in an email of 8 May 2018 (94) which included a type of microphone called a Roger Pen, and related equipment, set up and training. The equipment was obtained by the respondent and used by the claimant. There was some cost to the respondent, alongside funding provided by Access to Work.

20. It was identified by the claimant, after her employment had ended when she saw the relevant documents, that the respondent had not obtained all of the equipment recommended by Access to Work. An email of 1 May 2018 (111) had included the full extract of a workplace assessment report provided to the respondent. Within the list of equipment which it was recommended the respondent should acquire, were two other types of microphone: a Roger clip-on mic; and Roger table Mics (twin pack). In the detail about why that equipment was recommended, it was explained that those items of equipment would amplify the sound of all

attendees at a meeting and would enable the claimant to hear and understand more speech, and speakers, more clearly. In an email sent in response (110) Mr Patel asked questions about whether all the recommended microphones needed to be purchased and whether the clip-on mic was required for telephony use. The respondent ultimately did not purchase those other microphones. Mr Patel sent an email to the claimant on 8 May 2018 (94). In it, he described the equipment purchased only, and not the equipment which had been recommended and not purchased. In his email he quoted from the relevant report and made it clear that he was doing so, but he included only the extracts from the report which related to the equipment purchased. He did not include the aspects of the report which related to the equipment not obtained. The way that this was done, meant that the claimant was entirely unaware of the full recommendations of the report, and she was not aware that there had been other equipment recommended which had not been purchased (or the ways in which that equipment would have assisted her). The claimant remained unaware of that difference until after her employment had ended. Mr Wilk, on her behalf, placed significant emphasis on that difference and what he contended it showed about Mr Patel and the respondent.

21. The Tribunal heard evidence from the claimant that the equipment was not as successful as it could have been. Having seen the details of the microphones not obtained, the claimant contended that she would have been better able to hear in meetings if it/they had been. Whether that was the case, was not something which the Tribunal needed to determine. The claimant said she did the best she could with the equipment which she had.

22. In late 2019 the claimant had an issue with her hearing aid and how it worked with the pen. The claimant emailed her team to tell them about the issue on 4 December 2019 (166). In that email the claimant explained in clear terms what that meant for her. The claimant saw an audiologist who advised that new equipment was required (170). When it was requested, the new equipment was obtained by the respondent without undue delay.

23. In 2019 the claimant and her team were provided with training to use a new ticketing system for addressing work. At that time the team in which the claimant worked used emails as the way of obtaining work. The ticketing system enabled a customer to provide a ticket with the information about the work and enabled those handling the work to use that ticket to see what had been done and to progress the work in accordance with the ticket. The ticketing system was used elsewhere in the respondent's business but was not used by the claimant's own team until 2020. The ticketing system also included an element which related to the time taken to address the ticket, the effective use of which was important to ensure the respondent's compliance with its service level agreements with its customers. The claimant, in her evidence to the Tribunal, was critical about the training provided and her ability to hear it. She contended that those providing the training were not trainers and did not maintain a loud projected voice. In the training, the claimant asked the trainers to speak more clearly, which they did for a short period, before returning to speaking less clearly. The Tribunal was shown no documents or emails in which the claimant raised any issues about this at the time, albeit the claimant's evidence was that she did mention it orally.

24. On 16 January 2020 (190) the claimant's team was told that the new method of working with tickets was likely to go live in March 2020 and dates were scheduled for Mr Ashraf Patel to take the team through the new method required. Notes were also provided about use of the system, stored on the respondent's SharePoint system. The claimant was very critical of the provision of documents on the SharePoint system, describing them as hotch-potch and difficult to find, because no one was assigned the role of gatekeeper.

25. In late January 2020, a high-level complaint was received by the respondent from a customer. The issue was looked into, including in a telephone call which included the claimant and Mrs Southall on 27 January 2020. The claimant's evidence to the Tribunal was that she felt that another member of the team was unfairly addressed in this call. The claimant emailed Mrs Southall on 28 January 2020 (219) and said that she felt incredibly uncomfortable with the previous day's call and extremely upset. She described herself as feeling totally undervalued and said that she did not feel there was equal opportunity across the team as she felt pressured to catch up to those who had been given individual training and coaching. The email concluded by describing how the claimant had never felt so demotivated in her working career. The email made no reference to hearing, or anything which could be read as being hearing-related. The email evidenced that the claimant was able to raise matters in clear terms when she wished to, as she had done so on occasion. In her answers during cross-examination, the claimant stated that she was not a quiet person and she said she would make her feelings known.

26. Mrs Southall responded to that email in an email (218) and said she was sorry that the claimant felt that way, explained her response to the issue, referenced the documents on SharePoint, said she would do all she could to help the claimant and expressed concern about her welfare. In the email Mrs Southall expressly said "*If there is anything you need specific refresher training on then please let me know*".

27. It was the evidence of both parties that the claimant had previously had a good working relationship with Mrs Southall. The Tribunal was provided with documentation in which Mrs Southall expressed positive views of the claimant and her work. The claimant in her evidence suggested that Mrs Southall's approach to her changed following these emails in January 2020. Mrs Southall denied that it had.

28. There were some issues with the implementation of the ticketing system. It was clear that the claimant had strong views about it and its shortcomings. In cross-examination the claimant said she did not deny that she did have some problems with it. She also agreed that she was still personally making mistakes by June 2020. The claimant said that to be marked against a system which was not working was unfair. In her skeleton argument, the respondent's representative accepted that, initially, there were some teething issues when the new ticketing system was implemented.

29. In her skeleton argument, the respondent's representative emphasised the various formats of training which the claimant received, based upon the evidence heard. These were: training with Ms Crossan prior to July 2019; group training in person with Ms Small in July 2019; group training (in person) with Mr Ashraf Patel in January 2020; training sessions with Ms Southall remotely via Teams (known as huddles); and bespoke training sessions with Ms Holroyd, which also must have

been via Teams or other remote communication. Ms Holroyd was a trainer; the others were not. The claimant complained to Ms Southall that the trainers were not formally trained as trainers. The claimant accepted during her cross-examination that people were notified that she had a hearing impairment (at least by her personally) and that they should speak clearly at the start of each meeting. The claimant also stated that she reminded the speakers to project their voices. It was the claimant's evidence that despite being told, and her reminders, the speakers' voices dropped, or they became less clear during the training given.

30. When in the office undertaking training, in common with the other members of the team, the claimant was required to answer in-coming calls from customers during training even if that meant that part of the training was missed. The claimant gave no examples of specifically when that had occurred and what had been missed, but there appeared to be no dispute that was the respondent's requirement.

31. Prior to the first Covid lockdown in 2020, the claimant worked in an open-plan office the majority of her time. The claimant requested a change of desks and that was arranged for her by Mrs Southall so that she sat in a desk with only one person next to her rather than two. The training took place in the general office with background noise, it was not undertaken in a quiet room or separate quieter location. After the Covid lockdown, the claimant worked from home. All training provided during 2020 after lockdown commenced, was provided by Teams (without the same issues arising associated with being trained in an open-plan office). In her evidence, the claimant referred to the problems she had with observing speakers during a Teams call, but such issues were those which inevitably arose from the need to undertake such training remotely, they were not specific to the arrangements for the training undertaken.

32. The claimant alleged that Mrs Southall said to her as part of a meeting "*it's not rocket science*". It was stated in the list of issues as having occurred in April 2020. In her witness statement the claimant said that, from memory, it had been in May or thereabouts. The claimant said that she had asked for more time to study the documentation and Mrs Southall had directed the comment at her personally. The claimant did not raise the issue at the time. Mrs Southall confirmed that it was a phrase that she would on occasion use, and she did not deny that she had ever said it. However, it was Mrs Southall's evidence that she did not say the phrase in the way alleged, and, if she had said it, it would not have been directed at the claimant. In her witness statement, Mrs Southall described it as having been used as an encouragement tool to motivate an individual and show that they would understand the task, as it was manageable. When cross-examined about this, the claimant referred to messages which she said she had received from colleagues about what had been said asking if she was ok, as proof that the comment had been said and directed at her. She stated that she had such messages. No such messages were produced by the claimant and provided to the Tribunal.

33. Mrs Southall arranged for the claimant to have coaching conversations with a trainer, Kathryn Holroyd, in April 2020. The Tribunal was provided with some emails which referenced the training having been undertaken and which recorded the claimant as having agreed with the coaching details (229), and some notes of the coaching conversation and what was addressed (228). That was one to one training

with the claimant (albeit, based upon the date of the training, it is likely that it was remote training).

34. The Tribunal was shown some emails from 29 and 30 April 2020 in which Mrs Southall asked Mr Lewis to support the claimant with some aspects of ticket handling (233). Mr Lewis agreed, and Mrs Southgate asked Mr Lewis and Ms Holroyd to arrange it. In the emails provided a time was proposed, but it was the claimant's evidence that the training never took place. Mr Lewis was a colleague of the claimant.

35. On 21 May Mrs Southall provided the claimant and other with training on the use of the time system associated with the ticketing system. Notes were provided by email (236). The claimant responded in an email criticising the style of the document provided which did not accord with her own learning style (235), she did not raise anything regarding hearing. Further emails were exchanged in which Mrs Southall asked the claimant to let her know if further coaching was required.

36. On 26 May Mrs Southall emailed the team about the number of failures experienced over the previous few weeks. She referenced a huddle the following day (243). It was the claimant's evidence that the huddle would have been a virtual huddle undertaken by Teams as the work was being undertaken virtually at that time due to the pandemic. Notes were provided following the training/huddle (242).

37. The claimant suffered a bereavement in early July 2020 and had a period of leave as a result. It was clear that the bereavement (and the limited funeral arrangements available) had an impact on the claimant.

38. On 13 July 2020 the claimant and Mrs Southall spoke on a telephone conversation. There was some dispute about exactly what was said during the call. It was not in dispute that Mrs Southall raised some issues she perceived with the claimant's work. Mrs Southall accepted that the call had not gone well and the claimant had become emotional. There was also no dispute that, at the end of the call, Mrs Southall asked the claimant whether she was ok. It was clear that the claimant was very upset by what she had been told during this call.

39. Mrs Southall's evidence was that, prior to the call with the claimant, she had discussed with Ms Holroyd issues which had arisen and whether coaching could be provided to the claimant. The Tribunal was provided with an email (278) which recorded in detail the specific things to be discussed. Mrs Southall's witness statement recorded that, when she spoke to the claimant, she explained to her that to assist in the issues which she had identified, she would be arranging some coaching for her. It was Mrs Southall's evidence that the claimant was not receptive. In cross-examination, Mrs Southall denied that she told the claimant that there was a problem with all of the claimant's work, or that her concerns had begun in January 2020 (as alleged).

40. On the afternoon of 14 July Mrs Southall also sent an email to the claimant (280) recapping on what had been discussed. The claimant's evidence was that she had not seen that email at the time (as she was by the time of receipt absent on ill health grounds). Nonetheless the Tribunal accepted what was said in the email as being accurate as it recorded shortly after the conversation what Mrs Southall had

understood to have been discussed. The email referred to some mistakes in recent weeks. It referred to the claimant being offered some coaching over the coming weeks, to support the claimant and "*in order that you are able to consistently deliver to the required standard*". It said that coaching with Mrs Holroyd would be arranged on the claimant's return from ill health. The email was focussed in nature, it did not address all of the claimant's work.

41. The claimant's evidence about the call differed, as she said that Mrs Southall had told her that there was not just a problem with some of the claimant's work, but all of it. The claimant also said that she had been told that the concerns about her work had begun in January 2020. The claimant said that she was aware of some issues in her work before the conversation with Mrs Southall on 13 July. However, she said that the conversation was out of the blue. The claimant said her work had been her life for thirty-seven years, and that when someone said something like that, it hits you like a ton of bricks.

42. There was no suggestion that what was being raised with the claimant at that point was formal. In cross-examination, the claimant accepted that it was not.

43. The claimant attended work (remotely) on 14 July 2020. During the call at the start of the day she became upset. She spoke to her sister-in-law about the call and how she was feeling. She ceased working and commenced a period of ill health absence. It was the claimant's evidence that she did not look at emails after she commenced her period of absence that day. The claimant ultimately did not return to work.

44. Following the conversation on 13 July, Mrs Southall and the claimant had no further contact at all. Mrs Southall was clear in her evidence that she was not involved in any subsequent discussions or decisions regarding the claimant.

45. The respondent operates a system under which someone is appointed a duty of care manager where an issue has arisen between an individual and their line manager. It appeared from the evidence that Mr Patel appointed a duty of care manager for the claimant. Mrs Aulakh was appointed to be the claimant's duty of care manager. She was a manager at the same level as Mrs Southall, working in a different team in a different location. She was the sole point of contact with the claimant during her absence in the period from early August 2020. The Tribunal heard evidence from Mrs Aulakh. In her submission document, the claimant recorded that Mrs Aukalakh "*was a lovely witness*".

46. On 4 August 2020 Mrs Aulakh telephoned the claimant and spoke to her briefly, but she made the decision to reschedule the call as the claimant was crying uncontrollably.

47. A further conversation took place between Mrs Aulakh and the claimant on 5 August 2020. The details of the conversation were recorded by Mrs Aulakh in an email to Mrs Southall of 6 August (302) and by the claimant herself in a note made the following day (306). In that conversation the claimant explained to Mrs Aulakh about the conversation on 13 July and why she felt so strongly about it. There was also discussion about training generally and the claimant referred to the "rocket

science" remark. The claimant informed Mrs Aulakh that she did not wish to speak or communicate with Mrs Southall.

48. At the end of the call, Mrs Aulakh also advised the claimant about the recently announced changes in Manchester, that is Project Rouge (which is addressed in more detail below). In her note, the claimant recorded this part of the conversation as: "*Jazz then tells me that my jobs gone offshore. Again I'm gobsmacked!"*. Mrs Aulakh's note recorded that she told the claimant of the recently announced changes within Manchester, but not exactly what was said. In her submissions, the claimant recorded that "*Jazz did reiterate that the role/job was, had gone offshore, but that ultimately a new role/work/offer of suitable alternative employment was being sourced by Tim*". The submission document also referred to Mrs Aulakh explaining her understanding of the position because her own team had gone through the equivalent process, something Mrs Aulakh explained in her evidence to the Tribunal. In her evidence to the Tribunal, Mrs Aulakh emphasised that it was part of the work which was being offshored, not the role itself, and that some of the work would continue. In her witness statement, Mrs Aulakh said that she emphasised in the call that, whatever happened, the claimant would still have a job as her job was not at risk and, she would not be losing her job or anything like that as a result of the project.

49. Mrs Aulakh's email of 6 August recorded that the claimant asked whether an early leaver package was available.

50. There was some dispute about how frequently Mrs Aulakh spoke to the claimant during the claimant's absence after the call on 6 August. The claimant's evidence was that she had been contacted far more frequently than Mrs Aulakh evidenced. Nothing material turns upon the frequency of contact. It is clear that the claimant and Mrs Aulakh had at least one other conversation about Project Rouge and the impact of it on the claimant. As recorded in her doctor's note (addressed below), the claimant clearly felt that the contact was too frequent during her absence.

51. The Tribunal was provided with an absence review note prepared by Mrs Aulakh of a telephone call on 11 August 2023 (315). The note recounted the claimant informing Mrs Aulakh that she believed that the reason for her absence was Mrs Southall's behaviour to her, with reference to what had been said on 13 July which was described as "*a personal attack*". In the note it was recorded "*Pauline has advised that she is unwell to resume work, and considering raising a grievance case against her manager. She felt she couldn't return at this point"*. Mrs Aulakh's evidence was that she was told by the claimant that the claimant was considering raising a grievance, and she provided her with information about how to raise a formal grievance as well as directing her to speak to her trade union representative.

52. In her claim form, the claimant asserted that she had raised an informal grievance on 14 August 2020 (14). When asked about this in the hearing, the claimant emphasised that she believed that mentioning verbally any issue amounted to an informal grievance. There was no evidence heard by the Tribunal about anything specific being raised by the claimant on that date or of her raising any form of grievance (albeit as already recorded, the claimant did explain to Mrs Aulakh the matters about which she was unhappy on, at least, 6 and 11 August). The claimant

did not contradict Mrs Aulakh's evidence about what the claimant had said about the possibility of raising a grievance.

53. On 11 September 2020 the claimant emailed Mrs Aulakh (329) and provided a copy of a letter from her doctor. She explained that she appreciated being invited to training, but was not (at that time) in the right frame of mind. She said she was very distressed. She also said "*Until the grievance has been addressed I cannot see past that*". The enclosed Doctor's letter (330) advised:

> "*She is finding your telephone calls very stressful indeed. She is not in the right frame of mind to make decisions regarding new roles and new training. She would be grateful if you could refrain from contacting her whilst she is off sick. Ringing to do a stand alone welfare check would be acceptable but not call regarding new roles and training".*

54. In response to the claimant's email, Mrs Aulakh provided reassurance and said that bespoke training would be provided on the claimant's return (329). It was both the evidence of the claimant and Mrs Aulakh that the frequency of contact reduced after the 11 September email.

55. As part of her answer to questions asked about the informal grievance raised in August, the claimant referred to some messages she exchanged with her trade union representative. Those messages were provided to the Tribunal during the hearing (553). It was not disputed that the claimant was in touch with her trade union representative during this period and Mrs Aulakh understood that the union was assisting the claimant with the potential grievance which she had said she was considering raising. The emails relied upon by the claimant, were dated between 9-14 September 2020, and showed the trade union representative informing the claimant that there was a meeting with Mr Patel at midday on 29 September. The claimant referred to the meeting in answering questions. Mr Patel did not include the meeting in his witness statement. The Tribunal was not provided with any detail about what was intended to be discussed at the meeting or who, exactly, was going to attend. In her skeleton argument, the respondent's representative referred to the proposed meeting as being a "back to work" meeting, which was how it was described by Mr Patel when he was asked about it. This was a meeting arranged with the claimant's line manager's manager. Within the claimant's resignation email of 27 September 2020 (418) the claimant said, "*I believe the meeting we had arranged for Tuesday the 29.09.2020 is no longer required*".

56. The claimant resigned with immediate effect by email on Sunday 27 September 2020 (418). In that email she referred to her ill health absence, which she attributed to treatment received from Mrs Southall. She went on to say:

> "*I appreciate that an offer for a new role has been made, but I feel this is not acceptable, given the large breach of trust BT has inflicted upon me in my current role. In addition, the process under which my job has been moved offshore, has been dealt with in an unfair manner. The reason I say this is outlined on page 1 of the attached grievance document. My informal grievance has not been dealt with…I am officially making this a formal grievance. It is with regret that I ask you to accept this email as notice of my immediate resignation. This is final."*

57. The resignation email went on to further refer to the unfairness of the claimant's role being taken off-shore and to the claimant's grievance.

58. At the same time as emailing her resignation, the claimant also provided a written formal grievance (334). In evidence the claimant confirmed that the document attached to the resignation was the first time that she had raised a formal grievance. The grievance was very lengthy and detailed and therefore what it said cannot be reproduced in this Judgment. On the first page of the grievance the claimant explained how she believed the offshore project should have been announced to her team. She referred to her hearing loss and said she did not feel that she had been supported as other team members with disabilities had. She said "*I feel betrayed, and my trust has been broken. My grievance had been disregarded*". There followed a lengthy and detailed grievance.

59. At the very end of the grievance document was a section headed "*What I want to happen*" (406). Within that section the claimant said "*I appreciate everything that the management team are now doing to accommodate me in a new role, but I do fear its just too little, too late. My confidence has been seriously affected*". The claimant stated that she should not be pressured to return to work. She referred to management style. She said retraining for a new role was not appropriate. She suggested she should receive a redundancy package (which had not been offered to her).

60. Mr Patel spoke to the claimant, following her resignation, on 28 September and subsequently responded by email on 30 September (417). In that email he recorded four things which had been discussed, including that the claimant had informed him that she no longer trusted the respondent. He said, "*We spoke about the transition of the offshoring of work, where I clarified the position on the growth opportunities within Manchester i.e. the new role in Data Repair*".

61. In a subsequent email of 1 October (416) Mr Patel confirmed that he would be arranging for the claimant's grievance to be heard by an independent person "*over the next couple of weeks*". He also offered the claimant a five-day cooling off period from the date of his email if she wished to withdraw her resignation. The claimant responded on 2 October to say that she noted the five-day cooling off period, but that did not change her position. In an email of 9 October, Mr Patel confirmed that the claimant's resignation would be processed effective of 2 October and asked whether the claimant intended to work her notice period. The claimant responded on the same day making clear that it was her intention to resign on 27 September with immediate effect (415).

62. On 13 November Robert Fearey (of the respondent) emailed the claimant to explain that he had been assigned to the claimant's grievance as the investigating manager (452). The claimant responded by email on the same day and said:

> "*Unfortunately matters have progressed beyond the internal grievance. I originally applied for an informal grievance which was not dealt with. I then made it formal and that was not dealt with either….There seems little point in pursuing the internal grievance"*

63. Mr Fearey responded to say he would close down the internal grievance.

Annual leave

64. It was the claimant's evidence that she was entitled to 8.2 days annual leave outstanding and unpaid on the termination of her employment. She relied upon a document which the respondent had prepared showing she was due 50.3 hours accrued but untaken annual leave (481). That document recorded that the claimant's leave entitlement for the proportion of the final leave year in which she had worked was 115.23 hours. It recorded that the claimant had taken 64.48 hours. It stated that there was 50.35 hours outstanding. The claimant was employed for 7.2 hours per day and therefore the 50.35 hours outstanding was equivalent to 7 days.

65. None of the respondent's witnesses addressed the claimant's annual leave entitlement at all or explained what she was due or what had been (or had not been) paid to her. When the respondent's case was clarified with its representative during the time when the claimant was giving evidence, it was explained that the respondent asserted that the claimant had left prior to the end of September 2020, having been paid for the full month. It was contended by the respondent that the claimant had therefore been overpaid three days' pay for September 2020. The claimant accepted in evidence that was the case; but asserted (correctly and obviously) that she was due more money in lieu of accrued but untaken annual leave than was due for the overpaid salary.

Project Rouge

66. The respondent had a project called Project Rouge. It was described by Mrs Southall in her statement as being a reorganisation project undertaken by the respondent to manage the growth of the business, and to reduce overall operating costs. The project meant relocating some of, what were described as, the simpler key stroke tasks to the respondent's offshore operational teams based in India, to free up resource in Manchester to handle new areas of growth onshore.

67. The respondent ascribed considerable importance to the confidentiality of Project Rouge. They required all staff who undertook work on it to sign a non-disclosure agreement. It was clear that, for a period, there was a distinction in place between those who had signed such an NDA who were able to know about and work on Project Rouge, and those who had not.

68. A team was put together, which included some members of the claimant's team in Manchester, to undertake work on Project Rouge. In her evidence, Mrs Aulakh clarified that the work the specific team members undertook was providing training to those located offshore. Mrs Southall confirmed that the team members who were asked to sign NDAs and to work on Project Rouge (and their approximate ages) were: Vincent Cirino (in his 30s); Ashraf Patel (22); Rekha Patel; and Mischa Small (29). Mr Southall explained that Ashraf Patel was brought in shortly before the end of the project, due to his particular specialism. A distinction was drawn between Ms Small and the other team members, because Ms Small was a graduate who was undertaking a further degree with the respondent as part of the higher level apprentice scheme. The Tribunal heard evidence from Mrs Patel herself, who confirmed that she was aged 45 at the material time. In his evidence, Mr Patel was asked about the ages of those who worked on Project Rouge generally and he described the breadth of ages of those who worked on the project generally (but for

the particular issues raised by the age discrimination claim, the Tribunal considered the relevant ages to be those of the people in the claimant's team who worked on the project, not the ages of those across the company).

69. The claimant was not, at the time when this initial team was put together, made aware of Project Rouge. In evidence she described her perception that the younger members of the team were undertaking other work in a separate (glass-walled) area. They were not undertaking the same work with tickets as the claimant and other team members. That perception was essentially correct. Mrs Southall's evidence was that she needed to manage the provision of the ticketing work for customers alongside the requirements of Project Rouge. The respondent emphasised the importance of confidentiality and a by-product of that was that none of the other team members were aware of the work which the sub-team was undertaking, nor were they made aware of how or why that team had been selected and why they were not undertaking the usual ticketing work.

70. In her witness statement, Mrs Southall explained that Vic Crossan had selected the individuals for the Project Rouge work and that Ms Crossan had since left the business. In her statement, Mrs Southall also provided some explanation about why it was that she believed Ms Crossan had selected the relevant individuals. During the cross-examination of Mrs Southall, it became clear that in practice she was entirely unable to provide any genuine evidence about how or why Ms Crossan had in fact selected the particular team members, and that what was included in her statement was no more than assumption after the event or conjecture about why she might have done so.

71. Mr Patel, in his evidence, confirmed Ms Crossan's role in the project, but he was also unable to provide any genuine evidence about the basis for the decisions made by Ms Crossan about who should be included in the team. In her submissions, the respondent's representative submitted that Mr Patel had given evidence about how and why the team had been selected and referred to the fact that Mr Patel had in his evidence used the word "*we*" to describe himself and Ms Crossan. The Tribunal accepted that Mr Patel in his evidence had been able to explain the project's approach and aims, as collectively identified by himself and Ms Crossan and, to an extent, he had also evidenced the broad aims behind the selection of the relevant team. The Tribunal did not find that Mr Patel evidenced why the respondent had in fact selected the relevant team members, which was a task undertaken by Ms Crossan and not evidenced in documents before the Tribunal. The Tribunal did not hear evidence from Ms Crossan. The Tribunal was not provided with any documents which recorded Ms Crossan's decisions, or which recorded how or why the decisions had been made.

72. The respondent and its witnesses placed considerable reliance upon a skills matrix document which recorded the skills held by the members of the team (411). It was the respondent's evidence that it was the responsibility of each team member to ensure that the skill matrix was kept up to date and recorded their own particular skills. The matrix had a key which showed the rating for each skill: no skill; trained but haven't used it; can use with help from colleagues; can use it without help; and can teach and coach it. It was the respondent's case that the matrix would have been used by Ms Crossan to identify who in the team had the skills required to train those offshore who required the training. The respondent did not identify which of the

skills was specifically required. The respondent contended that, as the requirement was for training, it would be those with identified skills which they could teach and coach, which would be required. From the matrix provided (and in broad terms), the claimant was recorded as having considerably fewer skills where she was identified as being able to teach and coach, than was the case for any of the individuals who did work on the Project Rouge team. In her submissions the respondent's representative proposed an analysis which allocated points to the skills in the matrix and the level obtained and submitted that the analysis showed that each of the relevant team members scored more highly than the claimant. The Tribunal did not find that analysis assisted and did not (and could not) evidence why Ms Crossan had made her decisions.

73. Save for the four people identified and Mrs Southall herself, no other members of the claimant's team were involved in Project Rouge. It was Mrs Southall's evidence that she managed fifteen to nineteen people plus two graduate placements. The ages of the rest of the team were not provided, save that Mrs Southall stated that the team comprised of a mixture of age groups, with the youngest being about 22 and the oldest over 60, with the average age being about 45-47.

74. The impact of Project Rouge was first announced to the claimant's team in August 2023. The claimant was not present when the presentation was made to the team, as she was absent on ill health grounds. The Tribunal was provided with a presentation document which set out what the team was told (289). Of particular importance in that document, was a page (293) which recorded each of the names of the members of the team and their grade (including the claimant). It explained that thirteen members of the team were in scope. There would be a reduction of six team members as part of a selection exercise. It said something about four remaining roles and one other person being re-aligned. The meaning of what was said in the presentation in practical terms was not immediately obvious.

75. On a subsequent page (294) the presentation said:

> "*Our aim is to re-deploy where possible. Re-deploy the 6 people to a growth area within our Fault Management role work stream, This will match the appropriate grade & skills the team. How will you decide on the SME role? We'll be running a selection process"*

76. It was the claimant's evidence that she had not seen the presentation at the time. It is possible that the presentation was sent to the claimant by email, but it was not seen or read by her because she was absent.

77. The claimant was told about Project Rouge by Mrs Aulakh as has already been recorded.

78. The respondent's evidence was not consistent on exactly what the changes meant for the claimant's role. Mrs Southall's evidence was that the claimant had the opportunity to change roles into a role in the Ethernet and MEAS team on the same grade etc. Mr Patel's evidence was that the first option available to the claimant was the same job, with the second option being changed to a similar role in data repair. Mrs Patel herself went through the process and she described a process where

selection had been undertaken of those retained in the pre-existing roles, with a further selection process for those appointed to new roles. There was no evidence of any compulsory redundancies from the claimant's team as a result of the reorganisation. The respondent's witnesses were keen to emphasise that the intention was not to make anyone redundant. Mrs Southall's evidence was that nobody in the team (including the claimant) was subject to redundancy, nor was it considered. Her evidence was that they all either stayed doing what they had done in previous roles or moved to new ones that had required skill sets very similar to that in their previous roles.

79. In its grounds of response to the claim, the respondent explained the position as (38):

> "*The result of the offshoring of work was that the individuals employed in the Claimant's team were to be moved into different teams where they would carry out almost identical roles in the same location for the same salary. The claimant's role was never at risk of redundancy, nor was any material contractual change envisaged"*

80. The Tribunal was not provided with any documentation which evidenced selection for roles, applications for roles, or any process followed. None of the witnesses explained in any detail what process had been followed for other members of the team. It was not in dispute that the claimant ultimately did not return to any role, as she resigned having been absent on ill health grounds.

81. The respondent's witnesses were asked about consultation. Mr Patel confirmed in his evidence that collective consultation had been undertaken about the project with the trade unions and that the unions had been provided with the team presentation in advance of it being given to the team. The chart upon which the respondent relied in showing the project undertaken, recorded as nought percent the completion of the consultation, but Mr Patel explained that as being essentially an oversight due to Ms Crossan not completing all the paperwork as the project developed. The Tribunal was not provided with any documentation which showed the collective consultation undertaken or the outcome of it. In terms of individual consultation, it was clear that the team members were not informed about the project until the presentation in early August (save for those working on the project team who obviously would have been aware of it). For the claimant, the first she knew about it was her conversation in August with Mrs Aulakh and the only other information provided to her was in subsequent conversations with Mrs Aulakh.

Other evidence

82. The Tribunal also heard evidence about the respondent's ghosting process and passwords. All of the respondent's witnesses were keen to emphasise that the respondent does not routinely use customers passwords or log-ins and, on the occasions when it has occurred, the customer has provided the password and has known about it. The issue raised by the claimant in the list of issues was her perception of Mrs Patel's use of private access details to carry out certain actions, which it was said occurred on a regular basis between January and April 2020. The Tribunal heard evidence from Mrs Patel in which she explained her use of two admin level logins under her name and with a profile linked to her which she used to amend

a customer's account if needed. This was a personal work around which Mrs Patel explained that she used in her role, as she gave evidence that at time the ghost process did not work. The function used by Mrs Patel was not available to other team members. Mrs Patel did acknowledge that she had occasionally used the customer's log in details to fix issues, but this had only been done with the customer's knowledge and permission. It was her evidence that she had never breached the customer's trust by using the details unauthorised and she said she always encouraged the customer to change the password once it had been used.

83. There was no evidence of the claimant raising issues with access to customer accounts or similar data protection issues in her resignation email or in the lengthy grievance which she raised at the time of her resignation (at least not clearly). Whilst the claimant said in her grounds of claim that she no longer felt comfortable working in such a manner that could potentially be a breach of the GDPR regulations (21), there was no evidence that she personally had ever done so or been asked to do so, and there was no evidence of her refusing to undertake any action whilst employed.

The Law

Constructive unfair dismissal

84. An unfair dismissal claim can be pursued only if the employee has been dismissed as defined by Section 95 of the Employment Rights Act 1996. Section 95(1)(c) provides that an employee is dismissed by her employer if:

> *"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

85. The principles behind such a constructive dismissal were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp** [1978] IRLR 27. The statutory language incorporates the law of contract, which means that the employee is entitled to treat herself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The respondent relied upon that decision as establishing that there must be a breach of contract that amounts to more than just unreasonable conduct.

86. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA** [1997] IRLR 462 the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation that the employer shall not:

> *"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

87. It is apparent from the decision of the House of Lords that the test is an objective one, in which the subjective perception of the employee can be relevant but

is not determinative. A Tribunal must look at all the circumstances. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

88. The respondent in its skeleton argument highlighted that conduct after the resignation/dismissal cannot be considered when determining whether there is a breach of contract, relying upon **Gaelic Oil Co Ltd v Hamilton** [1977] IRLR 27.

89. Not every action by an employer, which can properly give rise to complaint by an employee, amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. It has been described as a demanding test. Simply acting in an unreasonable manner is not sufficient.

90. A part of the test to be applied is whether the actions of the employer fell outside the range of reasonable responses which a reasonable employer might consider to be appropriate What was said in **Claridge v Daler Rowney Ltd** [2008] IRLR 672 is:

> *"It is necessary that the conduct must be calculated to destroy or seriously damage the employment relationship. The employee must be entitled to say "You have behaved so badly that I should not be expected to have to stay in your employment". It seems to us that there is no artificiality in saying that an employee should not be able to satisfy that test unless the behaviour is outwith the band of reasonable responses."*

91. If an individual delays too long in resigning, they will have affirmed the contract and waived the breach. The Tribunal must also determine whether the claimant resigned in response to the respondent's conduct/breach.

Discrimination and the burden of proof

92. The claim relied (in part) on section 13 of the Equality Act 2010 which provides that:

> *"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

93. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur and these include any other detriment and dismissal. The characteristics protected by these provisions include age.

94. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case. The requirement is that all relevant circumstances between the claimant and the comparator must be the same and not materially different, although it is not required that the situations have to be precisely the same.

95. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> *"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.*
>
> *(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".*

96. At the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This is sometimes known as the prima facie case. It is not enough for the claimant to show merely that she has been treated less favourably than her comparator and there was a difference of a protected characteristic (such as age) between them. In general terms "*something more*" than that would be required before the respondent is required to provide a non-discriminatory explanation. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination, the question is whether it could do so.

97. If the first stage has resulted in the prima facie case being made, there is also a second stage. There is a reversal of the burden of proof as it shifts to the respondent. The Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. To discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

98. In practice Tribunals normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, second, whether the less favourable treatment was on the ground that the claimant had the protected characteristic. However, a Tribunal is not always required to do so, as sometimes these two issues are intertwined, particularly where the identity of the relevant comparator is a matter of dispute. Sometimes the Tribunal may appropriately concentrate on deciding why the treatment was afforded, that is was it on the ground of the protected characteristic or for some other reason?

99. In most cases there is a need to consider the mental processes, whether conscious or unconscious, which led the alleged discriminator to do the act. Determining this can sometimes not be an easy enquiry, but the Tribunal must draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). The subject of the enquiry is the ground of, or the reason for, the alleged discriminator's action, not his or her motive. In many cases, the crucial question can be summarised as being, why was the claimant treated in the manner complained of?

100. The Tribunal needs to be mindful of the fact that direct evidence of discrimination is rare, and that Tribunals frequently have to infer discrimination from all the material facts. Few employers would be prepared to admit such discrimination even to themselves. The protected characteristic does not have to be the only reason for the conduct, provided that it is an effective cause or a significant influence

for the treatment. The explanation for the less favourable treatment does not have to be a reasonable one. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment. It cannot be inferred from the fact that one employee has been treated unreasonably that an employee of a different age (or with any other difference of a protected characteristic) would have been treated reasonably.

101. The way in which the burden of proof should be considered has been explained in many cases, including: **Barton v Investec Henderson Crosthwaite Securities Limited** [2003] IRLR 332; **Shamoon v Chief Constable of the RUC [**2003] IRLR 285**; Hewage v Grampian Health Board** [2012] ICR 1054**; Igen Limited v Wong** [2005] ICR 931**; Madarassy v Nomura International PLC** [2007] ICR 867**;** and **Royal Mail v Efobi** [2021] UKSC 33.

Discrimination arising from disability

102. Section 15 of the Equality Act 2010 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.*

103. For unfavourable treatment there is no need for a comparison, as there is for direct discrimination. However, the treatment must be unfavourable, that is there must be something intrinsically disadvantageous to it. It is not simply enough that the claimant thinks that she should have been treated better.

104. In **Sheikholeslami v University of Edinburgh** [2018] IRLR 1090 the Employment Appeal Tribunal held that:

> *"the approach to s 15 Equality Act 2010 is now well established … In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."*

105. **Pnaiser v NHS England** [2016] IRLR 170 outlines the correct approach to be taken. A tribunal must first identify whether there was unfavourable treatment and by

whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises. The tribunal must determine what caused the impugned treatment, or what was the reason for it. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it. The Tribunal must determine whether the reason/cause (or, if more than one, a reason or cause) is 'something arising in consequence of B's disability'.

106. Section 15(1)(b) provides that unfavourable treatment can be justified where it is a proportionate means of achieving a legitimate aim. That requires: identification of the aim; determination of whether it is a legitimate aim; and a decision about whether the treatment was a proportionate means of achieving that aim.

The duty to make reasonable adjustments

107. Section 20 of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer. Section 20(3) provides that the duty comprises the requirement that where a provision, criterion or practice of the employer's puts a person with a disability at a substantial disadvantage in relation to a relevant matter in comparison with people who do not have a disability, to take such steps as it is reasonable to have to take to avoid the disadvantage.

108. Section 21 of the Equality Act 2010 provides that a failure to comply with the requirement set out in section 20 is a failure to comply with a duty to make reasonable adjustments. Schedule 8 of the same Act also contains provisions regarding reasonable adjustments at work.

109. The requirement can involve treating disabled people more favourably than those who are not disabled. Whether something is a provision, criterion or practice should not be approached too restrictively or technically, it is intended that phrase should be construed widely.

Time limits/jurisdiction

110. Section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which the complaint relates (and subject to the extension for ACAS Early Conciliation), or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. A failure to do something is to be treated as occurring when the person in question decided on it. If out of time, the Tribunal needs to decide whether it is just and equitable to extend time. Section 123(1)(b) of the Equality Act 2010 states that proceedings may be brought in, *"such other period as the Employment Tribunal thinks just and equitable"*.

111. In her submissions the respondent's representative also addressed the test under section 111(2) of the Employment Rights Act 1996 in relation to unfair dismissal and some case law in relation to that test. That provision and those issues did not need to be considered in this case as the claim for constructive dismissal was brought within the time required.

Redundancy

112. Section 139 of the Employment Rights Act 1996 defines redundancy:

> *"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 – … the fact that the requirements of that business – for employees to carry out work of a particular kind, or 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."*

Other issues

113. In their submissions both parties focussed on the facts rather than the law. The respondent's representative did rely upon certain limited law in her skeleton argument as already addressed. The Tribunal consider the claimant's breach of contract claim as to notice, and her claim for accrued but untaken annual leave, but as the law which applied to those claims is not controversial there is no need to explain it within this Judgment.

114. In her closing submissions, the claimant contended that the respondent's entire response should be struck out, based upon the fact that the claimant asserted that the respondent (and Mr Patel in particular) had relied upon dishonest information. The claimant stated that this was the only remedy that is fair and in the interests of justice. The Tribunal's decision about what was asserted is explained below. Legally, the Tribunal rules of procedure do give the Tribunal the power to strike out a response where the manner in which the proceedings have been conducted has been scandalous, vexatious or unreasonable. However, such a discretion to strike out should be exercised sparingly (particularly in claims of discrimination) and should only be exercised where a fair hearing is no longer possible and where no other remedy would be an appropriate response. It would be incredibly rare for a Tribunal to strike out a response at the end of the hearing when all of the evidence has been heard, because it is asserted (or found) that a witness or a party has given dishonest evidence. The usual and correct approach is for the Tribunal to reach a decision based upon the evidence heard and, if it does determine that a party has been dishonest or relied upon dishonest information, that would be part of the findings of fact and those findings would be reflected in the decision made on the issues to be determined.

115. In the course of the cross-examination of the respondent's witnesses, the Tribunal did question the relevance of some of the questions being asked and did highlight that the Tribunal would only determine the issues listed in the agreed list of issues. The claimant explained questions which related to the microphones not obtained (about which the claimant was not told), as being asked because that issue was one which she believed was relevant to the credibility of Mr Patel and was background to the claims for breach of the duty to make reasonable adjustments. It was also explained that the claimant believed that the evidence was also relevant to the issue of the respondent's knowledge. The Tribunal did not stop the claimant/her

representative from asking Mr Patel questions about the issue. It was, however, emphasised that the Tribunal would not determine whether something else would have been a reasonable adjustment other than the adjustments relied upon by the claimant as recorded in the list of issues.

Conclusions – applying the Law to the Facts

116. The Tribunal did not consider the issues in the order they were set out in the list of issues. The Tribunal considered first the claimant's claim for holiday pay. The Tribunal then considered the discrimination claims (age and then disability). The Tribunal considered the unfair dismissal claim next, followed by the wrongful dismissal claim and redundancy payment claim.

Holiday pay – issue 30

117. The Tribunal started by considering the claim for accrued but untaken annual leave. The respondent acknowledged that it had failed to pay the claimant what she was due. In its skeleton argument, the respondent submitted that there had been a net overpayment in September 2020 of £229.80 (being three days pay). It was accepted that, based upon the respondent's calculation in the bundle (480), 6.3 days of holiday were owed (less the overpayment). When asked, the respondent's representative stated that a day's pay was £76.60. The claimant asked the Tribunal to calculate what she was due and claimed a total sum of £1,021 in her schedule of loss (544) without setting out how the sum had been calculated.

118. Based upon the document prepared by the respondent (481), addressed in the facts above, the Tribunal found that the claimant was due to be paid for seven days accrued but outstanding annual leave outstanding as at the termination of her employment. As the claimant had accepted that she had already been paid for three of those days in the amount paid for September 2020, the payment for the remaining four days was outstanding. Based upon the daily rate of pay stated by the respondent's representative (£76.60) the respondent had failed to pay the claimant the sum of £306.40 (being 4 x £76.60). The respondent is ordered to pay to the claimant that amount.

119. The Tribunal could not understand why the respondent had failed to pay the claimant a sum due to her, when it had been due for approximately three years as at the date of the Tribunal hearing.

Age discrimination – issues 9 to 15

120. The group who worked on Project Rouge from the claimant's team, who accordingly did not answer the usual calls, was a team made up of employees who were younger in age than the claimant. The claimant and others who were not part of the team who had signed NDAs, were not privy to information about Project Rouge and were required to answer calls. In practice nobody told the claimant why the team members were not taking the normal calls or what they were working on. All that the claimant saw at the time was a specific group undertaking different work. The Tribunal found that the claimant did reasonably see that treatment as a detriment. She felt excluded from the identified group who were working on the project, and she was left with the ticketing work.

121. Looking specifically at the comparators relied upon, those were Vincent Chirino, Mischa Small and Ashraf Patel. In the light of the evidence heard, the Tribunal did not find Mischa Small or Ashraf Patel to be comparators in materially the same circumstances as the claimant. As Mrs Southall explained in her evidence, which the Tribunal accepted, Ashraf Patel was brought in shortly before the end of the project because of his particular specialism, which meant his circumstances were materially different. Mischa Small was a graduate undertaking a further degree, who was part of the higher level apprentice scheme, which meant that her circumstances were materially differed. The Tribunal accepted that Vincent Cirino appeared to be in materially the same circumstances as the claimant and was selected for Project Rouge when the claimant was not.

122. The Tribunal did not find that the claimant was treated less favourably by not undertaking work on Project Rouge, when Vincent Cirino did. The Tribunal did not find that it was, in fact, less favourable to undertake ticketing work than it was to work on Project Rouge. The two groups undertook different work. It was not less favourable for the claimant to undertake her work, when compared to undertaking the training work associated with Project Rouge. The work which the two groups undertook was different, but the claimant undertaking one type of work when compared to the other, was not less favourable (or at least it was not evidenced to the Tribunal that it was).

123. Even had the Tribunal found that not being included in the Project Rouge team was less favourable treatment, the Tribunal would not have found that the difference in treatment was because of age. The claimant did not show the "something more" required to shift the burden of proof. The claimant and Mr Cirino differed in age and one was included on the project when the other was not, but the something more required to show that the difference in treatment was or might have been due to age was absent in this case. As a result, the burden of proof did not shift to the respondent. The Tribunal would observe that had the burden shifted, the respondent would not have been able to have shown that the selection decision was in no sense whatsoever on the grounds of age, as the person who made the decision did not give evidence to the Tribunal and there was no genuine evidence about (or record which showed) why she had actually made the decision about who should be on the team (it had not been Mr Patel or Mrs Southall's decision, it had been a decision made by Ms Crossan).

124. As the respondent confirmed in submissions that it was not arguing that the action was a proportionate means of achieving a legitimate aim, the Tribunal did not need to determine issues 14 and 15.

125. As a result, the claim for direct age discrimination did not succeed because the Tribunal did not find that not being included in Project Rouge was less favourable treatment and it did not find that the reason for the claimant not being included in the Project Rouge team was age, the claimant not having shown the something more required to shift the burden of proof.

Disability discrimination – issues 16-26

126. The respondent conceded that the claimant had a disability at the material time, so issue 16 did not need to be determined.

127. Issue 17 addressed the question of the respondent's knowledge about the claimant's disability. The Tribunal found that the respondent did know that the claimant had the disability, indeed in practice there was no real question that it did not.

128. Issue 18(1) asked whether the respondent treated the claimant unfavourably by the claimant having to participate in training for the new system? The claimant was required to participate in the training. However, the Tribunal did not find that there was any unfavourable treatment as a result of the claimant having to participate in training. Being trained on a new system which is being implemented is appropriate and necessary to understanding and using a new system. Being trained (and being required to participate in training) was not unfavourable treatment.

129. Issue 18(2) was the "*It's not rocket science*" comment which the claimant alleged that Mrs Southall had made. Mrs Southall accepted the phrase was something she would on occasion use, so the Tribunal accepted that the comment was said by Mrs Southall on an occasion. It was notable that the claimant was not consistent about when the comment was made. She also did not provide any evidence that she had received supportive messages from colleagues when it had been said, as she said she would be able to when cross-examined. The Tribunal did not accept Mrs Southall's view that the use of the phrase would be an encouragement tool when used, however it did accept that the phrase when used by Mrs Southall had not been directed specifically at the claimant. If the comment had been directed specifically at the claimant in the way she suggested during the hearing, the Tribunal found that the claimant would have raised the comment earlier than she did and would have raised it at the time (as she did with other things). The absence of either the corroborative evidence the claimant asserted she could provide or of a complaint at the time, meant the Tribunal accepted Mrs Southall's evidence that it was not directed at the claimant.

130. The Tribunal did not find that Mrs Southall making the comment in a meeting at which the claimant was present, was treating the claimant unfavourably. It was a comment made to which the claimant took offence (at least she did at a later date), but that did not mean that the comment being made was unfavourable treatment of her.

131. Issue 18(3) arose from the conversation in which Mrs Southall raised issues with the claimant's work on 13 July 2020. The evidence about this issue is addressed above. The Tribunal accepted Mrs Southall's evidence about what was said in this call, and it accepted her evidence that she did not say that the problems were with all of the claimant's work. This was a difficult call in which the claimant believed that her work was being criticised. Mrs Southall accepted that the call had not gone well. The Tribunal accepted that the claimant believed the evidence she gave about what had been said, based on her recollection of a difficult conversation at a difficult time. Nonetheless, as the Tribunal was faced with determining what was said based upon two different recollections, the Tribunal accepted Mrs Southall's evidence about what had actually been said. In particular, that evidence was entirely consistent with the email which Mrs Southall sent the following day and the type of conversation described within it.

132. As explained in the list of issues, the Tribunal was required to decide whether what was said by Mrs Southall on 13 July was unfavourable treatment of the claimant. The Tribunal accepted that it was. Being told that she was not performing well, was of itself unfavourable. It was not in dispute that what was being raised was not a formal performance management process, and the Tribunal accepted that part of the conversation was focussed on training to be provided, nonetheless the nature of the conversation did amount to unfavourable treatment.

133. Both of the matters listed at issue 20 (as issues 20.1 and 20.2) were found to be something arising from the claimant's disability. Clearly the need for people to speak more clearly and for the claimant to see their lips when speaking, and the need for a quiet room, were something arising in consequence of the claimant's hearing impairment.

134. As part of issue 20, the Tribunal was required to determine whether the unfavourable treatment found (that is that Mrs Southall spoke to the claimant about her performance on 13 July) was because of the somethings arising in consequence of her disability (the need for people to speak clearly, for their lips to be seen, and for a quiet room). The Tribunal did not find that the conversation about performance (or the need for it) was because of those things. By 13 July 2020 the claimant had received training and coaching in various different formats, including one to one training and coaching. The fact that the claimant had not mastered working with the new ticketing system and required further coaching to do so, was not because of the two things relied upon (as being the something arising). Taking the claimant's case at its strongest on the deficiencies of the early training provided in groups, any such issues or deficiencies were background issues which meant that the first training provided to the claimant on the new system was not as effective for the claimant as it otherwise would have been. However by 13 July 2020 there had been many other opportunities to learn and understand the new system which had intervened. The failings which Mrs Southall wished to discuss (and provide further training about) were not on 13 July because of those things. In relation to the requirement for a quiet room, the claimant had been working remotely since March 2020 due to Covid and therefore any such requirement in the office had ceased to apply for some time. The Tribunal did not find that the unfavourable treatment found was because of the somethings arising relied upon, the treatment was because the claimant had not performed consistently and at the required standard in using the new ticketing system.

135. Issue 21 did not need to be considered as a result of the decision which the Tribunal made.

136. There was no argument put forward by the respondent on issue 22. The respondent did know that the claimant had a disability.

137. The respondent did have the PCP (provision, criterion or practice) relied upon and recorded at issue 23. The PCP was requiring employees in the claimant's team to take part in meetings. It was recorded in the list of issues that was in-person prior to Covid, and by remote video link afterwards.

138. Issue 24 asked whether that PCP put the claimant at a substantial disadvantage compared to someone without the disability in that the claimant had

difficulty in hearing what was said? The answer was yes, the claimant was at a substantial disadvantage when taking part in a meeting because of her disability which makes it harder for her to hear and understand all that is said, than for others.

139. Issue 25 was whether the respondent knew, or could reasonably have been expected to know, that the claimant was likely to be placed at a disadvantage by the requirement to attend meetings. The respondent did know that.

140. In practice that meant that the only genuinely contested/argued issue for which the Tribunal needed to reach a decision in the reasonable adjustments claim, was whether the respondent failed in its duty to take such steps as were reasonable to avoid the disadvantage found (issue 26). The claimant put forward two adjustments which she said would have been reasonable.

141. At 26(1) the claimant contended that it would have been a reasonable adjustment for participants in the meetings to have been reminded of the claimant's hearing impairment and to be asked to speak clearly. It was the respondent's case that they were. As recorded in the respondent's skeleton argument, the claimant accepted early in her evidence on the first day of the hearing, that people were notified that she had a hearing impairment and to speak clearly at the start of the meeting. Accordingly, the respondent did not fail to make the reasonable adjustment which the claimant contended it should have made.

142. At 26(2) the reasonable adjustment sought was, for in-person meetings, for the speaker to project their voice. The respondent accepted that this was a reasonable adjustment and contended that the respondent made efforts to ensure that this was in place. As addressed for the previous adjustment sought, speakers were reminded of the claimant's disability at the start of meetings and the claimant herself in evidence explained that she reminded speakers to project their voices. The Tribunal did not find that there was a breach by the respondent of its duty to make reasonable adjustments as a result. The respondent made the adjustments which were reasonable, that is reminding the speakers of the need to raise or project their voices. If individual speakers (including colleagues of the claimant) failed to maintain sufficient projection of their voices, the Tribunal did not find that that alone meant that the respondent had breached the duty to make reasonable adjustments. Any occasions when voice projection had fallen short of the level required did not amount to a breach by the respondent of this legal duty (where reminders had been given).

143. As a result and for the reasons given, the claimant's claims for disability discrimination did not succeed.

Jurisdiction – time point – issue 33

144. Issue 33 related only to the claimant's discrimination claims. It was clear that had the Tribunal found for the claimant only on certain of the specific allegations (for some of them), the claim would have been entered out of time. The alleged discrimination arising from disability in relation to the "*rocket science*" comment would have been entered out of time. Any of the allegations which ceased when the claimant and others moved to working from home due to Covid (such as the alleged breach of the duty to make reasonable adjustments in face-to-face meetings or to have projected their voices in such meetings), would also have been brought outside

the time required. As the Tribunal has not found for the claimant on any of her allegations, it is not necessary or appropriate for the Tribunal to decide which of the matters alleged might or would have been found to have been part of a continuing act with those which would have been entered in time. Similarly, the Tribunal has not needed to determine whether or not it might have found it to have been just and equitable to extent time if it had found for the claimant in some of the allegations and not others.

Unfair dismissal – issues 1-8

145. At issue 1 the list of issues listed each of the matters upon which the claimant relied as being breaches of the implied duty of trust and confidence. The Tribunal considered each of the matters listed at issue 1 and applied subsequent issues 2, 3, 4 and 5 to each of them in turn.

146. Issue 1(1) related to the new ticketing system and the issues which the claimant had in adapting to it. The claimant contended that the system did not work properly, and the claimant could not properly participate in some of the training because of her hearing. There were issues with the new system when it was introduced to the claimant's team. There were issues with the training provided. As has been explained, the claimant had issues in fully participating in, and understanding, the early training provided. The respondent provided further training in various ways to the claimant, including in one-to-one training. Further training was offered to the claimant in July 2020. The Tribunal did not find that any failings that there were in the system, or the training provided on the system, amounted to a breach of the duty of trust and confidence. It was not the respondent conducting itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust.

147. Even had the Tribunal found that those failings had been sufficient to amount to a breach of the duty of trust and confidence, the Tribunal did not find that those issues were the reason why the claimant resigned.

148. Issue 1(2) was that the claimant was not always able to participate in the training because she was on a call. Sometimes the training was listed for an hour, and she could only do part of it. This was how the respondent operated when training was provided. It seemed to the Tribunal to be an inefficient approach to training, which must have had the effect of resulting in some trainees missing training or significant parts of it. However, the Tribunal did not find that this arrangement was something which breached the duty of trust and confidence. The Tribunal also did not find that this was in fact the reason why the claimant resigned.

149. Issue 1(3) was that training was provided by people who were not trainers and did not know how to project their voice. Having training conducted by colleagues and people not trained as trainers or employed specifically as trainers, was not (and could not be) a breach of the duty of trust and confidence. The particular issues in relation to the claimant's hearing have been addressed for the discrimination claims. Whilst any inability of a colleague to raise or project their voice would have been a more significant issue for the claimant than others, any shortcomings in doing so were not sufficient to be a breach of the duty and confidence. In any event, the respondent sought to provide the claimant with training from different people in

different ways. At the point at which the claimant commenced her ill health absence, she had been provided with one-to-one training and more was to be provided. The issues with voice-projection would also have ceased (or at least reduced significantly) from March 2020 when the claimant worked from home due to the Pandemic. The Tribunal did not find that what was alleged amounted to a breach of the duty of trust and confidence. The Tribunal also did not find that this was why the claimant resigned from her employment taking into account the timing of her resignation.

150. At issue 1(4) it was stated that the claimant asked Mrs Southall, her manager, for extra training in the period January to July 2020. That was true. It was also stated in the list of issues that Mrs Southall told the claimant she would get training for her, but it never happened. That was not accurate. In the findings of fact above there is reference to the training provided. At the point at which the claimant commenced ill health absence, Mrs Southall had offered further one-to-one training to the claimant and had made arrangements for it to be provided. What was alleged was neither a breach of the duty of trust and confidence, nor was it the reason why the claimant resigned.

151. Issue 1(5) was the provision of information on SharePoint. It is clear that the claimant did find SharePoint, and the way that resources were stored on it, to be confusing and difficult to use. However, the fact that she did and even if it was, the Tribunal did not find that storing resources on SharePoint was a breach of the duty of trust and confidence. It was also not the reason why the claimant resigned.

152. Issue 1(6) was the "*rocket science*" comment which has already been addressed by the Tribunal in relation to the discrimination allegations. The Tribunal did not find that it was a comment directed at the claimant. It did find that the comment was said by Mrs Southall in a meeting. The claimant did not raise it at the time. There was no evidence that other employees had messaged the claimant after the comment was said. The comment being said in a meeting was not a breach of the duty of trust and confidence. The comment was not the reason why the claimant resigned in the light of the timing of the claimant's resignation.

153. Issue 1(7) arises from Project Rouge. In the list of issues, it was alleged that the breach was that the respondent's manager knew that the job would be moving offshore but the respondent did not inform the claimant of this fact. The respondent was perfectly entitled to keep the planning and implementation of Project Rouge confidential and the claimant's manager being aware of the project and not telling the claimant about it, was not a breach of the duty of trust and confidence. Mrs Aulakh did explain the impact of the project to the claimant shortly after the other members of the team (who had not signed NDA's and worked on the project) were informed. The timing of the claimant being informed was not a breach of the duty of trust and confidence.

154. Issue 1(8) was the conversation between Mrs Southall and the claimant on 13 July 2020 which has already been addressed. The Tribunal did not find that Mrs Southall informed the claimant that there was a problem with not just some of the work but with all of it. There is no doubt that the claimant took significant offence at what Mrs Southall in fact said to her in that conversation, in the context of her long working history. That was part of the reason why the claimant resigned. However,

the Tribunal did not find that what was said to the claimant was a breach of the duty of trust and confidence. An employer is able to raise and address performance concerns with an employee, where they arise. The issues were, at that point, being addressed informally and the conversation was a preface to providing the claimant with coaching or training on the issues raised. The conversation clearly did not go well. However, the Tribunal did not find that the conversation was a breach of the duty of trust and confidence (when the law, as outlined, about what is required for such a breach, was taken into account).

155. Issue 1(9) recorded the alleged breach as being that the claimant was shocked and surprised when Mrs Aulakh told the claimant the job had gone offshore on or around 5 August 2020. The list of issues said that when the claimant was informed that her job had gone offshore, she was not given any opportunity to be consulted or to consider any alternative work

156. In the submission document present on her behalf, the claimant said of Mrs Aulakh that she "*was a lovely witness*". Mrs Aulakh was the duty of care manager who explained the position with the claimant's role and the work during the claimant's absence on ill health grounds. A more detailed meeting had been conducted with the other members of the claimant's team with a presentation, but the claimant had been absent and had not been able to attend. Mrs Aulakh informed the claimant that some of the work was going offshore. What was said and the claimant's own submissions about what had been explained to her, is detailed at paragraph 48 above.

157. The Tribunal did not find that the respondent's case and the evidence of the witnesses was consistent about whether or not the claimant's role was under threat of redundancy or whether or not there was in fact redundancy of the claimant's role. The lack of clarity is addressed at paragraphs 78-80 above. If, after a five day Tribunal hearing, the Tribunal remained confused, it fully understood why the claimant was confused, after her conversations with Mrs Aulakh on 5 August 2020 and shortly thereafter. However, confusion about what may occur as part of a reorganisation or potential redundancy process when first informed about it, did not in the Tribunal's view amount to a breach of the duty of trust and confidence where further meetings and consultation were due to take place.

158. From the respondent's witnesses' evidence it was clear that they could not tell the Tribunal exactly what role the claimant could or would have fulfilled post reorganisation, because the claimant was initially absent due to ill health and then resigned, so the matter was never resolved.

159. Looking at the issues/allegation upon which the claimant relied, as recorded in the list of issues, Mrs Aulakh informing the claimant about the work being offshored on 5 August 2020 was not of itself a breach of the duty of trust and confidence. It was appropriate for her to do so. What she told the claimant was that there would be a process, and it is clear that the claimant knew that there was work available. In particular, the claimant's GP's letter (330) shows that the claimant had informed her GP that she had been asked to talk about new roles and new training. The Tribunal understood that there would have been some confusion on the part of the claimant about what exactly the reorganisation meant for her, but it is clear that she knew that the respondent wished to talk about other work/roles available.

160. The second sentence in issue 1(9) (as recorded in the list of issues) was not accurate. The Tribunal found that the claimant was given the opportunity to meet and talk about alternative work. The claimant's GP had specifically requested that Mrs Aulakh stopped asking the claimant to consider such issues whilst absent on ill health grounds. As at the date of the claimant's resignation, she was due to meet with Mr Patel (her manager's manager) a few days later. It was recorded in the claimant's submissions that Mrs Aulakh had told her that ultimately a new role/work/offer of suitable alternative employment was being sourced.

161. The Tribunal did not find that what the claimant was informed by Mrs Aulakh on 5 August 2020 or in subsequent conversations, was a fundamental breach of her contract of employment. The Tribunal understood that what the claimant was told about her duties going offshore was a difficult thing to be told. However, it was not a breach of the duty of trust and confidence to be told about it, indeed the respondent was obliged to do so. The claimant resigning when she did, precluded the respondent from entering into further consultation/discussion with her about her future role or alternative roles.

162. The Tribunal found that part of the reason why the claimant resigned was what she was told by Mrs Aulakh and the process being undertaken. The claimant said that in her resignation email (418) and her contemporaneous grievance.

163. The Tribunal accepted that the respondent wanted to keep the claimant in employment, and it was not the respondent's intention to end the relationship. It was not the case that the respondent was seeking to (or did) conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust. Unfortunately, the claimant resigned before the implications of Project Rouge for her were able to be fully explored, including potentially in the meeting which was due to take place very soon afterwards. That stopped consultation/discussion taking place when the impact on the claimant's role, or the availability of alternative roles, could have been fully explored. The Tribunal did not find that the respondent breached the duty of trust and confidence in what the claimant was informed by Mrs Aulakh.

164. Issue 1(10) (the GDPR issue) is recorded in full in the attached list of issues. The Tribunal found that the issue was not the reason why the claimant resigned. There was nothing which showed that, at the time, that was why the claimant had chosen to end her employment. In reaching this decision the Tribunal particularly focussed upon the resignation email and the grievance raised at the same time, neither of which raised this issue as being why she resigned (at least in any identifiable way). The Tribunal accepted Mrs Patel's evidence about the method she used with the system. It is not this Tribunal's role to determine whether any breach of GDPR occurred. The respondent's witnesses were adamant that the respondent did not breach its GDPR obligations. Whilst it might be entirely possible that unlawful working practices might breach the duty of trust and confidence, in this case the Tribunal did not find that any such perception of such practices was genuinely something which the claimant considered at the time to have been a breach of her employment contract. They were not why she, in fact, resigned.

165. Issue 1(11) was the alleged breach of the duty of trust and confidence that, on 14 August 2020 the claimant presented an informal grievance, and Mrs Aulakh knew

about it and did not address it, as did a more senior manager, Sanjay Patel. In, or around, early August 2020 (the precise date in the list of issues appeared to be inaccurate) the claimant explained to Mrs Aulakh the matters about which she was not happy at that time. As the duty of care manager, Mrs Aulakh knew about the claimant's dissatisfaction. The Tribunal accepted Mrs Aulakh's evidence (as confirmed in her notes (316)) that the claimant told her that she was considering raising a grievance, not that she was doing so at that time. It was Mrs Aulakh's understanding that the claimant was talking to (or would talk to) her trade union about her proposed grievance. Mrs Aulakh provided the claimant with a copy of the grievance policy. The claimant did not raise a formal grievance until the date when she resigned, when her resignation email was accompanied by her written grievance. There was no evidence that Mr Patel knew about the claimant's complaints in early August 2020 and, in any event, he had appointed Mrs Aulakh as the duty of care manager to be the primary managerial point of contact with the claimant.

166. The Tribunal accepted that the way that her complaints had been handled, following them being explained to Mrs Aulakh, was a part of the reason why the claimant resigned as she explained at the time (where she described her grievance as having been "*disregarded*")(334). However, the Tribunal did not find that Mrs Aulakh's response to what she was told by the claimant was a breach of the duty of trust and confidence. She listened to the claimant's complaints. The claimant's line manager had been changed during her absence. Mrs Aulakh understood the claimant was speaking to her trade union and intended to raise a formal grievance. She waited for the claimant to raise the grievance formally. Doing so was not a breach of the duty of trust and confidence and, in those circumstances, could not be. The respondent's policy did contain wording which encouraged grievances to be raised and addressed informally if possible, as many policies do. However, the fact that Mrs Aulakh awaited the formal grievance and did not take some semi-formal steps to address what she was told by the claimant (whether under the informal procedure or otherwise), was not a breach of the duty – it was a sensible and appropriate response.

167. Issue 1(12) was the allegation that the claimant told Sanjay Patel she wanted to make the grievance formal on or around 14 or 15 September 2020, but it was ignored. The way in which the claimant's formal grievance was handled could not possibly have been part of the reason why the claimant resigned, because she only raised her formal grievance at the same time as she resigned. The resignation could not have been in response to the way the formal grievance had been handled, as it was only raised as she resigned. The Tribunal did not need to determine whether any delay in addressing the formal grievance was (or could have been) a fundamental breach of contract, because, even if it had been, it was not why the claimant chose to resign. Ultimately, the claimant chose not to pursue her formal grievance.

168. After considering each of the alleged breaches of the duty of trust and confidence individually as explained, the Tribunal also considered whether the matters found, collectively, also amounted to a breach of the duty of trust and confidence. The Tribunal did not find that they did so, for the reasons already explained. The Tribunal did not find that the claimant was constructively dismissed, whether the matters listed were considered individually or collectively.

169. The claimant and her accompanier also put forward an argument which was not included in the list of issues, but which the Tribunal did nonetheless consider. It was contended that the respondent sought to manage out the claimant. It was said that the respondent acted dishonestly and without good faith. It was contended that the respondent took the approach that it did, in an attempt to persuade the claimant to leave. The Tribunal did not find that the claimant was being managed out as alleged. The respondent was offering the claimant coaching and support. The Tribunal did not find that Mrs Southall's telephone conversation of 13 July was part of a plot or was had with the intention of making the claimant wish to leave. The Tribunal also noted that Mrs Southall ceased to manage the claimant when the claimant raised issues with her, and the claimant was instead assigned a duty of care manager who was removed from the issues. That was a supportive measure. The Tribunal's view, having heard the respondent's witnesses, was not that they were engaged in any plot or conspiracy to manage the claimant out as alleged.

170. Issues 6, 7 and 8 did not need to be determined, no such reason having been advanced by the respondent.

Wrongful dismissal

171. The issues to be determined in the claimant's wrongful dismissal claim were set out at issues 27-29. As the Tribunal has determined that the respondent did not breach the duty of trust and confidence, it has found that it did not fundamentally breach the claimant's contract of employment. As a result, the claimant was not wrongfully dismissed by the respondent in breach of contract. The claimant chose to resign with immediate effect (even after she was offered the opportunity to retract her resignation) and accordingly her contract was not breached by the respondent, and she was not entitled to notice from the respondent, or to damages arising from a breach by the respondent.

Redundancy

172. The claimant also claimed a redundancy payment and the issues were set out at 31 and 32 of the list of issues. The Tribunal did not find that redundancy was the reason for the termination of the claimant's employment. Whilst, at the time the claimant chose to resign, the reorganisation and off-shoring was being explored with her, she was not redundant and had not had her employment terminated by reason of redundancy. Fundamentally, the claimant jumped the gun when she resigned. There was due to be a meeting. Discussion about the claimant's role and the implications of the off shoring for the role and the claimant, were ongoing. As already recorded, the Tribunal accepted that the respondent was not seeking to end the claimant's employment, rather it was seeking to retain her either in her role or an alternative one. As a result of the timing of the claimant's resignation ahead of those further discussions taking place, the Tribunal did not need to consider whether other roles available would have constituted suitable alternative employment had they been offered to the claimant, and/or whether the claimant would have been acting reasonably to have rejected any such employment offered. Those issues could only arise where the Tribunal had found that the claimant was dismissed by reason of redundancy. She was not dismissed, she resigned. She was not entitled to a redundancy payment as a result.

Summary

173. For the reasons explained above, the Tribunal found for the claimant in her claim that she had not been paid for all of the accrued but untaken annual leave to which she was entitled, but did not find for her in any of her other claims.

Employment Judge Phil Allen

16 October 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

19 October 2023

FOR THE TRIBUNAL OFFICE

Appendix to the Judgment – agreed list of issues

Unfair Dismissal – section 95 and section 98 Employment Rights Act 1996

1. The claimant relies on the following as breaches of the implied duty of trust and confidence:

   (1) When the respondent introduced a new ticketing system and procedures in January 2020, the new system had problems and did not work properly. The claimant was having problems adapting to the new system because of the problems that were created by the system and the lack of appropriate training-the respondent introduced some training which took place in huddles. The claimant could not fully participate because she could not hear properly.

   (2) The claimant was not always able to participate in the training because she was on a call. Sometimes the training was listed for an hour and she could only do part of it.

   (3) The training was done by people who were not trainers and did not know how to project their voice, meaning the claimant could not hear. This occurred between February and July 2020.

   (4) The claimant asked Sandra Southall, her manager, for extra training in the period January to July 2020. She told the claimant she would get training for her but it never happened.

   (5) The respondent provided information on SharePoint which was confusing and did not provide the claimant extra time to read it thoroughly, which she requested.

   (6) When the claimant was on a team conference call and asked whether time to study the documentation would be given, Sandra Southall said in front of everyone, “It’s not rocket science”. This happened in or around April 2020, and she failed to take into account the claimant's disability and made her feel belittled and embarrassed.

   (7) The respondent’s manager knew that the job would be moving offshore but the respondent did not inform the claimant of this fact.

   (8) On 13 July Sandra Southall said she wished to speak to the claimant and told her in conversation that there was a problem with not just some of the claimant’s work but with all of it. She said her concerns about the claimant's work had begun in January 2020.

   (9) The claimant was shocked and surprised when Jazz Aulakh told the claimant the job had gone offshore on or around 5 August 2020. When the claimant was informed that her job had gone offshore she was not given any opportunity to be consulted or to consider any alternative work.

(10) Whilst the claimant was absent from work on sick leave she reflected the working practices within her team. On more than one occasion, on a regular basis, from January, February, March and April 2020 she witnessed Rekha Patel using the private access details of the respondent's customers, being their log-on user details and passwords, in order to access customer portals, from the customer's log-in dashboard, in order to carry out certain actions. The claimant considers that these practices may not be legal. (In the course of her employment the claimant had received training on GDPR and privacy and protection of data held as part of working practice).

(11) On 14 August 2020 the claimant presented an informal grievance. Jazz Aulakh knew about it and did not address it, as did a more senior manager, Sanjay Patel.

(12) The claimant told Sanjay Patel she wanted to make the grievance formal on or around 14 or 15 September 2020 but it was ignored.

2. Did the facts relied upon by the claimant above occur?

3. If yes, did that breach the implied term of trust and confidence? The Tribunal will take into account the actions or omissions and decide whether individually or cumulatively:

(1) the respondent had reasonable and proper cause for those actions; and if not

(2) whether the respondent behaved in a way that when viewed objectively was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.

4. Was the breach of contract a reason for the claimant's resignation?

5. Did the claimant affirm the contract before resigning, by delay or otherwise?

6. Has the respondent shown the reason or principal reason for the fundamental breach of contract?

7. Was it a potentially fair reason?

8. Has the respondent complied with the fairness test in section 98(4) Employment Rights Act 1996?

Age Discrimination

9. What is the age group to which the claimant belongs? The claimant relies on an age group over 50.

10. Did the following facts occur between January and July 2020:

The team the claimant was in consisted of people who were 50+ and younger members who were in their 20s or 30s. The claimant says :-

(i) older members of the group were left to answer telephone calls and

(ii) were not privy to information given to the younger members of the team about the new system.

(iii)The younger members of the team were also invited to work with the offshore team.

11. If yes, did the claimant reasonably see the treatment as a detriment?

12. If yes, has the claimant proved facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances of a different age group would have been treated? The claimant relies on the comparators of Vincent Chirino, Mischa Small and Ash Patel.

13. If so, can the respondent show there was no less favourable treatment?

14. Was the treatment a proportionate means of achieving a legitimate aim?

15. What is the legitimate aim and could something less discriminatory have been done instead?

Disability Discrimination

16. Was the claimant a disabled person within the meaning of section 6 Equality Act 2010, and did the respondent have knowledge or could they reasonably have been expected to have had knowledge of disability?

Discrimination arising from Disability (section 15 Equality Act 2010)

17. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

18. Did the respondent treat the claimant unfavourably in any of the following respects:

    (1) The claimant had to participate in training for the new system;

    (2) When the claimant was on a team conference call and asked whether time to study the documentation would be given, Sandra Southall said to her in front of everyone, “It’s not rocket science”. This happened in or around April 2020, and she failed to take into account the claimant's disability and made her feel belittled and embarrassed.

    (3) On 13 July Sandra Southall said she wished to speak to the claimant and told her in conversation that there was a problem with not just some of the claimant’s work but with all of it. She said her concerns about the claimant's work had begun in January 2020. The claimant was shocked and surprised.

19. Did those things occur?

20. If yes, did they arise because of "something" in consequence of the claimant's disability? What is the "something"? Did it arise in consequence of disability?

    The claimant has confirmed that the "something" arising in consequence of her disability are:

    20.1 the need for people to speak clearly and for the claimant to see their lips when speaking; and

    20.2 the need for a quiet room.

21. If the claimant can show she was unfavourably treated because of "something" arising in consequence of disability, can the respondent show the treatment was a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments – sections 20-21 Equality Act 2010

22. Did the respondent know or could it reasonably have been expected to know the claimant had the disability? From what date?

23. A PCP is a provision, criterion or practice. Did the respondent have the following PCPs:

    (1) Requiring employees in the claimant's team to take part in meetings (in person prior to COVID or post-COVID remotely by video link)

24. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the disability in that the claimant had difficulty in hearing what was said?

25. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

26. Did the respondent fail in its duty to take such steps as was reasonable to take to avoid the disadvantage? The claimant says that the following adjustments would have been reasonable:

    (1) For participants in the meeting to be reminded of the claimant's hearing impairment and to be asked to speak clearly;

    (2) If the meetings were in person, to project their voice.

Wrongful Dismissal

27. What was the claimant's notice period?

28. Was the claimant paid for that notice period?

29. Was the claimant entitled, having been constructively dismissed, to be paid in lieu of notice?

Holiday Pay

30. The claimant considers she is owed accrued but untaken holidays on the termination of employment – is that correct? If so, how many days?

Redundancy

31. What was the reason for the termination of the claimant's employment? Was it redundancy?

32. If yes, is the claimant entitled to a redundancy payment?

Jurisdiction – time point

33. In light of ACAS Early Conciliation commenced on 6 October 2020, any acts/omissions which pre-date 7 July 2020 may be out of time. The Tribunal shall decide:

    a. Whether such acts form part of conduct extending over a period past 7 October 2020 and so are rendered in time; and

    b. If not, should time be extending under s.123 of the Equality Act 2010 on the grounds that it is just and equitable to do so?

    c. Any omissions to act shall be considered having regard to the provisions of section 123(3)(b) and (4).

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990
ARTICLE 12

Case number: **2418478/2020**

Name of case: **Mrs P Pantegi** v **BT Plc**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 19 October 2023

the calculation day in this case is: 20 October 2023

the stipulated rate of interest is: **8% per annum**.

For the Employment Tribunal Office