EMPLOYMENT TRIBUNALS

Claimant: Mrs E Neal

Respondent: Croner-i Limited

Heard at: Midlands East Tribunal

On: 7, 10,11,12, 13 and 14 June 2024

Before: Employment Judge Brewer
Ms K Srivastava
Ms J Dean

Representation
Claimant: Mr C Crow, Counsel
Respondent: Ms J Charalambous, Pupil Barrister

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The claimant's claim for unfair dismissal succeeds.
2. The claimant's claim for direct disability discrimination succeeds to the extent set out in the reasons below.
3. The claimant's claim for discrimination contrary to section 15 Equality Act 2010 succeeds to the extent set out in the reasons below.
4. The claimant's claim for harassment related to disability succeeds to the extent set out in the reasons below.
5. The claimant's claim for failure to make reasonable adjustments fails and is dismissed.

REASONS

Introduction

1. We heard this case over six days. The first day was taken up with reading and other case management issues. Evidence started on day two. We heard submissions on the last day and reserved our judgment which we set out below.

2. During the hearing we heard evidence from the claimant and, on behalf of the respondent from Mr Ben Chaplin, Managing Director and Ms Andrea Litchfield, formerly the Operations Manager.

3. We had a bundle of documents running to 325 pages and were presented with various other documents during the hearing including skeleton arguments and we are grateful to both representatives for their assistance in navigating us through this case.

Issues

4. There was an agreed list of issues which was amended as the hearing progressed. The final version is as follows:

Unfair dismissal

4.1. What was the principal reason for the claimant's dismissal? The respondent contends it was redundancy.

4.2. Was the reason for the claimant's dismissal one of the potentially fair reasons.

4.3. Did the respondent act reasonably in treating the redundancy as a sufficient reason to justify dismissing the claimant and did this fall within the band of reasonable responses which a reasonable employer might have adopted?

4.4. Did the respondent follow a fair procedure in the redundancy of the claimant and follow a fair consultation process?

4.5. Did the respondent consider suitable alternative employment for the claimant and offer her this alternative employment.

4.6. Should the procedure found to be unfair, or any reductions to be made in line with the **Polkey** principles.

Direct disability discrimination

4.7. What primary facts does the claimant reliant upon from which the tribunal could infer that [in the absence of an explanation from the respondent] she was treated less favourably because of her disability.

4.8. The claimant relies on the following allegations,

4.8.1. the claimant was dismissed,

4.8.2. the claimant was required to undertake an exam and/or given less/insufficient time to complete it,

4.8.3. the redundancy process associated with the claimant's dismissal was unfair,

4.8.4. between 21 June 2021 and 12 August 2021, the claimant's access to her teams HR/annual leave requests was not returned,

4.8.5. between 21 June 2021 and 12 August 2021, Mr Chaplin and Ms Litchfield changed their attitude towards the claimant, specifically Mr Chaplin spoke over the claimant during a Microsoft teams meeting,

4.8.6. on 24 June 2021 Mr Chaplin ignored the claimant and did not acknowledge her return to work in a Microsoft Teams meeting,

4.8.7. on 25 June 2021 Mr Chaplin contradicted the claimant's view,

4.8.8. on 30 June 2021 Ms Litchfield failed to make the claimants desk available to her and she felt to assign the claimant a desk,

4.8.9. on 21 July 2021 Mrs Litchfield provided the claimant with less/insufficient time to complete the technical questions,

4.8.10. on 19 August 2021 Mr Chaplin was asked questions inferring that the claimant was to be criticised for her absences,

4.8.11. on 9 September 2021 Mr Chaplin referred to the claimants work as administrative

4.8.12. Mr Chaplin contradicted the claimant in front of her peers.

4.9. Insofar as the above acts are admitted or proven, has the respondent advanced a non a discriminatory explanation that is capable of defeating such an inference.

Section 15 Equality Act 2010

4.10. Did the respondent treat the claimant unfavourably as follows,

4.10.1. between 21 June 2021 and 12 August 2021 decisions were made about the claimant's teams without involving her, specifically,

4.10.1.1. the need to review technical work was removed,

4.10.1.2. the claimant's access to her teams HR/annual leave requests was not returned,

4.10.2. on 24 June 2021 Mr Chaplin and Ms Litchfield ignored the claimant and did not acknowledge her return to work in Microsoft Teams meetings,

4.10.3. on 24 June 2021 Ms Litchfield did not take the claimant's complaint of exclusion seriously,

4.10.4. on 19 August 2021 Mr Chaplin was asked questions inferring that the claimant was to be criticised for her absences,

4.10.5. excluded the claimant from meetings ref: VAT review work,

4.10.6. by dismissing her.

4.11. If so, was any such unfavourable treatment as the claimant may prove because of something arising in consequence of the claims disability. The claimant relies on her absence from the work premises and/or in relation to dismissal, her handover of work to cover her absence.

4.12. Was the treatment a proportionate means of achieving a legitimate aim.

4.13. In respect of 4.11.1.1, 4.11.1.2 and 4.11.1.4 the respondent relies upon a proportionate means of managing the claimant's team in her absence the legitimate aim being allowing the team to run with appropriate oversight in the claimant's absence.

4.14. In respect of 4.11.3 the respondent relies upon a proportionate means of achieving a legitimate aim of keeping employees' personal matters private where they have not been informed that the matters can be discussed.

4.15. In respect of 4.11.4 the respondent relies upon addressing complaints in the same manner they are complained of, namely if an issue is brought in an informal manner than it is addressed in an informal way. The legitimate aim being the effective running of the business.

4.16. in respect of 4.11.7 the respondent relies upon not retaining employees in a business where there is no longer a requirement or need for their role

Reasonable adjustments

4.17. Did the respondent have the following PCPs,

4.17.1. PCP1 - the respondent required the claimant to attend work and sit next to/in the same area as "potentially infected" individuals,

4.17.2. PCP2 - the respondent's sick pay policy.

4.18. Did any such PCPs put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled any relevant time, in that,

4.18.1. with regard to PCP1: she could not safely comply with these requirements,

4.18.2. with regards to PCP2: she had a greater likelihood of suffering a loss of pay, alternatively having to use annual leave to avoid a loss of pay, during a phased return to work.

4.19. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage.

4.20. If so, were there any steps that were not taken that could have been taken by the respondents to avoid such disadvantage:

4.20.1. work from home,

4.20.2. allowing full pay during the period of phase return.

Harassment related to disability

4.20.3. Did the respondent engage in unwanted conduct as follows,

4.20.3.1. between 21 June 2021 and 12 August 2021 Mr Chaplin and Ms Litchfield changed their attitude towards the claimant, specifically,

4.20.3.1.1. Ms Litchfield was dismissive of the claimant and was not interested in things she said,

4.20.3.1.2. Mr Chaplin spoke over the claimant during a Microsoft Teams meeting,

4.20.3.2. on 24 June 2021 Mr Chaplin and Ms Litchfield ignored the claimant and did not acknowledge her return to work in Microsoft Teams meetings,

4.20.3.3. on 24 June 2021 Ms Litchfield did not take the claimant's complaint of exclusion seriously,

4.20.3.4. on 25 June 2021 Mr Chaplin contradicted the claimant's view,

4.20.3.5. on 30 June 2021 Ms Litchfield failed to make the claimant's desk available for her and she failed to assign the claimant a desk,

4.20.3.6. on the 6 July 2021 Ms Litchfield suggested the claimant had insufficient technical knowledge,

4.20.3.7. on 21 July 2021 Ms Litchfield provided the claimant with less/insufficient time to complete the technical questions,

4.20.3.8. on 19 August 2021 Mr Chaplin was asked questions inferring that the claimant was to be criticised for her absences,

4.20.3.9. on 9 September 2021 Mr Chaplin referred to the claimant's work as administrative,

4.20.3.10. Mr Chaplin contradicted the claimant in front of her peers.

4.21. Was the conduct related to the claimant's protected characteristic.

4.22. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has the effect referred to, each of the following must be taken into account,

4.22.1. the claimant's perception,

4.22.2. other circumstances of the case,

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

4.23. If the tribunal decided that any harassment occurred, did the respondent take all reasonable steps to prevent the harassment or discrimination that was necessary in the circumstances.

Jurisdiction

4.24. Were any of the claimants claims of discrimination brought outside of the three-month time limits prescribed by a section 123(1)(a) the Equality Act 2010.

4.25. The respondent asserts that any allegation brought which occurred before 28 July 2021 is out of time.

4.26. Did any such claims form part of conduct extending over a period such has to be treated as being done at the end of the period (s.123(3)).

4.27. If the claim was brought out of time, is it just and equitable to extend time.

Law

5. We set out here a brief explanation of the key law.

Direct disability discrimination

6. In relation to direct discrimination, for present purposes the following are the key principles.

7. Under section 13 Equality Act 2010 (EqA), there are two issues: (a) less favourable treatment and (b) the reason for that less favourable treatment. These questions need not be answered strictly sequentially (**Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337).

8. Given the treatment must be "less favourable" a comparison is required, and a comparator must "be in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class" (**Shamoon** above).

9. The burden of proof is set out in section 136 EqA. The leading cases on the burden of proof pre-date the Equality Act (**Igen Ltd v Wong** 2005 EWCA Civ 142 and **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, [2007] IRLR 246) but in **Hewage v Grampian Health Board** 2012 the Supreme Court approved the guidance given in **Igen** and **Madarassy**.

10. By virtue of section 136, it is for a claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, absent any explanation from the respondent, that the respondent has discriminated against the claimant. If the claimant does that, the burden of proof shifts to the respondent to show it did not discriminate as alleged.

11. In **Madarassy** the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. This merely gives rise to the possibility of discrimination. Something more is needed. Any inference about subconscious motivation has to be based on solid evidence (**South Wales Police Authority v Johnson** 2014 EWCA Civ 73).

Discrimination arising from disability

12. Section 15 EqA, which is headed 'Discrimination arising from disability', provides that a person (A) discriminates against a disabled person (B) if:

    12.1. A treats B unfavourably because of something arising in consequence of B's disability, and

    12.2. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

13. Section 15(2) goes on to state that '[S.15(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.' In other words, if the employer can establish that it was unaware — and could not reasonably have been expected to know — that the claimant was disabled, it cannot be held liable for discrimination arising from disability.

14. In **Secretary of State for Justice and anor v Dunn** EAT 0234/16 the EAT (presided over by Mrs Justice Simler, President) identified the following four

elements that must be made out in order for the claimant to succeed in a S.15 claim:

14.1. there must be unfavourable treatment,

14.2. there must be something that arises in consequence of the claimant's disability,

14.3. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability, and

14.4. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

15. The EHRC Employment Code indicates that unfavourable treatment should be construed synonymously with 'disadvantage'. It states: 'Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably' — para 5.7.

16. In **Pnaiser v NHS England and anor** 2016 IRLR 170, EAT, Mrs Justice Simler considered the authorities, and summarised the proper approach to establishing causation under S.15. First, the tribunal has to identify whether the claimant was treated unfavourably and by whom. It then has to determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant. The tribunal must then determine whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

17. The distinction between conscious/unconscious thought processes (which are relevant to a tribunal's enquiry on a S.15 claim) and the employer's motives for subjecting the claimant to unfavourable treatment (which are not) was described by Simler J in **Secretary of State for Justice and anor v Dunn** EAT 0234/16 in the following terms: '[Counsel for the claimant asserts] that motive is irrelevant. Moreover, he submits that the claimant did not have to prove the reason for the unfavourable treatment but simply that disability was a significant influence in the minds of the decision-makers. We agree with him that motive is irrelevant. Nonetheless, the statutory test requires a tribunal to address the question whether the unfavourable treatment is because of something arising in consequence of disability… [I]t need not be the sole reason, but it must be a significant or at least more than trivial reason. Just as with direct discrimination, save in the most obvious case, an examination of the conscious and/or unconscious thought processes of the putative discriminator is likely to be necessary'. The enquiry into such thought processes is required to ascertain whether the 'something' that is

identified as having arisen as a consequence of that claimant's disability formed any part of the reason why the unfavourable treatment was meted out.

18. In **Hall v Chief Constable of West Yorkshire Police** 2015 IRLR 893, EAT, the EAT clarified that a claimant needs only to establish some kind of connection between the claimant's disability and the unfavourable treatment.

Reasonable adjustments

19. In relation to duty to make Reasonable Adjustments, section 20 states that the duty comprises three requirements, however this case is concerned only with the following

    19.1. a requirement, where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage — S.20(3)

20. In the case of an employer, a 'relevant matter' for the above-mentioned purposes is any matter concerned with deciding to whom to offer employment and anything concerning employment by the employer — para 5, Sch 8.

21. It is no part of the duty to make reasonable adjustments for the employer actively to consult the employee about what adjustments should or could be made (**Tarbuck v Sainsbury's Supermarkets Ltd** 2006 IRLR 664, EAT).

22. The first situation in which the duty to make reasonable adjustments arises is where a 'provision, criterion or practice' (PCP) of the employer's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled — S.20(3) EqA. A PCP is one 'applied by or on behalf of' the employer — para 2(2)(a), Sch 8 EqA.

23. In the non-employment case of **Finnigan v Chief Constable of Northumbria Police** 2014 1 WLR 445, CA, Lord Dyson MR observed that 'the [PCP] represents *the base position* before adjustments are made to accommodate disabilities. It includes all practices and procedures which apply to everyone but excludes the adjustments. The adjustments are the steps which a service provider or public authority takes in discharge of its statutory duty to change the [PCP]. By definition, therefore, the [PCP] does not include the adjustments' (our stress).

24. In **Nottingham City Transport Ltd v Harvey** EAT 0032/12 it was held that where a disabled person claims that a 'practice' (as opposed to a provision or criterion) puts him or her at a substantial disadvantage, the alleged practice must have an element of repetition about it and be applicable to both the disabled person and the non-disabled comparators.

25. In ***Secretary of State for Justice v Prospere*** *EAT 0412/14* the EAT held that 'the importance of properly identifying the PCP cannot be emphasised too strongly', since 'the steps which a respondent is under a duty to take must depend on the particular PCP applied'.

26. In **Griffiths v Secretary of State for Work and Pensions** 2017 ICR 160*,* CA (another case concerning an employer's absence management policy), the Court of Appeal emphasised the importance of identifying not only the relevant PCP but also the precise nature of the disadvantage it creates for a disabled claimant by comparison with a non-disabled person.

27. In **Abertawe Bro Morgannwg University Local Health Board v Morgan** 2018 ICR 1194, CA, the Court of Appeal held that the duty to comply with the reasonable adjustments requirement under S.20 begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage.

28. In **Humphries v Chevler Packaging Ltd** EAT 0224/06 *the* EAT confirmed that a failure to act is an omission and that time begins to run when an employer decides not to make the reasonable adjustment.

29. The Court of Appeal considered the question further in **Kingston upon Hull City Council v Matuszowicz** 2009 ICR 1170, CA. The Court of Appeal noted that, in claims where the employer was not deliberately failing to comply with the duty, and the omission was due to lack of diligence or competence or any reason other than conscious refusal, the employer is to be treated as having decided upon the omission at what is in one sense an artificial date.

30. In the absence of evidence as to when the omission was decided upon, the legislation provides two alternatives for defining that point (see S.123(4) EqA).

31. The first of these, which is when the person does an act inconsistent with doing the omitted act, is fairly self-explanatory.

32. The second option, presupposes that the person in question has carried on for a time without doing anything inconsistent with doing the omitted act, and that then requires consideration of the period within which he or she might reasonably have been expected do the omitted act if it was to be done. In terms of the duty to make reasonable adjustments, that seems to require an inquiry as to when, if the employer had been acting reasonably, it would have made the reasonable adjustments.

33. In determining when the period expired within which the employer might reasonably have been expected to make an adjustment, the tribunal should have regard to the facts as they would reasonably have appeared to the claimant, including what the claimant was told by his or her employer.

34. In **Fernandes v Department for Work and Pensions** 2023 EAT 114, the Appeal Tribunal, having analysed the decisions of the Court of Appeal in **Matuszowicz** and **Abertawe** (both above), offered guidance as to how tribunals should determine the notional date from which limitation is to run in reasonable adjustments cases. In the absence of a finding that the employer has made a specific decision not to alleviate a disadvantage, there must be judicial analysis to identify the notional date.

34.1. This analysis must begin with the identification of the feature which causes the disadvantage (a PCP, physical feature or auxiliary aid). This will be a fact which dates the start of the disadvantage.

34.2. The next element is a factual finding to determine when it would be reasonable for the employer to have to take steps to alleviate the disadvantage. This will be a finding of fact which dates when the breach occurred.

34.3. The tribunal should then ask if there are facts which would allow it to conclude that the employer acted inconsistently with the duty to make adjustments. If there are, then that determines the notional date. If there is no inconsistent act by the employer, then there will come a time when it would be reasonable for the employee, on the facts known to him or her, to conclude that the employer is not going to comply with the duty. In those circumstances, identifying the notional date is a jurisdictional question in which there should be an objective analysis of the facts known to the employee, which is then considered on the basis of what a reasonable person would conclude from those facts about the employer's intention to comply with the duty. However, if the notional date means the claim falls outside the primary time limit, the tribunal would then be entitled to consider the claimant's subjective state of mind when considering the discretionary question of whether time should be extended on a just and equitable basis.

Harassment

35. Three forms of behaviour are prohibited under S.26 EqA, which is entitled 'Harassment':

35.1. 'general' harassment, i.e. conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment — S.26(1);

35.2. sexual harassment — S.26(2); and

35.3. less favourable treatment following harassment — S.26(3).

36. The general definition of harassment set out in S.26(1) states that a person (A) harasses another (B) if:

36.1. A engages in unwanted conduct related to a relevant protected characteristic — S.26(1)(a); and

36.2. the conduct has the purpose or effect of (i) violating B's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B — S.26(1)(b).

37. There are three essential elements of a harassment claim under S.26(1):

37.1. unwanted conduct;

37.2. that has the proscribed purpose or effect; and

37.3. which relates to a relevant protected characteristic.

38. Mr Justice Underhill, then President of the EAT, expressed the view that it would be a 'healthy discipline' for a tribunal in any claim alleging unlawful harassment specifically to address in its reasons each of these three elements — **Richmond Pharmacology v Dhaliwal** 2009 ICR 724, EAT (a case relating to a claim for racial harassment brought under the Race Relations Act 1976 (RRA)). Nevertheless, he acknowledged that in some cases there will be considerable overlap between the components of the definition — for example, the question whether the conduct complained of was unwanted may overlap with the question whether it created an adverse environment for the employee. An employment tribunal that does not deal with each element separately will not make an error of law for that reason alone — **Ukeh v Ministry of Defence** EAT 0225/14.

Unwanted conduct

39. The Equality and Human Rights Commission's Code of Practice on Employment ('the EHRC Employment Code') notes that unwanted conduct can include 'a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour' — para 7.7. The conduct may be blatant — (for example, overt bullying) — or more subtle (for example, ignoring or marginalising an employee). An omission or failure to act can constitute unwanted conduct as well as positive actions (see, for example, **Marcella and anor v Herbert T Forrest Ltd and anor** ET Case No.2408664/09 below and Owens v Euro Quality Coatings Ltd and ors ET Case No.1600238/15, in which an employer's failure to remove a picture of a swastika for some weeks amounted to unwanted conduct).

40. The following have all been held to constitute unwanted conduct:

40.1. the failure to provide female toilet facilities on a building site for an employee who was the only woman in a team of skilled bricklayers — **Marcella and anor v Herbert T Forrest Ltd and anor ET** Case No.2408664/09. In reaching its decision that this constituted harassment under the SDA, the tribunal took into account the fact that the Factories Act 1961 and other health and safety provisions clearly envisage that it is preferable for sanitary facilities to be provided separately for men and women, as well as M's evidence that she felt it was degrading to have to share a toilet — which did not have a lock on the door — with a number of men;

40.2. the unilateral removal of various adjustments that had evolved to accommodate an employee's disability — **Williams v North Wales Police** ET Case No.2902135/08;

40.3. a written warning (later overturned) — **Grace v Royal Bank of Scotland Insurance Services Ltd** ET Case No.1102412/09;

40.4. office gossip — **Nixon v Ross Coates Solicitors and anor** EAT 0108/10;

40.5. nicknaming a French employee 'Inspector Clouseau' — **Basile v Royal College of General Practitioners and ors** ET Case No.2204568/10; and

40.6. a drip feed of comments relating to the claimant's Irish nationality, including being dubbed 'Irish', comments about terrorism and bomb making, and mimicry of his accent — **Sherlock v Barbon Insurance Group Ltd** ET Case No.2601755/11.

41. Where there is disagreement between the parties, it is important that an employment tribunal makes clear findings as to what conduct actually took place, such as what words were used. In **Cam v Matrix Service Development and Training Ltd** EAT 0302/12 an employment tribunal had erred by failing to find whether or not the alleged harasser had used the expression 'white trash', given that he denied doing so.

Unwanted

42. In **Reed and anor v Stedman (above) and Insitu Cleaning Co Ltd v Heads** (above) (both decided before the statutory harassment provisions came into force) the EAT held that the word 'unwanted' is essentially the same as 'unwelcome' or 'uninvited'. This is confirmed by the EHRC Employment Code (see para 7.8). The EAT in **Thomas Sanderson Blinds Ltd v English** EAT 0316/10 pointed out that unwanted conduct means conduct that is unwanted by the employee. The necessary implication is that whether conduct is 'unwanted' should largely be assessed subjectively, i.e. from the employee's point of view. This could possibly become an issue where employee B is alleging that he or she has suffered harassment by virtue of having witnessed harassment suffered by employee C. Depending upon the circumstances, the employer might be able to argue that although the treatment was unwanted by C it did not affect B and therefore was not unwanted conduct so far as B was concerned.

43. That said, the conduct does not have to be directed specifically at the complainant in order for it to be unwanted by him or her. The EHRC Employment Code gives the following example: during a training session attended by both male and female workers, a male trainer directs a number of remarks of a sexual nature to the group as a whole. A female worker finds the comments offensive and humiliating to her as a woman. She would be able to make a claim for harassment, even though the remarks were not specifically directed at her (see para 7.10).

44. The employee does not even have to be present when the words/actions occur.

'**Violating dignity**

45. Perhaps surprisingly, there are few cases examining precisely what is meant by violating a claimant's dignity. In **Richmond Pharmacology v Dhaliwal** 2009 ICR 724, EAT, Mr Justice Underhill, then President of the EAT, said: 'Not every racially

slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended'. Mr Justice Langstaff, then President of the EAT, affirmed this view in **Betsi Cadwaladr University Health Board v Hughes and ors** EAT 0179/13. In that case a senior nurse suffered from Parkinson's to the extent that she could no longer do clinical work. Her grade and pay were maintained by creating a non-clinical post for her, which initially was a meaningful job but which after about three years had become menial. Her responsibility for training was taken over by someone else without reference to her; she wrote detailed policies but these were not progressed and she was given no clear explanation as to why this was; she had initially been proactive in respect of stock control but was subsequently expected to order what other people asked her to; she was given to think that her system of recording stock was changed; and ultimately her sole role was to manage the stocking of cardboard boxes and on one occasion to clear out a room and move furniture. She was signed off sick with stress and ultimately dismissed.

46. H brought a claim in an employment tribunal, which found that a number of matters, including the circumstances which led to the deterioration in the quality of her role, collectively constituted unwanted conduct that had the effect of violating her dignity and of creating a demeaning environment. However, the EAT held that not every matter, taken individually, justified such a conclusion. In particular, a letter sent to some consultants referring to the deterioration in H's health, of which they were aware, could not justify a finding that it violated her dignity or created a degrading environment, even if she had found it upsetting. Nor could a referral to occupational health violate her dignity or create a degrading environment. The EAT observed that 'the word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence'. However, the EAT upheld the tribunal's conclusion that the Board's conduct in permitting or causing the deterioration in H's position, albeit unwitting, clearly violated her dignity. It observed: 'One only has to think of a grade 6 nursing sister now being asked to look after cardboard boxes to understand how that is justified'.

Intimidating, hostile, degrading, humiliating or offensive environment

47. Some of the factors that a tribunal might take into account in deciding whether an adverse environment had been created were noted in **Weeks v Newham College of Further Education** EAT 0630/11. Mr Justice Langstaff, then President of the EAT, held that a tribunal did not err in finding no harassment, having taken into account the fact that the relevant conduct was not directed at the claimant, that the claimant made no immediate complaint and that the words objected to were used only occasionally. (However, he noted that tribunals should be cautious of placing too much weight on the timing of an objection, given that it may not always be easy for an employee to make an immediate complaint.) Langstaff P also pointed out that the relevant word here is 'environment', which means a state of affairs. Such an environment may be created by a one-off incident, but its effects must be of longer duration to come within what is now S.26(1)(b)(ii) EqA.

48. The meaning of the term '**environment'** was considered in **Pemberton v Inwood** 2017 ICR 929, EAT, where P, a Church of England priest, was refused a licence that would allow him to take up a position as a hospital chaplain because he had entered into a same-sex marriage against the Church's doctrines. The EAT upheld the tribunal's decision that this was not unlawful discrimination or harassment, because a religious occupational requirement exception applied. But the EAT also noted that the tribunal had apparently failed to engage with the question whether the decision not to grant the licence and its communication created an 'environment'. P argued that this could be inferred from the tribunal's findings that the refusal obviously caused him stress, would have been humiliating and degrading for someone in his position, and was a stunning blow. However, the EAT found it hard to see that the tribunal had shown how it found that the requisite environment was thereby created.

Single or multiple events

49. The adverse purpose or effect can be brought about by a single act or a combination of events. The EAT in **Reed and anor v Stedman** 1999 IRLR 299, EAT, made some useful comments about how the effect should be assessed when dealing with a combination of events, suggesting that tribunals should adopt a cumulative approach rather than measure the effect of each individual incident.

    49.1. e.g. **Rowland v Cryo Store Ltd** ET Case No.2302560/09: a tribunal held that a one-off remark, while sexist and offensive, was not serious enough to amount to harassment. R, who was employed by CS Ltd as a senior storage technician, saw an e-mail between two company directors, H and W, which discussed managing her out of the business. The e-mail reminded W that he was 'now travelling in hostile territory' and so should make 'no sexist jokes' and 'whatever you do don't get her pregnant'.

    49.2. e.g**. Quality Solicitors CMHT v Tunstall** EAT 0105/14: T, who was Polish and spoke in 'heavily accented' English, was employed as a paralegal by QS. The tribunal found that she had been unlawfully harassed when her supervisor said to a client 'she is Polish but very nice' or 'she is Polish and very nice'. The EAT considered that it would have been best if the tribunal had decided what had actually been said, but in any event it had erred in that it had not directly and carefully addressed the question whether this single remark could truly be said to have violated her dignity or created an offensive environment for her and, if so, why.

Purpose

50. A claim brought on the basis that the unwanted conduct had the purpose of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment obviously involves an examination of the perpetrator's intentions. As the perpetrator is unlikely to admit to having had the necessary purpose, the tribunal hearing the claim is likely to need to draw inferences from the surrounding circumstances.

Effect

51. In deciding whether the conduct has the effect referred to in S.26(1)(b) (i.e. of violating a person's (B) dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B), each of the following must be taken into account:

    51.1. the perception of B;

    51.2. the other circumstances of the case; and

    51.3. whether it is reasonable for the conduct to have that effect — S.26(4).(Note that S.26(4) is not applicable to 'purpose' cases.)

52. The test therefore has both subjective and objective elements to it. The subjective part involves the tribunal looking at the effect that the conduct of the alleged harasser (A) has on the complainant (B). The objective part requires the tribunal to ask itself whether it was reasonable for B to claim that A's conduct had that effect.

53. In **Pemberton v Inwood** 2018 ICR 1291, CA, Lord Justice Underhill, gave the following guidance: 'In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.'

Subjective element

54. The first part of the statutory test set out in S.26(4) involves examining the act from the complainant's perspective — that is, whether he or she regarded it as violating his or her dignity or creating the proscribed environment (see para 7.18 of the EHRC Employment Code). This is a factual enquiry.

55. Tribunals should bear in mind that different people have different tolerance levels. Conduct that might be shrugged off by one person might be found much more offensive or intimidating by another.

Objective element

56. The objective aspect of the test is primarily intended to exclude liability where B is hypersensitive and unreasonably takes offence. As noted by the EAT in ***Richmond Pharmacology v Dhaliwal*** *2009 ICR 724, EAT*, 'while it is very important that

employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the… legislation…) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase'. It continued 'if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question.'

Related to a relevant protected characteristic

57. In order to constitute unlawful harassment under S.26(1) EqA, the unwanted and offensive conduct must be 'related to a relevant protected characteristic'. However offensive the conduct, it will not constitute harassment unless it is so related, and a tribunal that fails to engage with this point will err — **London Borough of Haringey v O'Brien** EAT 0004/16.

58. Whether or not the conduct is related to the characteristic in question is a matter for the appreciation of the tribunal, making a finding of fact drawing on all the evidence before it – **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor EAT** 0039/19.

59. The words 'related to' in S.26(1)(a) have a broad meaning and holding that conduct that cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it — **Hartley v Foreign and Commonwealth Office Services 2016** ICR D17, EAT.

60. In disability cases, the mere fact that unwanted conduct occurs at a time when a claimant satisfies the definition of a disabled person will not necessarily mean that it is related to the disability. In **Private Medicine Intermediaries Ltd v Hodkinson** EAT 0134/15 H, who was disabled in that she suffered from thyroid dysfunction and cardiac arrhythmia, was absent with work-related depression and anxiety. During her absence, PMI Ltd sent her a letter outlining six areas of concern that it wanted to discuss, none of which was serious. Upset by the letter, H resigned and a tribunal subsequently found that the letter was an act of disability-related harassment. However, the EAT overturned the tribunal's finding in this respect. The tribunal had found that the unwanted conduct had been 'in the circumstances of' H's stress-related illness. However, it had made no finding that that illness related to her underlying disability.

61. Where direct reference is made to an employee's protected characteristic or he or she has been subjected to overtly racist/sexist/homophobic, etc, conduct, the necessary link will usually be clearly established.

62. Where the link between the conduct and the protected characteristic is less obvious, tribunals may need to analyse the precise words used, together with the

context, in order to establish whether there is any (negative) association between the two.

Unfair dismissal

63. **Redundancy** is defined in S.139(1) of the Employment Rights Act 1996 (ERA) The section provides that:

> *'For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to —*
>
> *(a) the fact that his employer has ceased or intends to cease —*
>
> *(i) to carry on the business for the purposes of which the employee was employed by him, or*
>
> *(ii) to carry on that business in the place where the employee was so employed, or*
>
> *(b) the fact that the requirements of that business —*
>
> *(i) for employees to carry out work of a particular kind, or*
>
> *(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.'*

64. Under section 139(1)(b) it is the requirement for employees to do work of a particular kind which is significant. The fact that the work is constant, or even increasing, is irrelevant. If fewer employees are needed to do work of a particular kind, there is a redundancy situation — **McCrea v Cullen and Davison Ltd 1988** IRLR 30, NICA.

65. The EAT has made it clear that there is no need under S.139(1)(b) for an employer to show an economic justification (or business case) for the decision to make redundancies (see **Polyflor Ltd v Old** EAT 0482/02)

66. The test we must apply was set out in **Safeway Stores plc v Burrell** 1997 ICR 523, EAT where Judge Peter Clark set out a simple three-stage test. A tribunal must decide:

66.1. was the employee dismissed?

66.2. if so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

66.3. if so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

67. The test set out in the **Burrell** case was widely acclaimed as bringing light and clarity to a previously dark and muddled area of redundancy law and was subsequently endorsed by the House of Lords in **Murray and anor v Foyle Meats Ltd** 1999 ICR 827, HL.

68. For a dismissal to be by reason of redundancy, a redundancy situation must exist, and it is legitimate for the tribunal to consider that. However, if a genuine redundancy situation exists, it is not for tribunals to investigate the reasons behind such situations (**Moon and ors v Homeworthy Furniture (Northern) Ltd** 1977 ICR 117, EAT).

69. In **Williams and ors v Compair Maxam Ltd** 1982 ICR 156, EAT, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. These were,

    69.1. whether the selection criteria were objectively chosen and fairly applied

    69.2. whether employees were warned and consulted about the redundancy

    69.3. whether, if there was a union, the union's view was sought, and

    69.4. whether any alternative work was available.

70. However, these guidelines are not principles of law but standards of behaviour that can inform the reasonableness test under S.98(4) ERA. A departure from these guidelines on the part of the employer does not lead to the automatic conclusion that a dismissal is unfair, nor should a tribunal's failure to have regard or give effect to one of the guidelines amount to a misdirection in law. It is also noted that these guidelines represent the view of the lay members of the EAT as to fair industrial relations practice in 1982 and are not immutable. Practices and attitudes change with time and the overriding test is whether the employer's actions at each step of the redundancy process fell within the range of reasonable responses.

71. Where there is no customary arrangement or agreed procedure to be considered in determining the **pool** for selection, employers have a good deal of flexibility in defining the pool from which they will select employees for dismissal. In **Thomas and Betts Manufacturing Co v Harding** 1980 IRLR 255, CA. the Court of Appeal said that the employer need only show that they have applied their minds to the problem and acted from genuine motives.

72. The tribunal should judge the employer's choice of pool by asking itself whether it fell within the range of reasonable responses available to an employer in the circumstances. As the EAT put it in **Kvaerner Oil and Gas Ltd v Parker and ors** EAT 0444/02:

> *'different people can quite legitimately have different views about what is or is not a fair response to a particular situation… In most situations there will be a band of potential responses to the particular problem and it may be that both of solutions X and Y will be well within that band.'*

73. In considering whether this was so, the following factors may be relevant:

    73.1. whether other groups of employees are doing similar work to the group from which selections were made

    73.2. whether employees' jobs are interchangeable

    73.3. whether the employee's inclusion in the unit is consistent with his or her previous position, and

    73.4. whether the selection unit was agreed with any union.

74. In order to ensure fairness, the **selection criteria** must not be unduly vague or ambiguous, they must be objective; not merely reflecting the personal opinion of the selector but being verifiable by reference to data such as records of attendance, efficiency and length of service.

75. Provided an employer's selection criteria are objective, a tribunal should not subject them or their application to over-minute scrutiny — **British Aerospace plc v Green and ors** 1995 ICR 1006, CA. Essentially, the task is for the tribunal to satisfy itself that the method of selection was not inherently unfair and that it was applied in the particular case in a reasonable fashion.

76. In order that dismissals on the basis of any particular selection criteria are fair, the application of those criteria must be reasonable.

77. In terms of **consultation**, in **Polkey v AE Dayton Services Ltd** 1988 ICR 142, HL. In that case, Lord Bridge stated that:

> *'In the case of redundancy… the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation.'*

78. This was reinforced in **De Grasse v Stockwell Tools Ltd** 1992 IRLR 269, EAT in which it was stated that the size and administrative resources of the respondent, specifically referred to as relevant to the determination of reasonableness in S.98(4) ERA could affect the nature and formality of the consultation process and later cases determined that a total absence of consultation could be excused but only if it could have reasonably been concluded that a proper procedure would be 'utterly useless' or 'futile'.

79. In relation to individual consultation the question is consultation about what? To some extent, the subject matter will depend upon the specific circumstances, but best practice suggests that it should normally include:

    79.1. an indication (i.e. warning) that the individual has been provisionally selected for redundancy,

79.2. confirmation of the basis for selection,

79.3. an opportunity for the employee to comment on his or her redundancy selection assessment,

79.4. consideration as to what, if any, alternative positions of employment may exist, and

79.5. an opportunity for the employee to address any other matters he or she may wish to raise.

80. The purpose of consultation is not only to allow consideration of alternative employment or to see if there is any other way that redundancies can be avoided, it also helps employees to protect themselves against the consequences of being made redundant.

81. In **Thomas and Betts Manufacturing Co v Harding** 1980 IRLR 255, CA, the Court of Appeal ruled that an employer should do what it can so far as is reasonable to seek **alternative work**.

82. In **Fisher v Hoopoe Finance Ltd EAT 0043/05** the EAT suggested that an employer's responsibility does not necessarily end with drawing the employee's attention to job vacancies that may be suitable. The employer should also provide information about the financial prospects of any vacant alternative positions. A failure to do so may lead to any later redundancy dismissal being found to be unfair. Furthermore, when informing an employee of an available alternative position, the employer should be clear about any eligibility criteria for the role, and the terms on which the role might be offered.

83. We shall refer to other case law as necessary below.

Findings of fact

84. We make the following findings of fact.

85. The respondent operates a consultancy business delivering a variety of resources to their clients, including tax, accountancy and other matters. The respondent is part of a group of companies.

86. The claimant started employment with the respondent on 28 April 2008. The claimant was a trained and experienced inspector of taxes employed by HMRC Prior to joining the respondent.

87. In August 2010 the claimant became the manager of the tax and VAT consultancy team. She reported to the Managing Director, Ben Chaplin.

88. The claimant's role as manager of the tax and VAT consultancy team involved many tasks some of which may be described as purely administrative, other tasks which relate to what might be termed personnel management (such as motivating the team, and tasks which may be described as technical, such as providing second opinions on cases, triaging incoming correspondence and new cases.

89. A full list of the claimant's duties is at [311 – 313} and whilst there is some dispute over the precise categorization of the duties, what is apparent is the wide and varied range of duties undertaken at the claimant's level and however they may be described it is clear that the claimant's duties were not all administrative, indeed the majority of her duties were clearly not merely administrative. Importantly for our findings below, we are clear that the claimant did undertake the work of her team to the extent required, that is she triaged incoming cases, gave second opinions on tax cases (but not VAT cases), audited files (which we find required technical knowledge), provided training and reviewed IR35 contracts.

90. Along with many in 2020 the claimant began working from home because of the impact of the pandemic. During that time the Group Chief Executive Officer, Peter Done began sending a series of weekly update emails to staff, including the claimant. These can be seen in the bundle for example at [92], [93], [94], [96], [102].

91. The general theme of these updates is that the nature of the respondent's business including the large client base, meant that it was unlikely anybody would lose their job because of the pandemic. There is a theme of putting people over profit and an overarching sense that everyone's job was secure.

92. On 15 February 2021 Andrea Litchfield started employment with the respondent.

93. At all material times Mr Chaplin was aware of the claimant's skills, qualifications, and experience.

94. Between 2 and 14 March 2021 the claimant had a period of sick leave because of the pandemic.

95. On 7 March 2021 Mr Chaplin sent an e-mail to Ms Litchfield [320]. The e-mail is in the following terms,

> *"I think we are about there with the proposed structure. See attached. We can discuss this week".*

96. Attached to the e-mail were three structure charts these are at [321], [322] and [323]. For our purposes the relevant charts are at [321] and [322].

97. The chart at [321] shows the then current structure of the respondent which at the time was known as of Croner Taxwise limited. So far as the claimant is concerned this showed her role as "consultancy manager" in charge of two teams being the respondent's VAT consultants and Tax consultants.

98. The chart at [322] is the proposed new structure and relates only to the Hinckley site where the claimant worked. Again, so far as the claimant is concerned her role is set out as Enquiry Consultants Manager managing the Tax enquiries team and the VAT enquiries team.

99. In the then current structure, the claimant reported to Mr Chaplin, but in the proposed new structure she would report to Ms Litchfield. It is important to understand that Ms Litchfield is no sense a tax specialist, she has no training,

qualifications, skills, or experience giving advice on any tax matters. She is, as it were, a professional manager in the most general sense.

100. In the proposed new structure chart is a key showing various names or roles in various colours indicating that, depending on the colour, that person is in their probation period, working their notice or indicating there was a vacancy for a particular role. The claimant's name is not in any of these colours, and we find as a fact that in March 2021 the responder's intention was that the claimant would retain her role as manager of the Tax inquiries/ VAT enquiries team in the new structure. Furthermore, it is clear from the e-mail at [324] that the chart proposing the new structure had been agreed between Mr Chaplin and his boss, Alan Price. It should also be noted that this new structure was proposed despite the proposed removal of some tasks from the teams managed by the claimant, in particular what is referred to as "*admin and chasing the leads"* which is referred to in an e-mail between Darren Chadwick and Alan Price dated 19 October 2020 [326].

101. On 5 April 2021 the claimant was admitted to hospital.

102. On 6 April 2021 Mr Chaplin sent an e-mail to his staff to confirm that the respondent had commenced a return to the office stating that COVID secure measures were in place along with weekly COVID testing [98].

103. Following the claimant's admissions hospital, sadly, around 7 April 2021 she was diagnosed with renal cell carcinoma. At this point the claimant became disabled within the meaning of section 6 of the Equality Act 2010. Notwithstanding this diagnosis, the claimant began working from home on around 12 April 2021.

104. On 13 April 2021 Ms Litchfield sent an e-mail to the claimant to ask her if it was OK for her, Ms Litchfield, to use the claimant's desk.

105. The claimant was notified of a date for surgery and in preparation for having some time off to recover, on 13 May 2021 the claimant e-mailed Ms Litchfield on with an attachment setting out a list of her tasks which could be reallocated while she was off sick. The e-mail is at [103] and the attachment is at [104]. We find as a fact that the attachment is not a list of all the claimant's duties. It is a list of largely administrative duties which needed to be undertaken regularly and which therefore would benefit from reallocation whilst the claimant was off sick recovering from her surgery.

106. The claimant underwent surgery on 19 May 2021 and provided a sick note on 24 May 2021 for a period of four weeks for postoperative recovery.

107. On 16 June 2021 the claimant and Ms Litchfield exchanged several emails discussing the claimant's proposed return to work following her surgery. The claimant was proposing a phased return but was clearly open to discussion with Ms Litchfield about that. The phased returned to work was in accordance with the claimant's sick note which appears at [109]

108. During June 2021, whilst the claimant was absent, a new member of staff was recruited to her team but without her knowledge.

109. The claimant and Ms Litchfield agreed to catch up over the telephone on 18 June 2021, but Ms Litchfield failed to telephone the claimant as arranged. Ms Litchfield apologised for this by e-mail on 21 June 2021 [111] and there was further correspondence between them concerning the claimant's return to work.

110. On 24 June 2021 Ms Litchfield sent an e-mail to the claimant which said, amongst other things, the following,

> "*I just wanted to follow up on the recent discussions regarding the VAT consultancy review process. Currently there is no formal review process for the VAT work, while I understand that Julie would run some of her work past the advice team this was completed on an ad hoc basis. Emma I agree we should look at a formal peer sign off process going forward but given the fact we don't have any dedicated VAT consultancy resource at the moment, I would suggest continue with ad hoc reviews where required but revisit and agree a formal process when we have fully resourced the VAT consultancy team"*
>
> [113]

111. In response the claimant said she was unsure what Ms Litchfield meant by ad hoc basis [114] and in response to that Ms Litchfield confirmed that she meant that because all VAT work could not be peer reviewed for lack of resource, peer review would only take place on cases where the topic was unusually complicated, the case was very high value or if the writer was concerned over ambiguity of the request or their response [115].

112. Clearly the claimant was feeling anxious about not being in the office and on 24 June 2021 she emailed Ms Litchfield as follows,

> *"Are you free for a chat? I get the feeling me not being in the office is causing some issues, potentially I am out of the loop on things and perhaps I need to come back sooner rather than later"*
>
> [116]

113. In response, Ms Litchfield sent an e-mail to the claimant to say that she was not available that day and suggested that they could catch up on the following day, 25 June 2021. The email continued,

> "it's up to you regarding when you want to come back but in line with the phased RTW I would pace this"
>
> [117]

114. Ms Litchfield also said,

> *"also we need to talk about desk locations. I have taken over your old desk so we need to discuss where you sit when you come back"*

115. On 25 June 2021 the claimant also emailed Ms Litchfield regarding her pay in which she noted that there had been a reduction of seven half days pay without any warning or explanation and she asked Ms Litchfield to explain [118].

116. Around the same time, 25 June 2021 the claimant attended a management meeting held over the Teams platform, which included Ms Litchfield and Mr Chaplin and the claimant says that during that meeting Mr Chaplin contradicted her view of a particular matter. Mr Chaplin agreed that he did contradict the claimant because in essence she was incorrect. On the same day there was a meeting with the claimant's team (again held over Teams) attended by Ms Litchfield who the claimant says took over the meeting and ignored the claimant. We find that Ms Litchfield did run that meeting and did not specifically acknowledge that the claimant had recently returned to work from a period of sick leave.

117. The claimant returned to work in the office on 30 June 2021. Ms Litchfield remained sitting at the claimant's desk and the claimant had no desk allocated to her on her return to work.

118. On 30 June 2021, and without any warning the claimant was called into a meeting by a notice appearing in her inbox. The meeting was titled "business update". The claimant attended the meeting which was held by Ms Litchfield who also had with her a note taker, Caroline Wood. The notes of the meeting are at [121, 122].

119. In short, the purpose of the meeting was to put the claimant at risk of redundancy. It was described as an initial 'kick off' meeting and the claimant was told that it would be followed by a consultation meeting to discuss what were referred to as "your options". The explanation for the meeting given by Ms Litchfield was that the respondent was looking to make changes on the basis that the claimant's "*role requires quality checking and someone that can give second opinions... As a result of this we are proposing that your role is redundant and putting your role at risk".*

120. On the same day the claimant was given the letter which appears at [123, 124]. This is more specific about the then current proposal which was to make the role of consultancy and enquiries manager, the claimant's position, redundant "*in the near future".* The basis of this decision was said to be the current and future needs of the business with a view to making the business more efficient, cost effective and resilient. The letter says that the changes which have led to the potential redundancy was the move of consultancy task allocation to what was a new VIP concierge team, and the tracking of consultancy work and management information reporting being centralised. Finally, the letter states that line managers for the consultants and enquiries team needed to possess "*technical knowledge and experience, in order to be able to assist with complicated queries and escalations as well as being able to review, quality check and undertake tasks themselves*".

121. The first consultation meeting took place on 6 July 2021. The meeting was held by Ms Litchfield, the claimant attended, and the meeting was also attended by a Mr Alum who is in fact part of the respondent's legal team.

122. The central theme of the consultation meeting was that the respondent wanted to have team leaders who could do the work of their teams and who therefore had strong technical knowledge. However, it seems to us that the meeting got somewhat side-tracked into discussing specific qualifications. After Ms Litchfield told the claimant that the team leader needed to be able to do the work of their team, the claimant asked, "*So what qualifications will be required for each of the roles".* Ms Litchfield stated that the respondent was looking for formal qualifications. The claimant does not have the qualifications suggested by Ms Litchfield and she therefore said, "*so I presume I've been ruled out of both positions*". The answer to that question from Ms Litchfield was in effect to ask the claimant whether she believed she was qualified for the roles. Ms Litchfield made the point that the claimant said that she did not check the work of her team but the claimant said in response that just because she did not do that work it did not mean that she was not capable of doing it. The claimant made the point that she was a fully trained HMRC tax inspector with seven years' experience in that role.

123. Following the meeting the claimant was sent a list of vacancies most of which were in Manchester which would have required the claimant to relocate, which she was not able to do. Other roles were ones for which the claimant was not qualified such as in relation to occupational health.

124. On 12 July 2021 the claimant sent an e-mail to Ms Litchfield in which she explains why she felt she was able to undertake the role of enquiries team leader. She pointed out that she was already managing 19 tax and VAT consultants, she set out her previous HMRC experience and she confirmed that she was able to deal with different areas of tax and that she is experienced in managing caseloads or various consultants, employees and self-employed individuals in tax, VAT and employment taxes. The claimant states that she offers daily technical and tactical support to her team, she offers solutions and can take on case work. The claimant accepted that she is not an expert on VAT for example but in all other respects the claimant makes a strong case that she was able to do the job which the respondent appeared to require.

125. The second and final consultation meeting was on 13 July 2021 the notes of which start at [160].

126. At the meeting, Ms Litchfield acknowledged the claimant's e-mail of 12 July 2021, but confirms that the role occupied by the claimant was going to disappear from the structure. The meeting very quickly moved on to talk about alternative employment and the emphasis from Ms Litchfield was essentially that if the claimant wanted the role of managing the enquiries team, she would have to prove her level of technical skill. Ms Litchfield asked the claimant to provide evidence of completed cases or case reviews and to provide that information to Ms Litchfield within the next couple of days following the meeting. Ms Litchfield said that she would also send to the claimant an example case and technical questions for the claimant to respond to and said that "*if I can get them over to you tomorrow which is Wednesday, I'd be looking for those back by Friday if that's possible*". The claimant agreed.

127. Following the meeting on 12 July 2021 the claimant sent an e-mail to Ms Litchfield which included the following,

> "*with hospital appointments and the extreme tiredness I'm currently feeling, I will need a bit longer to complete the tasks you require for me to do to demonstrate my suitability for the role of enquiry team leader".*

128. On the same day Ms Litchfield responded to the claimant confirming that the role of consultancy and enquiries manager would cease to exist and be replaced by two separate roles, enquiries team leader and consultancy team leader. Ms Litchfield confirmed that as the claimant was interested in the enquiries team leader position she, Ms Litchfield, was "l*ooking for you to showcase your qualifications as well as your practical and technical ability to fulfil the job specification".* Ms Litchfield gave the claimant until 21 July 2021 to provide the information and also said to that she would send to the claimant scenarios for the claimant to respond to and that she would send them over on either the following Tuesday or Wednesday.

129. On 15 July 2021 the claimant emailed Ms Litchfield setting out her relevant skills and experience [171].

130. On 20 July 2021 the claimant sent an e-mail to Ms Litchfield stating that the respondent had won a case at tribunal which would be good publicity for the respondent. There was no response to that e-mail from Ms Litchfield.

131. On 21 July 2021 the claimant received an e-mail from Ms Litchfield which contained the case scenario and some technical questions for her to respond to. Instead of being given a couple of days to respond, the claimant was expected to respond by 12:30 pm on the same day. The e-mail was sent at 10:00 am which gave the claimant a maximum of two and a half hours to respond. The claimant duly responded however she was never given any feedback on her responses.

132. On 3 August 2021 the claimant emailed Ms Litchfield to confirm that she had been accepted for immunotherapy. Ms Litchfield responded to confirm that she would book in a well-being meeting later that week to see what support the claimant may need going forward.

133. On 5 August 2021 Ms Litchfield sent an e-mail to the claimant in the following terms,

> "*I just wanted to follow up on our brief conversation yesterday regarding the outcome of the at risk process we are going through with you. Apologies for the delay in this update, please let me reassure you that this delay is not related to the recent assessment exercise that you completed for me on 21 July. We are however currently going through a further review of our current team structures within CIL, which may now have an impact on the current process. I will be in touch shortly to confirm our next steps and if you have any further questions please do not hesitate to contact me".*

134. On 6 August 2021 Ms Litchfield emailed Mr Chaplin [196]. In the e-mail she confirms that she has another meeting with the claimant "*regarding the review process".* The e-mail says,

> *"MO has suggested reopening her opportunity to apply for other roles in the business as we have removed the only role she was interested in, this may therefore extend the process we are going through but I will let you know."*

135. In the email, Ms Litchfield sets out and asks Mr Chaplin to review what she proposes to say to the claimant at their next meeting. Part of what Ms Litchfield proposed to say to the claimant was to explain that the respondent anticipated creating the team leader role which they had been discussing with the claimant but *"based on the prospective team structures that we are looking at, as well as the size of the existing team and revenue generated by that team at present, we can no longer justify creating a standalone management role".* In other words, the role that the claimant was interested in, and which she had evidenced, as far as she was concerned, that she was capable of doing, would no longer be created. Ms Litchfield sets out a revised proposal which included creating a senior/ technical tax consultancy manager which is potentially a role the claimant could have done. However, in his response Mr Chaplin deleted any reference to that role. In his response Mr Chaplin says, "w*e can't justify a tax enquiry manager or team leader at this stage, the volume of work is not there and the team is not big enough*". Mr Chaplin goes on to say as follows,

> *"If we look at the existing head of consultancy role now, what are the tasks and workload relating specifically to managing the enquiry team currently, looking back over the last six months, then how much of this is really administration and reporting that can be done centrally - does what's left justify a role?"*

136. We find these comments were intended to suggest to Ms Litchfield that the claimant's current role was largely administrative but that we find that he knew this was not the case given that he had managed the claimant and was well aware all of her duties only a small part of which could properly be described as administrative.

137. Finally, Mr Chaplin also confirmed that the claimant would not need to work her notice.

138. The final meeting with the claimant took place on 9 August 2021 [201, 202]. The meeting was intended to give the claimant the outcome of the process and the claimant was informed that she was to be made redundant.

139. The letter of dismissal is at [206]. The claimant's employment on 12 August 2021 purportedly by reason of redundancy. The claimant was offered the right to appeal.

140. On 13 August 2021 claimant appealed against her dismissal

141. The claimant's appeal was dealt with by Mr Chaplin who invited the claimant to an appeal meeting which took place n o23 August 2021.

142. Mr Chaplin rejected the appeal on all the points raised by the claimant and his letter setting out his findings is at [235].

143. The claimant undertook early conciliation between 27 October and 2 December 2021

144. The claimant presented her claim to the employment tribunal on 28 December 2021

Discussion and conclusions

145. We have broken down our discussion into various key questions.

Burden of proof

146. We are satisfied that the claimant has met the burden on her as set out in section 136 of the Equality Act 2010, that is we have found facts from which we could decide that the unlawful discrimination has occurred (save as set out below in relation to certain specific claims).

147. The first and key question in this case is why was the claimant dismissed. The respondent contends that the reason for the claimant's dismissal was redundancy, that is to say her role was removed from the establishment because there was a diminished requirement for employees to do work of a particular kind. For her part, the claimant says that either there was in fact no redundancy situation or alternatively if there was, that was not the real reason for her dismissal and in fact that the real reason for her dismissal was the fact that that she became disabled.

148. Normally an employment tribunal cannot go behind the facts and investigate how a redundancy situation arose, whether it could have been avoided and whether there were other options open to the employer. The justification for declaring a redundancy may be relevant if the true reason for dismissal is put in issue as it is in this case. In other words, in a case where it is contended that the real reason for dismissal is not redundancy it is open to the tribunal to consider whether the apparent redundancy situation is a genuine redundancy situation or whether the employer is seeking to use the alleged redundancy situation as a pretext for an otherwise unfair dismissal (see for example **Maund v Penwith District Council** [1982] IRLR 399).

149. Before we move on to tackle this issue, we do wish to say something about the witness evidence we heard and in particular the question of credibility.

150. Starting with the claimant, she provided both a witness statement and a supplementary statement and insofar as any matter she refers to is dealt with in the documentation, her evidence was consistent with that documentation. She expressed her beliefs about how she was treated and how she says it made her feel and although that is largely subjective, we found the claimant to be a truthful and credible witness.

151. So far as Ms Litchfield is concerned, she is no longer employed by the respondent, and it seems that she left their employment through choice. She has no axe to grind either with the claimant or the respondent. Given that she was relatively new to the business she was largely reliant on what Mr Chaplin was telling her and of course she was subordinate to him. For the reasons we set out

below, where there was a conflict of evidence between Ms Litchfield and Mr Chaplin, we prefer the evidence of Ms Litchfield.

152. In contrast, we found the evidence of Mr Chaplin difficult to accept in material respects. For example, his categorisation of the claimant's role as largely administrative is hard to sustain given all her duties which included supporting her team at a technical level. Furthermore, it was Mr Chaplin's evidence that the process which led to the claimant's dismissal was essentially being run by Ms Litchfield, but it is entirely plain from even a cursory glance at the documentation that Mr Chaplin was at the heart of everything which took place, and given his role, that is hardly surprising. What was surprising was his denial of that fact. It was Mr Chaplin who proposed a structure in which the claimant had a role, and it was Mr Chaplin who removed that role, not Ms Litchfield. Furthermore it was Mr Chaplin who essentially told Ms Litchfield that the claimant's role was largely administrative despite the fact that he had managed the claimant in her role for a number of years and would have been well aware of her duties as well as her skills, qualifications and experience (matters he conceded under cross-examination), and we bear in mind that at no point was there any suggestion that the claimant was anything other than very good at her job.

153. Putting it as neutrally as we can, we did not find Mr Chaplin to be a credible witness and we consider that in some respects he was less than truthful.

Who was the decision maker?

154. We consider it a reasonable starting point to ask who the ultimate decision maker was in this case.

155. It was Mr Chaplin's evidence to the tribunal that he was relatively uninvolved in the redundancy process prior to determining the claimant's appeal against her dismissal. It was also Mr Chaplin's evidence that Ms Litchfield had offered the claimant the opportunity to undertake a new team leader role as a frolic of her own. This was in stark contrast to the evidence of Ms Lichfield. Her evidence was that she was in regular discussion with Mr Chaplin about proposed changes to the business and that she would not have offered a role as a frolic of her own. The absurdity of Mr Chaplin's evidence is apparent simply by looking at the fact that in March 2021 he was the person who told Ms Litchfield that there would be a new tax Enquiries team leader role following removal of the claimant's managers' position in the structured chart he sent to Ms Litchfield.

156. Furthermore, it was Mr Chaplin who told Ms Litchfield that there would no longer be a team leader role and it was Mr Chaplin who deleted from Ms Litchfield's proposed discussion suggestions for meeting with the claimant the suggestion that there would be a new senior tax role which she may be able to fulfil.

157. We are in no doubt that the real decision maker in this case, that is to say the person who had the final say over whether or not the claimant would remain in employment, was Mr Chaplin not Ms Lichfield.

A 'genuine' redundancy?

158. In March 2021 the respondent proposed to restructure itself and included as part of that restructure was a team leader role for the tax enquiries team to be filled by the claimant. There was no suggestion that this amounted to a redundancy, it was merely a reorganisation with a portion of the claimant's role in respect of the VAT consultants being removed from her. Even if such a change amounted to a dismissal in the sense of **Hogg v Dover College** [1990] ICR 39, it was plainly envisaged by Mr Chaplin that the claimant would not be dismissed, or at least there is no suggestion in any of the contemporaneous documents that that would be the case.

159. It was not until 30 June 2021 that the claimant was put at risk of redundancy, which was after her return to work, after she became disabled. It was not until the first consultation meeting on 6 July 2021 that the full rationale for putting the claimant at risk of redundancy was explained to her by Ms Litchfield. The justification was put as follows,

> *"there have been several changes within the business, and part of which have resulted in a slight reduction, and what we class as a diminishment of your duties. In addition to which, there's a move, as far as the business is concerned, and I'm now looking for all line managers for the customer facing staff members to have technical knowledge and experience to support with quality review work, checking, and, obviously, undertaking tasks themselves"*

160. In short, the justification is twofold. First there was a slight reduction in the claimant's duties and, second, a need for managers to be able to have technical knowledge to support the work of their team, that support being quality review, checking and undertaking the work themselves [130].

161. At the second consultation meeting on 13 July 2021 Ms Litchfield reiterated that it was key to the claimant remaining in the business that she has the technical ability required by the respondent and as we have set out above, she was asked to showcase her ability by providing evidence and by doing what amounts to a short test.

162. Interestingly it is worth noting that both Mr Chaplin and Ms Litchfield questioned the claimant's technical ability in their witness statements but under cross examination both readily accepted that the claimant had the necessary technical ability in relation to the tax enquiry work. Mr Chaplin confirmed that the claimant had previously undertaken a consultant job and performed a technical role on a daily basis. Indeed, Mr Chaplin conceded that there was no need for Ms Litchfield to have tested the claimant's technical ability. That said, it was Ms Litchfield's evidence that it was Mr Chaplin who was telling her that there was doubt about the claimant's technical ability and in our view this is supported by looking at Mr Chaplin's emails to Ms Litchfield where he describes the claimant's role as largely administrative placing no emphasis at all upon any technical aspect of the work the claimant was doing with her team. We prefer the evidence of miss Lichfield that Mr Chaplin told her that he doubted the claimant had the necessary ability to do the technical aspects of the team leader role and that he did not think she was in fact doing any technical work. This was not true.

163. On 5 August 2021 there was a conversation between Mr Chaplin and Ms Litchfield which although not documented was significant. Ms Litchfield's evidence, which we accept, was that she approached Mr Chaplin because she believed that the claimant had demonstrated that she could undertake the team leader role which Mr Chaplin had included in his original structure chart provided in March 2021. Miss Litchfield told us that she was surprised when Mr Chaplin suggested there was no such role, that it was merely a suggestion which had not been signed off at group level and that he would no longer be seeking to include that role in the new structure.

164. So, the rationale of wanting to create a team leader or manager who could do the work of the team was now abandoned so that the tax enquiry team would not in fact have a technical team leader at all. In the new structure the team would report to Ms Litchfield who has no tax skills, experience, or qualifications. This is a complete abandonment of the original rational for creating the new structure set out by Mr Chaplin in March 2021.

165. We are therefore left with this rather curious position which is that it is the prerogative of management to determine that they no longer required a team leader for the tax enquiry team and that team could be led by a non-technical manager notwithstanding their stated aim of having teams led by individuals who were able do the work of the team. In that there was a diminished requirement for employees to do work of a particular kind it could be said that this process met that requirement and that therefore this is a genuine redundancy. However, none of the contemporaneous documents supports such a conclusion.

166. When Mr Chaplin created his structure in March 2021 this appears to have had group level sign off and certainly there were discussions at group level about the claimant's position as late as October 2020 [326] following which Mr Chaplin provided his new structure which showed the claimant still in employment.

167. There is no contemporaneous documentation suggesting a change of rationale for the new structure with the requirement that managers and team leaders were able to do the work of the teams and on the face of it the only team affected by any change in this rationale was the claimant team who went from reporting to a technically competent manager, claimant, to one who was not technically competent, miss Litchfield.

Discrimination – general

168. We make the following general findings.

169. It is clear that the respondent had actual knowledge of the claimant's disability at all material times.

170. In relation to time limits and the jurisdiction question, we find that infofar as any individual complaint is potentially out of time, all of the matters complained of are linked either by those who perpetrated the acts, Mr Chaplin and/or Ms Litchfield, and/or they were linked by an underlying desire by Mr Chaplin to ensure that the claimant was dismissed.

Discriminatory and unfair dismissal

171. Our conclusion is that this was not a genuine redundancy. We find that the reason Mr Chaplin told Ms Litchfield that he was not moving forward with a team leader for the tax enquiry team was because he did not want to retain the claimant in employment not because the restructure was proceeding on a different basis to the one suggested prior to the claimant becoming disabled.

172. We were invited by Mr Crow on behalf of the claimant to draw adverse inferences from a number of factors relating to Mr Chaplin's change of attitude towards the claimant and we refer to some of those below. At this stage we do not feel it necessary to refer to those attitudinal matters in relation to our finding about whether there was or was not a genuine redundancy in this case. We are satisfied that we can draw adverse inferences from what we have set out above which is that there is no basis for accepting the evidence of Mr Chaplin that he did not have authority to create the team leader role, that he included that role because he was keen to retain the claimant in employment until she became disabled when his position changed and that changed was for no other reason that we can discern either from his evidence or from the contemporaries documentation. Therefore we conclude that the only reason for the change from a position in which the claimant remained employed to deleting the role she should have been given such that there was no alternative employment for her was her change of status from non-disabled to disabled.

173. For those reasons we conclude both that the claimant's dismissal was unfair in that there was no potentially fair reason for the dismissal and discriminatory in that the reason for dismissal was the fact that the claimant was disabled within the meaning of section 6 of the Equality Act 2010.

Unfair dismissal

174. We should add for the sake of completeness that leaving aside the above, even if there was a genuine redundancy situation here, and we are clear that there was not, the dismissal of the claimant was unfair.

175. Proper consultation is fundamental to a fair redundancy dismissal. By proper we mean that the respondent should have communicated its proposals to the claimant, should have given her sufficient information upon which she could make representations about those proposals and should have listened to and responded appropriately to any representations made by the claimant before making any final decision. Such a process should also have included a reasonable search for alternative employment and if any is found, a consideration or whether that alternative employment was suitable for the claimant.

176. Looking at the process which was followed, the claimant was put at risk of redundancy notwithstanding that her name was included in the proposed new structure in March 2021. The explanation for putting her at risk ignored the fact that she already had the skills, qualifications, and experience to meet the requirements set out in the consultation meetings, that is that she could do the technical work of the tax enquiry team. Instead, she was asked to undertake an exercise to prove something which Mr Chaplin was already well aware of which is that the claimant already possessed the skills and experience they were purportedly looking for.

177. It was also unfair not to allow the claimant more time to produce the evidence to show that she was technically capable of the work required as the team leader.

178. It was a further act of unfairness to change the structure part way through the consultation so that there was no team leader role without in effect commencing the consultation again or at least giving more time for the consultation. Essentially what happened in this case was that consultation with the claimant commenced on one basis and partway through the consultation process the basis upon which she was being consulted changed, and by the time the claimant attended the second consultation meeting her fate was determined because the role that she was being tested for was removed by Mr Chaplin and there was no alternative employment according to the respondent.

179. Whilst strictly speaking a redundancy process would not be unfair if there was no appeal, if a respondent decides to offer an appeal, then the requirement is that it is conducted fairly. In this case the appeal was conducted by Mr Chaplin and was in no sense independent or fair to the claimant. By the time the appeal came around Mr Chaplin had a closed mind to continuing the claimant's employment. The decision to dismiss claimant was his in the first instance. The claimant did not have a fair appeal.

180. Finally, we do not consider that there was any or any proper search for alternative employment. The claimant raised the fact that she had discovered a number of advertisements for jobs in Hinckley at the time she was being taken through a redundancy process.

181. These documents appear at [314 – 316]. These jobs were being advertised on Monday 9 August 2021 and include a tax advisor based in Hinckley, a tax administrator based in Hinckley, an advice line administrator based in Hinckley and a client services post based in Hinckley. The issue for the tribunal is not whether the claimant wanted or was able to do any of these roles but the fact that none of them were drawn to her attention. When asked about this during his evidence Mr Chaplin said that recruitment was outsourced and that it is possible that these advertisements were old and had merely remained online, but given the number of them we find that inherently unlikely and in our judgment these were deliberately or negligently not drawn to the claimant's attention at the time as they should have been, and they would have been had there been a proper search for alternative employment for her.

182. For all those reasons, had we found there was a genuine redundancy situation we would have, in any event, found the claim's dismissal to have been unfair.

183. We turn next to the remaining disability discrimination claims.

Direct disability discrimination

184. As we have set out a above, the question of whether something which occurred amounts to direct discrimination is a question of causation. Was there less favourable treatment because of a protected characteristic and that requires an analysis of what was in the mind of the alleged perpetrator of the discrimination.

Direct disability discrimination – Ms Litchfield

185. We turn first to the allegations of direct discrimination which relate to the actions of Ms Litchfield. For good reason a number of the original allegations against Ms Litchfield were abandoned during the course of the hearing as a result of the evidence which emerged and we make no criticism of the claimant for doing that, and indeed we commend her for so doing. The allegations of direct disability discrimination in relation to Ms Litchfield are therefore limited to the following,

185.1. that Ms Litchfield spoke over the claimant during a Microsoft Teams of meeting,

185.2. That Ms Litchfield failed to make the claimant's desk available for her and failed to assign her to another desk on 30 June 2021,

185.3. that Ms Litchfield provided the claimant with less or insufficient time to complete the technical questions we have looked at above, and, arguably,

185.4. that the claimant's access to her teams' HR/annual leave requests would not return to her when she returned to work.

186. We say arguably in relation to the last point because it is unclear, and we heard no direct evidence about, who would have been responsible for that although we do note that although at the relevant time Ms Litchfield was the claimant's line manager that had been the case for a very short time.

187. On balance we find that Ms Litchfield was largely misled by Mr Chaplin, particularly with regard to the claimant's abilities and experience, as she began the process of discussions with the claimant about the restructuring. At the time she had every reason to believe that the claimant would remain employed and was somewhat wrong footed by Mr Chaplin when he told Ms Litchfield that the post she had been discussing with the claimant would no longer be included in the new structure and indeed that there would be no post for the claimant.

188. Ms Litchfield advised the claimant about taking over her desk and in terms of assigning her a new desk, we accept that Ms Litchfield simply understood that the claimant would arrive at work, choose a desk and then be assigned that desk rather than there being a need to assign her a desk before she arrived in the office. We do not consider that this was less favourable treatment because of disability.

189. In terms of speaking over the claimant during a Microsoft Teams meeting, the tribunal has experience of similar technology, and it can be difficult to manage such meetings. There is no evidence that the reason for this treatment was the claimant's disability.

190. In relation to the technical questions, the position is somewhat unusual because Ms Litchfield was in no sense whatsoever technically competent to either create or assess the scenarios and questions given to the claimant, Ms Litchfield could not recall where the questions came from, and it appears from the evidence that they were never assessed. The rationale for asking the questions in the first instance is not challenged as an act of discrimination but it is difficult to divorce that from whatever else happened in relation to those scenarios and questions. We find that Ms Litchfield was led to believe that the claimant needed to prove her technical

ability because she was led to believe that the claimant's role was largely administrative by Mr Chaplin and we do not believe that Ms Litchfield would have had any idea how long it may have taken someone, including the claimant, to respond to the scenarios and questions she asked and therefore we cannot find and do not find that the time given by Ms Litchfield was driven by anything other than a timetable which seemed to fit with the process she was being asked to follow and it was not time which was insufficient because Ms Litchfield would have had no idea what a sufficient or insufficient time would have been.

191. In relation to failing to return to the claimant access to HR and annual leave in respect of her team, it is unclear whether that with something within the gift of miss Litchfield and therefore in relation to this allegation the claimant has not shifted the burden of proof.

Direct disability discrimination – Mr Chaplin

192. The allegations of direct disability discrimination in relation to Mr Chaplin are the following,

192.1.1. between 21 June 2021 and 12 August 2021, the claimant's access to her teams HR/annual leave requests was not returned,

192.1.2. between 21 June 2021 and 12 August 2021, Mr Chaplin changed his attitude towards the claimant, specifically Mr Chaplin spoke over the claimant during a Microsoft teams meeting,

192.1.3. on 24 June 2021 Mr Chaplin ignored the claimant and did not acknowledge her return to work in a Microsoft Teams meeting,

192.1.4. on 25 June 2021 Mr Chaplin contradicted the claimant's view,

192.1.5. on 19 August 2021 Mr Chaplin was asked questions inferring that the claimant was to be criticised for her absences,

192.1.6. on 9 September 2021 Mr Chaplin referred to the claimants work as administrative,

192.1.7. Mr Chaplin contradicted the claimant in front of her peers.

192.2. We recognise the risk that because we have found the claimant's dismissal to have been discriminatory, and because we have found that the prime mover in relation to that dismissal was Mr Chaplin, we also find that everything else Mr Chaplin did with which the claimant took issue or which she found objectionable must also be direct disability discrimination.

192.3. We have dealt above with the question of access to HR/annual leave and we have no more to say about that.

192.4. We also note that Mr Chaplin is said to have spoken over the claimant in a Microsoft Teams meeting and, in another meeting, contradicted the claimant's view. We have set out of thoughts about Microsoft Teams and

meetings, and we repeat them here. So far as the disagreement between Mr Chaplin and the claimant is concerned, there seems to us to be no more to this than they each took a different view about an indemnity clause. We see nothing inherently discriminatory or anything from which we could draw an inference of discrimination in a disagreement about a contractual clause. We consider that to be the case whether or not that took place in front of the claimant's peers.

192.5. The one matter which gave us pause for thought is the reference by Mr Chaplin to the claimant's work as administrative. The overarching finding we have made is that before the claimant became disabled it was Mr Chaplin's intention to retain her in his employment. However, once she became disabled, he moved to ensure that she was dismissed purportedly by reason of redundancy, and we have set out above how he did that and our reasons for finding that it amounted to disability discrimination. Part and parcel of that was to label the claimant as a non-technical manager and define her work as, if not purely then fairly largely, administrative which was not true. In this respect therefore we do find that the comment by Mr Chaplin on 9 September 2021 that the claimant's work was administrative was direct disability discrimination.

Harassment related to disability

193. The matters pleaded as direct disability discrimination are pleaded in the alternative as harassment related to disability. We shall now deal with that issue save in relation to what took place on 9 September 2021 given that that cannot be both harassment and direct discrimination.

194. As we have set out above, there are three essential elements of a harassment claim under S.26(1):

194.1. unwanted conduct,

194.2. that has the proscribed purpose or effect, and

194.3. which relates to a relevant protected characteristic.

195. We have no doubt that the conduct experienced by the claimant was unwanted. She had been through a traumatic experience and upon her return to work might have expected things to get back to normal as quickly as possible but instead she was thrown straight into a process which very quickly led to the termination of her employment. During that process the claimant was treated in a way which was different from how she had been treated before she became disabled. Unlike in the case of direct discrimination which requires the treatment to be "because of" the protected characteristic, in this case of course disability, a claim of harassment only has to be related to the protected characteristic. We draw adverse inferences from the treatment itself as well as the 'redundancy' process set in train by Mr Chaplin.

196. In this case on her return to work, the claimant was put on a path which we found was inevitably going to lead to her dismissal because that was what Mr Chaplin required, and what he did both directly and indirectly through miss

Litchfield related to the claimant's disability because it related to his wish to dismiss the claimant because she had become disabled.

197. It also follows that what Ms Litchfield did was likewise related to the claimant being disabled albeit that may not have been her intention. The reality is of course that intention is not necessary in a claim for harassment whether that is intention in relation to the impact on the claimant of what was done or the question whether the behaviour was related to the disability.

198. In other words, we can find that the claimant was subject to harassment even if it was not the intention of either Mr Chaplin or Ms Litchfield to subject the claimant to harassment and indeed that is our finding. What they did individually and collectively was to treat the claimant in a way which made her feel unwanted, they created a hostile environment for the claimant, they did that as part of the process leading to dismissal and we find that the matters complained of in the list of issues individually and collectively meet the definition of harassment.

S.15 discrimination arising from disability

199. We remind ourselves of the four elements that must be made out in order for the claimant to succeed in a S.15 claim:

199.1. there must be unfavourable treatment,

199.2. there must be something that arises in consequence of the claimant's disability,

199.3. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability, and

199.4. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

200. The following are the allegations of unfavourable treatment,

200.1. between 21 June 2021 and 12 August 2021 decisions were made about the claimant's teams without involving her, specifically,

200.2. the need to review technical work was removed,

200.3. the claimant's access to her teams HR/annual leave requests was not returned,

200.4. on 24 June 2021 Mr Chaplin and Ms Litchfield ignored the claimant and did not acknowledge her return to work in Microsoft Teams meetings,

200.5. on 24 June 2021 Ms Litchfield did not take the claimant's complaint of exclusion seriously,

200.6. on 19 August 2021 Mr Chaplin was asked questions inferring that the claimant was to be criticised for her absences,

200.7. excluded the claimant from meetings ref: VAT review work,

200.8. by dismissing her.

201. The first thing we note is that all of the treatment complained about was self-evidently unfavourable. Essentially, following the claimant becoming disabled she was side-lined by the respondent and in particular of course by Mr Chaplin and miss Litchfield. They did this by failing to engage with her in relation to changes in the business, changes to her team, not returning full management of her team on her return to work, and all of the matters set out above. In effect they treated the claimant as though she was never going to return to manage her team which of course turned out to be the case.

202. The something arising was the claimant's absence from work which was because she was having treatment for her cancer.

203. That just leaves the question of the treatment was caused by the absence and in our judgment, save for the dismissal itself, self-evidently it was. The unfavourable treatment either took place whilst the claimant was absent or was related to that absence.

204. Having said that, we find that the claimant's dismissal was not related to the something arising, the absence from work. The claimant was dismissed because she was disabled, not because she was absent from work.

205. That leaves the question of justification.

206. So far as the aim of running the claimant's team while she was off, two the matters complained of to which this relates were abandoned leaving only the HR/annual leave issue and the compliant is not that access was removed whilst the claimant was off, it is that it was not returned when she came back to work and insofar as the justification was meant to extend to that then the justification fails because failing to return access once the claimant was back working has nothing to do with oversight during her absence.

207. So far as not welcoming the claimant back is concerned the aim of what might generally be termed privacy fails. The claimant's complaint is that on 24 June 2021 Mr Chaplin and Ms Litchfield ignored the claimant and did not acknowledge her return to work in Microsoft Teams meetings. Acknowledging that she was back from a period of sick leave would in no sense have been a breach of the claimant's privacy. We have no doubt that the reason for her absence would have been known even if the precise nature of the 'sickness' was not.

208. So far as failing to take the claimant's concern about exclusion seriously, the justification that matters raised informally should be dealt with informally with the aim of the effective running of the business seems to us to be somewhat irrelevant because there is no evidence that the concern raised by the claimant was dealt with at all, informally or otherwise.

209. Finally, as to the dismissal, the justification fails because we have found that the reason for the claimant's dismissal was not a genuine redundancy as set out above.

210. For those reasons the claims under s15 Equality Act 2010 succeed save for the claim relating to the claimant's dismissal.

Reasonable adjustments

211. The claimant nhas pleaded two PCPs as follows,

211.1.1. PCP1 - the respondent required the claimant to attend work and sit next to/in the same area as "potentially infected" individuals,

211.1.2. PCP2 - the respondent's sick pay policy.

212. Having considered the evidence, we find that the respondent did not require the claimant to attend work and sit next to/in the same area as "potentially infected" individuals. In fact, the respondent deliberately moved desks to ensure a safe distance and on her return to the office the evidence was that the claimant was not required to sit close to anyone.

213. So far as the respondent's sick pay policy is concerned, that claimant is arguing that she had a greater likelihood of suffering a loss of pay, alternatively having to use annual leave to avoid a loss of pay, during a phased return to work.

214. We reject this complaint. The PCP of only paying those on a phased return for the time they are working affects anyone who is off sick and who requires a phased return. There is no evidence to suggest that disabled people in general require more time off sick and are more likely therefor to need a phased return to work as that conflates 'disability' with 'sickness' and they are not necessarily the same thing. Furthermore, we were presented with no evidence that disabled people who are also sick are off sick for longer, and more likely to need a phased return to work that non-disabled sick people.

215. Form those reasons the claims for failure to make reasonable adjustments fail and are dismissed.

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Employment Judge Brewer

Date: 5 July 2024

JUDGMENT SENT TO THE PARTIES ON

....15 July 2024.....

FOR THE TRIBUNAL OFFICE

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/