EMPLOYMENT TRIBUNALS

Claimant: Mrs Elaine Scott

Respondent: Royal & Sun Alliance Insurance Ltd

Heard at: Liverpool (in person) **On:** 30 April, 1 & 2 May, 15, 16 July & 29 July 2024 (in chambers).

Before: Employment Judge Shotter

Members: Mr F Crane
Mr J Murdie

REPRESENTATION:

Claimant: In person
Respondent: Mr C Kelly, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The amended response dated shall stand as the respondent's Amended Grounds of Response.

2. The claimant was not disabled with the mental and physical impairment of perimenopause in the relevant period June 2022 to January 2023 in accordance with section 6 of the Equality Act 2010, a Tribunal does not have the jurisdiction to consider her claim for unlawful disability discrimination under section 13, 15, 26 and 27 of the Equality Act 2010 which is dismissed.

3. In the alternative, the claimant's claim of disability discrimination brought under section 13 of the Equality Act 2010 set out in allegations 3.1.1 was not presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done) the last date being the 9 November 2022. ACAS early conciliation commenced on the 10 January 2023, the certificate was issued on the 12 January 2023 and claim form presented on the 10 February 2023. The complaint is out of time and in all the circumstances of the case it is not just and equitable to extend time.

4. The Tribunal does not have the jurisdiction to consider the complaint which are dismissed.

5. In the alternative, the claimant has not proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances of a different age and/or sex and/or disability was or would have been treated. The claimant was not unlawfully discriminated against on the grounds of her age, sex or disability and claimant's claim of unlawful direct discrimination brought under section 13 of the Equality Act 2010 and set out in set out in allegation 3.1.1 is dismissed.

6. The claimant's claims of disability discrimination brought under sections 13, 15, 26 and 27 of the Equality Act 2010 are dismissed. The claimant has not proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances of a different age and/or sex and/or disability was or would have been treated. The claimant was not treated unfavourably because of something arising in consequence of her disability and her claims of discrimination arising from disability brought under section 15 of the Equality Act 2020 fail and are dismissed. The respondent's conduct did not have the proscribed affect under section 26 of the Equality Act 2010, the claimant's claims of harassment fail and are dismissed. The claimant did not do a protected act and she has not proven facts from which the Tribunal could conclude the respondent had contravened section 27 of the Equality Act 2010**.**

7. The claimant was not unfairly dismissed, and her complaint of unfair dismissal is not well founded and is dismissed.

REASONS

Preamble

The hearing

1. This is an in person hearing. The claimant, who is presently on medication for anxiety was invited to take as many breaks as she wanted, in order that she could walk around and stretch to alleviate the pain she experienced on occasions, which she did throughout the hearing. We also arranged for the claimant to sit and answer questions with her back to counsel and the respondent's witnesses.

2. Throughout the hearing the Tribunal took into account the guidance set out within the Equal Treatment Bench Book and Presidential Guidance. In addition, the claimant as a litigant in person was given time (as was the respondent) to prepare written submissions. These were exchanged before oral submissions and the claimant was given additional time to read them and prepare her written submissions (which she chose to do). The claimant took a break between oral submissions given on behalf of the respondent before giving her oral submissions to assist in preparing her arguments.

Documents

3. The documents the Tribunal was referred to are in 3 bundles totalling over 1006 pages together with additional documents produced by the claimant marked "C1," "C2," "C3," "C4" and "C5" the contents of which the Tribunal has referred to where relevant below. At one point the Tribunal adjourned in order that the claimant could find and produce an attachment (marked "C2") which appeared relevant and was introduced into evidence without objection by Mr Kelly. The claimant produced C4 and C5 on the last day of the hearing and a discussion took place concerning why she had not disclosed this information earlier as it was available to the claimant throughout this litigation. The claimant's explanation was that she had conducted a Google search and found C4 that evening and decided to produce C5, which she had not thought of doing before because of her disability. This was most unsatisfactory given there is no medical evidence before the Tribunal that the claimant, who could recall page numbers of documents in the bundle and informed the Tribunal when it was suggested she took notes (offering the claimant pen and paper in order that she could so so) the claimant refused on the basis that she could remember what was said and take notes at the end of the day. Taking into account the balance of prejudice and the fact the claimant is a litigant in person the Tribunal accepted the additional documents in evidence, which they have read and dealt with below in the findings of facts.

4. Turning to the document marked "C4" it became clear that a dispute had arisen concerning whether the document had been sent to the respondent. The claimant said it had, the respondent denied this on the basis that it had been sent by the claimant to her work email address and no one else. The claimant's response was that she had proof, and in oral submissions stated the Tribunal should accept her evidence that she had because she had proof. The Tribunal asked the claimant why she had failed to disclose the document earlier together with the "proof" given the claimant had produced a number of documents throughout this final hearing which had been accepted in evidence late, and the claimant was unable to provide a coherent response despite being fully aware of the issue in relation to C3 which could be resolved possibly though production of the email "proof" referred to by the claimant. The alleged document has not been disclosed and on that basis it cannot be taken into account.

Pleadings - preliminary issue application by respondent to file an amended response.

5. The respondent made an application to amend its response objected to by the claimant which was left to today's hearing to be decided as a preliminary issue. Oral submissions were heard from both parties.

6. The background to the respondent's application goes back to the preliminary hearing that took place on the 8 August 2023 when both parties were given leave to amend their pleadings following clarification of the claimant's claims. The respondent did not make an application to extend the time to present the amended response until 22 April 2024, a considerable number of months after it should have been presented even taking into account the respondent's submission that the Case Management Summary had not been sent to it by the Tribunal although the claimant had forwarded a copy to it.

7. The claimant was not taken by surprise by the contents of the amended response and she was able to cross-examine the respondent on the witness statements produced on behalf of the respondent. Taking into account the balance of prejudice between the parties the Tribunal gave oral judgment concluding that it was in the interests of justice for leave to be granted to the respondent to amend, despite its failure to comply with case management orders and it was ordered that the amended response dated shall stand as the respondent's Amended Grounds of Response.

Witnesses

8. The Tribunal was provided with a four witness statements in total, consisting of a written statement prepared by the claimant unsigned and undated, and on behalf of the respondent unsigned and undated witness statements from the following; Danielle Waring, the claimant's line manager until February 2022, Gareth Quantrill, investment manager, no longer employed by the respondent since January 2023 and Mathew Ahmad, cash management treasury team leader who line managed the claimant from January 2022 to November 2022.

9. There were a number of conflicts in the evidence between that given by the claimant and the respondent's witnesses which the Tribunal resolved largely through the contemporaneous documents including notes taken at the time, which it was satisfied reflected the true position. In the well-known case of Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm) [16] – [22] a number of principles relevant to this case before the Tribunal are set out. The key principles are:

a. "We are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are;

b. **Memories are fluid and malleable, being constantly rewritten whenever they are retrieved**;

c. External information can intrude into a witness's memory as can his or her own thoughts and beliefs; both can cause dramatic changes in recollection;

d. **Memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions** about an event in circumstances where his or her memory is already weak due to the passage of time;

e. **The best approach for a judge to adopt is to base factual findings on inferences drawn from the documentary evidence and known or probable facts**" [the Tribunal's emphasis].

10. In short, when it came to the conflicts in the evidence, the Tribunal noted the claimant's responses given to questions asked on cross-examination on occasion lacked detail and could not be relied upon. The Tribunal noted that when the claimant gave evidence she was prone to exaggeration, especially when it came to her mental

and physical health, confusing the recent present with the past. In oral submissions the claimant stated the respondent "expressed disgust towards me after struggling with perimenopausal symptoms. Feel and judge about the way I look and the way I act…I'm taking photographs to pre-empt them saying I've made a mistake, and do I have to take photographs of every single reviews which are significantly different – in the grips of HR and describing being told that I was being made busier than Leo when he was catching up with me, a consequence of me suffering from perinatal symptoms. I've said many times with bullying and discrimination to highlight the bullying with Gareth [Quantrill], evidence on 11 October the strange and behaviour – he doesn't mince his words, or stumble – ticked all the boxes very well, with me he 50 seconds when he was very, very forward…" The claimant adduced no satisfactory evidence to this effect, and as set out by the Tribunal below, Gareth Quantrill's behaviour at the redundancy meetings could not be criticised and there was no evidence that he an created an intimidating, hostile, degrading, humiliating or offensive environment for the claimant in the consultation meetings as alleged by the claimant in her oral evidence with reference to the covert recordings she had taken, which on careful scrutiny did not reflect the claimant's criticism of Gareth Quantrill.

11. It is inevitable that memories fade with the passage of time, especially if no notes are taken and/or proceedings issued well outside the limitation period. The claimant re-wrote history and at the same time she attributed motives to managers that were not present in reality. The claimant denied making the racist remark, knowing full well what she had said. This is evident by the fact that the claimant never asked the respondent what she had said, and in cross examination the claimant made it clear that it was misinterpreted. The claimant's evidence concerning the equal opportunities training she was ordered to complete was unsatisfactory and not credible, the claimant attempting to underplay because of the effect her comment had in her selection for redundancy.

12. The Tribunal concluded that the evidence given on behalf of the respondent supported by contemporaneous documents was truthful, straightforward and honest. It accepted that there were issues with the claimant's communication, that managers had been working on her communication skills for a number of year as reflected in the appraisals and the fact that the claimant made a general racist/religious discriminatory comment in a meeting with other people including her manager Mathew Ahmad, who was Muslim. Mathew Ahmad was and remained supportive towards the claimant. In evidence, the claimant denied this and made much of the fact that Mathew Ahmad had accepted it was an isolated incident and she had been respectful towards him. The covert recordings taken by the claimant of her meetings with Mathew Ahmad reflect they had a good relationship as recorded below. After Mathew Ahmad had given evidence in this trial the claimant reported to the Tribunal that he had approached her, confirmed "you was always respectful to me" in a "friendly" way that was not threatening. The parties were in agreement, as reflect by Mathew Ahmad's evidence and his approach to the claimant afterwards, that it was not part of the respondent's case the claimant was generally disrespectful.

Claimant's disability

13. The claimant relies on perimenopause disorder ("perimenopause") which she described as a severe manifestation or perimenopause which affects most women before they enter into menopause, with the effect varying from individual to

individual. The claimant has produced no medical documentation supporting her evidence that during the relevant period she was experiencing a severe effect. The respondent disputes the claimant is disabled with perimenopause of which it had no knowledge. Knowledge is an issue in this case, and the claimant's position on this has been confused and confusing where she referred to having no diagnosis until after termination of employment, accepting she had not informed the respondent perimenopause had an adverse effect on day-to-day activities during the relevant period and relied on anxiety and depression as evidence that she was disabled by perimenopause. The Tribunal on the balance of probabilities did not find the claimant's evidence that during the relevant period she found it difficult to concentrate, sit still, had migraines, irritable bowel syndrome, fatigue, aches and pains, sweating and brain fog, urinary incontinence, quickly exhausted and disconnected." There is no reference to the symptoms including memory loss and reduced concentration relied on by the claimant in the GP records, MED3 certificates and the Appraisals completed by the claimant referred to be the Tribunal below.

List of issues

14. A list of issues was included in the Record of Preliminary Hearing held on the 26 May 2023 which were extracted and amended on the first day of the liability hearing following discussions and agreement reached with the parties. In oral closing submissions the claimant submitted that "The true reason for dismissal is discrimination, a tort inflicted on me with no regard for my mental health. I've being subjected to discrimination by perception pertaining to my mental health." This was not the claimant's pleaded case and nor did she cross-examine any of the respondent's witnesses on their perception of her mental health. The claimant confirmed at the outset of the hearing the list of issues as recorded below and made no mention of age, sex or disability discrimination by perception.

1. **Unfair Dismissal – section 98 Employment Rights Act**

1.1 It was for the respondent to show that the dismissal was for a potentially fair reason under section 98(1) and (2) Employment Rights Act 1996. The reason relied upon in this case was redundancy and it is for the respondent to show that the dismissal was caused by a diminished need for employees to do work of a particular kind.

1.2 If the respondent was able to show a potentially fair reason for dismissal, then the Tribunal would consider whether the respondent acted reasonably under section 98(4), having particular regard to:

1.2.1 whether there was adequate warning and genuine consultation;

1.2.2 whether there was a fair basis for selection (in terms of the pool and the application of selection criteria to the pool); and

1.2.3 whether there were reasonable attempts to redeploy the claimants or find them alternative roles.

1.3 If so, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant? Was the dismissal within the band of reasonable responses.

2. <u>Disability – section 6 Equality Act 2010</u>

If disability remains in issue, the Tribunal will determine whether the claimant had a disability, as defined in section 6 of the Equality Act 2010 at the material time. The tribunal will decide:

2.1 Whether the claimant had the physical impairment of perimenopause.

2.2 If so, whether that impairment had a substantial adverse effect on her ability to carry out day-to-day activities.

2.3 If not, whether the claimant had medical treatment, including medication, or took other measures to treat or correct the impairment and whether the impairment would have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures.

2.4 Whether the effects of the impairment were long-term. The tribunal will decide:

2.4.1 whether they lasted at least 12 months, or whether they were likely to last at least 12 months; and

2.4.2 if not, whether they were likely to recur.

3. <u>Direct age and/or sex discrimination and disability discrimination – section 13 Equality Act 2010</u>

3.1 What are the facts in relation to:

3.1.1 On 17 June 2022, the lowering of her performance grade from “Excellent”, as graded by Matthew Ahmed, to “Ineffective” when re-graded by Gareth Quantrill;

3.1.2 her selection for redundancy on 11 October 2022;

3.1.3 an alleged failure to offer her a similar role which was advertised on 9 January 2023;

3.1.4 the dismissal/termination of her employment on 11 January 2023.

3.2 Has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances of a different age and/or sex and/or disability was or would have been treated?

3.3 The claimant relies on hypothetical comparators in relation to each allegation. In addition, in respect of the age and sex discrimination claims relating to the selection for redundancy and dismissal she relies upon the actual comparator, Leo O'Neil, who was identified in the same pool for selection but was retained in favour of the claimant. Mr O'Neil is a man and is said to be in the age range 30 or under whilst the claimant was over 40 at the material time.

3.4 If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of age (or perceived age) and/or sex and/or disability?

3.5 If so, has the respondent shown that there was no less favourable treatment because of age (or perceived age) and/or sex and/or disability?

3.6 The claimant relies in particular on emails sent on 21 and 26 September 2022 from Gareth Quantrill which were sent to the claimant's team but were addressed to "the Gents", and submits that an inference should be drawn from those emails in support of the sex discrimination claim (paragraphs 141-143 of the amended particulars refers).

4. <u>Discrimination arising from disability – section 15 Equality Act 2010</u>

4.1 Whether the respondent knew or could reasonably have been expected to know that the claimant had the disability of perimenopause at the material time 17 June 2020 to dismissal on 11 January 2023.

4.2 Did the respondent treat the claimant unfavourably in any of the following alleged respects:

4.2.1 On 17 June 2022, the lowering of her performance grade from "Excellent", as graded by Matthew Ahmed, to "Ineffective" when re- graded by Gareth Quantrill;

4.2.2 her selection for redundancy on 11 October 2022;

4.2.3 an alleged failure to offer her a similar role which was advertised on 9 January 2023;

4.2.4 the dismissal/termination of her employment on 11 January 2023.

Whether (under section 136) the claimant has proven facts from which the Tribunal could conclude that the unfavourable treatment relied upon above was because of something arising in consequence of disability. The "something arising" is said to be "weaker communication" (paragraph 149 of the amended claim form) and/or "the way you express yourself" (paragraph 166) or the

claimant's impaired performance at work which she contends was caused by her disability.

4.4 If so, whether the respondent can show that there was no unfavourable treatment because of something arising in consequence of disability.

If not, was the treatment a proportionate means of achieving a legitimate aim, namely, the Respondent's need to properly assess performance and apply performance ratings; and the need to fairly assess employees against agreed criteria for the purposes of a redundancy selection process.

5. <u>Victimisation – section 27 Equality Act 2010</u>

5.1 Did the claimant do a protected act: she relies upon a grievance submitted in September 2020 as the protected act (paragraph 62 of the amended claim).

5.2 Did the respondent subject the claimant to the detriments?

5.2.1 On 17 June 2022, the lowering of her performance grade from "Excellent", as graded by Matthew Ahmed, to "Ineffective" when re-graded by Gareth Quantrill;

5.2.2 her selection for redundancy on 11 October 2022;

5.2.3 an alleged failure to offer her a similar role which was advertised on 9 January 2023;

5.2.4 the dismissal/termination of her employment on 11 January 2023.

5.3 If so, has the claimant proven facts from which the Tribunal could conclude that it was because the claimant did a protected act or acts or because the respondent believed the claimant had done, or might do, a protected act or acts?

5.4 If so, has the respondent shown that there was no contravention of section 27?

6 **<u>Harassment – section 26 Equality Act 2010</u>**

6.1 Did the Respondent engage in the following unwanted conduct?

6.1.1 On 17 June 2022, the lowering of her performance grade from "Excellent", as graded by Matthew Ahmed, to "Ineffective" when re-graded by Gareth Quantrill;

6.1.2 her selection for redundancy on 11 October 2022;

6.1.3 an alleged failure to offer her a similar role which was advertised on 9 January 2023;

6.1.4 the dismissal/termination of her employment on 11 January 2023.

6.2 Was any such conduct related to the Claimant's sex, age and/or disability?

6.3 Did any such conduct have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

7 **Time limits**

7.1 Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 11 October 2022 may not have been brought in time.

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

7.2.1 Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?

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

7.2.3 If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?

7.2.4 If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

a) Why were the complaints not made to the Tribunal in time?

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

The pleadings

15. In a claim form received on 10 February 2023 following ACAS early conciliation undertaken between 10 January and 12 January 2023 the claimant, who was employed as a technical specialist level 5 from 7 December 2015 to 11 January 2023 when she was dismissed by reason of redundancy, brings claims of unfair dismissal, age, sex and disability discrimination. The claimant filed a lengthy Grounds of complaint particularising her claim which has been diluted into the agreed list of issues. In short, the claimant claimed she was disabled with peri/menopause symptoms, and invisible and unpredictable disability according to the claimant, from September 2019. Since her absence recorded as “gynaecological” by the respondent the claimant alleges she has been harassed which includes “people” making “extreme coughing or sneezing noises at her direction or around

her" Danielle Waring criticised the claimant and provided her with negative feedback, the claimant felt threatened and in her own words she “surreptitiously” recorded conversations. The key issue is with Mathew Ahmed marking the claimant’s performance as “Excellent” followed by Gareth Quantrill “requesting him to alter the performance grade down to ineffective” without discussing the changes with the clamant when her previous grades were “good.” The claimant was not selected for the data focused role of Treasury analyst and she was selected for redundancy with reference to her “weaker communication.”

16. In her Grounds of Complaint the claimant refers to a covert recording she made at a meeting with Gareth Quantrill who was using “weaponised words” and harassing her demonstrated “because Gareth Quantrill said grossed, then he counter the numbers out loud before he pauses and executes a peculiar noise or sneeze…” The claimant described the behaviour of Gareth Quantrill “to be abhorrent and he wants to cause her distress.”

17. The Tribunal spent time listening and re-listening to the recording between the claimant and Gareth Quantrill as there was a possibility that the recording could give rise to credibility issues and an adverse inference being raised.

18. The respondent disputes the claimant’s claims and disputes the claimant was disabled.

19. The Tribunal was referred to an agreed bundle of documents, cast list and a chronology of key events (not agreed but largely undisputed) and having considered the oral and written evidence and written and oral submissions presented by the parties (the Tribunal does not intend to repeat all of the written and oral submissions, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons), we have made the following findings of the relevant facts.

Facts

20. The respondent is involved in the insurance market on a national and international scale. It recognised two unions, the TMA and UNITE with whom the respondent consulted including on the re-organisation in June 2021 and after a sale of part of the business completed on the 1 May 2022. The respondent had a number of policies and procedures which included redundancy on which it consulted with the unions.

21. The claimant was based in Liverpool and employed as a CM Specialist (L5) from 7 December 2015 until she was dismissed by reason of redundancy on 11 January 2023. The claimant worked in the cash management department and was at the same level as her male colleague Leo O’Neill and managed by Danielle Waring and Mathew Ahmed. The group director was Gareth Quantrill. Earlier in her career the claimant had been involved in other re-organisations, for example, she was employed to transition part of the finance function from Germany to Liverpool.

22. It is undisputed that the respondent by 2021/2022 had put in place a Menopause employee network, employees had access to menopause champions and training for manager on menopause took place. It was awarded Accredited

Menopause Friendly Employer in 2022. The claimant was aware of this and yet made no mention to it or any manager that she believed perimenopause adversely affected her daily including memory and the way she communicated at work. The Tribunal found the claimant had exaggerated the effects of for the purpose of this litigation and even had she suspected Menopause in 2019 as she now claims, the work history does not reflect this and consequently the claimant did not make use of the respondent's menopause champions, and she did not inform anybody within the respondent that she believed her health was being adversely affected by perimenopause.

23. The claimant maintains that on the 26 September 2019 she was debilitated by perimenopause and that remained to be the case until she was dismissed. The Tribunal found there was no satisfactory evidence to this effect before it.

Performance reviews

24. The Tribunal was referred to a number of performance reviews going back as far as 2016 referring to a "key area" the claimant needed to focus on that included "effective communication" when the claimant scored a "good" rating overall and the comment "continuing to demonstrate an excellent work ethic during the first half of the year." The claimant completed many sections of the appraisal setting out how she well she was performing and there was no issue for her with the "good" rating awarded. It is notable the claimant had problems with communication in 2016 years before she believed her communication skills were adversely affected by perimenopause in 2019.

25. In the 2017 appraisal the claimant was "by now a full time treasury assistant" her manager reported that the claimant's "confidence was fragile…be concise in your explanations – I know that you've developed in this area…and I've only seen you slip back once recently."

26. In the 2019 review it was noted that the claimant "has made some improvements to her communications skills…" undermining the claimant's evidence in this litigation concerning her health condition. The global review figure was "performing."

27. In the 2020 End of Year Performance Review the manager referred to the claimant's communication skills as follows: "Try and make your communication as "neutral" as possible – it's fine to have an opinion but temper it with diplomatic language…forgot to mention your amazing memory which helps us out a lot…" The global figure was performing according to the parties. It is noticeable that the comment about the claimant's "amazing memory" was observed during a period when the claimant believed she was adversely effected by peri-menopausal that affected her memory, undermining the claimant's evidence which was not confirmed by any medical records disclosed by her, and the claimant had not made any mention of her memory loss in any the appraisal sections she had completed that were before the Tribunal. All of the appraisals were silent about perimenopause and/or the adverse effect of the condition.

28. In the 2021 Mid-Year Performance Review there are many references to the claimant's excellent performance including an improvement in focus which had been

noticed, the leader manager referred to the claimant working "hard on the areas for improvement in 2020 and has made sure she has largely kept herself focused on the job" and positive feedback was given relating to her communication. The claimant was rated "performing." The appraisal undermined the evidence given by the claimant on the effects of perimenopause in this period.

29. Leo O'Neill worked at the same level as the claimant, and scored higher than the claimant, performing beyond "performing" to "excelling" in 2021 and 2022 for the "how" and "performing" for the "what's" and this continued to 2023. "What" an employee and "how" and employee delivers contributes to pay and bonuses marked against a 5-point scale ranging from "outstanding" through to "excelling," performing," "building" and "not performing." The score "building" can apply to somebody moving into a new role focusing on areas of "opportunity and development." The appraisal scores are important and the claimant did not challenge any of hers or the comments criticising her communication skills. The difference in performance scores underlined the fact that Leo O'Neill was judged to be a better performer in comparison to the claimant well before they were included in the selection pool of two for redundancy. The claimant has not questioned Leo O'Neill's performance scores and the respondent's evidence that Leo O'Neill voluntarily took on additional responsibility and had skills the claimant did not possess or use.

Disability status

30. It is undisputed the claimant had a good attendance record, and she relies on a one day absence on 27 September 2019 recorded by the respondent as "gynaecological" and this is the only reference in the respondent's records to any condition that could remotely be described as menopause/perimenopause. The claimant argued that this entry fixes the respondent with knowledge as far back as 2019. The Tribunal does not agree taking into account the information before the respondent at the time, including the content of appraisals carried out through to the claimant's dismissal.

31. Before her absence on the 27 September 2019 the claimant had three counselling sessions on the 10 August 2019, 24 August 2019 and 14 September 2019. After the 27 September 2019 the claimant did not undergo any counselling, there are no GP records for this period and it is undisputed the claimant did not inform the respondent that the menopause and/or perimenopause may be causing her stress and anxiety. There was nothing to put the respondent on notice that the claimant was either perimenopause and could be experiencing the effects of the menopause to such an extent that it adversely affected day to day activities. As far as the respondent was considered the claimant was performing and one of her managers, Mathew Ahmed in 2021, took the view that her performance was "excelling."

32. The claimant has produced a report dated 12 September 2023 from the counsellor submitting that it was the counsellors view that she was perimenopause. The report does not say this. The Tribunal appreciates the claimant now says she was, however, it is undisputed the claimant did not provide the respondent with the report at any stage and did not inform anybody within the respondent that she suspected perimenopause rather than cervical cancer for which she was investigated and found not to have cervical cancer.

33. The claimant's next absence was 17 February 2020 to 7 April 2020. The Sickness Absence Information for this sickness absence recorded "stress, anxiety and personal issues…" Between 8 December 2020 to 12 January 2021 the claimant was absent with "stress and anxiety" and there were no further absences until after the claimant had received a letter from the respondent confirming her redundancy. The claimant's GP certified the claimant unfit for work with no adjustments because of "stress at work." The claimant has invited the Tribunal to find she was not absent due to stress at work but because of anxiety and depression. However, the claimant has produced no evidence that the GP was treating her for anxiety and depression until she was prescribed Sertraline 50mg in July 2023, months after the effective date of termination. All of the Med3's refer to "stress at work" during the period when the claimant was absent during the redundancy process after she had been selected and it was made clear to her by the respondent that it wanted to redeploy her.

34. The claimant was referred to gynaecological investigations in late 2022, 3 years after the claimant three counselling sessions in 2019, with no reference in the medical report perimenopause. In her disability impact statement the claimant refers to taking medication to manage her stress and anxiety order, but there is no record of the claimant being prescribed medication until 2023. The only reference in any of the medical evidence to there being a possible link to the menopause was in in the report dated 12 September 2023 when the claimant mentioned back in 2019 that the symptoms of menopause "were causing her increased stress and anxiety" the claimant's own self-diagnosis with no medical confirmation either from the therapist or in the claimant's own GP records. The problem for the Tribunal is that whatever the diagnosis, the claimant has not shown her medical condition whether it is anxiety/depression and/or perimenopause and/or menopause had an adverse effect on her day to day activities in the relevant period. Even had the claimant shown this she did not tell anybody in the respondent of her medical condition, and nor was there any information before the respondent that would have put it on notice that further investigation was needed, for example, by a referral to occupational health.

35. There was nothing to put the respondent on notice that the claimant may have been disabled, and the Tribunal finds the respondent had no knowledge even had the claimant discharged the burden to show she was disabled under S.6 of the EqA.

<u>Redundancy Policy effective from 1 January 2017</u>

36. The Redundancy Policy provides that "during an employee's notice period, we will look for suitable alternative employment for that employee…Suitability – "the suitability of any alternative role offered to you will depend on a range of factors (to be considered as a whole)." Following consultation with the unions the redundancy policy was expanded in 2022 as set out below.

<u>Claimant's absence 17 February 20202 to 7 April 2020</u>

37. In her witness statement the claimant refers to her "work environment" being signed off with stress, anxiety and personal issues including abnormality in her cervical screening. The claimant was not saying her stress and anxiety was due to perimenopausal symptoms at that time, and she was not saying that at any stage she made the respondent aware of any perimenopausal symptoms.

Grievance 22 September 2020

38. The claimant issued a grievance on the 22 September 2020 complaining about her manager Danielle Waring and how she dealt with a complaint against the claimant by a third party, and a situation involving two emails when the claimant thought there was one. The claimant relies on the comment "this is feeling like harassment and I am being treated unfairly" as evidence that the grievance was a protected act. However, apart from the reference to harassment and being treated unfairly there is no suggestion the claimant is linking the alleged treatment to any protected characteristic, whether it be disability, age or sex which are not mentioned and nor can discrimination be inferred if a generous interpretation was given to the document taking the claimant's case at its highest.

39. The claimant also relies on what she described as an "attachment" to the grievance dated 22 September 2020 and at the final hearing produced the document marked "C2" as evidence that it was a protected act. The respondent denied receiving the attachment and the claimant, despite stating she had "proof" it had been sent, did not produce the email despite being given the opportunity.

40. The email is dated 20 November 2020 sent at 12.14pm from the claimant's personal account to her work email address and it was not sent to anybody else. The original grievance email was sent to HR services (UK)on the 22 September 2020 almost a month earlier with no attachment and given the claimant's less than credible evidence in a number of other matters, the Tribunal on balance accepts the respondent was not sent the attachment. Turning to the attachment itself it refers to "the main additional issues that have occurred since my return to work in April: **time off from work with stress and anxiety and personal issues from 17 February 20 to 7 April 20. GP recommended a break from the current situation in work & cervical cancer diagnosis which a later diagnosis explained had not developed**. 7 April: returned to work, 17 April: back to current duties" [the Tribunal's emphasis]. The claimant listed a number of issues she had with the payments team." The claimant referred to the half yearly review "**there are no concerns about my contribution to the team. DW said there are real changes and I am really trying**…the team missed me…I do things that the men don't like to do…I keep the admin up to date…DW said her only concern was with the payments team. I should try to engage with them individually." The claimant referred to "DB" informing her that a team member thought an email sent by the claimant was "passive aggressive" to which the claimant responded "is passive aggressive the opposite to blunt?" The claimant referred to being instructed to delegate administration functions and her communication skills were referenced plus a colleague "ranting." There was no reference to any discrimination, no reference to the claimant's belief that she was struggling with anxiety and depression due to menopause and no reference to age or sex. The attachment was not a protected act, and underlined the fact that the claimant was not struggling to perform at work and there was nothing she did or said that put the respondent on notice that she could be disabled with perimenopause or menopause symptoms, and so the Tribunal found.

41. Danielle Waring, the claimant's line manager, went off on maternity leave in February 2022. Mathew Ahmad covered her maternity leave, reporting to Dan Ferguson and Gareth Quantrill, who had been working in Canada and nevertheless was aware of the work carried out by individual employees including the claimant.

As a result of a restructure Gareth Quantrill, investment director, took over the Treasury team from the group treasurer with effect from July 2022.

April 2022 sale of shareholding

42. The respondent made public its intention to sell its shareholding in the Middle East and Scandinavia and by May 2022 the business was sold. The impact of the sale was that the volume and complexity of Treasury operations is expected to diminish, resulting in one of the two cash management specialist roles becoming redundant. UK Treasury and Treasury operations were to be consolidated and is undisputed that the union was consulted concerning the re-organisation and the redundancy process which followed.

Communication skills – discriminatory comment

43. In or around May 2022 after the claimant had made a racist comment in April 2022 which Mathew Ahmed reported to Gareth Quantrill because as a Muslim he had been offended by it. In oral evidence Gareth Quantrill explained he was aware from discussions with his direct reports about the problems with the claimant's communication style including the claimant being too blunt. Gareth Quantrill discussed with the claimant the racist comment and instructed her to complete diversity and inclusion training, which she did. Gareth Quantrill emailed the claimant on the 26 May 2022 referring to the offence "that may be caused…to other attendees" at a team meeting, "this may have bene a slip of the tongue, but you should understand that we are all responsible for creating an inclusive and respectful working environment…I have requested that you be assigned the Diversity and Inclusion training module as a refresher on RSA value".

44. In oral evidence the claimant denied making the discriminatory comment stating "I can't believe they would put words in my mouth without an investigation" and the Tribunal found the claimant's responses to be less than credible, preferring the evidence of Mathew Ahmed that the words were said and he had informed Gareth Quantrill because they had upset him at the time, and Gareth Quantrill's evidence that he had taken the claimant to task, giving her the benefit of the doubt and she had carried out the diversity and inclusion training. .

45. The claimant's case is that the respondent including Gareth Quantrill were involved in generating a sham redundancy to dismiss her from the business because of her disability, sex and age, or in the alternative, select her as redundant and not find suitable alternative employment, preferring to retain Leo O'Neil. The Tribunal found on the balance of probabilities that had it been Gareth Quantrill's intention to engineer the claimant's dismissal for discriminatory reasons, the discriminatory remark could have given him the opportunity to discipline the claimant, instead he accepted that the claimant had made a mistake and should not be given any warning. This incident underlined to Gareth Quantrill the difficulties the claimant had in communicating with other people inside and outside the business, which he took into account when carrying out the redundancy desk top exercise in addition to other feedback, for example, from a manager Kevin Mahoney.

Six month review 2022

46. Mathew Ahmed informed the claimant when it came to the 6 month review that he was going to rate her as "excelling" for "what" and "How." The claimant understood she was given the "excelling grade" because she had met one hundred percent of her objectives and Mathew Ahmed was impressed with a report she had produced. There is no suggestion that the claimant had difficulties with her performance including memory. In oral evidence the claimant explained how her hormones affected her; "thinking becomes so limited, the impact it has on your thinking, it makes you very limited struggle, hard to put into work and perceive it's happening. Can't make a recollection of things. I think it covers everything, Got it there as well, your brain is blank like a severe head injury and sometimes it is not as bad, a bit of forgetfulness, you play it down as well." The Tribunal found there was no evidence the claimant was experiencing an adverse effect of her day to day activities with memory loss and reduced concentration, and she has not produced any medical evidence for 2022 to show that she was experiencing such symptoms, and there is no reference to perimenopause in any of the medical evidence for this period.

47. Mathew Ahmed's rating of Leo McNeil was higher than his rating of the claimant. He awarded Leo McNeil "Outstanding" for both "What" and the "How."

48. Gareth Quantrill did not agree with Mathew Ahmed's rating of the claimant and Leo McNeil, and took the view that Mathew Ahmed was not authorised to inform the claimant of any rating. Mathew Ahmed's responsibility was to make a recommendation to Gareth Quantrill and the decision lay with him. Mathew Ahmed's ratings of the claimant and Leo McNeil were "excessive" according to Gareth Quantrill's assessment.

49. The claimant's mid-year performance review was conducted by Gareth Quantrill with the claimant giving many examples of the "great work" she had done with no suggestion by the claimant that she was struggling due to her disability. Gareth Quantrill's commented "Elaine works diligently to achieve her goals, but sometimes how she goes about her work undermines her achievement **we will continue to work with Elaine to develop the way she presents and interacts with others to ensure more consistently positive outcomes**" [the Tribunal's emphasis]. Gareth Quantrill rated the claimant as "building" for the "How" and "performing" for the "what." The claimant's complaint in this litigation is that Gareth Quantrill lowered her score from "excelling" as rated by Mathew Ahmad for the "what" and "how to" to "performing" for the "What" and "building" for the "How." She did not complain about the changes at the time.

50. Gareth Quantrill also reduced Leo McNeil's score from "Outstanding" for both "What" and the "How" to "Excelling" for the "How" as he was involved in forecasting (when the claimant was not) and had taken on greater responsibilities. The change in the score was made on a date sometime before the 17 June 2022, and for the purpose of time limits the Tribunal concluded that the decision was made by Gareth Quantrill and communicated to Mathew Ahmed in or around 17 June 2022.

51. The claimant was made aware of this on the 17 June 2022 by Mathew Ahmed who also informed the claimant "he scores everyone he takes my input into account but then makes his own mind…**he feels that according to feedback left to him by Danielle and Dan Ferguson there is still areas of development…but he's taking feedback from other people…and it's not just you whose been dropped on the**

team. It's other people been dropped on the team in their rating as well. Okay, for everyone on the team who I've rate have been dropped as well, so maybe I was a bit optimistic…I saw a lot of improvement in your performance suddenly, so upbeat and so improved. And I could feel that buzz…" [the Tribunal's emphasis]. The claimant responded "it's always about communication" taking the view that she was being "undervalued and thrown under the bus." In this honest intimate conversation covertly recorded by the claimant not once is there a reference to the claimant's health, age, sex, disability, menopause, or her inability to carry out her role in any way due to any of these factors, and it undermines the claimant's evidence that she did not have the chance and/or opportunity to speak with Mathew Ahmed.

52. It is also apparent from the respondent's correspondence and strapline "Committed to be a Menopause friendly employer Proud to display the BADGE" that it was committed to supporting employees with Menopause and yet the claimant did not raise any issues concerning the problems she was experiencing either perimenopause or the menopause at any stage during her discussion with Mathew Ahmed who divulged the difficulties he experienced as manager working for the respondent to her clearly under the misapprehension that it was a private discussion between two colleagues who got on well, and totally unaware that the claimant was recording it with the intention of using it later on, which she did in the public forum of a trial. The 27 minutes spent discussing her grade and other matters with Mathew Ahmed reflects the true position, which is that he had aligned himself with her in the organisation and would have been sympathetic to any health problems had she divulged them because he believed "I'm one of the better bosses you've had at RSA" and the claimant responded "that's not a hard place to fill. You know, as soon as you spoke to me, you know, openly and directly and not condescendingly. You know." The Tribunal, taking into account the fact the claimant recorded this conversation unbeknown to Mathew Ahmed, who she trusted, undermined her credibility.

53. The claimant was disappointed in the score changes, however, she raised no objection until her "building" rating was challenged when the redundancy desktop selection process outcome was discussed at the meeting held on 11 October 2022. Taking to claimant's case at its highest, and the date of the alleged act of discrimination as 17 June 2022, the claimant had until 16 September 2022 to start ACAS early conciliation and/ or issue proceedings, and there was nothing to prevent her from doing this. The claimant's explanation was that she did not know proceedings for discrimination could be issued whilst she was employed was not credible given the claimant had access to the union and discussed with her representative taking Employment Tribunal proceedings for unfair dismissal arising out of the redundancy with no reference to any possible discrimination. The claimant did not have discrimination in mind and this is why she did not issue proceedings, and the day before the claimant's employment ended she contacted ACAS as reflected in the Early Conciliation certificate, which undermined her argument that she had no knowledge proceedings could be issued when she was employed. The Tribunal is aware there is a great deal of information on the internet about discrimination and time limits, all accessible to the claimant who was aware of the Employment Tribunal's existence.

The redundancy process.

Union consultation

54. The respondent had begun the consultation process with The Managers Association (TMA) and UNITE the Union on the proposed changes from July 2022. A number of redundancies during this period including that of the claimant. The unions agreed the process and took part in the consultation when providing support to individuals. It is marked that the claimant's union representative made the position clear to her that it was a genuine redundancy situation and the selection process fair.

Employee briefings

55. Gareth Quantrill had a team meeting with the claimant and Leo on 15 September 2022 which was followed by a letter for the same date that referred to the "Treasury & Cash Management Review" and individual consultation. At the time when Gareth Quantrill had reviewed the ratings for the claimant and Leo O'Neill he was aware that the sale had gone through, and there was to be a re-organisation. There was no evidence that he had thought through what the new structure would be and whether it affected the future employment of claimant and Leo O'Neill. The unions were involved in the Treasury & Cash management Review, and the claimant was a union member and supported by the union during the relevant period.

Treasury and Cash Management Organisational Design Briefing Pack September 2022

56. On the 15 September 2022 he claimant was provided with a briefing pack titled "Treasury and Cash Management Organisational Design Briefing Pack September 2022" which showed the existing and intended structure, the rationale for the changes and the selection criteria plus a timeline. The document titled "Background and what is changing" confirmed the group and treasury group treasures had "departed" "subsequent to the sale of the Middle East businesses and termination of the TSA with the ALM brand, the volume and complexity of Treasury operations is expected to diminish, resulting in one of the two cash management technical specialist roles becoming redundant…we are hopeful we can find an internal role for anyone displaced who wants to remain with RSA."

57. The claimant was informed that she and Leo O'Neill were at risk and in a pool of two. The claimant was informed the respondent would be using "our standard pooling approach…those in the primary pool will be able to apply for roles at the same level within their own function/business area" and a standard desktop selection would be used, "and where necessary…" an interview".

58. The briefing pack made it clear that the respondent was seeking to support individuals, and the claimant was made aware that it was her responsibility to look at the vacancy board. Under the heading "Supporting our People" the respondent promised "we will seek to support displaced individuals in search of suitable alternative roles…**we will share any open roles remaining within the scope of re-organisation as well as our usual vacancy board. It will be the individual's responsibility to check for updates on the vacancy board**" [the Tribunal's emphasis].

59. It is agreed between the parties that the vacancies were over one hundred based in various places including abroad. It is undisputed that the vacancies totalled between 120 and 130 approximately during the consultation period and it was made clear to the claimant that she was to inform the respondent is she was interested in any of the vacant roles. This is an important point because the claimant showed no interest in any vacant roles and did not provide a copy of her updated CV despite requests from HR who made it clear to her that they would support her in any way, including contacting managers directly about vacancies that were yet to go on the vacancy board and helping the claimant update her CV.

60. The claimant was provided with a copy of the Desktop Selection Criteria that included formal disciplinary warnings currently in force. The CM technical specialist role undertaken by the claimant and Leo O'Neill was no longer required, and the two roles were to be replaced by the new role "Treasury Analyst." The claimant did not question the information she was provided with, and raised no issue with the Desktop Selection Criteria which was explained to her in detail.

Email sent on the 21 September 2022 at 14.27 and 26 September 2022

61. In an email sent on the 21 September 2022 at 14.27 and 26 September 2022 at 12.13 Gareth Quantrill wrote to named male recipients only, and headed the email "Gents" and copied both to Liverpool Treasury email address. Gareth Quantrill's credible explanation was that it was a thoughtless act described as "lazy language" because he was writing to named male individuals and only copying in the rest of the team. When he headed the email "Gents" Gareth Quantrill did not have in his mind the possibility that when the email was copied to the Liverpool Treasury email address women would also read it. All he had in mind were the named male recipients. Gareth Quantrill had in mind during the redundancy process neither the claimant's age, sex or disability when he graded the claimant in the desktop selection process and so the Tribunal found.

The desktop assessment

62. Gareth Quantrill assessed the claimant and Leo O'Neill against their existing roles over a 2 year period and the new role of Treasury Analyst concluding Leo O'Neill was better qualified for the role due to his experience, analytical abilities, and the fact he had taken on greater responsibilities. He scored 25.5 against the claimant's lower score of 19.8. There is nothing that undermines these scores taking into account the earlier appraisals, where Leo O'Neill consistently outperformed the claimant, and he appeared to have no communication difficulties, unlike the claimant. Gareth Quantrill also factored into his decision making process the claimant's racist remark when it came to communicating effectively, and the claimant's unawareness of the adverse impact on team and colleagues of what the claimant said and how she said it. The claimant achieved the same score as Leo O'Neill in relation to disciplinary records both achieving the maximum score as Gareth Quantrill did not take into account the discriminatory comment when accessing the claimant on the basis that she was given the benefit of the doubt and had completed the diversity training as instructed.

63. The redundancy was not a sham, it was genuine, the statutory definition was met as there was a reduction in the need for two CM Technical specialists role and a need for the role of Treasury Analyst which had a different job description including an emphasis on analysis and communication directly as a result of the reorganisation and so the Tribunal found.

64. Leo O'Neill scored highly on his ability to analyse and communicate in comparison to the claimant, who has attempted to explain her weaknesses on the effects of perimenopause including the difficulties she was experiencing with memory and brain fog when there was no objective evidence to this effect and no medical evidence linking any performance issues with the effects of perimenopause. It is notable that the claimant did not refer to any link between performance and her medical condition at the time.

65. Gareth Quantrill wrote to the claimant on the 10 October 2022 inviting her to a meeting before he made a decision and she was provided with his assessment of her scores for discussion "before any formal selection decisions are made."

Consultation meeting with the claimant 11 October 2022

66. A consultation meeting with the claimant, her union representative Peter Curran, and Gareth Quantrill took place on the 11 October 2022 covertly recorded by the claimant. Gareth Quantrill was unaware the recording had taken place, and at the outset he said "nice to meet you at long last Elaine" as he had not met the claimant face-to-face in the past. The claimant responded "Yeah, it's been a while since I showed my face" reflecting the undisputed fact that the claimant was working at home and did not switch her camera on at meetings. The scoring against the criteria was explored in detail which the Tribunal does not intend to repeat other than record that the claimant was given an opportunity to put her views across.

67. It is apparent from the transcript the claimant refused to accept there were communication difficulties and that she had made a discriminatory comment. The union representative acknowledged it was a genuine redundancy and there is no issue with the scoring. The Tribunal from its experience is aware that acting in the capacity of a union representative requires pragmatism, and the claimant was informed the redundancy situation was genuine. Numerous promises were made relating redeployment and the respondent's preference to redeploy the claimant who Gareth Quantrill believed had performed well and was suitable providing she could find a role acceptable to her. The claimant has been looking at the intranet, there were 120 vacant roles available and the claimant was aware that it was her responsibility to inform the respondent which of the roles she was interested in.

68. The claimant relied on a pause in the recorded conversation between 5.47 to 5.53 as evidence of harassment by Gareth Quantrill. The transcript recorded the following the claimant having asked Gareth Quantrill "what's the scale?" Gareth Quantrill responded "so, the so let me think how to answer that…And I'm just making sure I've got this right one two three…err" [5.47] and at 5.43 "So so there are nine criteria…" Gareth Quantrill proceeded to explain the scoring" and at 06.55 stated "for some key components of the role you currently do, you're very strong in and you've been marked accordingly. And some of the more analytical or change focused or communication focused elements of the role you've been rated weaker on, Which I

think wouldn't, shouldn't some as a surprise, given some of the feedback you've received through reviews."

69. Gareth Quantrill discussed the new role and the changing "nature of the team…we're a much smaller organisation…" When asked for specifics "to take away" Gareth Quantrill explained "so I guess on the communicating piece, one of them that was raised, or that we considered was the diversity point if you remember, we did we, there was a complaint which we decided not to make formal around the diversity inclusion and we asked you to do some training on that…we did give robust feedback…colleagues have rectified the situation that they've also talked to you about…you've sent an email to an external third party, and it's in an abbreviated fashion and it's effectively sent them in the wrong direction. So it isn't clear what you're actually looking to achieve…somebody got the wrong end of the stick as a consequence…at the half year we were identifying these issues…we did highlight that the how was building, which is the same types of issues that we're discussing now. And given the greater emphasis in the new role around some of those held points, there were things that were weaker in the in your selection." The claimant denied the points put to her, including the discriminatory comment which she described as "someone's perception."

70. It is clear from a common sense interpretation of the words and language used Gareth Quantrill was trying to make sure he had the figures right, and the claimant when reviewing the transcript is seeking any confirmation possible that harassment took place, even when on any objectively assessed view it could not have been. Gareth Quantrill made it clear "I'm just making sure I've got this right…" The Tribunal took the view that this further undermined the claimant's credibility.

71. Gareth Quantrill informed the claimant "…we only said the first time we talked on this subject, we are very keen that we redeploy, rather than lose you from the business. And I now that Louise [HR} has been showing you opportunities…there's further pipeline of potential opportunities that are coming. And so you know we'll highlight these to you…

72. Peter Curran, the claimant's union representative, made it clear to the claimant during the meeting that the team was being reorganised, there was a reduction in headcount and a selection process "the unfortunate side…it's not you now…your being dismissed because you can't do your role. **It's a reorganisation, and I know because UNITE's perspective**, we deal with this all the time…it's not a nice process to go through…and hear the reasons why…it sounds very promising about…things in the future, you know, being able to be redeployed…we can speak again in a couple of days" [the Tribunal's emphasis].

73. Louise MacLean, HR business partner, at some point joined the meeting and continued the discussion about arranging a one to one with the claimant to discuss available roles "and then I can help you with your CV, how to apply?...If people are redundant, we look at, you know, making sure we want to try and keep people, so I'll absolutely support you…the performance rating is good../.that's a very strong platform to look at other opportunities in the group." The claimant responded "on the intranet there's, there's 120 roles available" and she left the meeting aware that the possibility of redeployment was a strong one and she had the support of both the respondent's HR and UNITE.

Redundancy confirmation letter 12 October 2022

74. In the 12 October 2022 redundancy confirmation letter produced by Gareth Quantrill, the decision maker, reference made to redeployment support, appeal and outplacement. The claimant was informed the leaving date was 11 January 2023.

75. On the 13 October 2022 the claimant spoke to her union representation, Peter Curran, and covertly recorded the conversation. The transcript reflected Peter Curran confirming the redundancy was genuine, stating "it's always awful when it's clear that there's, you know, a reduction in roles two going into one and the other person has scored higher…both of you put down for the role, they've scored you both. Unfortunately they scored him higher...you were challenging…you questioned them around with some of the feedback. He'd obviously said that he's got from, you know, various people. And then you were asking them for the specifics, because, you know, you need you needed to know either way. You know what those specifics were and what he was talking about?" The claimant answered "Yeah, I mean, because yeah…he explained to me what the driving force for the decision was…" Peter Curran discussed with the claimant the difference in the appraisal ratings "Leo's always got a good good or you know good excelling and then that will put him ahead in the score…if your team goes through a restructure, and that's what they use, it could go against you…nobody's got a crystal ball…so no one knew this was coming until it came" pointing out that the claimant had not challenged her cores at the time.

76. Peter Curran referred to the UNITE consultation and "**we don't rubber stamp the business case**…they consult with us and tell us what their business proposal is…if it's something absolutely bizarre…we can disagree with them and…put our objections on the table…but what they are doing here…it is not for you UNITE to tell them how to run the business…**they've followed the correct process…them going from reducing the team from two people to one**…" [the Tribunal's emphasis].

77. The claimant discussed the fact that "even since the other day we spoke 120 opportunities, there's 129 today" and was advised to "push for it" with HR. Peter Curran offered to be on the call with HR who wanted to discuss alternative employment, keep in touch with the claimant concerning what roles were available and/or those she was interested in and vacancies in the pipeline. An appeal and Employment Tribunal claim was raised and the claimant made no mention of any discrimination in the selection process or that her performance had been adversely affected by perimenopause. The claimant also made no mention that Gareth Quantrill changing her appraisal performance scores on the 17 June 2022, approximately 4 months earlier, was an act of discrimination and she did not attempt to obtain union advice on this because it had not crossed the claimant's mind that discrimination had taken place.

14 October 2022 consultation

78. A further consultation meeting took place on the 14 October 2022, and Gareth Quantrill accepted the claimant's criticism that 1-2-1 were not as regular as they should have been pointing out that his assessment had been "forward looking" at the

skills she and Leo O'Neill had demonstrated for the new role. The claimant was accompanied by Peter Curran and at one point Louise MacLean from HR joined the meeting. The Tribunal has read the transcript of the meeting recorded covertly by the claimant, who discussed a number matters including updating her CV with the assistance of HR and putting it on the portal if any of the vacancies were "attractive…and then what happens is the recruitment business partner calls you and let you know if you've been successful for an interview and then you go for an interview. So that's how simple it is to apply for the roles." Louse MacLean stated "if you want to stay…I can negotiate…can speak to the hiring manager…we have an agreement with UNITE that if we can keep people we do. So this is genuine…we can go through the job roles, adapt job profiles together…have weekly meetings and it's just to go through any new jobs that we see…and then if you see a new job come on board…" The claimant confirmed she was interested in the Treasury department and it was made clear to her that she would be given time to update her CV and look on the "jobs website." Roles were discussed and Louse MacLean offered to speak to a manager if the claimant was interested, and raised a job in Liverpool that was not on the board "outsourced business analyst…hot off the press" and the claimant was told that the faster she got her CV updated "the better because we can send it over" and promised to keep looking every week, I'll send you what I think…might float your boat or if you see any send me the link and I'll look at it…." The possibility of a secondment was discussed" and the claimant was aware that she needed to produce her CV "then you've got something to work from."

<u>The claimant's sickness absence from which she did not return.</u>

79. Four days later the claimant was absent having been diagnosed by her GP with "stress at work" from which she did not return. The claimant was absent with stress and depression during which time she checked the intranet for vacancies. Despite an agreement that the claimant would provide the respondent with her updated CV she did not, and nor did she take up the offer made by Louise MacLean to assist her updating it and find alternative employment.

80. A number of emails were sent to the claimant's work email address about alternative positions including 24 October 2022, 7, 15, 22 November 2022, 18 December 2022, 9 January and 11 January 2023. For example, in the 24 October 2022 email Louise MacLean wrote "How is your CV coming along? Please let me know if you need any support, or want to book any time in. Here are some new roles posted last week…Give me a shout if you want to chat any through." The claimant did not respond. The claimant denied receiving some of the emails, and described them in oral evidence on cross-examination as follows; "they are job adverts not offers of redeployment." The Tribunal found there was no reason why the claimant would not have received all the emails sent to her on the usual internal email address to which she had access whilst absent, and on the balance of probabilities it found that she had. During this period the claimant was accessing her emails and the job vacancy board and she did not contact the respondent or her union representative indicating she was interested in any of them.

81. The claimant was unable to give a coherent explanation as to why she failed to inform the respondent which of the job adverts she was interested in and why she refused to update her CV or show interest in any of the vacancies forwarded to her by email or on the job vacancy board.

82. The claimant "came across" a vacancy for a level 5 "cash management technical specialist "two days before the employment ended I saw this role." The vacancy was in Liverpool, business line finance, the hiring manager Lindsey Byrne and the closing date 12 January 2023, one day before the claimant's termination date. The claimant was aware she had to apply or at the very least give an indication to HR that she was interested in the role. The claimant had still not produced a CV, had not approached the respondent's HR concerning any of the 130 job vacancies, and had taken no active steps to secure or show an interest in alternative employment in a period of just under 3 months. There was nothing to stop the claimant from giving the respondent an indication that she was interested in the role, and she had sufficient time to do this even if the CV was not up to date. In oral submissions the claimant stated that the job should have been offered to her "on a plate" and it should not have gone to print despite the respondent's process as confirmed by UNITE that the claimant's obligation was to inform it which role she was interested in.

83. The claimant did not appeal her redundancy and she did not inform the respondent prior to the effective date of termination that her redundancy was not for genuine business reasons and the cash management specialist was either her original role or similar to her original role. The respondent's evidence is that the role was in a different team to the Treasury Team, it was in the Accounts Payable Team and not the same role that was made redundant. Taking into account all the evidence before it the Tribunal is satisfied that the claimant has not shown on the balance of probabilities that the CM Technical specialist vacancy in Accounts Payable team was her original role, and this is reflected in her grounds of Complaint at para. 208 where she refers to the role in the alternative as "one very similar." It is unfortunate the claimant did not contact the respondent or at the very least UNITE to confirm her interest, or send through a copy of her CV to the Accounts Payable team's hiring manager. Had she done so the position would have become clearer, nevertheless, the Tribunal is satisfied on the balance of probabilities that this is a role the claimant could have been considered for had she shown an interest it is, although it cannot say that it was suitable alternative employment which should have been offered her without the claimant giving an indication that she was interested in the role against the background of the claimant taking no steps whatsoever to try and secure alternative employment despite the number of vacancies and strong indication given to her that redeployment was likely. At the very least the claimant could have made contact with UNITE, especially given the offer made to her that her union representative would become involved in negotiating alternative employment on her behalf. The claimant had raised the possibility of bringing Employment Tribunal proceedings with her union representative for unfair dismissal earlier and her intention was to accept the redundancy payment (which she did) and proceed down the litigation route, which she did the next day and so the Tribunal found, concluding that the claimant was not precluded for health reasons from exploring suitable employment, and was capable of instigating litigation as an alternative.

84. The effective date of termination was 11 January 2023.

<u>Law and applying the law to the facts.</u>

<u>Direct discrimination</u>

85. S.13(1) EqA provides that direct discrimination occurs where "a person (A) discriminates against another (B) if, because of a protected characteristic [race] A treats B less favourably than A treats or would treat others.

86. An actual or hypothetical comparator is required who does not share the claimant's protected characteristic and is in not materially different circumstances from her. Para 3.23 of the EHRC Employment Code makes it clear that the circumstances of the claimant and comparator need not be identical in every way, what matter is that the circumstances "which are relevant to the [claimant's treatment] are the same or nearly the same for the [claimant] and the comparator." This is relevant to the comparators relied upon by Ms Scott who were not in the same or nearly the same circumstances as Leo O'Neill and the Tribunal was unable to formulate a hypothetical comparator based on the evidence in the alternative.

87. Section 13 EqA requires not just consideration of the comparison (the less favourable treatment) but the reason for that treatment and whether it was because of the relevant proscribed ground. These two questions can be considered separately and in stages; or they can have intertwined: the less favourable treatment issue cannot be resolved without deciding the reason why issue. As was observed by Lord Nicholls in the well-known case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL, at paragraph 11: "…tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? … If the former, there will … usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable then was or would have been afforded to others." As can be seen from its findings of facts, the Tribunal in the case of Ms Scott examined all of the facts in the case to ascertain whether the claimant was treated less favourably as she alleges both in relation to the actual comparator concluding they were not like for like, and concentrating on the question why the claimant was treated as she was, concluded there was no less favourable treatment and Leo O'Neill had performed better than the claimant and was more suitable to the new role, and his selection had no causal connection whatsoever with sex, race or disability.

88. A Tribunal should not assume a finding of unlawful discrimination from a finding that an employer acted unreasonably; there may be other explanations (if only simply human error): Bahl v Law Society [2004] IRLR 799 CA. **More is required than simply a finding of less favourable treatment and a difference in the relevant protected characteristic** [the Tribunal's emphasis]. Where there is a comparator, the 'something more' might be established in circumstances where there is no explanation for the unreasonable treatment of the complainant as compared to that comparator; see per Sedley LJ in Anya v University of Oxford [2001] ICR 847 CA, and the discussion of those dicta in Bahl , per Maurice Kay LJ, observing (paragraph 101) that the inference of discrimination would not then arise from the unreasonable treatment but from the absence of explanation. This test is relevant to the claimant's invitation that the Tribunal should infer sex discrimination from Gareth Quantrill addressing two emails to "Gents" when forwarding a copy of the email to the department that included the claimant. Gareth Quantrill provided an explanation which was credible and untainted by sex discrimination, namely, in his

own mind he was writing to named male recipients and the Tribunal does not accept managerial incompetence equates to unlawful discrimination on the grounds of sex.

Section 15 EqA

89. Section 15(1) of the EqA provides-

(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B less favourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

90. Paragraph 5.6 of the Equality and Human Rights Commission: Equality Act 2010 Code of Practice provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability. Had the claimant satisfied the Tribunal that she was disabled under section 6 of the EqA (which Ms Scott did not) she would have fallen at this hurdle.

91. 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. Taking into account the EHRC guidance the Tribunal concluded as set out below that the claimant was not subjected to unfavourable treatment, and nor could she reasonably consider that she had been taking into account the Tribunal's findings of facts as set out above.

92. Unfavourable treatment is not the same as detriment. The test is whether a reasonable worker would consider that the treatment is unfavourable. Useful guidance on the proper approach to a claim under s.15 was provided by Mrs Justice Simler in the well-known case of Pnaiser v NHS England and anor [2016] IRLR, EAT:

1. A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

2. The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct

discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it. The Tribunal examined closely the conscious and unconscious thought process of the respondent's witnesses, particularly Gareth Quantrill, concluding the explanations he gave were untainted by disability discrimination. For the reasons set out above, not one person in the respondent had any knowledge of the claimant's perimenopause condition and the fact that the claimant had two absences due to anxiety and depression before she was selected for redundancy and stress at work after she was selected, does not fix the respondent with knowledge.

3. Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport *[1999] IRLR 572*. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises…"

4. The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. …the statutory purpose which appears from the wording of s.15, namely, to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

5. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

93. Whether or not treatment is "unfavourable" is largely question of fact **but this does not depend just on the disabled person's view that he should have been treated better** [the Tribunal's emphasis]. In Williams v Trustees of Swansea University Pension and Assurance Scheme [2018] UKSC 65. The Court referenced passages in the Equality and Human Rights Commission's Code of Practice (2011) which provided helpful guidance as to the relatively low threshold of disadvantage ("unfavourable treatment") sufficient to trigger the requirement to justify the treatment as a proportionate means of achieving a legitimate aim, under the Equality Act 2010, s 15(1).

94. 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) as described by Simler J in Secretary of State for Justice and anor v 10 Dunn EAT 0234/16 in the following: "…We agree…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.

95. In the well-known case of Sheikholeslami v University of Edinburgh [2018] IRLR 1090, the EAT held that the approach to this issue requires : an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment, then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.

96. The actual disability does not need to be the cause of the unfavourable treatment under s.15 but it needs to be "a significant influence" or "an effective cause of the unfavourable treatment" The more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact – Pnaiser cited above.

97. It is not enough that but for their disability an employee would not have been in a position where they were treated unfavourably. The unfavourable treatment must be because of the something which arises out of the disability - Robinson v Department of Work and Pensions [2020] EWCA Civ. 859.

Justification in S.15(1)(b)

98. A legitimate aim for the purposes of S.15 of the EqA should not be discriminatory in itself and should represent a real, objective consideration. Case law has recognised a range of legitimate aims, including health and safety and the operational needs of the business.

99. The test of justification in S.15(1)(b) requires that the treatment complained of amounts to a proportionate means of achieving a legitimate aim. weighing an employer's justification against the discriminatory impact, considering whether the means correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question, and are necessary to that end.

100. The EHRC Employment Code sets out guidance on objective justification that largely reflects existing case law in this area. In short, the aim pursued should be legal, should not be discriminatory in itself, and should represent a real, objective consideration. Although business needs and economic efficiency may be legitimate aims, the Code states that an employer simply trying to reduce costs cannot expect to satisfy the test (see para 4.29). As to proportionality, the Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see para 4.31). In short, the aim pursued should be legal, should not be discriminatory in itself, and must represent a real, objective consideration — para 4.28.

101. Land Registry v Houghton and others UKEAT/0149/14) and Kelly v Royal Mail Group Ltd EAT 0262/18) on the issue of less severe alternatives and proportionality. In Houghton HHJ Peter Clark referred to the "classic test propounded by Balcombe LJ in Hampson v DES [1989] ICR 179 at 191E: "… "justifiable" requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition" [para.8]. In Kelly (above) the EAT held that "ensuring that there is a reliable pattern of attendance on the part of the Respondent's employees. The Tribunal correctly considered that to be a legitimate aim. It also considered that the Claimant's dismissal was in furtherance of that aim because the Respondent did not have confidence that he would provide reliable attendance" [para.67B].

102. Hardy & Hansons plc v Lax [2005] ICR 1565 when considering the question of justification of the discrimination arising from disability it is incumbent upon an Employment Tribunal to make a proper and clear assessment of the proportionality between the discriminatory effect of the challenged provision and the need of the employer to proceed in the way that that employer has. The Court of Appeal emphasised the importance of that critical evaluation. In paras. 28 to 34 Pill LJ referred to the appraisal of the competing requirements of the employer and the employee as being an appraisal requiring considerable skill and insight: "33. … As this court has recognised in Allonby [2001] ICR 1189 and in Cadman [2005] ICR 1546, a critical evaluation is required…the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification. 34….a broader understanding of the needs of business will be required than in most other situations in which tribunals are called upon to make decisions."

103. In Hensman v Ministry of Defence UKEAT/0067/14/DM [2014] EqLR 670, the EAT applied the justification test as described in Hardy to a claim of discrimination under s.15 EqA. Singh J. held that when assessing proportionality, while an ET must reach its own judgment, which must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. This was subsequently applied in Monmouthshire County Council v Harris UKEAT/0010/15 (23 October 2015, unreported)).

104. On the question of proportionality MacCulloch v ICI plc [2008] IRLR 846 [2008] ICR 1334 and Hampson v Department of Education and Science [1989] IRLR 69, [1990] ICR 511. Tribunal notes that para.10 summarised the legal principles, namely, that the burden is on the respondent to establish justification and the measures "must 'correspond to a real need that are appropriate with a view to achieving the objectives pursued and are necessary to that end…necessary means 'reasonably necessary. The principle of proportionality requires an objective balance struck between the discriminatory effect of the measure and the needs of the undertaking." Hardys above was referenced.

105. The Court of Appeal in Harrod & Ors v Chief Constable of West Midlands Police & Ors, Court of Appeal, 24 March 201 in deciding whether a measure is legitimate and proportionate, referred to the decision in Land Registry v Benson that highlighted that the test should be whether the measure was *reasonably necessary* and not whether it was one of *absolute necessity*. The analysis in that case, which the Court of Appeal agreed with, was that an employer's decision about how to allocate its resources, and specifically its financial resources, can still constitute a legitimate aim, even when shown that a different allocation with a lesser impact on the class of employee in question could have been made.

Harassment

106. The EHRC Employment Code provides that unwanted conduct can be subtle, and include 'a wide range of behaviour, including spoken or written words or facial expressions' para 7.7. Where there is disagreement between the parties, it is important that an Employment Tribunal makes clear findings as to what conduct actually took place.

107. Section 26 EqA covers three forms of prohibited behaviour. In the claimant's case the Tribunal is concerned with conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment — S.26(1) It states that a person (A) harasses another (B) if: A engages in unwanted conduct related to a relevant protected characteristic — S.26(1)(a), and 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).

108. The word 'unwanted' is essentially the same as 'unwelcome' or 'uninvited' confirmed by the EHRC Employment Code at para 7.8. Unwanted conduct means conduct that is unwanted by the employee assessed subjectively.

109. S.26(4) states that, in determining whether conduct has the proscribed effect, a tribunal must take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. There can be cases where the claimant when alleging the acts violated his or her dignity, is oversensitive and it does not necessarily follow that an act of harassment had objectively taken place despite a subjective view that it had.

110. In order to decide whether any conduct has either of the proscribed effects under s.26 (1)(b) EA 2010, the ET must consider both (by reason of s. 4(a)) whether

the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of s.4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). All the other circumstances must also be taken into account (s.4(b)) - Pemberton v Inwood [2018] EWCA Civ 564.

111. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended - Richmond Pharmacology v Dhaliwal [2009] IRLR 336. A claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention. Three essential elements for a claim of harassment to be proved as follows:

a. unwanted conduct

b. that has the prescribed purpose or effect, and

c. which relates to a relevant protected characteristic.

Related to a protected characteristic.

112. This is a very broad test, but some guidance about how the Tribunal should approach the issue was provided in UNITE the Union v Nailard [2018] EWCA Civ. 1203. It should make findings as to the mental processes of the alleged harassers.

113. Whilst the view of a claimant might be that the conduct related to the protected characteristic is relevant, it is not determinative - Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495 *EAT.* The ET has to apply an objective test in determining whether the conduct was related to the protected characteristic in issue. The intention of the actors concerned might form part of the relevant circumstances, but it is not the only factor.

Burden of proof

114. Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

115. In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply, as affirmed in Ayodele v CityLink Ltd [2018] ICR 748. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that it did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondent and can take

into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex, race or disability failing which the claim succeeds.

Unfair dismissal

116. S.139(1) of the ERA sets out the following: '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.'

117. 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. Ms Scott submitted that her role had not disappeared and there was no genuine redundancy as the number of employees in her department were not decreased. The Tribunal did not agree on the clear evidence before it, which was that as a result of the reorganisation following the sale (which the claimant also disputed) there was a redundancy situation. The requirement of the respondent for two CM technical specialists had diminished from two to one as there was less work available, and the type of work required had changed in to a different role. The Tribunal was satisfied there existed a genuine redundancy and it was not a vehicle by which to dismiss Ms Scott for a discriminatory reason, as alleged by her.

118. In Safeway Stores plc v Burrell [1997] ICR 523, EAT His Honour Judge Peter Clark set out a simple three-stage test. A tribunal must decide:

- (i) was the employee dismissed?

- (ii) 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?

- (iii) if so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

119. HHJ Peter Clark stated that there are no grounds for importing into the statutory wording a requirement that there must be a diminishing need for employees to do the kind of work for which the claimant was employed. The only question to be asked when determining stage (ii) of the three-stage test is whether there was a diminution in the employer's requirement for *employees* (rather than the individual claimant) to carry out work of a particular kind. It is irrelevant at this stage to consider the terms of the claimant's contract. The terms of the contract are only relevant at stage (iii) when determining, as a matter of causation, whether the redundancy situation was the operative reason for the employee's dismissal. The Tribunal had this test in mind when it concluded (a) the requirement in the respondent's business for cash management specialists in the Treasury department had ceased or diminished, or were they expected to cease or diminish, and the dismissal of the claimant was caused wholly or mainly by the cessation or diminution.

120. Applying the two-stage test set out in Murray and anor v Foyle Meats Ltd [1999] ICR 827, HL (the definition of 'redundancy' for the purpose of clear words of the statue as set out in S.139(1)(b) was satisfied in the case of Ms Scott, in that there was a diminution in the requirements of the business for employees (the claimant and Leo O'Neil) to carry out work of particular kinds, and the claimant's dismissal were attributable to that diminution.

121. The unfair dismissal provisions are contained in S.98(4) of the Employment Rights Act 1996 (ERA). This states that 'the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) — (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case'.

122. 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. It stressed, however, that in determining the question of reasonableness it was not for the employment tribunal to impose its standards and decide whether the employer should have behaved differently. Instead it had to ask whether 'the dismissal lay within the range of conduct which a reasonable employer could have adopted.' The factors suggested by the EAT in the Compair Maxam case that a reasonable employer might be expected to consider were:

(1) whether the selection criteria were objectively chosen and fairly applied

(2) whether employees were warned and consulted about the redundancy

(3) whether, if there was a union, the union's view was sought, and

(4) whether any alternative work was available.

123. The Compair Maxam the guidelines are not principles of law but standards that can inform the reasonableness test under S.98(4), and if they are not followed does not lead to the automatic conclusion that a dismissal is unfair. On of the issues

in Ms Scott's case is whether the respondent when it considered a dismissal by reason of redundancy, considered alternatives to dismissal.

Alternative employment

124. This is one of the key issues in the unfair dismissal claim brought by Ms Scott. The reasonableness test under S.98(4) requires a tribunal to consider whether the employer's actions lay within the range of responses of a reasonable employer. If the Tribunal decides the matter by determining **what it objectively considers to have been reasonable** in the circumstances it will fall into the trap of substituting its view for that of the employers. The question was whether the respondent had taken reasonable steps to find alternative employment for the claimant so that she could retain her employment. Particularly, whether it acted unreasonably if there was a vacant post for which the claimant was suitable but for which she was not considered because she failed to inform the respondent of her interests as required under the agreed procedure. As a general rule, tribunals will expect an employer with sufficient resources to take reasonable steps to ameliorate the effects of redundancy, including giving detailed consideration to whether suitable alternative employment is available, providing and drawing the employee's attention to job vacancies and providing information about any vacant alternative positions.

Conclusion

Unfair Dismissal – section 98 Employment Rights Act

125. The burden is on the respondent to show that the dismissal was for a potentially fair reason under section 98(1) and (2) Employment Rights Act 1996. The reason relied upon in this case was redundancy and it is for the respondent to show that the dismissal was caused by a diminished need for employees to do work of a particular kind and the statutory definition is met. The respondent has met this burden and the claimant has produced no satisfactory evidence to the effect that the redundancy was a sham and her contractual role still existed.

126. The Tribunal does not intend to repeat its findings of facts above. A genuine redundancy situation existed, and despite the claimant's protestations that a share sale was not a sale of the business, it is clear from the contemporaneous documents including the article produced by the claimant during the final hearing that the respondent had sold its Middle East and Scandinavian businesses following which a reorganisation took place and the respondent concluded that two cash management technical specialists were not required. The claimant was provided with this information as soon as practicable, and it is notable at a one-to-one conversation with her union representative the claimant was assured that it was a genuine redundancy, the selection pool was two people who were equally at risk and the claimant's colleague succeeded when she did not because he was the better performer.

127. With reference to issue 1.4, namely, if the respondent was able to show a potentially fair reason for dismissal, then the Tribunal would consider whether the respondent acted reasonably under section 98(4), having particular regard to:

128.1 Whether there was adequate warning and genuine consultation, the Tribunal found that there was, accepting Mr Quantrill's evidence that the respondent had no idea the cash management technical specialist role would be put at risk until after the sale. The unions consultation started in July 2022. The Claimant was warned by letter dated 15th September 2022 and at the first consultation meeting on 11th October 2022.

128.2 With reference to whether there was a fair basis for selection (in terms of the pool and the application of selection criteria to the pool TMA and Unite were consulted, the claimant was shown the desk top assessment and did not object to it or the fact she was in a selection pool of two. The desk-top selection criteria was objective and the selection fair, reflecting the historical and present performance. The Tribunal accepted Mr Quantrill's evidence which was consistent with the contemporaneous document and there was no suggestion whatsoever that the claimant was selected for discriminatory reasons taking into account Mr Quantrill's thought processes at the time. He did not have in his mind the fact that claimant had absences from work for anxiety and depression including the period when she was being tested for cervical cancer, and his selection process was untainted by age and the fact the claimant was female. The claimant's argument that Mr Quantrill's emails addressed to "Gents" was evidence of sex discrimination and an inference should be raised by the Tribunal was unpersuasive. It does not follow as a matter of logic that Mr Quantrill's reference to "gents" was discriminatory conduct without more in the particular circumstances of this case – Bahl above. The conduct of Mr Quantrill was unwise given he had copied in the whole department at the same time as addressing the email to individual male colleagues, but not discriminatory and Mr Quantrill's explanation was untainted by sex discrimination.

128.3 The Tribunal was satisfied that the respondent was not paying lip service to the redeployment process. Management, (including at director level), HR and the union were all trying to persuade the claimant to apply for redeployment, but she was having none of it even when it came to informing her union representative and the respondent that the CM Technical Specialist role was the one she was interested in. The claimant's case is that the CM technical specialist role vacancy should have been offered to her without any indication on her part that she was interested in the role and considered it to be suitable alternative employment. The claimant was aware that HR was supporting her and still willing to do so, and it was the claimant who showed no enthusiasm for redeployment even when she was facing dismissal in 2 days' time.

128.4 The claimant now alleges that the role of CM Technical Specialist was her original role, with no satisfactory evidence to support this view. There was a further restructure after the claimant's selection for redundancy in October 2022 and according to Gareth Quantrill, it

sat within a different team evidence which was undisputed by the claimant. Had the claimant shown interest or applied for the position what the role entailed would have become clearer for her, but as she did not apply the claimant had little to base her suspicions on. The Tribunal cannot say one or another that the role was suitable alternative employment that should have been offered to the claimant. It is unfortunate the claimant did not follow due process and comply with the obligation that had been agreed with the unions and made clear to her by the respondent and her representative who advised her that there was a genuine redundancy, and given the unions acceptance of this it is unlikely the vacant CM Technical Specialist role was the claimant's original job. The claimant's failure to show any interest whatsoever in the role suggests it was not as far as she was concerned. The claimant had not applied for or shown an interest in any suitable alternative employment, despite the number and breadth of vacancies, preferring to take her redundancy payment and undergo early ACAS conciliation the day after she had taken a screen shot of the CM Technical Specialist vacancy for use in this litigation the day before the effective date of termination.

128.5 The key issue in this case, which the Tribunal deliberated on for some time including at the final in chambers meeting held on 29 July 2024 was whether there were reasonable attempts to redeploy the claimant or find has an alternative roles without falling into the trap of substitution, concluding that it had taken reasonable steps in this particular case. The claimant was made aware from the outset that the respondent was keen to find alternative employment so that she could retain her employment with it, and there 130 vacancies from which the claimant could chose and inform the respondent of her interests as required under the agreed procedure. The respondent had sufficient resources to take reasonable steps to ameliorate the effects of redundancy, and communicated with the claimant (at meetings and by email) discussing and making suggestion of suitable alternative employment, providing and drawing her attention to job vacancies including those the respondent considered suitable and providing information about them, for example, on 14 October 2022 HR informed the Claimant how to apply for role, offered to negotiate on her behalf, offered to have weekly meetings and offered to look every week for roles and offered to help the claimant update her CV. During the claimant's sickness absence with stress at work, HR referred roles to the claimant's and offered to discuss them with her on 14t October 2022 24 October 2022, 7th November 2022, 15th November 2022, 22nd November 2022 and then in 2023 which the claimant was not interested in. In the period of absence leading to the effective date of termination the claimant had access to 120/130 vacancies on the intranet and her evidence is that she came across a vacancy for cash management technical specialist "two days before the employment ended I saw this role" and when it was put to her that she did not apply responded "I was not offered the role." The claimant was aware it was a possibility and all she had to so was apply or at the very least give an indication to HR that she

was interested in the role. Despite promising to do so, the claimant had still not produced a CV, had not approached the respondent's HR team concerning any of the 120/130 job vacancies and had not responded to any of the emails sent to her regarding vacancies. By January 2023 when the cash management technical specialist vacancy arose the claimant had taken no active steps to secure or show an interest in alternative employment in a period of just under 3 months. From the outset the position was made very clear to the claimant, whose responsibility it was to inform the respondent which of the roles out of the 120/130 vacancies she was interested in. The claimant's union representative also advised her of this obligation. The claimant was told numerous times that the respondent did not want to lose her and was seeking to redeploy in what was an "employee's market."

128.6 The claimant was not interested in redeployment she had disconnected herself from the redeployment process. The claimant had brought up with the union the possibility of taking Employment Tribunal proceedings for unfair dismissal earlier, only to be advised that the respondent had followed the correct redundancy process and it had selected her colleague. This was the route the claimant intended to proceed down, and she did not take up any of HR's offers, she did not apply for any of the vacancies and she did not inform HR of her interest in the role of cash management technical specialist despite her being informed in no uncertain terms that the respondent wanted to redeploy and keep her in the business. The Tribunal has taken into account that the claimant's discussions and meetings with HR were recorded by the claimant covertly with the result that HR had no idea that the promises concerning redeployment and the assistance it could provide the claimant would become an issue in litigation, unlike the claimant. The Tribunal has carefully read the transcripts concluding that the offers made to the claimant were genuine and the respondent's intention was to retain the claimant in the business she wanted to remain employed, and it was not outside the bands of reasonable responses for it not to offer the claimant the position of cash management technical specialist in another team when the claimant had shown no interest in the vacancy. Within the consultation process employees should also take active steps, especially when their employer and union had made it clear that there was a reciprocal obligation for an employee to state if they were interested in a vacancy. In the particular circumstances of this case it would fall outside the band of reasonable responses for HR to offer the claimant the cash management technical specialist vacancy when she had ignored and rejected all attempts at finding her alternative employment over a period of approximately three months bearing in mind the claimant applied for none of these roles, nor did she show any interest in what HR was offering and there was nothing to stop the claimant from informing HR she was interested in cash management technical specialist role (and believed it was her original job) when she was

well enough to undergo ACAS early conciliation and issue proceedings .

128. With reference to the last issue, namely, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant, the Tribunal found that it did and the dismissal fell well within the band of reasonable responses taking into account the entire procedure adopted by the respondent and the factual matrix in the case. It was particularly concerned with whether the respondent had made reasonable efforts to identify suitable alternative employment for the claimant in accordance with Compare Maxim above, and concluded on the balance of probabilities that in the particular circumstance of this case it had. It recognises that the consideration of alternative employment for employees selected for redundancy is important to a fair and reasonable redundancy procedure, and there is a danger that we will slip into the substitution mindset if we were to conclude that the respondent should have done more offering the claimant the "job on a plate" without requiring her to give an initial indication of interest prior to an assessment of suitability taking place. The assessment of suitability is twofold; the claimant satisfied that she wanted the role as an alternative to redundancy, and the respondent satisfied that the claimant was suitable for that particular vacancy which may involve her agreeing to extra training and working in a department that was not Treasury. The reasonableness test under section 98(4) does not require an employer to offer a vacancy to an employee who has access to over 130 vacancies online and has not shown any interest in applying for them. The claimant's case is not that her health prevented her from applying., and the respondent was not obliged in the particular circumstances of the case to bring the claimant's attention to the vacancy, it was aware that the claimant had been told the procedure which she must follow and yet she chose not to respond to any emails or offers of assistance and the respondent had no opportunity to assess any role including the 9 January 2023 vacancy .

3. Disability – section 6 Equality Act 2010

Law and conclusion: Disability status

129. S.6(1) of the Equality Act 2010 ("EqA") provides that a person, 'P', has a 'disability' if he or she 'has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.'

130. Schedule 1 of the EqA 2010 sets out factors to be considered in determining whether a person has a disability. S.6(5) of the EqA 2010 provides for the issuing of guidance about matters to be taken into account in deciding any question for the purposes of determining who has a disability. When considering whether a person is disabled for the purposes of the EqA regard should be had to Schedule 1 ('Disability: supplementary provisions') and to the Equality Act (Disability) Regulations 2010, and the 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' under 6(5) of the Equality Act 2010 should be taken into account.

131. The relevant time to consider whether a person was disabled is the date of the alleged discrimination; see the well-known case of McDougall v Richmond Adult Community College [2008] IRLR 227, *[2008] ICR 431.*For any claim to succeed, the burden is on the claimant to show, on the balance of probabilities, something an 'impairment' whether it is a mental or physical condition. Ms Scott has not met this burden.

132. **It is not appropriate to have an examination for the purposes of discovering the causes of an alleged disability, since, whatever the cause, a disability which produces the effects specified in legislation will suffice. In considering what amounts to an 'impairment', its effect, not cause is what is of importance** [the Tribunal's emphasis].This approach is set out in the Guidance issued under the EqA 2010, where (at para A8) it is stated that 'it is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded. This is relevant to Ms Scott's case given the issue concerning when she was diagnosed with perimenopause (months after the effective date of termination) and the claimant's argument that anxiety and depression was a health condition she experienced as a result of the perimenopause during her employment.

133. In the well-known case of Goodwin v Patent Office [1999] ICR 302, EAT, the EAT said that of the four component parts to the definition of a disability and judging whether the effects of a condition are substantial is the most difficult. The EAT went on to set out its explanation of the requirement as follows: 'What the Act is concerned with is an impairment on the person's ability to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook, but only with the greatest difficulty. **In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts**. Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves…" The problem for the Tribunal in Ms Scott's case was that it did not find her evidence credible on the effects, and there was no satisfactory medical evidence to support her evidence that she was disabled under section 6.

134. The focus must be on the extent to which the impairment adversely affects the claimant's ability to carry out normal day-to-day activities. Substantial is defined in S.212(1) EqA as meaning 'more than minor or trivial'. In determining whether an adverse effect is substantial, the tribunal must compare the claimant's ability to carry out normal day-to-day activities with the ability she would have if not impaired. Appendix 1 to the EHRC Employment Code states: 'The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people' — para 8. This should not be interpreted as meaning that in order to assess whether a particular effect is substantial, a comparison should be made with people of 'normal' ability — which would be very difficult to ascertain.

135. In cases where it is not clear whether the effect of an impairment is substantial, the Guidance suggests a number of factors to be considered (see paras B1– B17). These include the time taken by the person to carry out an activity (para B2) and the way in which he or she carries it out (para B3). A comparison is to be

made with the time or manner that might be expected if the person did not have the impairment. The Guidance states that it would not be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person (see para B9).

Conclusion on disability – applying the law to the facts.

136. The claimant relies on stress and anxiety referenced in her 2020 absences which she asserts were symptoms of perimenopause, the problem for the Tribunal is that there is no medical evidence to support this position, and the claimant's assertion to her therapist in 2019 is insufficient taking into account the claimant's evidence that it was the therapist who made the connection was not credible. The claimant's evidence that her memory was poor at times, "brain blanks" which "you played down" and the reference in the appraisal to her excellent memory was described by the claimant in oral evidence as "facetious" when it was clearly a factual statement about the claimant's memory that undermined the case she is now putting forward concerning the adverse effect of perimenopause on her during the relevant period. The Tribunal concluded the claimant has exaggerated the effect of her health condition and its effect during the relevant period, and this evidence has been undermined by the appraisals introduced by the claimant in evidence. The appraisals have a twofold effect, they reflect the claimant was performing well and had an excellent memory, the claimant was performing in a new role and building on her experience and she had problems communicating that had nothing to do with the menopause, problems which the claimant had worked on since 2016.

137. With reference to the first issue, namely, whether the claimant had the physical impairment of perimenopause during the relevant period the Tribunal found she had not on the balance of probabilities. It notes that the respondent accepted the claimant was diagnosed with perimenopause after the effective date of termination on 11th January 2023 sometime later in 2023. The Claimant has provided evidence of a prescription for hormone replacement therapy patches dated 11th November 2023 and apart from the prescription for Sertraline after her dismissal in 2023 the claimant was not prescribed medication earlier.

138. With reference to the second issue, namely, whether that impairment of perimenopause had a substantial adverse effect on her ability to carry out day-to-day activities during the relevant period, the Tribunal found on the balance of probabilities that it had not and the claimant has not discharged the burden of showing her medical condition of perimenopause fell under section 6 of the EqA. The label is irrelevant, as is the cause of the condition. What is important is whether the claimant's physical condition had a substantial adverse effect on her ability to carry out day-to-day activities, and it concluded that it did not, preferring to rely on the contemporaneous documents including the appraisals completed by the claimant and her line manager rather than the claimant's unsatisfactory evidence, particularly her confusion between the cervical cancer investigation and the claimant transposing the perimenopause diagnosis in 2023 back to 2019.

139. Whatever label is placed on the claimant's medical condition, when determining whether the claimant meets the definition of disability under the EqA the Guidance emphasises it is important to focus on what the claimant cannot do, or can

only do with difficulty, rather than on the things that she can do (see para B9), and the Tribunal was not satisfied on the balance of probabilities the claimant was disabled from June 2022 when her performance review was downgraded, through to 11th January 2023 when her employment terminated.

140. The claimant has produced a report dated 12 September 2023 from the counsellor submitting that it was the counsellors view that she was perimenopause. The report does not say this. The Tribunal appreciates the claimant now says she was, however, it is undisputed the claimant did not provide the respondent with the report at any stage and did not inform anybody within the respondent that she suspected perimenopause rather than cervical cancer for which she was investigated, found not to have cervical cancer and perimenopausal was not a condition put forward by the medical experts at the time.

141. As referenced above, the claimant produced a report dated 12 September 2023 from her treating therapist following three sessions in 2019 referring to perimenopause. Contrary to the claimant's evidence that report (which is not an experts report) does not say that the therapist had suggested perimenopause, this came from the claimant. The therapists notes from 2019 were not disclosed and it unclear whether the short report referencing three sessions that took place 4 years before was produced by memory or supported by notes. It was a most unsatisfactory report that made no mention whatsoever of the adverse effect on day to day activities the claimant relies on in her impact statement and oral evidence, which are unsupported by any contemporaneous evidence and contradicted by the appraisals, the claimant's performance at work and Mathew Ahmed in 2021 concluding her performance was "excelling" and the claimant agreeing that it was.

142. Mr Kelly submitted there is no medical evidence which mentions perimenopause in the relevant period. The Claimant's counsellor's letter, which mentions menopause, is dated 12th September 2023 and records only that the Claimant made the link between symptoms of anxiety and depression and menopause. No such link is drawn by the counsellor in the letter. The Tribunal agreed. There is no medical evidence sufficient to allow the Tribunal to conclude that the Claimant was experiencing perimenopause in the relevant period and without supporting evidence the Tribunal was not prepared to take the claimant's word alone that she was experiencing perimenopause in the relevant period given her less than credible evidence on a number of matters, not least her performance at work.

143. Mr Kelly referred the Tribunal to the EAT's decision in Rooney v Leicester City Council [2022] IRLR 17, a reminder of what a Tribunal should be considering when assessing disability, including medical records. The Tribunal notes the reference to the EqA guidance which refers to normal day to day activities as: "In general, day to day activities are things people do on a regular or daily basis, and examples including shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities….the focus should be on what the employee cannot do or can do only with difficulty and not on what they can do easily, and the effects of an impairment must be more than minor or trivial."

144. In Rooney (above) reference was made by HHJ Tayler to Ahmed v Metroline Travel Ltd UKEAT/0400/10/JOJ in which Cox J considered the importance of not carrying out a balancing exercise between what a person can and cannot do, although what can be done may be evidence that is relevant if there is a challenge to what the person states that she or he is not able to do: "Ms Kochnari is correct in submitting that, under the DDA, the Tribunal must focus upon what a Claimant cannot do. I accept therefore that, as a matter of principle, it will be impermissible for a Tribunal to seek to weigh what a Claimant can do against what s/he cannot do, and then determine whether s/he has a disability by weighing those matters in the balance…there will sometimes be cases where there is a factual dispute as to what a Claimant is asserting that he cannot do. In those circumstances…findings of fact as to what a Claimant actually can do may throw significant light on the disputed question of what he cannot do." This analysis was relevant to Ms Scott given there is a dispute as to what she is asserting she cannot do against a background that contradicts the claimant's evidence as set out in the facts above, particularly the claimant's assertion that the effects of perimenopause started in 2019 including the difficulties she had in memory and communication at work, when the appraisal records show the claimant had these issues at work as far back as 2016 so it cannot be the case that the claimant the normal day to day activity of communicating with colleagues and clients at work had a more than minor effect on the claimant between June 2022 to the effective date of termination taking into account the claimant's performance as confirmed in her appraisals including the 2019 review it was noted that the claimant "has made some improvements to her communication skills…" undermining the claimant's evidence in this litigation concerning her health condition, and 2020 End of Year Performance Review. "Try and make your communication as "neutral" as possible – it's fine to have an opinion but temper it with diplomatic language…forgot to mention **your amazing memory which help us out a lot**…".

145. Mr Kelly submitted the alleged symptoms of perimenopause with the most tangible basis in the medical evidence are anxiety and depression, however, there is insufficient evidence from which the Tribunal could conclude that the claimant was disabled by reason of those symptoms at the relevant times; and there is no contemporaneous evidence of a link between those symptoms and perimenopause The Tribunal agreed.

146. The claimant's impact statement sets out symptoms which she said that she experienced in 2019 and does not address what symptoms the claimant experienced from June 2022 to January 2023, however, her position appears to be that these symptoms continued throughout despite the lack of medical evidence to this effect. The GP records record the claimant was diagnosed with a mixed anxiety and depression disorder in February 2020. Mr Kelly reminded the Tribunal the severity of the symptoms of anxiety and depression can vary greatly, and one cannot automatically move from a conclusion that a person experienced an anxiety and depressive disorder to a conclusion that they were disabled. An assessment needs to be made of the impact which symptoms had on the individual at the relevant time, and there is insufficient evidence to do so. It is undisputed that there is no prescription for anti-depressants/anti-anxiety medication until July 2023, and there is no medical evidence linking any such symptoms to perimenopause. Mr Kelly noted that the GP distinguishes between a diagnosis of anxiety in 2020, and 24 October 2022 to 11 January 2023 sick notes for *"work related stress"* with no reference to anxiety and depression in this period. The claimant's explanation for the difference

between the GP records in 2020 and two years on in 2022/2023 emphasised her lack of credibility. In short, she sought to persuade the Tribunal that the MED3 fit notes were a "summary" and it covered stress and anxiety. The Tribunal was unpersuaded, preferring to rely on the GP's prognosis rather than the claimant's interpretation and gloss. Mr Kelly submitted the Tribunal should not infer any more from the fit notes than what they say: that the claimant was too stressed to attend work. The Tribunal agreed, acknowledging that the claimant, like other employees facing redundancy and possible redeployment, would find the process stressful and found it difficult to work because of it. At the time the respondent correctly took the view that the claimant was stressed with the redundancy dismissal and she would not be returning to work before the effective date of termination. Finally, there was nothing whatsoever to put the respondent on notice that there was a link between the Claimant experiencing stress at work and her being perimenopausal. The Claimant's absence from work commenced shortly after the redundancy consultation period began, the event that caused her stress and absence and so the Tribunal found.

147. With reference to the issue, namely, if not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment, the Tribunal found on the evidence before it that she did not.

148. Finally, with reference to the issue, namely, were the effects of the impairment long-term, clearly they were not as the condition on the claimant's account supported by the medical evidence did not exist until the 8 August 2023, and by May 2024 there was a seventy percent improvement which suggests there was no adverse impact on day-to-day activities in contrast to the claimants evidence, and it was not likely to last at least 12 months.

149. With reference to the final issue, namely, whether the claimant's physical and/or mental impairment of perimenopause were long-term, the Tribunal decided on the balance of probabilities that it was not taking into account the factual matrix and the claimant's most recent absence that occurred within the consultation period when there were ongoing discussions about finding her suitable alternative employment which the claimant was not interested in following up. It is arguable that the claimant's absence in the consultation period may be evidence that she could not attend work due to stress and work during a redundancy process, it does not follow that the effect was long term and it is more likely than not a symptom of the stress she was understandably experiencing during a redundancy when she was in a pool of two and selected, and not an underlying condition of anxiety and depression that can be attributed to perimenopause. Life's adverse experiencing such as a cervical cancer investigation, personal problems at home and redundancy will invariably result in anxiety and in some cases depression, however, there was no satisfactory evidence before the Tribunal that the effect on the claimant were long-term, lasted 12 months or more or likely to last for 12 months or more. The Tribunal would require medical evidence to this effect, which it did not have before it, and it could not conclude on the balance of probabilities that any substantial adverse effects were likely to recur.

150. In conclusion, the claimant was not disabled with the mental and physical impairment of perimenopause in the relevant period June 2022 to January 2023 in accordance with section 6 of the Equality Act 2010, a Tribunal does not have the

jurisdiction to consider her claim for unlawful disability discrimination under section 13, 15, 26 and 27 of the Equality Act 2010 which is dismissed.

151. There was nothing to put the respondent on notice that the claimant may have been disabled, and the Tribunal finds the respondent had no knowledge even had the claimant discharged the burden to show she was disabled under S.6 of the EqA.

152. Having found the claimant was not disabled under section 6 of the Equality Act 2010 there is no requirement for the Tribunal to consider the disability discrimination claims. However, in the alternative the Tribunal has briefly set out what it would have found had the claimant satisfied it that she was disabled under section 6 of the EqA.

Direct age and/or sex discrimination and disability discrimination - section 13 Equality Act 2010

153. The claimant has not satisfied the burden of proof set out in Section 136 EqA and the fact that she was selected for redundancy in the particular circumstances of this case does not shift the burden. The Tribunal was referred to the decision of the Supreme Court in Efobi v Royal Mail Group Ltd [2021] 1 WLR 3863, where at [46] Lord Leggatt stated as follows: "As Sir Patrick Elias pointed out in the judgment of the Court of Appeal (at para 48), even if the recruiters believed that the claimant was black and of African origin – as they might have inferred from his name whether or not they looked at the fields on his application forms stating his place of birth – that would in any event hardly have got the claimant's case off the ground. Even if, in addition, it had been established (or the tribunal had been willing to infer as a matter of probability) that the person appointed to any particular post was white – or at any rate neither black nor African – that would still have come nowhere near establishing a prima facie case of discrimination. As Mummery LJ stated in *Madarassy* [2007] ICR 867 at para 56: "The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that…the respondent had committed an unlawful act of discrimination." If the Tribunal is incorrect in its assertion that the burden of proof has not shifted, in the alternative it would have gone on to find had the burden shifted to the respondent the explanation give was untainted by any discrimination.

154. With reference to the first issue, namely, what are the facts in relation to the following:

3.6.1 On 17 June 2022, the lowering of her performance grade from "Excellent", as graded by Matthew Ahmed, to "Ineffective" when re-graded by Gareth Quantrill; the Tribunal found the performance grade was lowered for the claimant and her comparator who had performed better than her consistently in the past and had not been required to undergo diversity training as a result of making a discriminatory comment to a manager.

3.6.2 her selection for redundancy on 11 October 2022; the claimant was selected for redundancy having been in a selection pool of two which she shared with her comparator.

3.6.3 an alleged failure to offer her a similar role which was advertised on 9 January 2023; the claimant was not offered a "similar role" advertised on 9 January 2023 and the reason for this is that the claimant did not inform the respondent that she was interested in being offered the role notwithstanding the clear redundancy procedure that the onus was on her to inform the respondent if any of the 120/130 vacancies were of interest to her.

3.6.4 the dismissal/termination of her employment on 11 January 2023; the claimant was dismissed by reason of redundancy for factors that were not discriminatory.

<u>On 17 June 2022, the lowering of her performance grade from "Excellent", as graded by Matthew Ahmed, to "Ineffective" when re-graded by Gareth Quantrill; and her selection for redundancy on 11 October 2022; the claimant was selected for redundancy having been in a selection pool of two which she shared with her comparator.</u>

155. With reference to the issue, namely, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances of a different age and/or sex and/or disability was or would have been treated, the Tribunal found that she was not and her age, sex and health had not impact on the redundancy process that resulted in her dismissal. The claimant has not provided any satisfactory evidence on which the Tribunal can build any hypothetical comparator, and given her performance rating coupled with the communication problems she had evidenced in part by the discriminatory comment, the claimant has been unable to identify any hypothetical comparator that would enable her to succeed in any of her claims.

156. The claimant relies on hypothetical comparators in relation to each allegation. In addition, in respect of the age and sex discrimination claims relating to the selection for redundancy and dismissal she relies upon the actual comparator, Leo O'Neil, who was identified in the same pool for selection but was retained in favour of the claimant. Mr McNeil was selected on a fair selection criteria that was untainted by age or sex discrimination. The age range was 30 to 40, when the claimant was 43 at the time of the alleged discrimination, and the Tribunal accepted the evidence given by the respondent's witnesses that they had not realised there was an age different. Gareth Quantrill had not looked on the claimant's HR records to establish her age in comparison with Leo O'Neil and until the first consultation meeting Gareth Quantrill had not even seen the claimant and he was responsible for carrying out the desk top exercise selecting the claimant prior to that meeting. The difference of sex was not a consideration, it was all based on performance, past performance and suitable for the new post.

157. There were issues with the claimant that were not a factor with Leo O'Neil, who was not a like for like comparator because his performance was higher, this had been the case before the reorganisation that resulted in the redundancies, and he did not have the same or similar communication difficulties as the claimant, not least being required to undergo equal opportunities training for making a racist comment that upset a manager to such an extent that he reported it to a director. With reference to the issue of less favourable treatment the Tribunal concluded that the

claimant adduced no satisfactory evidence in support of her claim a hypothetical comparator in materially the same circumstances would have been treated differently, and it is notable that Leo O'Neill was treated in exactly the same way as the claimant, as were other employees who had also been downgraded and it is accepted the claimant was told this. By the time by Mr Ahmad. Mr Quantrill downgraded Leo O'Neill's 'What' grade from Outstanding to "Performing": **and** 'How' grade from Outstanding to "Excelling" which was consistent with previous assessments. Throughout her employment until Mr Ahmad's grade the claimant had never achieved a higher grade than "performing" and there had never been any hint she was "excelling." These grades alone marks her out from Leo O'Neill, and the claimant had not produced any evidence from which the Tribunal could conclude Mr Quantrill's decision was taken because of any protected characteristic.

158. Turning the disability discrimination claim, even had the claimant satisfied the Tribunal that she was disabled, there is the insurmountable difficulty of knowledge. Despite the claimant's confusing evidence and attempts to argue that she "suspected" perimenopause as far back as 2019, it is uncontroversial that the claimant did not know, the medical experts did not know and most important of all, at no stage during the relevant period did the claimant mention she had perimenopausal symptoms to the respondent that were causing her difficulties at work against the background of the minimal sickness absence when she had personal problems and was being tested for cervical cancer. The appraisals reflected there were no difficulties at work. The absences recording anxiety and depression did not point to perimenopausal symptoms but anxiety and depression such that the respondent was not put on notice that the claimant could be disabled. In short, the respondent had no knowledge of perimenopause and could reasonably be expected to possess that knowledge.

159. Mr Kelly in submissions reminded the Tribunal that when it was put to the claimant was that she never told the respondent she was perimenopausal, her only response was to refer to a single day of absence on 27th September 2019 the reason for which was subsequently re-coded as "*Gynaecological*". The Tribunal did not agree with the claimant's submission that this one entry in 2019 coupled with her absences fixed the respondent wit constructive knowledge that the claimant has a physical or mental impairment which had a substantial and long-term effect on her ability to carry out day-today activities.

160. In conclusion, the claimant was not treated less favourably than Mr O'Neill because there were material differences between the circumstances of their cases and Mr Quantrill has given non-discriminatory reason for Mr O'Neill scoring better in the desk-top selection exercise in comparison to the claimant which had no causal connection to any protected characteristic.

161. Finally, with reference to the sex discrimination allegation the claimant relies in particular on emails sent on 21 and 26 September 2022 from Gareth Quantrill which were sent to the claimant's team but were addressed to "Gents", submitting that an inference should be drawn from those emails in support of the sex discrimination claim. In the emails sent on the 21 September 2022 at 14.27 and 26 September 2022 at 12.13 Gareth Quantrill was writing to named male recipients only, and headed the email "Gents" not the most inclusive of terms when Gareth Quantrill copied both to Liverpool Treasury email address. The Tribunal found the

use of the description "Gents" is an example of old fashioned language in a corporate environment that is unacceptable today. Gareth Quantrill's credible explanation was that it was a thoughtless act which he described as "lazy language" because he was writing to named male individuals and was only copying in the rest of the team. All he had in mind were the named male recipients. The Tribunal does not accept the claimant's argument that an inference can be drawn from those emails in support of the sex discrimination claim, taking into account that Gareth Quantrill had in mind during the redundancy process neither the claimant's age, sex or disability when he graded the claimant in the desktop selection process and so the Tribunal found.

Failure to Offer the Claimant the 9 January 2023 Role

162. The Claimant was not directly informed by HR of the role advertised on the internal vacancy board and she was not 'offered' to her without her needing to express an interest in the role or apply for it. However, she had access to the internal vacancy board and had been instructed to inform the respondent if there was any vacancy she was interested in, and she chose not to communicate with the respondent about the role or apply despite her awareness that this was required under the procedure agreed with the unions. A hypothetical comparator in the same circumstances as the claimant would have been treated the same as they would also have been required to apply or express an interest under the respondent's Redundancy Policy which the claimant accepted applied to her. A suitable alternative will depend on a number of factors, including whether the role is commensurate with the employee's skills, aptitudes and experience, the problem for the claimant is that given there was no expression interest in the role an assessment could take place as to whether she might have been suitable to fill the role. The Tribunal accepts Mr Kelly's submission that respondent would not have treated other employee in materially similar circumstances the same as it did the claimant.

Dismissal

163. With reference to the claimant's dismissal the Tribunal refers to its findings and conclusion above that she was fairly selected for redundancy and her selection was not tainted by unlawful discrimination.

Discrimination arising from disability – section 15 Equality Act 2010

164. With reference to the issue, namely, whether the respondent knew or could reasonably have been expected to know that the claimant had the disability or disabilities at the material time, the Tribunal found that it could not.

165. With reference to the issue, namely. did the respondent treat the claimant unfavourably in any of the following alleged respects the Tribunal concluded, taking into account the legal test referenced above, on the balance of probabilities disagreeing with Mr Kelly that:

165.1 Lowering the performance grade was unfavourable treatment.

165.2 Selecting the claimant for redundancy was unfavourable treatment.

165.3 Failing to offer the claimant a similar role on the 9 January 2023 was not unfavourable treatment taking into account the fact the claimant did not even contact the respondent to register her interest.

165.4 Dismissal by reason of redundancy was unfavourable treatment.

166. With reference to the issue, namely, whether (under section 136) the claimant has proven facts from which the Tribunal could conclude that the unfavourable treatment relied upon above was because of something arising in consequence of disability, the Tribunal found that she had not. The "something arising" is said to be "weaker communication" (paragraph 149 of the amended claim form) and/or "the way you express yourself" (paragraph 166) or the claimant's impaired performance at work which she contends was caused by her disability. The claimant in her section 15 claim concedes that her performance was worse that her colleague who did not have the same communication weaknesses and yet also criticises the respondent for selecting him following the desk top exercise. The claimant cannot have it both ways. There was no satisfactory evidence her performance was impaired, the reverse, her performance improved according to the appraisals and the claimant's own assessment. The claimant's communication was weak and on ongoing issue since 2016, well before the period when the claimant maintains she was disabled. There was no evidence whatsoever that this was due to a disability and it is difficult to see how the discriminatory comment made in the circumstance of this case was a result of perimenopause syndrome.

167. If the Tribunal is wrong in its assessment that the respondent has shown there was no unfavourable treatment because of something arising in consequence of disability, in the alternative it would have gone on to find with reference to the issue of proportionate means of achieving an legitimate aim, that the claimant's treatment was proportionate taking into account the union agreed redundancy process, the respondent's need to properly assess performance and apply performance ratings; and the need to fairly assess employees against agreed criteria for the purposes of a redundancy selection process. The Tribunal found it was a fair assessment against properly agreed criteria that had been discussed with the union and the claimant herself, who did not object to it when a copy was provided to her in the pack and applied without dissent by the claimant and her union representative.

Victimisation – section 27 Equality Act 2010

168. With reference to the issue, namely, did the claimant do a protected act: she relies upon a grievance submitted in September 2020 as the protected act (paragraph 62 of the amended claim), this was not a protected act and had it been whilst it could be said that the claimant's regrading was a detriment, the problem for the claimant is that on past reviews the best the claimant could have achieved was "performing" given her past history and the scores generated by Danielle Waring without issue. With a "performing score" the claimant would still be scored lower than Leo O'Neill. For the reasons stated above, the Tribunal would have found in the alternative that the claimant has not proven facts from which the Tribunal could conclude that it was because the claimant did a protected act or acts or because the respondent believed the claimant had done, or might do, a protected act or acts, and it has not contravened section 27 of the EqA.

Harassment – section 26 Equality Act 2010

169. With reference to the first issue, the Tribunal repeats its findings above, concluding that:

169.1 On 17 June 2022, the lowering of her performance grade from "Excellent", as graded by Matthew Ahmed, to "Ineffective" when re-graded by Gareth Quantrill was unwanted conduct.

169.2 Her selection for redundancy on 11 October 2022 was unwanted conduct.

169.3 The alleged failure to offer her a similar role which was advertised on 9 January 2023 was not unwanted conduct, and

169.4 the dismissal/termination of her employment on 11 January 2023 was unwanted conduct.

170. With reference to this issue, namely, was any such conduct related to the Claimant's sex, age and/or disability, the Tribunal found that it was not and that any such conduct did not have the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant having taken into account the factual matrix including the union advice given to the claimant which put her redundancy in its proper perspective. Mr Quantrill was objective and removed from the situation, his concern was solely with facts and figures and nothing else came into the equation. In short, he gave no thought to the claimant's age, health or sex.

Time limits

171. With reference to the first allegation relating to the 17 June 2022 lowering of the performance grade, this was raised outside the statutory time limit. The claim form was presented on 10th February 2023 following a period of ACAS early conciliation ending on 12th January 2023 and beginning on 10th January 2023. Any act which took place prior to 9th November 2022 is *prima facie* out of time. The downgrading the Claimant's mid-year performance review is therefore out of time. It was not part of any continuing act. Mr Kelly submitted that the claimant key explanation for why she did not bring an in-time claim or why it would be just an equitable for time to be extended – her ignorance of the law – is not a sufficient basis for time to be extended. The Tribunal agreed, and would add that it did not accept the claimant's evidence on this point as credible. It is uncontroversial as a result of the covert recording between the claimant and her union representative that she discussed on the 13 October 2022 the prospect of an Employment Tribunal claim. It was clear from the transcript she was fully aware of her rights, and contrary to her evidence which is that she did not know she could take action whilst in employment, she was aware that ACAS early conciliation was required and this commenced whilst the claimant was in employment the day after she took a screen shot of the vacancy referenced above. After the claimant's discussion with Peter Curran on the 13 October 2024 it took her 4 months to issue proceedings.

172. The claim was not made within three months, and nor was it made within such further period as the Tribunal thinks is just and equitable. The claimant has not given a satisfactory reason for this, and given the weaknesses in her claim (see above) it is not just and equitable in all the circumstances to extend time. The Tribunal has no jurisdiction to determine this aspect of the claimant's claim which is dismissed.

173. In conclusion, the claimant was not disabled with the mental and physical impairment of perimenopause in the relevant period June 2022 to January 2023 in accordance with section 6 of the Equality Act 2010, a Tribunal does not have the jurisdiction to consider her claim for unlawful disability discrimination under section 13, 15, 26 and 27 of the Equality Act 2010 which is dismissed.

174. In the alternative, the claimant's claim of disability discrimination brought under section 13 of the Equality Act 2010 set out in allegations 3.1.1 was not presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done) the last date being the 9 November 2022. ACAS early conciliation commenced on the 10 January 2023, the certificate was issued on the 12 January 2023 and claim form presented on the 10 February 2023. The complaint is out of time and in all the circumstances of the case it is not just and equitable to extend time. The Tribunal does not have the jurisdiction to consider the complaint which are dismissed.

175. In the alternative, the claimant has not proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances of a different age and/or sex and/or disability was or would have been treated. The claimant was not unlawfully discriminated against on the grounds of her age, sex or disability and claimant's claim of unlawful direct discrimination brought under section 13 of the Equality Act 2010 and set out in set out in allegation 3.1.1 is dismissed.

176. The claimant's claims of disability discrimination brought under sections 13, 15, 26 and 27 of the Equality Act 2010 are dismissed. The claimant has not proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances of a different age and/or sex and/or disability was or would have been treated. The claimant was not treated unfavourably because of something arising in consequence of her disability and her claims of discrimination arising from disability brought under section 15 of the Equality Act 2020 fail and are dismissed. The respondent's conduct did not have the proscribed affect under section 26 of the Equality Act 2010, the claimant's claims of harassment fail and are dismissed. The claimant did not do a protected act and she has not proven facts from which the Tribunal could conclude the respondent had contravened section 27 of the Equality Act 2010**.**

177. The claimant was not unfairly dismissed, and her complaint of unfair dismissal is not well founded and is dismissed.

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Employment Judge Shotter

Date: 29 July 2024

RESERVED JDGMENT AND REASONS
SENT TO THE PARTIES ON

30 July 2024

Mr P Guilfoyle
FOR THE TRIBUNAL OFFICE

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